INITIAL DECISION RELEASE NO. 1414
ADMINISTRATIVE PROCEEDING
FILE NO. 3-20531

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
HORTER INVESTMENT MANAGEMENT, LLC, and DREW K. HORTER	:	INITIAL DECISION March 20, 2023

APPEARANCES: Alyssa A. Qualls, Charles J. Kerstetter, Jonathan A. Epstein, and Andrew O'Brien for the Division of Enforcement, Securities and Exchange Commission

Matthew L. Fornshell and Nicole R. Woods of Ice Miller for Respondents Horter Investment Management, LLC, and Drew K. Horter

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision censures Horter Investment Management, LLC (Horter Investment) and imposes a supervisory collateral bar, with the right to reapply after two years on Drew K. Horter (Horter); and orders Horter Investment and Horter to pay third-tier civil penalties of $250,000 and $125,000, respectively.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings, pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, on September 8, 2021. On April 14, 2022, the Commission ordered that the matter be heard by an Administrative Law Judge. The proceeding was stayed pursuant to 17 C.F.R. § 201.161(c)(2) (Stay Pending Commission Consideration of Offer of Settlement) on September 23, 2022. *Horter Inv. Mgmt.*, Admin. Proc. Rulings Release No. 6873, 2022 SEC LEXIS 2540 (A.L.J.). On November 3, 2022, the Commission issued an Order that accepted Respondents' Offer of Settlement; made various findings of fact and conclusions of law; imposed a cease-and-desist order; and ordered continued proceedings to determine (a) what, if any, civil penalties are appropriate and in the public interest under Section 203(i) of the Advisers

Act; and (b) what, if any, other remedial actions are appropriate and in the public interest under Sections 203(e) and 203(f). *Horter Inv. Mgmt.*, Advisers Act Release No. 6182, 2022 SEC LEXIS 2976 (Settlement Order).[1] The Commission ordered that these issues may be determined "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, documentary evidence, expert reports, and if the [undersigned] determines it necessary, hearing testimony." *Id.* at *28. The stay was lifted on November 4, 2022, and the parties filed a joint proposal on procedures for the resolution of the issues that the Commission ordered to be determined. *See Horter Inv. Mgmt.*, Admin. Proc. Rulings Release No. 6878, 2022 SEC LEXIS 2975 (A.L.J.). The parties' proposal was adopted on December 5, 2022. *See Horter Inv. Mgmt.*, Admin. Proc. Rulings Release No. 6888, 2022 SEC LEXIS 3220 (A.L.J.). Accordingly, on January 9, 2023, the Division of Enforcement filed a Motion for Sanctions and Respondents filed a Brief Addressing Civil Penalties and Other Remedial Actions; and, on January 30, 2023, the parties filed Responses.[2]

The findings and conclusions in this Initial Decision are based on the record. Official notice pursuant to 17 C.F.R. § 201.323 is taken of the Commission's public official records and of Financial Industry Regulatory Authority, Inc. (FINRA), records as well. *See Joseph S. Amundsen*, Securities Exchange Act of 1934 Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014). Preponderance of the evidence was applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 97-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

B. Allegations and Arguments of the Parties

As detailed in the Settlement Order, the proceeding involves Respondents' supervision of an associated person who was subsequently convicted of state securities law violations arising in part from his misappropriation of funds from Respondents' clients. The Division requests that Horter be barred from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to reapply after two years; that Horter Investment be censured; and that Horter and Horter Investment be ordered to pay third tier civil penalties of $125,000 and $250,000, respectively. Respondents urge that no sanctions be imposed, but that, if sanctions are found to be appropriate, that they be censured and ordered to pay a Tier One civil penalty.

II. FINDINGS OF FACT

[1] The Settlement Order provides, "The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding." Settlement Order, 2022 SEC LEXIS 2976, at *2 n.1.

[2] Citations to exhibits offered by the Division and Respondents, which are attachments to the Division's Motion for Sanctions and Respondents' Brief Addressing Civil Penalties and Other Remedial Actions, are noted as "Div. Ex. __" and "Resp. Ex. __," respectively. Citations to the exhibits attached to Respondents' Response Brief are noted as Resp. Resp. Ex. __.

