

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10205 / September 9, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78797 / September 9, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of
MOSHE MARC COHEN

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud violations

Former registered representative of broker-dealer made material misrepresentations about variable annuity sales to obtain broker-dealer's approval of those sales in violation of antifraud provisions of the securities laws. Representative also caused and aided and abetted broker-dealer's books-and-records violations. *Held*, it is in the public interest to bar representative from the securities industry, impose a cease-and-desist order, and order him to pay disgorgement, with prejudgment interest, and civil money penalties.

APPEARANCES

Moshe Marc Cohen, pro se.
Dean M. Conway and *Britt Biles* for the Division of Enforcement.

Appeal filed: March 2, 2015
Last brief received: October 9, 2015

Moshe Marc Cohen, formerly a registered representative of Woodbury Financial Services, Inc. (“Woodbury”), a registered broker-dealer, appeals from an initial decision finding that he violated antifraud provisions of the federal securities laws and caused and aided and abetted Woodbury’s violation of recordkeeping provisions.¹ The Division of Enforcement appeals the law judge’s decision not to bar Cohen from the securities industry or impose civil penalties on the ground that the statute of limitations in 28 U.S.C. § 2462 prohibited those remedies.

Cohen does not dispute most of the pertinent facts. Rather, he argues that the antifraud provisions at issue do not apply to his conduct. He also claims that the law judge was biased against him, that he was denied due process, and that Section 2462 barred the proceeding.

Following a *de novo* review, we find that the antifraud provisions apply to Cohen’s conduct and that he violated those provisions by knowingly making false and misleading representations to Woodbury to obtain its approval for sales of variable annuity products. We find further that, by submitting false documentation to Woodbury in connection with these transactions, Cohen caused and aided and abetted Woodbury’s violation of recordkeeping requirements. We also find that Cohen’s claims of bias and due process violations are unsupported and that Section 2462 is inapplicable because Cohen entered into voluntary tolling agreements and, in any event, does not limit our authority to take remedial action.

I. Facts

A. **Michael Horowitz, a Morgan Stanley registered representative, devised a strategy to allow investors to profit from variable annuities in the short term.**

Variable annuities are securities issued and sold by insurance companies. They allow purchasers to allocate investment funds among sub-accounts that track the performance of different investments, such as the S&P 500 and other indices. Although variable annuities are typically intended as long-term investments, Michael Horowitz, a Morgan Stanley registered representative, devised a strategy to allow investors to profit in the short term.²

Many variable annuities have a “bonus” feature that provides the purchaser with a credit of generally between four and seven percent of the initial investment. Thus, a purchaser of a \$100,000 variable annuity with a 5% bonus feature would have \$105,000 to allocate to subaccounts. Normally, funds may be withdrawn during an annuity’s “surrender period”—typically the seven to ten years following purchase—only by paying a fee called a “surrender charge,” but surrender charges are typically waived when the annuitant dies.

¹ *Moshe Marc Cohen*, Initial Decision Release No. 733, 2015 WL 77529 (Jan. 7, 2015).

² Horowitz entered into a settlement with the Commission in which he agreed to be barred from the securities industry and pay disgorgement with prejudgment interest and civil penalties. *Michael A. Horowitz*, Exchange Act Release No. 72729, 2014 WL 3749703 (July 31, 2014).

The objective of Horowitz's strategy was to allow investors to quickly recoup the amount originally invested plus the additional amount generated by the bonus feature without being subject to a surrender charge. The strategy depended on the annuitants being close to death. To execute this strategy, nominees of the investors purchased variable annuities with a bonus feature and designated a terminally ill stranger as the annuitant.³

In the fall of 2007, Horowitz began working with two hedge funds, Platinum Partners Credit Opportunities LLC and Centurion (collectively, the "Funds"), as well as a corporation the Funds established, BDL Group LLC ("BDL"), to handle their variable annuity investments. BDL, which was managed by Howard Feder, purchased the annuities through eight individual nominees because many insurance companies refused to sell to corporate entities. The nominees were friends or relatives of the Funds' principals and received flat fees of \$20,000 each for their involvement. Like Horowitz, Cohen, and the investors, none of the nominees knew the annuitants. They testified that they had only a limited understanding of their role in the strategy and, for the most part, their involvement was only to sign forms.

Pursuant to agreements nominees signed, BDL provided them with the funds to purchase the annuities, had full control of the funds and the resulting investments, and was "entitled to all earnings, proceeds, or other profits earned" from them. BDL directed the nominees to establish trusts with which to purchase and hold the annuities. When an annuitant died, the nominees returned the proceeds to BDL, which transferred them to the hedge funds.

B. Cohen agreed to sell variable annuities using Horowitz's strategy.

In late 2007, Morgan Stanley prohibited Horowitz from engaging in further variable annuity sales. Cohen, who was introduced to Horowitz by a mutual acquaintance, knew about this prohibition. Nonetheless, Cohen agreed with Horowitz in January 2008 to effect variable annuity transactions on behalf of the Funds following Horowitz's strategy.

Although the parties dispute the extent of Cohen's involvement in devising the strategy, he admittedly understood it and took various steps to implement it. Cohen knew that that the annuitants "were not in good health," that using "hospice patients" as the annuitants offered a "much higher probability of an accelerated payout to the investor," and that the strategy "was using annuities for the short-term death benefit." Indeed, Cohen acknowledged in his pre-hearing brief that the strategy gave the Funds "short-term gains with little risk" in light of the "sign-on bonus" and the "waiving of [the] surrender charge" in the event of the annuitant's death.

³ The record does not contain information about how the annuitants were identified. Nor is there evidence that Cohen had any involvement in this process. The annuities at issue generally did not require that the annuitant be related to the purchaser of the annuity, and the annuitants were not related to Horowitz, Cohen, or the investors. The annuitants' families were in many instances unaware that an annuity had been taken out on their relative's life. Neither the annuitants nor their families received proceeds from the annuities

Cohen also admitted that he “reviewed each of the Insurance Company’s” materials and researched different variable annuity products “to better understand all the features” and thus “assure himself that this strategy” would work. As part of these efforts, Cohen created a spreadsheet of the products’ characteristics, including the surrender period, the bonus percentage, whether the annuities were owner-driven or annuitant-driven, and whether the sales commissions to be paid to him would be clawed back by the insurer if the annuitant died too soon after the annuity’s issuance.⁴ One of the columns was titled “\$1 million investment and Death in 60 Days” and detailed the potential returns under various market conditions if the annuitant died 60 days after the sale of the annuity. Another column, titled “max amount,” represented the “maximum amount that could be invested without triggering additional due diligence”—for example, a medical examination of the annuitant—by the insurer. Based on his research, Cohen encouraged the Funds to use trusts (instead of the nominees) as the “legal owners” so that the annuities would “automatically be designated as Annuitant-Driven and would pay at the demise” of the annuitants.

C. Woodbury had to approve Cohen’s sales of variable annuities.

As a registered representative associated with Woodbury, Cohen could not sell variable annuities without Woodbury’s approval. His variable annuity sales were subject to Woodbury’s supervisory review procedures. And insurance companies would not execute the requisite annuity contracts unless a broker-dealer had indicated that the sale had passed its review.

