UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3486/ October 12, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14894

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| In the Matter of | : | ORDER MAKING FINDINGS |
| | : | AND IMPOSING SANCTIONS |
| GREGORY D. TINDALL | : | BY DEFAULT |
| | : | |

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing (OIP) on May 29, 2012. The OIP alleges that Respondent Gregory D. Tindall (Tindall) was permanently enjoined from the antifraud and other provisions of the securities laws in SEC v. Tindall, 8:10-cv-02859-JDW-MAP (M.D. Fla. May 8, 2012). Tindall was served with the OIP by August 7, 2012, at the latest. On August 20, 2012, Respondent was ordered to show cause by September 4, 2012, why he should not be deemed in default for failing to file an Answer. See OIP at 2; 17 C.F.R. § 201.220(b). Respondent did not show cause, answer the OIP, or otherwise defend the proceeding; therefore, I found Respondent to be in default. See 17 C.F.R. §§ 201.155(a)(2), .220(f). The Division of Enforcement (Division) filed a Motion for Sanctions Against Tindall (Motion) on September 26, 2012, requesting a collateral bar be imposed on Tindall, and supporting its request by attaching a copy of the underlying judgment (Judgment) as Exhibit A.[1]

## Findings of Fact

Tindall, age 50, is a Canadian citizen and resides in Alberta, Canada. OIP, p. 1. From April 2008 through at least May 2009, Tindall was a managing member of Arcanum Equity Fund, LLC (Arcanum), and of Vestium Management Group, LLC, which managed Vestium Equity Fund, LLC (Vestium) (collectively, the Funds). Id. Tindall participated in the Funds' investment decisions, and signed investment contracts on behalf of the Funds. Id. Tindall was paid, in part, based on the Funds' performance. Id.

[1] In addition, I take official notice of the complaint filed in the underlying case (Complaint), the allegations of which were deemed admitted by Tindall, as well as the underlying civil penalty order (Penalty Order). See 17 C.F.R. § 201.323.

Throughout 2008, Tindall and other managing members raised about $23 million from selling Arcanum notes to ninety investors. Complaint, p. 6. Arcanum's offering materials stated that Arcanum would use investors' money only to purchase medium-term notes with a credit rating of A+. Id., pp. 6-7.

Tindall and others raised $10.7 million by selling Vestium membership interests to ten investors. Complaint, p. 8. Vestium's offering materials included a trust indenture and a private placement memorandum, which provided that Vestium would deposit all offering proceeds in a corporate custody account with U.S. Bank, N.A., and that the money raised in the offering would be invested in medium-term, A-rated notes, CDs, or money market funds. Id., p. 7.

Tindall participated in investing millions of dollars of the Funds' money in conflicted entities, which fell outside the scope of the Funds' offering documents. Complaint, p. 9. These included investments in the conflicted entities of Tonopah Mine, Transcap Corporation (Transcap), and Kokomo Capital Fund LLC. Id., pp. 9-11.

Tindall took fees based on the Funds' fictitious profits. Complaint, p. 16. In May 2009, both Funds distributed newsletters to investors reporting that the Funds had been profitable since their inception, while, in truth, during 2008 and 2009, the Funds lost approximately $8.1 million. Id., pp. 16-17. Throughout 2008 and 2009, Tindall withdrew $160,000 from Arcanum, without determining whether the fund was profitable. Id., p. 17. Finally, Tindall, and a cohort, took approximately $1.5 million of loans from Transcap, which Transcap received from the Funds. Id., p. 19.

Tindall failed to participate in the underlying case, and on May 8, 2012, a judgment was entered against Tindall, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (Advisers Act) and Rule 206(4)-8 thereunder. See Tindall, 8:10-cv-02859-JDW-MAP. The Judgment also ordered Tindall to disgorge ill-gotten profits of $160,000, individually, and $1,450,000, jointly and severally, plus prejudgment interest. On September 24, 2012, the District Court of the Middle District of Florida ordered Tindall to pay $1,610,000 in civil penalties. Penalty Order.

## Conclusions of Law

Section 203(f) of the Advisers Act gives the Commission authority to sanction any person who, at the time of the misconduct, was associated with an investment adviser, if the Commission finds that the sanction is in the public interest and the person has been enjoined from "engaging in . . . any conduct or practice . . . in connection with the purchase or sale of any security." See 15 U.S.C. §§ 80b-3(e)(4), 80b-3(f). Tindall, acting as an investment adviser, was permanently enjoined from conduct in connection with the purchase or sale of a security – namely, violating the antifraud and other provisions of the securities laws. Therefore, a sanction shall be imposed if it is in the public interest.

## Sanctions

The appropriateness of any remedial sanction in this proceeding is guided by the well-established public interest factors set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). See Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1120. They include: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. Steadman, 603 F.2d at 1140.

Tindall's actions were egregious and recurrent. As an investment adviser to two hedge funds, Tindall repeatedly breached his fiduciary duty to the Funds' investors by approving investments in which he or other managing members of the Funds had a financial interest, and by failing to disclose the resulting conflicts of interest. Tindall also took compensation based on the alleged profitability of the Funds when he had no basis to believe the Funds were profitable. Tindall's participation in the fraud against the hedge fund investors continued for approximately two years and, thus, was both egregious and recurrent.

The egregiousness of Tindall's conduct is demonstrated by the fact that he was enjoined from violating the antifraud and registration provisions of the federal securities laws and that he was ordered to disgorge $1,725,039.17 and to pay $1,610,000 in civil penalties. See Don Warner Reinhard, Exchange Act Release No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36947 & n.21 (citing Robert Bruce Lohmann, Exchange Act Release No. 48092 (June 26, 2003), 56 S.E.C. 573, 583 n.20 (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions")). The Commission has noted that "the fact that a person has been enjoined from violating antifraud provisions 'has especially serious implications for the public interest.'" Michael T. Studer, Exchange Act Release No. 50411 (Sept. 20, 2004), 57 S.E.C. 890, 898 (quoting Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 713), reconsideration denied, Exchange Act Release No. 50600 (Oct. 28, 2004), aff'd, 148 F. App'x 58 (2d Cir. 2005) (unpublished).

Tindall was found to have acted with scienter in the underlying civil action. Judgment, p. 2. Tindall failed to participate in this proceeding, offer assurances against future violations, or recognize the wrongful nature of his conduct. Accordingly, the Steadman factors overwhelmingly weigh in favor of finding that it is in the public interest to impose sanctions on Tindall.

The Division requests that Tindall be collaterally barred in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Motion, p. 5. Specifically, the Division requests that Tindall be barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (NRSRO). Id.

Dodd-Frank, enacted on July 21, 2010, added collateral bar sanctions to Section 203(f) of the Advisers Act. The new sanctions authorize the Commission to simultaneously suspend or

bar an individual who has engaged in certain unlawful conduct from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Prior to Dodd-Frank, collateral sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with the particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission could not impose sanctions as to any specific branch until it could "show the nexus matching that branch").

Retroactive application of a new law authorizing or affecting the propriety of prospective relief requires inquiry into whether the new law would impair vested rights – that is, "rights a party possessed when he acted." Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994); Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44 n.10 (2006) (noting that vested rights are "something more substantial than inchoate expectations and unrealized opportunities," and include "an immediate fixed right of present or future enjoyment"). In those cases where the question of retroactivity cannot be resolved by statutory construction and the new law authorizes injunctive relief, the question of retroactive application essentially reduces to the question of whether such application would impair vested rights. See Ferguson v. U.S. Attorney General, 563 F.3d 1254, 1261 (11th Cir. 2009) (describing two-step analysis under Landgraf); see also Wayde M. McKelvy, Exchange Act Release No. 65423 (Sept. 28, 2011), 102 SEC Docket 46319; Glenn M. Barikmo, Initial Decision Release No. 436 (Oct. 13, 2011), 102 SEC Docket 47146, Finality Order, Exchange Act Release No. 65782 (Nov. 17, 2011); John D. Friedrich, Advisers Act Release No. 3394 (Apr. 6, 2012), 103 SEC Docket 53102.

Dodd-Frank lacks an express retroactivity provision, and "'normal rules of [statutory] construction'" do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (D. Mass. Mar. 1, 2011) (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, No. 11-00137, 2011 WL 2183314, at *14 (N.D. Cal. June 6, 2011); Holmes v. Air Liquide USA LLC, No. 11-2580, 2012 WL 267194, at *5 (S.D. Tex. Jan. 30, 2012). The requested relief is injunctive, and the question, then, is whether retroactive application of Dodd-Frank's collateral bar would impair Tindall's vested rights.

Tindall plainly had no such vested right to associate with an investment adviser. Before Dodd-Frank's enactment, any person who was permanently enjoined "from engaging in or continuing any conduct or practice in connection with [activities as a broker or dealer]" or "in connection with the purchase or sale of any security" was subject to an investment adviser associational bar under Section 203(f) of the Advisers Act. 15 U.S.C. § 80b-3(e)(4) (2006).

Tindall also had no vested right to associate with a broker, dealer, municipal securities dealer, or transfer agent. Before Dodd-Frank, a conviction like Tindall's could bar him from such associations, even though the bar could not be imposed until the person actually sought association. 15 U.S.C. §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C) (2002); Teicher, 177 F.3d at 1020-21.

The analysis is more complicated with respect to a municipal advisor and NRSRO. There was no associational bar or similar provision predating Dodd-Frank with respect to a municipal advisor, nor was there a formal associational bar with respect to an NRSRO. See, e.g.,

Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting the absence of these two bars before Dodd-Frank). However, before Dodd-Frank's enactment, there existed a statutory provision for revoking the registration of an NRSRO if any person associated with it was found to have been enjoined as Respondents have, and if it was necessary for the protection of investors and in the public interest. 15 U.S.C. § 78o-7(d) (2006). Although this provision is not formally an associational bar, for practical purposes it amounts to one because it is unlikely that any NRSRO would hire or otherwise associate with the person enjoined. This provision became effective September 29, 2006, several years before Tindall began committing his violations.

Thus, Tindall had no vested rights in association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, or NRSRO, but did have such rights with respect to municipal advisors. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisers, municipal securities dealers, transfer agents, and NRSRO.

## Order

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Gregory D. Tindall is BARRED from association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, and NRSRO.

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Cameron Elliot
Administrative Law Judge