A. Findings of Fact Established in the Settlement Order

For purposes of this ID and pursuant to the offer of settlement, the findings of fact set forth in the Settlement Order are deemed true and incorporated herein. Horter Investment is a Cincinnati-based, Commission-registered investment adviser. It employs associated persons as "Investment Adviser Representatives" (IARs) operating as independent contractors from remote locations. Horter, the founder, Managing Member, Chief Executive Officer and President, and 90% owner, operated Horter Investment and had ultimate supervisory responsibilities, including for the IARs. Any delegation of his supervisory responsibilities were *ad hoc* and not followed up on or monitored. After receiving a deficiency letter from Commission staff, Horter Investment retained a compliance consultant. In March 2015, the compliance consultant advised that Horter Investment develop a more detailed procedure for supervising its remote IARs. On December 8, 2017, the Commission approved a settlement with Horter Investment arising from misstatements in its advertisements based on third-party-produced performance and marketing materials that contained false claims. Horter Investment lacked written policies and procedures for evaluating the accuracy of such material. The Commission censured it, imposed a cease-and-desist order, and ordered it to pay disgorgement of $482,595 plus prejudgment interest and a $250,000 civil penalty. In determining to accept the offer of settlement, the Commission was influenced by Horter Investment's retention of a compliance consultant in February 2015. *Horter Inv. Mgmt.,* Advisers Act Release No. 4823, 2017 SEC LEXIS 3984 (Dec. 8, 2017).

Issues in this proceeding relate to Kimm C. Hannan, an IAR with Horter Investment from December 2014 through March 24, 2017. Hannan fraudulently solicited and received a total of $728,001 from Horter Investment clients. He was convicted in January 2019 of Ohio state securities law violations, arising in part from his misappropriation of funds from Horter Investment clients, and was sentenced to twenty years of incarceration.[3] Prior to his association with Horter Investment, Hannan was associated with LPL Financial LLC from January 1, 2014, to November 2014.[4] Hannan signed an IAR agreement on November 21, 2014, and registered with Horter Investment on December 1, 2014. The next day FINRA informed Hannan that it was initiating an inquiry regarding the allegations at LPL, and Hannan forwarded the FINRA letter to Horter Investment's compliance officer, who recommended to Horter that Hannan be fired. Hannan's onboarding was unusually fast, and the compliance officer suspected that Hannan tried to rush it through before any disclosures were added to his publicly-available BrokerCheck report. Horter, however, accepted Hannan's self-serving explanation. Horter Investment designated Hannan a high risk, but did not subject him to specific restrictions, additional requirements, or heightened supervision. Hannan had outside business activities (OBAs). Horter and Horter Investment knew Hannan had OBAs and were on notice that Horter Investment was honoring requests to distribute

[3] The Commission ordered a collateral bar against Hannan, based on his conviction. *Kimm C. Hannan*, Advisers Act Release No. 5906, 2021 SEC LEXIS 3371 (Nov. 5, 2021).

[4] As reported on FINRA's BrokerCheck, Hannan resigned from LPL on October 22, 2014, after allegations were made regarding marketing materials and checks made payable to his DBA. *See* https://brokercheck.finra.org/individual/summary/2402527.

client funds to the OBAs. Horter Investment initiated an internal investigation on or about March 17, 2017, after staff alerted the compliance officer about a problem, and Hannan was fired on March 24, 2017.

Well before Hannan's association with Horter Investment, Commission examination staff sent it deficiency letters regarding its compliance program. After a December 2014 deficiency letter, Horter Investment engaged the consultant that advised developing a more detailed procedure for supervising the activities of its remote IARs. More than half of the IARs Horter Investment hired since November 2014 were identified as high or moderate risk, and the consultant warned that higher risk IARs require closer supervision, but that Horter Investment had no procedures for this. In September 2016, Horter Investment's compliance officer warned that it should develop a heightened supervision program.

B. Additional Findings of Fact

Horter Investment paid Hannan's defrauded clients pursuant to confidential settlements. Resp. Ex. A at 2. These payments did not amount to the full amount of the clients' claims. Div. Decl. of Nicholas Magina at 2-3 & Exs. 3, 4.

After Hannan's termination, Horter Investment implemented compliance and supervisory improvements; Horter's supervisory responsibilities are now greatly reduced. The company is markedly smaller: at the end of 2017, it had 220 IARs, 15 of whom were high risk, and $1.383 billion in assets under management (AUM); while at the end of 2022 it had 35 IARs, none of whom are high risk, and $260 million in AUM. Resp. Ex. A at 3.[5] The company purchased and currently uses software to monitor IARs' email and social media; track outside business activities; for performance reporting and IAR tracking; and to implement other compliance solutions. Resp. Ex. A at 3-4; Ex. E at 43-47; Ex. F at 19.[6]

