

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 5759 / June 24, 2021

Admin. Proc. File No. 3-19166

In the Matter of
OSCAR FERRER RIVERA

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Conviction

Respondent was convicted of mail fraud and conspiracy to commit mail fraud. *Held*, it is in the public interest to bar respondent from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

APPEARANCES:

Andrew O. Schiff for the Division of Enforcement.

On May 14, 2019, we instituted administrative proceedings against Oscar Ferrer Rivera (“Ferrer”), pursuant to Section 203(f) of the Investment Advisers Act of 1940, to determine whether the statutory predicate for an administrative remedy was satisfied and whether remedial action would serve the public interest.¹ The order instituting proceedings (the “OIP”) alleged that Ferrer had been convicted of mail fraud and conspiracy to commit mail fraud for misconduct that occurred while he was acting as an investment adviser. Ferrer failed to file an answer to the OIP, failed to respond to an order to show cause why he should not be found in default for failing to file an answer, and failed to respond to the Division of Enforcement’s subsequent motion for entry of default and sanctions. We now find Ferrer to be in default, deem the allegations of the OIP to be true, and bar him from the securities industry.

I. Background

A. The Commission issued the OIP against Ferrer.

The OIP alleged that, on September 7, 2018, Ferrer pleaded guilty to one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349 and eleven counts of mail fraud in violation of 18 U.S.C. § 1341, and that the same day and before the same court in a second case, Ferrer also pleaded guilty to one count of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). After the OIP was issued, Ferrer was sentenced to 97 months imprisonment for mail fraud and conspiracy to commit mail fraud, an additional 24 months to run consecutively for aggravated identity theft, and a subsequent period of supervised release.²

As alleged in the OIP, Ferrer admitted in connection with his plea in the first case that, between January 2011 and January 2016, he engaged in, and conspired with others to engage in, a scheme to defraud that involved materially misrepresenting to individuals that he would invest their money in securities with guaranteed principal and a fixed rate of return. But Ferrer failed to invest the money, pay investors all of the promised interest, and repay investors’ principal. Instead, Ferrer used the funds to benefit himself and others and sent investors false account statements and interest payments to keep them unaware of the true state of their investment. The OIP also alleged that Ferrer acted as an investment adviser between January 2011 and January

¹ *Oscar Ferrer Rivera*, Advisers Act Release No. 5234, 2019 WL 2103147 (May 14, 2019).

² *See United States v. Ferrer-Rivera*, Case 3:16-cr-00038-PAD, ECF No. 232 (D.P.R. Jan. 22, 2020) (judgment in mail fraud case); *United States v. Ferrer-Rivera*, Case 3:18-cr-00387-PAD, ECF No. 63 (D.P.R. Jan. 22, 2020) (judgment in identity theft case). We take official notice of the sentences imposed in these judgments pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323 (providing that official notice may be taken “of any material fact which might be judicially noticed by a district court of the United States”); *Maalouf v. Islamic Republic of Iran*, Civ. A. No. 16-0280 (JDB), ___ F. Supp. 3d ___, 2021 WL 230134, at *3 (D.D.C. Jan. 22, 2021) (recognizing that a court may take judicial notice of any fact “‘not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,’ including facts established in related proceedings and other court records”) (quoting Fed. R. Evid. 201(b)).

2016, because, for compensation, he engaged in the business of advising others as to the advisability of investing in, purchasing, or selling securities.³

The OIP instituted proceedings to determine whether the allegations contained therein were true and if any remedial action was appropriate in the public interest. It directed Ferrer to file an answer to the allegations contained therein within 20 days after service, as provided by Rule of Practice 220(b).⁴ The OIP informed Ferrer that if he failed to answer, he could be deemed in default, the allegations in the OIP could be deemed to be true as provided in the Rules of Practice, and the proceeding could be determined against him upon consideration of the OIP.⁵

B. Ferrer failed to answer the OIP, respond to an order to show cause, or respond to the Division’s motion.

Ferrer was properly served with the OIP on July 22, 2019, pursuant to Rule of Practice 141(a)(2)(i),⁶ but did not answer it. On October 7, 2019, more than twenty days after service, Ferrer was ordered to show cause by November 21, 2019, why the Commission should not find him in default due to his failure to file an answer, or otherwise defend this proceeding.⁷ Ferrer was warned that if found in default, the allegations in the OIP would be deemed to be true and the Commission could determine the proceeding against him upon consideration of the record. In the event that Ferrer failed to respond to the order to show cause, the order directed the Division to file a motion for default and other relief by December 5, 2019.

After Ferrer failed to answer the OIP or respond to the order to show cause, the Division filed a motion requesting that the Commission find Ferrer in default and bar him from the securities industry. The Division supported the motion with copies of the indictment, plea agreement and accompanying stipulation of facts, and docket entries reflecting Ferrer’s guilty plea in the criminal proceeding. Ferrer did not respond to the Division’s motion.

³ See Advisers Act Section 202(a)(11), 15 U.S.C. § 80b-2(a)(11) (providing that the term “investment adviser” generally includes “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings . . . as to the advisability of investing in, purchasing, or selling securities”).

⁴ 17 C.F.R. § 201.220(b).

⁵ See Rules of Practice 155(a), 220(f), 17 C.F.R. §§ 201.155(a), .220(f).

⁶ 17 C.F.R. § 201.141(a)(2)(i) (providing that service of an OIP on an individual may be made by “sending a copy . . . addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt”).

⁷ *Oscar Ferrer Rivera*, Exchange Act Release No. 87244, 2019 WL 4954621 (Oct. 7, 2019).

II. Analysis

A. We hold Ferrer in default and deem the OIP's allegations to be true.

Rule of Practice 155(a) provides that if a party fails to “answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding,” we may deem the party in default and “determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true.”⁸ Because Ferrer has failed to answer or respond to the order to show cause or the Division’s motion, we find it appropriate to deem him in default and to deem the allegations of the OIP to be true. We base the findings that follow on the record, including the OIP and the evidentiary materials that the Division submitted with its motion for default and sanctions.

B. We find an industry bar to be in the public interest.

Advisers Act Section 203(f) authorizes the Commission to suspend or bar a person from the securities industry if it finds, on the record after notice and opportunity for hearing, that (i) the person was convicted of violating 18 U.S.C. § 1341 within ten years of the commencement of the proceeding; (ii) the person was associated with an investment adviser at the time of the alleged misconduct; and (iii) such a sanction is in the public interest.⁹ Ferrer was convicted of violating 18 U.S.C. § 1341 within ten years of the commencement of this proceeding.¹⁰ The allegations of the OIP deemed true establish that Ferrer acted as an investment adviser, and because Ferrer was an investment adviser at the time of his misconduct, he necessarily also was a person associated with an investment adviser.¹¹

Thus, we need determine only if any remedial action is in the public interest. In doing so, we consider the egregiousness of the respondent’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent’s assurances against future violations, the respondent’s recognition of the wrongful nature of his conduct, and the

⁸ 17 C.F.R. § 201.155(a); *see also* Rule of Practice 220(f), 17 C.F.R. § 201.220(f) (providing that “[i]f a respondent fails to file an answer required by this rule within the time provided, such respondent may be deemed in default pursuant to Rule 155(a)”).

⁹ 15 U.S.C. § 80b-3(f) (cross-referencing Advisers Act Section 203(e), 15 U.S.C. § 80b-3(e)); *see also id.* § 80b-3(e)(2)(D) (discussing convictions for violating 18 U.S.C. § 1341).

¹⁰ *See* Advisers Act Section 202(a)(6), 15 U.S.C. § 80b-2(a)(6) (defining “convicted” to include a “plea of guilty” if it “has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed”).

¹¹ *Shreyans Desai*, Advisers Act Release No. 4656, 2017 WL 782152, at *3 (Mar. 1, 2017) (“[T]he finding that Desai acted as an unregistered investment adviser establishes that he was associated with an investment adviser for purposes of Advisers Act Section 203(f).”) (citing *Anthony J. Benincasa*, Advisers Act Release No. 1923, 2001 WL 99813, at *2 (Feb. 7, 2001) (explaining that a person who “acts as an investment adviser in an individual capacity” is “in a position of control with respect to the investment adviser” and thus “meets the definition of a ‘person associated with an investment adviser’”).

likelihood that the respondent's occupation will present opportunities for future violations.¹² Our public interest inquiry is flexible, and no one factor is dispositive.¹³ The remedy is intended to protect the trading public from further harm, not to punish the respondent.¹⁴

We have weighed all these factors and find an industry bar is warranted to protect the investing public. Ferrer's misconduct was egregious and recurrent. From about January 27, 2011, through about January 2016, Ferrer engaged in a scheme to defraud, and conspired with others to engage in a scheme to defraud, by lying and materially misrepresenting to individuals that he would invest their money in stocks, funds, securities, and other financial products with guaranteed principal and a fixed rate of return. Ferrer falsely represented that these investment vehicles were safe, that all principal was guaranteed, and that the vehicles would earn a fixed rate of return. Ferrer also falsely represented that investors' money would be invested but he failed to actually invest the money, pay promised interest, and return and repay principal. Ferrer instead created and mailed false investment statements to investors, transferred investors' funds to his personal accounts, and used investors' funds for himself and others. To delay individual investors from becoming aware of and reporting the scheme, Ferrer lulled victims through monetary payments and by providing false account statements to them.¹⁵

The record establishes that Ferrer repeatedly abused the position of trust he occupied as an investment adviser.¹⁶ Ferrer also acted with a high degree of scienter.¹⁷ Mail fraud requires a specific intent to defraud, and Ferrer acknowledged in the stipulated facts accompanying his plea agreement that he acted with an intent to defraud.¹⁸

Because Ferrer failed to answer the OIP or respond to the order to show cause or to the Division's motion, he has made no assurances to us that he will not commit future violations or that he recognizes the wrongful nature of his conduct. It appears that Ferrer's occupation presents opportunities for future violations because he acted as an investment adviser during the

¹² *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

¹³ *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *4 (July 26, 2013).

¹⁴ *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

¹⁵ *See generally SEC v. Holschuh*, 694 F.2d 130, 143 (7th Cir. 1982) (describing lulling activities as "later efforts to avoid detection of the fraud").

¹⁶ *See James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . as egregious.").

¹⁷ *See Aaron v. SEC*, 446 U.S. 680, 701 (1980) (the "degree of intentional wrongdoing evident in a defendant's past conduct" is an "important factor" indicating a risk of future harm).

¹⁸ *United States v. Stergios*, 659 F.3d 127, 132 (1st Cir. 2011) (stating that elements of mail fraud include "knowing and willful participation in [a] scheme [to defraud] with the specific intent to defraud"); *see also SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992) (scienter is "an intent to deceive, manipulate, or defraud").

five-year period of his misconduct, and he offers no assurances about his future plans.¹⁹ Although his guilty plea indicates that Ferrer might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that he poses a risk to the investing public.²⁰

The Commission may impose bars to protect the investing public from a respondent's future actions by restricting access to areas of the securities industry where a demonstrated propensity to engage in violative conduct may cause further investor harm. Here, the record establishes that Ferrer is unfit to participate in the securities industry and that his participation in it in any capacity would pose a risk to investors.²¹ Because Ferrer poses a continuing threat to investors, we conclude that it is in the public interest to bar him from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.²²

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

¹⁹ See *George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511, at *3 (Jan. 20, 2017) (observing that the Commission was concerned that respondent's occupation will present opportunities for future violations where he did not indicate that he planned to leave the securities industry); cf. *Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *41 (May 29, 2015) (explaining that respondent offered "no assurance against future violations other than to assert that he has left the industry voluntarily, which provides no guarantee that he will not seek to return at some point in the future," and concluding that "[a]bsent a bar, nothing would prevent [respondent] from reentering the industry").

²⁰ See *Lawrence Allen DeShetler*, Advisers Act Release No. 5411, 2019 WL 6221492, at *3 (Nov. 21, 2019) (finding that "[a]lthough his guilty plea indicates that DeShetler might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that DeShetler poses a risk to the investing public"); *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (finding the "egregious and recurrent nature of the fraud in which [respondent] violated his fiduciary duties and harmed his clients outweigh any acceptance of responsibility").

²¹ See *Tagliaferri*, 2017 WL 632134, at *6 (finding that the misconduct underlying the respondent's conviction demonstrated that respondent was unfit to participate in the securities industry and posed a risk to investors).

²² *Id.* (imposing associational bars where they were necessary to protect the public).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5759 / June 24, 2021

Admin. Proc. File No. 3-19166

In the Matter of
OSCAR FERRER RIVERA

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Oscar Ferrer Rivera is barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Vanessa A. Countryman
Secretary