Woodbury’s procedures manual required registered representatives to provide “complete, pertinent, and accurate information” about prospective customers to Woodbury so that it could “effectively perform . . . suitability functions.” For every sale of an annuity, Woodbury’s procedures required that Cohen provide: a new account form, a “point-of-sale” form, and the insurance company’s annuity application. These application materials became part of Woodbury’s books and records after Cohen submitted them. The point-of-sale forms required Cohen to specify the type of transaction and investment product, the age and investment experience of the customer, and the customer’s risk tolerance, investment objectives, and time horizon. Woodbury relied on the responses contained in these forms (as well as in other communications with the registered representative) in conducting its review of the transactions.

Timothy Stone, a compliance specialist at Woodbury, testified that Woodbury could not “make an accurate assessment of the suitability of the sale” if it did not “know the true or correct facts” or if it did not “know all of the facts.” Stone added that Woodbury would not have approved a variable annuity sale to a customer who intended to use it as a short-term investment

⁴ Cohen disputes the authorship and authenticity of the exhibit introduced at the hearing, which was a spreadsheet attached to an email that Horowitz sent to Feder on January 12, 2008. But during his investigative testimony, Cohen reviewed the same spreadsheet and admitted that he personally prepared a “pretty similar” one. Cohen could not confirm that any “specific cell” was the same, but he agreed that the “format,” the “various columns,” and the annuity products and “companies that are identified” all were familiar to and created by him.

strategy (even if the customer was fully aware of the risks of such a strategy). Nor would Woodbury have approved a sale if the point-of-sale form stated that Cohen did not know the customer or that the Funds were the ultimate investor.

D. Cohen sold variable annuities in January and February 2008 by providing false and misleading information to Woodbury.

During early 2008, Cohen sold 28 variable annuities to BDL nominees, generating total sales of approximately \$40 million and commissions to Cohen of \$776,958. Each of the annuities had a surrender period of at least seven years and a bonus feature. And, in every case, a terminally ill hospice or nursing home patient was designated as the annuitant.

Cohen dealt exclusively with BDL in effecting these transactions and had no contact with any of the nominees or annuitants. Feder provided Cohen with blank point-of-sale forms that had been signed by the nominees; basic biographical information about the nominees, including their dates of birth, addresses, and net worth; and scanned copies of the nominees' driver's licenses and trust agreements. Cohen completed the point-of-sale forms by providing nearly identical—and false and misleading—responses to questions about the purchasers' anticipated time-frame for accessing annuity funds, investment objectives, and source-of-funds.

For example, Cohen represented in one point-of-sale form that the purchaser anticipated “begin[ning] to access” the annuity in “11-15 years”; that the annuity was being purchased for the “[t]ax deferred treatment of earnings”; and that he was “familiar with” the purchaser. Cohen did not respond to the form's question about whether the purchaser anticipated accessing the annuity during the 8-year surrender charge period. He made substantively identical representations regarding the other 27 annuities.⁵ In approving each annuity sale, Woodbury relied on Cohen's misrepresentations in the corresponding point-of-sale form. Woodbury approved all 28 sales and forwarded the relevant paperwork to the insurance companies.

E. Woodbury discovered Cohen's misconduct after an insurance company requested that it investigate Cohen's variable annuity sales.

In January 2008, Cohen contacted Penn Mutual Insurance Company about its underwriting process for variable annuities, including what might raise “red flags” when a variable annuity application was reviewed. Penn Mutual found Cohen's inquiries unusual and disturbing. Although Penn Mutual took no further action at that time, it subsequently declined to approve two variable annuity applications (each for \$4.9 million) that Cohen submitted based on what it considered suspicious circumstances. These circumstances included that the owner's and annuitant's signatures were missing; that the purported owners were recently created Florida trusts and the annuitants lived in Illinois but the money was wired from New York banks; and that the applications claimed that gifts and inheritances were being used to purchase the annuities yet there was no apparent relationship between the owners and the annuitants. Following its

⁵ A summary of the 28 annuity sales at issue is presented in Appendix A.

decision to deny the applications, Penn Mutual relayed its concerns to Woodbury and requested that it conduct an investigation of Cohen’s annuity sales.

Woodbury reviewed the annuity applications that Cohen had submitted over the preceding month. It discovered that the annuitants were terminally ill and appeared to be unrelated to the nominee purchasers. As a result, Woodbury suspended processing the additional annuity applications that Cohen had submitted and placed Cohen’s commissions on hold.

On February 13, Steven Lee Smallidge, Woodbury’s national sales director for independent marketing organizations, questioned Cohen about the sales. Cohen told him that the annuities were purchased for “estate planning,” “tax deferral,” and “wealth preservation.” He also said that the purchasers had been referred to him by their “advisors (a CPA and an attorney)” but refused to disclose the advisors’ names or provide the relevant trust documents because they purportedly involved “private family matters.” Smallidge nevertheless insisted that Cohen identify the advisors and provide the trust documents by the end of the week. Cohen refused to do so, and Woodbury terminated him later that month.

II. Analysis

A. Cohen committed antifraud violations by making material misstatements in the point-of-sale forms that he submitted to Woodbury.

Securities Act Section 17(a)(1) prohibits, in the offer or sale of any security, “employ[ing] any device, scheme, or artifice to defraud.” Section 17(a)(2) prohibits, in the offer or sale of any security, “obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission.”⁶ Scierter is required to violate Section 17(a)(1); a showing of negligence suffices for a violation of Section 17(a)(2).⁷

Exchange Act Section 10(b) makes it unlawful “to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of” Commission rules.⁸ Rule 10b-5 implements Section 10(b).⁹ Subsection (a) prohibits “employ[ing] any device, scheme, or artifice to defraud.”¹⁰ Subsection (b) prohibits “mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading.”¹¹ And subsection (c) prohibits

⁶ 15 U.S.C. § 77q(a)(1)-(2).

⁷ *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

⁸ 15 U.S.C. § 78j(b).

⁹ *See United States v. Zandford*, 535 U.S. 813, 816 n.1 (2002).

¹⁰ 17 C.F.R. § 240.10b-5(a).

¹¹ *Id.* § 240.10b-5(b).

“engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”¹² A violation of all three subsections requires scienter.¹³

Cohen contends that he cannot be held liable under Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c) because those provisions contain a “separate and distinct” requirement that the respondent “engage in a scheme” to defraud involving conduct “independent of the actual words spoken.”¹⁴ According to Cohen, claims based upon only misstatements are not actionable under Section 17(a)(1) or Rule 10b-5(a) and (c) and instead must be brought under Rule 10b-5(b) and Section 17(a)(2).¹⁵ Cohen is mistaken.¹⁶

¹² *Id.* § 240.10b-5(c).

¹³ *Aaron*, 446 U.S. at 695.