As of February 9, 2022, the Compliance Committee has had overall supervision of the IARs. Resp. Ex. A at 4-5; Ex. A-2. The Compliance Committee, chaired by Chief Compliance Officer Jason Long, has two other members who are Horter Investment employees and two members, one of whom is non-voting, who are employees of a compliance consulting firm. *Id*. Horter is not a member. *Id*. The Compliance Committee's responsibilities include various topics for monitoring and review, including the Branch Office Supervisory Program (BSOP), personal trading, potential conflicts of interest, and emergent areas deemed to be a higher risk. Resp. Ex. A-2. The BSOP includes ongoing testing from the home office and reviews on-site at the branches. Resp. Ex. A at 5-6; Ex. A-3. The ongoing testing includes reviewing email, insider

[5] Resp. Ex. A is the affidavit of Jason D. Long, Horter Investment's Chief Compliance Officer. Resp. Ex. A at 1.

[6] Resp. Ex. E consists of excerpts from Long's January 21, 2021, investigative testimony. Resp. Ex. F is the May 11, 2022, Expert Report of Lisa Roth, president of a company that provides services regarding regulatory compliance for broker-dealers, investment advisers, and other financial services firms. Resp. Ex. F at 4.

trading, marketing, client complaints, disciplinary history, theft red flags, and other topics. Resp. Ex. A-3 at 1.

III. VIOLATIONS

As stated in the Settlement Order, Hannan, an investment adviser representative with Horter Investment, fraudulently misappropriated client assets in violation of Sections 206(1) and 206(2) of the Advisers Act. Respondents failed reasonably to supervise Hannan, within the meaning of Advisers Act Sections 203(e)(6) and 203(f). Horter Investment willfully violated Advisers Act Section 206(4) and Rule 206(4)-7, which require advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and Rules by the advisers and associated persons.

IV. SANCTIONS

The Division requests that Horter Investment and Horter be ordered to pay third-tier civil penalties of $250,000 and $125,000, respectively; and that Horter Investment be censured and Horter be barred from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to reapply after two years. Respondents urge that no sanctions be imposed, but that, if sanctions are found to be appropriate, that they be censured and ordered to pay a Tier One civil penalty. As discussed below, the sanctions requested by the Division will be ordered.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Securities Exchange Act of 1934 Release No. 48228, 2003 SEC LEXIS 1767, at *4-5 (July 25, 2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *23 (Jan. 21, 2006). As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *40 (Oct. 24, 1975). The amount of a sanction depends on the facts of each case and the value of

the sanction in preventing a recurrence. *See Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963); *Leo Glassman*, Exchange Act Release No. 11929, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975).

B. Censure and Bar

Advisers Act Section 203(e) and (f) authorizes the Commission to censure, bar, or place limitations on an investment adviser or associated person who has violated the securities laws and regulations or "has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision." 15 U.S.C. § 80b-3(e)(5), (6); (f). The Division requests that Horter Investment be censured and that Horter be barred from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to reapply after two years. Respondents argue that no sanction should be imposed, but that if it is concluded that a sanction is in the public interest, Respondents should only be censured.

Horter Investment's violative conduct was derivative of Horter's. Respondents' conduct was egregious and recurrent, continuing for more than two years. The Commission has made clear that, "supervisors must act decisively when an indication of irregularity is brought to their attention. That irregularity need not be a violation of the securities laws. Decisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations." *George J. Kolar*, Exchange Act Release No. 46127, 2002 SEC LEXIS 3420, at *11 (June 26, 2002) (footnotes omitted).[7] Yet Horter affirmatively overlooked warning signs and rejected advice from his own staff concerning Hannan. Consistent with a vigorous defense of the charges against them, Respondents have minimized the wrongful nature of their conduct, but point to their after-the-fact compliance structure as assurance against future violations. Although their occupation will present opportunities for future violations, Respondents, albeit belatedly, have adopted reforms that reduce the likelihood of violations. Their new compliance structure, in effect since February 2022, and the smaller size of the business diminish the opportunities for violations. The degree of harm to investors and the marketplace is quantified in the $728,001 that Hannan fraudulent received from clients, even if investor losses were repaid.[8] The requested sanctions, censure and a supervisory bar with the right to reapply after two years are justified by these factors, as well as in consideration of standards of conduct in the securities business generally and deterrence. The supervisory bar with the right to reapply after two years, "will encourage [Respondent] and other

[7] Citing *Consol. Inv. Serv., Inc.*, Exchange Act Rel. No. 36687, 1996 SEC LEXIS 83, at *7 (Jan. 5, 1996) (footnotes omitted): "[A]ny indication of irregularity brought to a supervisor's attention must be treated with utmost vigilance. A registered representative who has previous evidenced misconduct can be retained only if he subsequently is subjected to a commensurately higher level of supervision."

[8] The record shows that Horter Investment's payments to Hannan's defrauded clients did not amount to the full amount of their *claims*; it does not show whether the payments matched the full amount of their *losses*.

similarly situated to take more seriously their supervisory responsibilities and will thereby help protect the public from dealing with securities professionals who are not adequately supervised." *Thomas C. Bridge*, Securities Act Release No. 9068, 2009 SEC LEXIS 3367, at *61 (Sept. 29, 2009) (imposing a supervisory bar with the right to reapply after five years on a Respondent who was no longer employed in the securities industry).

Horter Investment will be censured and Horter will be subject to a collateral supervisory bar with the right to reapply after two years. In combination with the other sanctions ordered, these sanctions for Respondents' long-running shortfalls are in the public interest; they also are calibrated to enable Horter Investment to continue to operate and service clients as it has done since February 2022, and Horter, to continue to own and receive income from Horter Investment.

C. Civil Money Penalty

Advisers Act Section 203(i)(1)(A)(iv) authorizes the Commission to impose civil money penalties in a proceeding instituted pursuant to Advisers Act Section 203(e) or (f) against a person who "has failed reasonably to supervise . . . with a view to preventing violations of [the Advisers Act and rules] another person who commits such a violation, if such other person is subject to his supervision," where such penalties are in the public interest. 15 U.S.C. § 80b-3(i)(1)(A)(iv). In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. *See* 15 U.S.C. § 80b-3; *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 SEC LEXIS 2924, at *41 (Nov. 21, 2008).

Respondents' belatedly adopted compliance reforms are a mitigating factor. However, their violative actions facilitated Hannan's fraud. Harm to others is shown by the $728,001 of investor funds that Respondents allowed Hannan to divert improperly. Because Respondents repaid some or all of the clients' losses, they were not unjustly enriched, except through retaining the trust of clients whom they allowed Hannan to defraud. Although they failed to take action in response to Commission staff's earliest deficiency letters, they have no record of previous violations. Deterrence requires a substantial penalty because of the abuse of fiduciary duty owed.

Thus, penalties in addition to the other sanctions ordered are in the public interest. Third-tier penalties are appropriate because Respondents' failure to supervise Hannan evidenced at least a reckless disregard for regulatory requirements, including the antifraud statutes and regulations as well as their supervisory duties, and their failure created a significant risk of substantial losses to other persons. 15 U.S.C. § 80b-3(i)(2)(B). While Respondents' actions, or inactions, may not have been fraudulent in themselves, they enabled Hannan's fraud. Their conduct clearly created a significant risk of loss to other persons, as shown by the fact that actual losses, even if temporary, due to Respondents' full or partial repayment.

Respondents' violations, corresponding with Hannan's tenure at Horter Investment, occurred between December 2014 and March 24, 2017, and will be considered as one course of action for each Respondent. Third-tier civil penalties of $250,000 against Horter Investment and

$125,000 against Horter will be ordered. These penalties are well below the maximum amounts and, combined with the other sanctions ordered, are in the public interest.[9]

V. ORDER

IT IS ORDERED, pursuant to Section 203(e) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(e)(5), (6), that HORTER INVESTMENT MANAGEMENT, LLC IS CENSURED.

IT IS FURTHER ORDERED, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), that DREW K. HORTER IS BARRED from associating in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to reapply after a period of two years.

IT IS FURTHER ORDERED, pursuant to Section 203(i) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(i)(1)(A)(iv), that HORTER INVESTMENT MANAGEMENT, LLC, PAY A CIVIL MONEY PENALTY OF $250,000.

IT IS FURTHER ORDERED, pursuant to Section 203(i) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(i)(1)(A)(iv), that DREW K. HORTER PAY A CIVIL MONEY PENALTY OF $125,000.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to

[9] The maximum Tier 1, 2, and 3 penalty amounts for violations between March 6, 2013, and November 2, 2015, for a natural person were $7,500, $80,000, and $160,000, respectively; and for any other person, $80,000, $400,000, and $775,000. For violations after November 2, 2015, the maximum Tier 1, 2, and 3 penalty amounts (last adjusted for inflation in January 2023) were $11,162, $111,614, and $223,229, for a natural person; and $111,614, $558,071, and $1,116,140 for any other person. 17 C.F.R. § 201.1001 & tbl. I; Adjustments to Civil Monetary Penalty Amounts, 88 Fed. Reg. 1614, 1615-16 (Jan. 11, 2023. The Adviser Act provisions, like most civil penalty statutes, leave the precise unit of violation undefined. *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440-41 (1979).

correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge