UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10641 / May 31, 2019

SECURITIES ACT OF 1934
Release No. 86001 / May 31, 2019

INVESTMENT COMPANY ACT OF 1940
Release No. 33498 / May 31, 2019

Admin. Proc. File Nos. 3-16227, 3-16229

In the Matter of

GREGORY OSBORN

ORDER DENYING REQUEST TO MODIFY SETTLEMENT ORDER

On October 31, 2014, the Commission accepted Gregory Osborn's offer of settlement and entered an order that, among other things, barred him from acting in specified capacities in the securities industry (the "Order").[1] Osborn moves to modify or vacate the bars. The Division of Enforcement opposes Osborn's request. For the reasons set forth below, we deny his motion.

I. Background

Osborn was a managing partner of registered broker-dealer Middlebury Securities, LLC. In the Order, the Commission found that Osborn, in the course of his employment at Middlebury, made material misrepresentations in selling short-term notes ("Notes") of Navagate, Inc. from December 2009 through March 2011. Osborn touted a personal guarantee from Navagate's CEO that purportedly backed the Notes. But Osborn knew or must have known that the CEO "did not have anywhere near sufficient liquid assets to make good on his" personal guarantee. And despite the fact that Navagate started defaulting on the Notes in June 2010, Osborn "continued selling the Notes, but failed to tell any new investors about the defaults." Also, in October 2010, Osborn "used some of the proceeds of the Notes to pay back earlier investors, contrary to the disclosed use of proceeds" in the offering documents.

Osborn, Navagate, and Navagate's CEO sold approximately $3.2 million in Notes, including approximately $2.2 million after Navagate started defaulting in June 2010. The CEO did not make good on his personal guarantee. As of early 2014, Navagate owed more than $1.25 million in principal and $1.4 million in interest on the Notes.

[1] *Gregory Osborn*, Exchange Act Release No. 73486, 2014 WL 5493275 (Oct. 31, 2014).

The Commission determined that Osborn willfully violated, and willfully aided, abetted, and caused violations of, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.[2] The Commission barred Osborn from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization; prohibited him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and barred him from participating in any offering of a penny stock. The Commission further ordered Osborn to cease and desist from committing or causing any violations and any future violations of Exchange Act Section 10(b) and Rule 10b-5, and Securities Act Section 17(a).

In the Order, the Commission also instituted additional proceedings to determine what, if any, disgorgement, civil penalties, and prejudgment interest were in the public interest. An administrative law judge issued an initial decision that ordered Osborn to pay partial disgorgement of $150,000; the law judge did not impose prejudgment interest or civil penalties after considering Osborn's demonstrated inability to pay.[3] Osborn did not appeal the initial decision, and the Commission issued a notice stating that the administrative law judge's initial decision had "become the final decision of the Commission."[4]

Osborn has filed a request that we "reduce the [bars in the Order] to 'time served' or 3 years." The Division filed a brief opposing Osborn's request. Our order scheduling briefs in this matter provided Osborn with an opportunity to file a reply brief, but he did not do so.

II. Analysis

In reviewing requests to lift or modify bar orders, we consider whether, "under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar."[5] The factors that guide the Commission's "public interest/investor protection inquiry" are:

> the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since

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[2] 15 U.S.C. §§ 77q(a) & 78j(b); 17 C.F.R. § 240.10b-5.

[3] *Middlebury Sec., LLC*, Initial Decision No. 1110, 2017 WL 782156, at *12-13 (March 1, 2017).

[4] *Middlebury Sec., LLC*, Exchange Act Release No. 80618, 2017 WL 1787465 (May 5, 2017).

[5] *Ciro Cozzolino*, Exchange Act Release No. 49001, 2003 WL 23094746, at *3 (Dec. 29, 2003); *accord Edward I. Frankel*, Exchange Act Release No. 49002, 2003 WL 23094747, at *3 (Dec. 29, 2003); *Stephen S. Wien*, Exchange Act Release No. 49000, 2003 WL 23094748, at *4 (Dec. 29, 2003).

> issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement's response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.[6]

Relief is appropriate only in "compelling circumstances," and in the usual case the bar will remain in place.[7] Maintaining a bar serves the public interest and investor protection by ensuring that the Commission "retains its continuing control over [a] barred individual['s] activities."[8] Nonetheless, the Commission will act in response to those situations in which the equitable need for relief warrants vacating or modifying the bar order.[9] As explained below, Osborn fails to establish the compelling circumstances necessary to vacate or modify his bar order because the factors that guide our inquiry establish that relief is not appropriate.

Nature of the misconduct at issue in the underlying matter: We look to the findings of the Order to evaluate Osborn's misconduct. In the Order, we found that Osborn willfully violated, and willfully aided, abetted, and caused violations of, Exchange Act Section 10(b) and Rule 10b-5 thereunder and Securities Act Section 17(a) in selling the Notes during a period of more than a one year. In so finding, we determined that Osborn acted knowingly or recklessly. Osborn's misconduct also significantly harmed the noteholders: Navagate owed more than $2.65 million on the defaulted Notes as of early 2014. We conclude that Osborn engaged in "serious and extensive" misconduct that "militate[s] against relief."[10]

Osborn contends that his conduct was not serious because he did not act "with ill intent," did "everything with [c]ompliance and [c]ounsel review," and was lied to by Navagate and its CEO about their fraud. According to Osborn, he consented to the Order because of financial and medical concerns and "might have fared differently" had he not done so. But because Osborn settled, he waived the right to "complain that the record is inaccurate or incomplete."[11] Osborn

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6 *Kenneth W. Haver, CPA*, Exchange Act Release No. 54824, 2006 WL 3421789, at *2 (Nov. 28, 2006).

7 *Cozzolino*, 2003 WL 23094746, at *3.

8 *Id*.

9 *Id.*

10 *Id.*

11 *Haver*, 2006 WL 3421789, at *3 & n.19; *see also* Rule of Practice 240(c)(4), 17 C.F.R. § 240(c)(4) ("By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer: (i) all hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted; (ii) the filing of proposed findings of fact and conclusions of law; (iii) proceedings before, and an initial decision by, a hearing officer; (iv) all post-hearing procedures; and (v) judicial review by any court.").

"elected to forgo further proceedings"; "'[h]is choice was a risk, but calculated and deliberate and such as follows a free choice,'" and he "'cannot be relieved of such a choice'" now.[12] We will not entertain Osborn's collateral attack on the settlement.[13]

Time that has passed since issuance of the administrative bar: Less than five years have passed since we entered the Order imposing the bars that Osborn seeks to have vacated. This is a relatively short period of time. This factor weighs against Osborn's motion.[14]

The compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar: Osborn has no compliance record since issuance of the Order. Although barred individuals may seek and obtain from FINRA or the Commission consent to associate in various capacities in the securities industry notwithstanding their bars, Osborn has not done so. Thus, this part of this factor weighs against relief because Osborn "cannot demonstrate a record

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12 *Richard D. Feldmann*, Exchange Act Release No. 77803, 2016 WL 2643450, at *3 n.24 (May 10, 2016) (quoting *Ackermann v. United States*, 340 U.S. 193, 198 (1950)).

13 *See Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993) ("If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed."); *Michael H. Johnson*, Exchange Act No. 75894, 2015 WL 5305993, at *4-5 (Sept. 10, 2015) (finding that it would weigh against our "'strong interest'" in the finality of our settlement orders to modify bar where, by settling, respondent had waived the "opportunity to adduce evidence" he sought to admit in support of his modification request and "forfeited any claim that the Commission was working with incorrect facts when he consented" to the settlement he challenged) (quoting *Haver*, 2006 WL 3421789, at *3); *Haver*, 2006 WL 3421789, at *3 (finding that a respondent may not follow one course of action by settling and then subsequently try to take another course of action); *cf.* Rule of Practice 193, 17 C.F.R. § 201.193 (stating that the "Commission will not consider any application [by a barred individual for consent to associate] that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order"); *Sampson v. Radio Corp. of Am.*, 434 F.2d 315, 317 (2d Cir. 1970) (explaining that a "motion under Rule [of Civil Procedure] 60(b) cannot be used to avoid the consequences of a party's decision to settle . . . litigation or to forgo an appeal from an adverse ruling").

14 *See Johnson*, 2015 WL 5305993, at *4, *5 (declining "to modify the settled bar order to allow Johnson to apply for reentry to the securities industry after one year instead of five years," where "[o]nly sixteen months have passed since entry of the bar," which "is hardly enough time to conclude that its continuation is no longer required in the public interest"); *Haver*, 2006 WL 3421789, at *4 (declining to modify bar order "because even the five-year period after which Haver may apply for reinstatement has not yet elapsed"); *John Gardner Black*, Exchange Act Release No. 70318, 2013 WL 4737370, at *5 (Sept. 4, 2013) ("The bar and revocation were imposed fifteen years ago, but we have previously held, in considering requests to modify sanctions, that substantially longer periods are not unduly long.").

of compliance in [any] capacity."[15] Nonetheless, Osborn also has not been the subject of any regulatory interest. This part of this factor weighs in Osborn's favor. As a whole, this factor militates neither for nor against relief.

The age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar: Osborn's age and experience are not substantially different from when the Commission entered the Order barring him. They do not provide grounds to vacate the bars imposed less than five years ago. Moreover, "[w]e generally first grant incremental relief in our cases vacating bars."[16] Rule of Practice 193 provides a process for barred individuals to apply for consent to associate notwithstanding the bar.[17] As part of this process, an individual seeking reentry to the securities industry must provide detailed information regarding expected supervision.[18] FINRA also provides a process for an individual to seek consent to associate with a FINRA member firm notwithstanding a bar.[19] A firm and the barred individual it seeks to employ will fail to meet "their burden 'to show that . . . continued employment in the securities industry would be in the public interest'" if they fail "to establish heightened supervisory plans" for barred individuals.[20] These processes allow a barred individual to "establish a satisfactory compliance record" while under heightened supervision "before moving to vacate the bar."[21] Osborn has not obtained consent to associate notwithstanding his bar, and now seeks to avoid this process entirely. To allow this "would

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15 *Stephanie Hibler*, Exchange Act Release No. 70140, 2013 WL 4027263, at *2 (Aug. 8, 2013); *cf. Robert Quarles*, Exchange Act Release No. 66530, 2012 WL 759386, at *3 (Mar. 7, 2012) (vacating bar where applicant had "been almost continuously employed in the securities profession" since the bar and had "no record of further regulatory or compliance problems").

16 *Jesse M. Townsley, Jr.*, Exchange Act Release No. 52161, 2005 WL 1963783, at *2 (July 29, 2005).

17 17 C.F.R. § 201.193.

18 *Eric David Wanger*, Exchange Act Release No. 81111, 2017 WL 2953369, at *3 (July 10, 2017) (explaining that Rule of Practice 193 provides that applicant for consent to associate "'shall'" address the "'manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant'" and stating that "in determining whether a proposed association would be consistent with the public interest, an examination of . . . the proposed supervisory structure to which the applicant will be subject is appropriate").

19 *See generally Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745, at *2 (Mar. 6, 2017) (describing the process).

20 *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *10 (Dec. 20, 2012) (alteration in original) (quoting *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *6 & n.23 (July 17, 2009)).

21 *Salim B. Lewis*, Exchange Act Release No. 51817, 2005 WL 1384087, at *4 (June 10, 2005).

permit [Osborn] to engage in activities restricted by [his] bars without a prior period of demonstrated compliance."[22] Given our precedent, this factor weighs heavily against Osborn.

Whether the petitioner has identified verifiable, unanticipated consequences of the bar: Osborn contends that because of the bar he is "struggling to find work," that he lost a job opportunity in September 2016, and that he has suffered financial and reputational damage. But these issues arise from the bar itself and are no more than the "natural and foreseeable consequences" of the Order.[23] Osborn also contradicts his assertion that he is "struggling to find work" elsewhere in his filings because in an exhibit to his motion—emails from September 2016 with a firm that interviewed him—Osborn stated that he has a "good job" making "$150k base plus up to $300k additional in bonus" and that he has company stock.

The position and persuasiveness of the Division of Enforcement: The Division opposes Osborn's request. We find persuasive the Division's argument that "Osborn cannot demonstrate . . . any compelling circumstances necessary to warrant a modification of the bars" and that "Osborn's conduct both during and after the fraud suggests that he refuses to accept responsibility for his actions and that a permanent bar continues to be in the public interest." This factor does not favor Osborn.

Whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors: This factor weighs against Osborn. It appears that Osborn still fails to understand the seriousness of his misconduct. In the email attached as an exhibit to his motion, Osborn misrepresented the Commission proceeding that led to the Order by stating that it was "not a legal process" with "a judge" and that "[o]nly things that are criminal, theft, fraud etc go to DOJ."

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Based on the foregoing, we find that Osborn has failed to show compelling circumstances that establish it is consistent with the public interest and investor protection to modify or vacate the bars imposed upon him in our October 31, 2014 order.

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[22] *Hibler*, 2013 WL 4027263, at *2 (denying request to lift broker and dealer bars where respondent "ha[d] not obtained permission to associate with a broker or dealer in any capacity since the order was entered").

[23] *Johnson*, 2015 WL 5305993, at *4 n.20; *cf. Townsley*, 2005 WL 1963783, at *2 (finding that petitioner's claimed "inability to become registered as a commodities trading advisor was a consequence of the bar that he should have anticipated").

Accordingly, IT IS ORDERED that the request by Gregory Osborn to modify the order we entered in these proceedings on October 31, 2014, is DENIED.

By the Commission.

Vanessa A. Countryman
Acting Secretary