¹⁴ Cohen cites *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005), for the proposition that “[w]here the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a . . . claim under Rule 10b-5(a) and (c).” But *Lentell* held only that “plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c)” where “the sole basis for such claims is alleged misrepresentations or omissions.” *Id.* at 177. *Lentell* did not hold that misstatements may never form the basis for liability under Rule 10b-5 (a) and (c). We recognize that two circuits have held that liability under Rule 10b-5(a) and (c) requires conduct beyond a misstatement. *Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057-58 (9th Cir. 2011). We have explained previously that we disagree with those courts in light of the language of the rule. See *Dennis J. Malouf*, Exchange Act Release No. 10115, 2016 WL 4035575, at *8-10 (July 27, 2016). We adhere to that view here.

¹⁵ Cohen invokes the principle that effect should be given “to every word of a statute wherever possible.” But there is no surplusage in Section 17(a). Section 17(a)(1) reaches scienter-based fraud (including material misstatements) and Section 17(a)(2) reaches negligent misstatements that result in the receipt of money or property. In any case, the Supreme Court has held with respect to Section 17(a) that Congress included “both a general proscription against fraudulent and deceptive practices [Section 17(a)(1)] and, out of an abundance of caution, a specific proscription against nondisclosure [Section 17(a)(2)].” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-98 (1963). Because “the drafters of Rule 10b-5 modeled the rule on Section 17(a),” *SEC v. Tambone*, 597 F.3d 436, 444 (1st Cir. 2010) (en banc), the same rationale applies to the construction of Rule 10b-5.

¹⁶ Cohen does not dispute that variable annuities are “securities” within the meaning of the securities laws, see, e.g., *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67-73 (1959); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109 (2d Cir. 2001), or that his emails and telephone calls with Feder and Woodbury personnel establish the requisite nexus to interstate commerce, see, e.g., *United States v. Lewis*, 554 F.3d 208, 214-16 (1st Cir. 2009); *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1982).

Rule 10b-5(a) proscribes deceptive “device[s],” “scheme[s], and “artifice[s] to defraud.” Rule 10b-5(c) proscribes, among other things, deceptive “act[s].” It would be arbitrary—and inconsistent with their plain meaning—to read those terms as excluding making a misstatement. And the Supreme Court has recently indicated that it would reject such a narrow reading of Rule 10b-5(a) and (c).¹⁷

Similarly, Section 17(a)(1) prohibits making a material misstatement with scienter because such conduct constitutes “employ[ing] a device, scheme, or artifice to defraud.” The reach of Section 17(a)(1) is not limited because Section 17(a)(2) prohibits certain negligent misstatements. A misstatement of material fact is undoubtedly a “device” or “artifice” to defraud.

Accordingly, a respondent violates these provisions (and Rule 10b-5(b)) when, with scienter, he makes material misstatements in the offer or sale (Section 17(a)) or in connection with the purchase or sale (Section 10(b)) of securities.¹⁸ A violation of Section 17(a)(2) does not require scienter but does require that the respondent “obtain money or property by means of” the misstatements. We find that Cohen violated each of these provisions.

1. Cohen made material misstatements on the point-of-sale forms.

We find that Cohen’s responses to the questions on the point-of-sale forms were false and misleading. Cohen represented that the purchaser anticipated “begin[ning] to access” the annuity in “11-15 years,” that the annuities were purchased for the “[t]ax deferred treatment of earnings,” and that he was “familiar” with the nominee purchasers. These representations were false. The annuities were, in fact, intended to be short-term investments that would be accessed and liquidated as soon as the terminally ill annuitants died—presumably before the “11-15 years” that Cohen indicated. As Feder testified, the strategy was to “roll the money over quickly” and depended on the annuitants being “short-lived” and “dying.”¹⁹ Similarly, the annuities were

¹⁷ *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014) (stating that Rule 10b-5 “forbids the use of any ‘device, scheme, or artifice to defraud’ (*including* the making of ‘any untrue statement of a material fact’ or any similar ‘omission’) ‘in connection with the purchase or sale of any security’” (alterations in original; emphasis added)).

¹⁸ *See Malouf*, 2016 WL 4035575, at *6-12; *Mohammed Riad*, Exchange Act Release No. 78049A, 2016 WL 3627183, at *17 (July 7, 2016) (“All the provisions prohibit at least the making of fraudulent misstatements of material fact.”). There is no dispute that Cohen was the “maker” of the misstatements; he filled out the point-of-sale forms and therefore had ultimate authority over them. *See Janus Cap. Grp. v. First Derivative Traders*, 564 U.S. 135, 142 (2011).

¹⁹ Cohen asserts that he understood the investment access question as referring only to whether the purchaser had a “liquidity need” that might force an early “actual withdrawal,” and “not to the payout or death benefit maturity of the annuity.” A plain reading of the question does not include this qualification. The question states: “I anticipate that I will begin to access this investment: _____.”

purchased with the expectation of generating immediate, bonus-enhanced payouts upon the death of the annuitants, and not for any tax reasons.²⁰ And Cohen had no interaction at all with the nominees, who uniformly testified that they did not know Cohen or communicate with him in any way. Indeed, Cohen admitted that he never met any of the nominees before they appeared as witnesses at the hearing.

We also find that these misstatements were material. A misstatement is material if there is a “substantial likelihood that the disclosure of the omitted fact” would have “significantly altered the ‘total mix’ of information” available in making an investment decision.²¹ The false information need only be “important” to the recipient’s deliberations; proof that “disclosure of the omitted fact would have caused” the recipient to actually change his or her behavior is not necessary.²²

Cohen’s misstatements were material to Woodbury in deciding whether to approve his annuity sales.²³ Indeed, Stone testified that if Cohen had “at any point in time answered these questions correctly, none of these transactions would have been processed.” Stone testified that Woodbury could not “make an accurate assessment of the suitability of the sale” if it did not “know the true or correct facts” or if it did not “know all of the facts.” He added that a sale would fail suitability review if the “product was used in a way that it wasn’t intended to be used.” For example, Stone testified that Woodbury would not have approved a variable annuity sale to a customer who intended to use it as a short-term investment strategy (even if the customer was fully aware of the risks of such a strategy). Woodbury also “definitely would have rejected” a sale if Cohen had disclosed that the investor’s purpose was to access the investment

²⁰ Cohen asserts that tax-deferred growth is an intrinsic characteristic of a variable annuity, and independent of the actual purchaser’s time horizon. But the point-of-sale question asked for the reasons why “I [i.e., that specific purchaser]” was purchasing the annuity.

²¹ *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

²² *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

²³ *See, e.g., Graham v. SEC*, 222 F.3d 994, 996, 1000-01 & n.13 (D.C. Cir. 2000) (finding that customer’s misrepresentations to broker regarding common ownership of accounts were material because the broker “would not have paid had they known the true nature of the transactions”); *United States v. Tager*, 788 F.2d 349, 350, 355 (6th Cir. 1986) (finding that customer’s misrepresentations made to “induc[e] the broker to extend credit” were material because they “lull[ed] the broker into transferring the risk to itself”); *see also SEC v. Jakubowski*, 150 F.3d 675, 679, 681 (7th Cir. 1998) (finding that misrepresentation to bank regarding stock’s “beneficial ownership” was material because it would not have “issued the stock had they known the identities of the real purchasers”); *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL 3199181, at *7 & n.32 (Nov. 3, 2006) (finding that misrepresentations to exchange regarding whether orders were “legitimate” were material because they caused the exchange to believe that trades “qualif[ied] for rebate[s]”), *aff’d*, 269 F. App’x 217 (3d Cir. 2008).

upon the death of the terminally ill annuitants. Nor would Woodbury have approved a sale if the point-of-sale form stated that Cohen did not know the customer or that the Funds were the ultimate investor. Accordingly, the facts that Cohen misrepresented would have been significant to Woodbury in determining whether to approve the variable annuity sales.

Cohen claims that his misstatements were not material because, as unsolicited sales, these transactions were not subject to Woodbury's suitability review. But Stone testified that Woodbury did not allow unsolicited annuity sales. And Cohen admitted that he submitted the forms for the purpose of enabling Woodbury to do "their due diligence" and "suitability review."

Cohen also argues that FINRA's "Notices and Rules" did not require a suitability review. Regardless of the procedures FINRA mandated, the record is clear that Woodbury required all of the variable annuity sales at issue to undergo its suitability review process.

2. Cohen acted with scienter

Scienter is the "intent to deceive, manipulate, or defraud."²⁴ It may be established "by showing that the defendants knew their statements were false, or by showing that defendants were reckless as to the truth or falsity of their statements."²⁵ We find that Cohen knew his statements were false when he submitted the 28 point-of-sale forms to Woodbury.

Cohen understood that he was selling variable annuities to hedge funds that were using nominees in order to buy the annuities for short-term investment purposes. He admitted that the purpose of the strategy was "using annuities for the short-term death benefit" paid when the terminally ill annuitants died. Cohen also knew that the strategy depended on taking advantage of the bonus feature combined with a waiver of surrender charges. He also personally reviewed and researched variable annuity products to "better understand" them and "assure himself" that the strategy would function, including by compiling a spreadsheet that calculated the potential returns for a notional "\$1 million investment" in the event of the annuitant's "Death in 60 Days." Thus, Cohen knew that his statements that the purchasers anticipated "begin[ning] to access" the annuity in "11-15 years," that the annuities were purchased for the "[t]ax deferred treatment of earnings," and that he was "familiar" with the purchasers were false when he made them.²⁶

Cohen also took steps to minimize suspicion and reduce the risk that the truth would be discovered. He asked issuers what might raise "red flags" when a variable annuity application was reviewed and prepared a spreadsheet that tabulated the maximum amounts that could be

²⁴ *Hochfelder*, 425 U.S. at 193 & n.12.

²⁵ *Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010).

²⁶ *See, e.g., Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2d Cir. 1978) ("There is of course no difficulty in finding the required intent to mislead where it appears that the speaker believes his statement to be false.") (internal quotation marks omitted).

invested in each product without triggering due diligence by the insurer. These actions, and Cohen’s repeated and knowing falsehoods, constitute overwhelming proof of his scienter.

3. Cohen made his misstatements in the offer or sale, and in connection with the purchase or sale, of securities.

Cohen made his misstatements in the “offer and sale,” and in connection with the purchase or sale, of securities. In *United States v. Naftalin*, the Supreme Court held that “in the ‘offer or sale’ is ‘expansive enough to encompass the entire selling process.’”²⁷ The fraud need not “occur in any particular phase of the selling transaction.”²⁸ *Naftalin* held that material misstatements made to a broker in order to induce the completion of a securities transaction occur “in” the “offer” and “sale” of securities, and so are within the scope of Section 17(a)(1).²⁹ Cohen made his misstatements for this exact reason.

Similarly, Section 10(b)’s “in connection with” requirement is satisfied when the fraud and the sale “coincide.”³⁰ A “misrepresentation about who [is] buying” a security made to induce acceptance of the transaction satisfies the “in connection with” requirement.³¹ Because Cohen made the misstatements to induce Woodbury to approve the variable annuity sales, Section 10(b)’s “in connection with” requirement is satisfied.

Cohen argues that his conduct cannot violate Section 17(a) because that section is “limited to fraud against . . . purchasers” and does not reach frauds “where no direct investor harm” occurred.³² But in *Naftalin*, the Court held that “the statutory language does not require that the victim of the fraud be an investor—only that the frauds occur ‘in’ an offer or sale of

²⁷ 441 U.S. 768, 773 (1979) (citations omitted).

²⁸ *Id.* (quoting 15 U.S.C. § 77b(a)(3)).

²⁹ *Id.* at 770, 773 (“Respondent was aware, however, that had the brokers who executed his sell orders known [the truth] . . . , they . . . would not have accepted the orders[] [T]he fraud occurred ‘in’ the ‘offer’ and ‘sale.’”); *Orlando Joseph Jett*, Exchange Act Release No. 49366, 2004 WL 2809317, at *21 (Mar. 5, 2004) (concluding that respondent’s false statements to his broker-dealer employer coincided with potential and actual securities transactions and so “was ‘in the offer or sale of’ securities under Securities Act Section 17(a) and ‘in connection with the purchase or sale of’ securities under Exchange Act Section 10(b) and Rule 10b-5 thereunder”).

³⁰ See, e.g., *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002); see also *United States v. O’Hagan*, 521 U.S. 642, 655-56 (1997) (finding “in connection with” requirement satisfied “even though the person or entity defrauded is not the other party to the trade”).

³¹ *Jakubowski*, 150 F.3d at 680.

³² As a general matter, no showing of investor reliance or investor harm is required in an Commission enforcement proceeding. See, e.g., *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir.1985).

securities.”³³ In so concluding, the Court considered it significant that although Section 17(a)(3) is limited to fraud or deceit “upon the purchaser,” Section 17(a)(1) is not so limited.³⁴ Although *Naftalin* addressed only Section 17(a)(1) of the Securities Act, its holding and reasoning apply equally to Section 17(a)(2), which also does not contain an “upon the purchaser” limitation.

Cohen also contends that Rule 10b-5 is limited to fraud against investors. No subsection of Rule 10b-5 is limited by a “fraud upon the purchaser” requirement. Relying on *Naftalin* and the fact that “in connection with” is no narrower than “in,” the D.C. Circuit has held that Rule 10b-5 “cover[s] fraud against brokers.”³⁵

Cohen contends further that we have limited Section 17(a) to frauds on investors because in *John P. Flannery* we said that “there would need to be a showing that investors were or could have been defrauded” for liability under Section 17(a).³⁶ But we made that statement in the context of explaining that liability under Section 17(a) does not require conduct that is manipulative or deceptive but does require conduct that defrauds, and *Flannery* involved an alleged fraud on investors. *Flannery* did not involve a fraud on a broker, and we adhere to the Supreme Court’s view that fraud on a broker is within the purview of Section 17(a)(1) and (a)(2).

* * *

We find that, by virtue of the material misstatements Cohen made with scienter, he violated Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5(a), (b), and (c). Because Cohen also obtained money or property by means of the misstatements, we also find that he violated Securities Act Section 17(a)(2). The requirement that a defendant obtain money or property “by means of” the misstatements suggests the need for a causal link between the misrepresentation and the acquisition of money or property.³⁷ As we

³³ 441 U.S. at 772-73.

³⁴ *Id.* at 773-774 (“Congress did not write the statute that way. Indeed, the fact that it did not provide strong affirmative evidence that while impact upon a purchaser may be relevant to prosecutions brought under § 17(a)(3), it is not required for those brought under § 17(a)(1).”).

³⁵ *Graham*, 222 F.3d at 1002 (rejecting petitioner’s argument that, “[t]o constitute a violation of section 10(b), . . . the fraud must have been perpetrated upon an actual or potential investor”); *see also O’Hagan*, 521 U.S. at 658 (explaining that Section “10(b)’s language . . . requires deception ‘in connection with the purchase or sale of any security, not deception of an identifiable purchaser or seller’”); *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 396 (2d Cir. 1967) (finding that neither Section 10(b) nor Rule 10b-5 “speaks in terms of limiting the nature of the violation to one involving fraud of ‘investors’” and that there is no “justification for reading such an additional requirement into the Act”).

³⁶ *John P. Flannery*, Advisers Act Release No. 3981, 2014 WL 7145625, at *16 (Dec. 15, 2014), *vacated on other grounds*, 810 F.3d 1, 12 n.12 (1st Cir. 2015).

³⁷ *SEC v. Stoker*, 865 F. Supp. 2d 457, 463 (S.D.N.Y. 2012).

have explained, Cohen's statements were decisive in obtaining Woodbury's approval of the variable annuities sales. And Cohen was directly compensated for those sales in the form of approximately \$700,000 in commissions. This is more than sufficient to satisfy the requirement that he "obtain[ed] money . . . by means of" his misstatements.³⁸

B. Cohen aided and abetted and caused Woodbury's recordkeeping violations.

Exchange Act Section 17(a)(1) and Rule 17a-3(a)(6) thereunder require broker-dealers to make and keep current certain books and records relating to its operations.³⁹ "That requirement includes the requirement that the records be accurate, which applies regardless of whether the information itself is mandated."⁴⁰ Scienter is not required for a primary violation of Exchange Act Section 17(a)(1) or the rules thereunder.⁴¹

"To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the requisite scienter."⁴² Liability for causing a violation requires: (1) a primary violation; (2) that the respondent knew, or should have known, that his or her conduct would contribute to the violation; and (3) that the respondent engaged in an act or omission that contributed to the violation.⁴³ The primary violator need not be charged in order to find liability.⁴⁴

Woodbury violated Exchange Act Section 17(a)(1) and Rule 17a-3(a)(6) because the false and misleading point-of-sale forms rendered the requisite books and records that Woodbury's back office maintained to document each annuity sale inaccurate. Cohen substantially assisted and contributed to the violation because he was the one who submitted the

³⁸ See, e.g., *Big Apple Consulting USA, Inc.*, 783 F.3d at 796-97.

³⁹ 15 U.S.C. § 78q(a)(1); 17 C.F.R. § 240.17a-3(a) (listing required records).

⁴⁰ *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *11 (Feb. 27, 2012) (quotation marks omitted); see also *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) ("The . . . falsification . . . on [the] order tickets is so clearly a violation of the record-keeping requirements of [Section] 17(a) of the 1934 Act . . . that it hardly deserves comment . . . [E]ven assuming no legal obligation to furnish the names, there was an obligation, upon voluntarily supplying that information, to be truthful.").

⁴¹ *Jett*, 2004 WL 2809317, at *23.

⁴² *Brown*, 2012 WL 625874, at *11.

⁴³ See, e.g., *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 WL 1506286, at *8 (May 31, 2006); *Robert M. Fuller*, Exchange Act Release No. 48406, 2003 WL 22016309, at *4 (Aug. 25, 2003), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004).

⁴⁴ *Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 WL 768828, at *16 n.89 (Feb. 27, 2014), *aff'd*, ___ F. App'x ___, 2016 WL 2343244 (9th Cir. 2016).

false and misleading forms to Woodbury. And Cohen acted with the requisite scienter because he knew the forms were false and misleading when he submitted them. Accordingly, we find that Cohen aided and abetted and caused Woodbury's recordkeeping violations.

C. The record does not support Cohen's claim that the law judge was biased.

Cohen claims that the law judge conducted the hearing in a "lopsided, unbalanced, and biased" fashion. As an initial matter, we note that law judges are presumed to be unbiased.⁴⁵ To overcome this presumption, there must be a "showing of conflict of interest or some other specific reason for disqualification,"⁴⁶ such as where the law judge's behavior, "in the context of the whole case, was 'so extreme as to display clear inability to render fair judgment.'"⁴⁷ Cohen fails to meet this demanding standard.

Cohen supports his claim of bias by citing a number of the law judge's decisions, including her questioning of certain witnesses, reminding Cohen that he needed to comply with the rules, and urging Cohen to wrap up his cross-examination. This amounts to a recitation of the rulings that Cohen disagrees with, and disagreement is not evidence of bias. "[J]udicial rulings alone" almost "never constitute a valid basis for a bias [claim]."⁴⁸

Moreover, based on our independent *de novo* review of the record, we are satisfied that the law judge acted appropriately. It is settled that a "judge may question a witness in order to clarify testimony and to elicit necessary facts."⁴⁹ And we expect all "[p]arties, including those appearing *pro se*, . . . to familiarize themselves with the Rules of Practice" and to comply with procedural requirements.⁵⁰ Finally, our review of the record shows that the law judge gave Cohen broad latitude in cross-examination. Often, his "cross-examination was substantially

⁴⁵ See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

⁴⁶ *Schweiker*, 456 U.S. at 195.

⁴⁷ *Rollins v. Massanari*, 261 F.3d 853, 858 (9th Cir. 2001) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)); accord *Keith v. Barnhart*, 473 F.3d 782, 788 (7th Cir. 2007).

⁴⁸ *Liteky*, 510 U.S. at 555; accord *Marcus v. Dir., Office of Workers' Comp. Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) ("The mere fact that a decision was reached contrary to a particular party's interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune.").

⁴⁹ See, e.g., *United States v. Bamberg*, 478 F.3d 934, 941 (8th Cir. 2007).

⁵⁰ See, e.g., *BDO China Dahua CPA Co., Ltd.*, Exchange Act Release No. 72134, 2014 WL 1871077, at *3 (May 9, 2014) (quotation marks omitted).

more extensive than the Division's examination of these witnesses."⁵¹ In addition, Cohen "fails to explain how a longer cross-examination would have strengthened [his] defense."⁵²

In his petition for review, Cohen advanced two other grounds in support of his claim of bias. He asserted that the law judge gave "implicit blessing" to the Division's supposedly "deceptive" plan to deny him the opportunity to call two witnesses in his defense. He also asserted that the law judge had a substantive, 5-minute *ex parte* conversation with one of the Division's witnesses while he was outside the hearing room. Although Cohen did not pursue these claims in his brief, we issued an order directing Cohen to submit a brief regarding his claims.⁵³ Cohen never filed a brief in response to our order, and this failure by itself would justify our ruling against him on these issues.⁵⁴ Nonetheless, we have reviewed the record and find Cohen's claims unsubstantiated.

Cohen's opportunity to call witnesses: On the morning of Wednesday, August 27, 2014, after two days of presenting evidence, the Division closed its case. That afternoon, Cohen testified on his own behalf and called one witness.⁵⁵ The law judge concluded the hearing over Cohen's objection after Cohen had no other witnesses available to testify. Cohen asserts that he was planning on calling two witnesses, Baruch Gottesman and Michael Horowitz, who were flying in from California but had not yet arrived because Cohen did not expect his rebuttal case to begin until the next Monday. Cohen claims that the law judge "stated during a pre-hearing conference that the hearing would last for 10 days" and that the Division represented that it would present its case for five days and Cohen would be given the following five days to present rebuttal. But the hearing transcript contains no such statements and Cohen acknowledged at the hearing that the law judge never "told anyone that this case was going for two weeks." Because neither the law judge nor the Division misled Cohen regarding the anticipated length of the hearing, we find no error in the law judge's decision to end the hearing when she did.

⁵¹ *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *9 (Apr. 5, 1999); *see also United States v. Sanders*, 614 F.3d 341, 344 (7th Cir. 2010) ("Trial courts may impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, a witness' safety, or questioning that is repetitive or marginally relevant.").

⁵² *Canady*, 1999 WL 183600, at *9; *cf. Cellular Mobile Sys. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985) (explaining that the party who seeks more extensive cross-examination in an agency proceeding should identify "specific weakness in the proof which might have been explored or developed more fully").

⁵³ *Moshe Marc Cohen*, Exchange Act Release No. 75922, 2015 WL 5337460, at *1 (Sept. 15, 2015).

⁵⁴ Rule of Practice 180(c), 17 C.F.R. § 201.180(c).

⁵⁵ Cohen attempted to call another witness, Judah Pearlstein. The ALJ sustained the Division's objection to her testimony on the ground that she did not serve as a nominee for any of the variable annuity sales that are at issue. Cohen does not challenge this ruling.

The law judge's alleged ex parte conversation: Cohen claims that the law judge had an *ex parte* conversation with Timothy Stone during a recess after the Division's direct examination of that witness. According to Cohen, the hearing transcript shows that the *ex parte* conversation occurred because after the law judge indicated that the proceedings were to go "off the record" the reporter defied the law judge's instruction and instead "deliberately record[ed] and transcrib[ed] the conversations" that occurred outside Cohen's presence. The transcript of the hearing does not support Cohen's claim. Instead, it shows that every time the law judge indicated that the proceedings would go off the record, the court reporter followed that statement with an indication on the transcript "(Discussion held off the record)." Transcription of the proceedings then began again without any specific indication that the proceedings were back "on the record." Thus, the transcript indicates that the conversation that the court reporter transcribed was not an *ex parte* conversation that took place during the break but rather a colloquy that took place on the record in Cohen's presence after the proceedings resumed.

III. Sanctions

The Division seeks a bar from the securities industry, a cease-and-desist order, disgorgement, and a civil money penalty. Cohen argues that these sanctions are unwarranted and that the statute of limitations in 28 U.S.C. § 2462 precludes imposing a bar or civil penalty. We find that 28 U.S.C. § 2462 does not bar any of the requested relief because Cohen entered into voluntary tolling agreements, and that the relief requested is in the public interest.

A. Section 2462 is a non-jurisdictional statute of limitations subject to tolling.

Section 2462 provides that an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued" Although Cohen's fraud ended in February 2008 and the Commission did not institute proceedings until March 2014,⁵⁶ Cohen (through counsel) agreed to toll the statute of limitations until May 2014.⁵⁷ Nonetheless, Cohen argues that the five-year time limit is "jurisdictional" and cannot be tolled.

⁵⁶ *Michael A. Horowitz*, Exchange Act Release No. 71715, 2014 WL 977335 (Mar. 13, 2014).

⁵⁷ We grant the Division's request to adduce the tolling agreements as additional evidence. *See* Rule of Practice 452, 17 C.F.R. § 201.452. The agreements are "material" to the applicability of the statute of limitations, and "reasonable grounds" exist for the Division not to have introduced that evidence previously. The law judge denied all of Cohen's affirmative defenses at a July 2014 pre-hearing conference. The Division thus would not have known of the need to introduce evidence showing that the statute of limitations had not run until the law judge issued her decision holding that 28 U.S.C. § 2462 precluded the imposition of a bar and civil penalties.

We disagree. “Statutes of limitations and other filings deadlines ‘ordinarily are not jurisdictional.’”⁵⁸ As a result, there is a “high bar to establish that a statute of limitations is jurisdictional.”⁵⁹ The Supreme Court “treat[s] a time bar as jurisdictional only if Congress has ‘clearly stated’ that it is.”⁶⁰ Congress has not done so in Section 2462.

“To determine whether Congress has made the necessary clear statement,” the Court “examine[s] the ‘text, context, and relevant historical treatment’ of the provision at issue.”⁶¹ The text suggests that Congress did not mean Section 2462 to be jurisdictional. Section 2462 “does not expressly refer to . . . jurisdiction or speak in jurisdictional terms” and therefore does not “provide a ‘clear indication that Congress wanted [it] to be treated as having jurisdictional attributes.’”⁶²

Context also indicates that Section 2462 does not impose a jurisdictional limit. Section 2462 is “located in a provision ‘separate’ from those granting . . . subject-matter jurisdiction.”⁶³ It is located in the “Particular Proceedings” Part of Title 28 of the U.S. Code and is not found in the “Jurisdiction and Venue” Part of Title 28.⁶⁴ Section 2462 is also not among the provisions of the federal securities laws that provide subject-matter jurisdiction over Commission actions.⁶⁵ This context “supports the conclusion that [Section 2462] is not jurisdictional.”⁶⁶

So does the relevant historical treatment of Section 2462. The “law typically treats a limitations defense as an affirmative defense that the defendant must raise . . . and that is subject to rules of forfeiture and waiver.”⁶⁷ Section 2462 is no different. Numerous courts of appeals have held that Section 2462 provides an affirmative “statute of limitations defense” that can be

⁵⁸ *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (quoting *Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 825 (2013)).

⁵⁹ *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015).

⁶⁰ *Musacchio*, 136 S. Ct. at 717.

⁶¹ *Id.* (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)).

⁶² *Id.* (citation omitted); accord *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006); *Wong*, 135 S. Ct. at 1633 n.4.

⁶³ *Reed Elsevier*, 559 U.S. at 164.

⁶⁴ See 28 U.S.C. Part IV and Part VI.

⁶⁵ E.g., 15 U.S.C. § 77v(a); 15 U.S.C. § 78aa(a); 15 U.S.C. § 80b-14; 15 U.S.C. § 80a-43.

⁶⁶ *Musacchio*, 136 S. Ct. at 717; accord *Wong*, 135 S. Ct. at 1633 (explaining “that Congress’s separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional”); *Gonzalez v. Thaler*, 132 S. Ct. 641, 651 (2012) (same).

⁶⁷ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

“waived.”⁶⁸ This “history of treating the operative language in [Section 2462] as providing a nonjurisdictional defense” indicates that Section 2462 is subject to tolling.

Cohen argues that Section 2462 is jurisdictional because the Supreme Court in *Gabelli v. SEC* held that the discovery rule—which delays accrual of a claim until the plaintiff has discovered the facts giving rise to the cause of action—does not apply to civil penalty enforcement actions.⁶⁹ But nowhere did the Court suggest that Section 2462 was jurisdictional in nature and it did not address tolling. Instead, the Court stated explicitly that the applicability of “doctrines that toll the running of an applicable limitations period” was not before it.⁷⁰

Cohen also asserts that Section 2462’s use of the word “shall” denotes “absoluteness and jurisdictionality [sic].” But most “time prescriptions, however emphatic, are not properly typed ‘jurisdictional.’”⁷¹ The Supreme Court has “consistently found it of no consequence” that a time limitation uses language that is “mandatory—‘shall’ be barred”—or “emphatic—‘forever’ barred.”⁷² “‘However emphatic[ally]’ expressed” a time limit may be, “Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional.”⁷³ As we have explained, the language, context, and application of Section 2462 demonstrates it is not jurisdictional.⁷⁴

Because Section 2462 is not jurisdictional, it does not bar relief in this case because Cohen agreed to extend the statute of limitations until after the Commission instituted these proceedings.⁷⁵

⁶⁸ *United States v. Banks*, 115 F.3d 916, 918 n.4 (11th Cir. 1997); accord *Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000) (defendant’s reliance on Section 2462 is “an affirmative defense and is waived if a party does not raise it”); *United States v. Core Labs, Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) (Section 2462 is subject to equitable tolling).

⁶⁹ *Gabelli v. SEC*, 133 S. Ct. 1216, 1220, 1222 (2013).

⁷⁰ *Id.* at 1220 n.2.

⁷¹ *Arbaugh*, 546 U.S. at 510.

⁷² *Wong*, 135 S. Ct. at 1632 (collecting cases).

⁷³ *Id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011)).

⁷⁴ See also *SEC v. Amerindo Inv. Advisors*, 639 F. App’x 752, 754 (2d Cir. 2016) (holding that Section 2462 is not jurisdictional).

⁷⁵ Even had the statute of limitations not been tolled, Section 2462 would not prevent us from imposing equitable remedial sanctions, such as a bar, cease-and-desist order, or disgorgement. See, e.g., *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *15 & n.71 (Sept. 17, 2015) (finding that a bar, cease-and-desist order, and disgorgement are equitable remedies not subject to Section 2462).

B. We find that a bar, a cease-and-desist order, disgorgement, and a civil money penalty are in the public interest.

1. Bar

Section 15(b)(6) of the Exchange Act authorizes us to bar Cohen from association with a broker, dealer, investment adviser, municipal securities dealer, and transfer agent if we find that his violations were willful and that such a sanction is in the public interest.⁷⁶ Section 9(b) of the Investment Company Act provides similar authority to prohibit Cohen 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.”⁷⁷ Because a violator acts willfully by “intentionally committing the act which constitutes the violation,”⁷⁸ we find that Cohen’s violations were willful. We also find a bar to be in the public interest.

In determining whether to impose a bar, we consider the egregiousness of the respondent’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the respondent’s recognition of the wrongful nature of his or her conduct, the sincerity of the respondent’s assurances against future violations, and the likelihood that the respondent’s occupation will present opportunities for future violations.⁷⁹ We do not look solely at “past misconduct.”⁸⁰ Rather, because a bar is intended to “protect[] the trading public from further harm,” not to punish the respondent,⁸¹ the “degree of risk [that the respondent] poses to the public” and the extent of the respondent’s “unfitness to serve the investing public” are the touchstones of our analysis.⁸² Our inquiry is flexible, and no single factor is dispositive.⁸³

⁷⁶ 15 U.S.C. § 78o(b)(6). Although we also now are authorized to impose bars from association with a municipal advisor or nationally recognized statistical rating organization, we will not do so here because Cohen’s misconduct predated the effectiveness of the Dodd-Frank Act. *See Koch v. SEC*, 793 F.3d 147, 158 (D.C. Cir. 2015).

⁷⁷ 15 U.S.C. § 80a-9(b).

⁷⁸ *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quotation marks omitted); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976).

⁷⁹ *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d*, 450 U.S. 91 (1981); *John A. Carley*, Exchange Act Release No. 57246, 2008 WL 268598, at *21 (Jan. 31, 2008).

⁸⁰ *Johnson*, 87 F.3d at 490.

⁸¹ *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

⁸² *Meadows v. SEC*, 119 F.3d 1219, 1228 & n.20 (5th Cir. 1997).

⁸³ *See, e.g., Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009).

Cohen's misconduct was egregious and undertaken with a high degree of scienter. Cohen undoubtedly appreciated that his representations on the point-of-sale forms were false, and he made them to induce Woodbury to approve the annuity sales. Cohen's misconduct was also recurrent and cannot be viewed as a one-time lapse in judgment. He made misstatements in over two dozen point-of-sale forms over a two-month period. Finally, Cohen's attempt to blame others for his misconduct by asserting that he acted on the "advice of counsel"—a contention that lacks any support in the record—undermines the sincerity of his assurances against future violations.⁸⁴

Cohen asserts that a bar is unnecessary because he "no longer poses a threat to the securities industry." We disagree. Cohen's willingness to knowingly and repeatedly make material misrepresentations in connection with securities transactions indicates that he poses a serious and continuing threat to the investing public.

We find that the imposition of a bar in all the capacities indicated above is in the public interest. "[C]onduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws."⁸⁵ Cohen's fraudulent activities establish him as a threat to the investing public and unfit to serve that public and preclude his continued association as a securities professional.

2. Cease-and-desist order

Section 8A(a) of the Securities Act and Section 21C of the Exchange Act authorize us to issue a cease-and-desist order as to any person who "is violating, has violated, or is about to violate" any provision of these statutes or any rule or regulation thereunder.⁸⁶ Such orders must be in the public interest, and in making that determination we consider essentially the same factors discussed above.⁸⁷ The risk of future violations needed to support a cease-and-desist order "need not be very great"⁸⁸ and even a "single egregious violation can be sufficient to

⁸⁴ See, e.g., *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *15 (July 2, 2010) ("As we have stated, 'attempts to shift blame are additional indicia of [a respondent's] failure to take responsibility for his actions.'" (citation omitted).

⁸⁵ *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

⁸⁶ 15 U.S.C. §§ 77h-1(a), 78u-3.

⁸⁷ E.g., *Joseph J. Barbato*, Exchange Act Release No. 41034, 1999 WL 58922, at *14 n.31 (Feb. 10, 1999).

⁸⁸ *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *24 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002); see also *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *8 & nn.34-35 (Aug. 5, 2011).

indicate some risk of future violation.”⁸⁹ Indeed, “[i]n the ordinary case, and absent evidence to the contrary, a finding of past violation raises a risk of future violation sufficient to support our ordering a respondent to cease and desist.”⁹⁰ Cohen does not challenge the appropriateness of a cease-and-desist order. For the same reasons that we find that a bar is appropriate, we conclude that there is a sufficient risk of future violations to justify this sanction.

3. Disgorgement

Sections 21C(e) of the Exchange Act authorizes us to order disgorgement of ill-gotten gains.⁹¹ “[D]isgorgement’s underlying purpose is to make lawbreaking unprofitable for the lawbreaker[.]”⁹² It is an “equitable remedy” that deprives the wrongdoer of ill-gotten gains.⁹³ The amount disgorged must “be a reasonable approximation of the profits causally connected to the violation.”⁹⁴ This includes “all gains flowing from the illegal activities.”⁹⁵

We find that Cohen should disgorge \$766,958, which are the sales commissions he received from Woodbury as a result of his fraud. Cohen admitted in his testimony that he never returned these funds. Although Cohen asserts that he “does not currently have the funds” to pay disgorgement,⁹⁶ that is irrelevant. That Cohen might have already spent his ill-gotten gains does not eliminate his disgorgement obligation.⁹⁷ Nor does a respondent’s “claim of financial hardship” provide a “defense to a motion for an order of disgorgement.”⁹⁸

⁸⁹ *Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *15 (July 13, 2006), *pet. denied*, 512 F.3d 634 (D.C. Cir. 2008).

⁹⁰ *Fundamental Portfolio Advisors, Inc.*, 2003 WL 21658248, at *18.

⁹¹ 15 U.S.C. § 78u-3(e).

⁹² *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014).

⁹³ *Id.*

⁹⁴ *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1988); *accord Contorinis*, 743 F.3d at 305.

⁹⁵ *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotations and citation omitted).

⁹⁶ Cohen failed to provide documentation or evidence to support this claim as required by Rule of Practice 630. 17 C.F.R. § 201.630. His claim of an inability to pay is therefore waived. *See* Rule of Practice 600(d), 17 C.F.R. § 201.600(d).

⁹⁷ *See, e.g., SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987).

⁹⁸ *See, e.g., SEC v. Mohn*, 2005 WL 2179340, at *5 (E.D. Mich. Sept. 9, 2005).

4. Civil money penalties

Section 21B of the Exchange Act authorizes us to assess a civil money penalty when the respondent has willfully violated the securities laws and such a penalty is in the public interest.⁹⁹ A three-tier system establishes the maximum such penalty that may be imposed for each violation found. For each act or omission involving fraud or deceit that additionally resulted in (or created a significant risk) of substantial losses to other persons or that resulted in substantial gains to the wrongdoer, a third-tier penalty may be warranted.¹⁰⁰

Third-tier civil penalties are warranted against Cohen because his fraud resulted in substantial gains. Cohen made four separate misrepresentations in 28 different point-of-sale forms and earned, as a result, \$766,958 in commissions; if Woodbury had not discovered his misconduct, it would have (according to Cohen) paid him another \$1.3 million in commissions. Considering the nature of Cohen's fraudulent misconduct, the unjust gains that Cohen received, and the need to deter others from engaging in similar conduct, we have determined to impose a third-tier civil penalty of \$75,000 for each of the 28 variable annuity sales, for a total civil penalty of \$2,100,000.¹⁰¹

An appropriate order will issue.¹⁰²

By the Commission (Chair WHITE and Commissioner STEIN; Commissioner PIWOWAR, concurring separately).

Brent J. Fields
Secretary

⁹⁹ 15 U.S.C. § 78u-2.

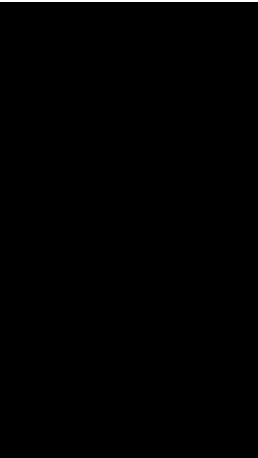
¹⁰⁰ 15 U.S.C. § 78u-2(c).

¹⁰¹ See 17 C.F.R. § 201.1003 (setting forth the inflation-adjusted maximum civil penalty amounts for violations occurring after February 14, 2005 but before March 3, 2009).

¹⁰² We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Appendix A: The 28 annuity sales that Woodbury approved because of Cohen's misrepresentations in the submitted point-of-sale forms

Issuer	Contract Number
AIG SunAmerica Life Assurance Company	
AIG SunAmerica Life Assurance Company	
AIG SunAmerica Life Assurance Company	
AIG SunAmerica Life Assurance Company	
AIG SunAmerica Life Assurance Company	
Genworth Life and Annuity Insurance Company	
Genworth Life and Annuity Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
Hartford Life Insurance Company	
ING USA Annuity and Life Insurance Company	
ING USA Annuity and Life Insurance Company	
ING USA Annuity and Life Insurance Company	
MetLife Investors USA Insurance Company	
MetLife Investors USA	

Insurance Company	
MetLife Investors USA Insurance Company	
Security Benefit Life Insurance Company	
Security Benefit Life Insurance Company	
Sun Life Financial	
Sun Life Financial	
Sun Life Financial	
Sun Life Financial	
Sun Life Financial	

Commissioner PIWOWAR, concurring:

Commissioner Piwowar concurs with the opinion, which concludes, among other things, that Moshe Marc Cohen violated Section 17(a)(1) of the Securities Act and Exchange Act Rules 10b-5(a) and (c).

Several courts have found that misstatements alone are not sufficient to give rise to scheme liability.¹ In this case, however, there is no need to determine whether the holdings of those cases apply. Although not specifically described in the majority opinion as a basis for liability, Cohen engaged in manipulative and deceptive activities beyond the misstatements. As discussed in the initial decision, Cohen's deceptive conduct included calling issuers to learn what characteristics of a variable annuity application might generate so-called "red flags" for additional due diligence by the insurer, and then taking actions to avoid such scrutiny. Cohen also, among other things, instructed others on how to deal with annuitant families, and thus assisted in preventing nominees from making statements that might reveal the nature of the investment strategy.

Because Cohen acted deceptively, employed deceptive devices and artifices to defraud, and engaged in deceptive acts, practices, and a course of business that operated as a fraud beyond his misstatements, there is no need to address whether those misstatements alone are sufficient to find violations of Section 17(a)(1) of the Securities Act and Exchange Act Rules 10b-5(a) and (c).

¹ See, e.g., *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057-58 (9th Cir. 2011) (collecting cases); *Public Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) (following *WPP Luxembourg*); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177-78 (2d Cir. 2005) (applying similar rule).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10205 / September 9, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78797 / September 9, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of
MOSHE MARC COHEN

ORDER IMPOSING REMEDIAL SANCTIONS

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

It is ORDERED that Moshe Marc Cohen be barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent and is prohibited, permanently, 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.

It is further ORDERED that Moshe Marc Cohen cease and desist from committing or causing violations or future violations of Section 17(a) of the Securities Act and Sections 10(b) and 17(a) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder.

It is further ORDERED that Moshe Marc Cohen disgorge \$766,958 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b), in the amount of \$277,384. Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from March 1, 2008, through the last day of the month preceding which payment is made.

It is further ORDERED that Moshe Marc Cohen pay a civil money penalty of \$2,100,000.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary