UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5682 / February 9, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-14393

In the Matter of DANIEL SHOLOM FRISHBERG	ORDER DENYING APPLICATION FOR CONSENT TO ASSOCIATE

Daniel Sholom Frishberg was chief executive officer and majority owner of Daniel Frishberg Financial Services, Inc. ("DFFS"), a formerly registered investment adviser. In 2011, to settle administrative proceedings brought against him, Frishberg consented to a Commission order barring him from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent. In 2019, Frishberg filed an application for consent to associate with an unspecified investment adviser.

Because Frishberg's bar is unqualified – it does not contain a provision that Frishberg may apply for consent to associate after a specified time – he must demonstrate extraordinary circumstances to meet the public interest standard for relief.

For the reasons set forth below, we conclude that Frishberg has failed to make the requisite showing. Accordingly, the application is denied.

I. Background

A. Frishberg Consented to a Bar from the Securities Industry

On March 25, 2011, the Commission filed and settled a civil action against Frishberg.[1] The complaint alleged that Frishberg authorized a DFFS representative to recommend the purchase BizRadio promissory notes to DFFS clients, even though BizRadio's poor financial condition made it unlikely the note obligations would be met. The complaint further alleged that he failed to disclose to investors that he had conflicts of interest with respect to BizRadio, including that note proceeds were used for BizRadio's operating expenses and for salaries. Separately, the complaint alleged that Frishberg knew that the DFFS representative was offering

[1] *SEC v. Daniel Sholom Frishberg*, Civil Action Number 4:11-cv-1097 (S.D. Tex. filed March 25, 2011).

promissory notes to DFFS clients that were issued by an entity owned by the representative. The complaint also alleged that Frishberg failed to investigate the promissory notes or to determine whether they were suitable for clients; because of the issuer's poor financial condition, the investments were not suitable.

Frishberg consented to the entry of a final judgment enjoining him from violating Section 206(2), or aiding and abetting violations of Sections 206(1) or (2), of the Investment Advisers Act of 1940 ("Advisers Act") and ordering him to pay a penalty of $65,000 in five installments by March 1, 2012. The court also established a Fair Fund for distribution of Frishberg's civil penalty with amounts recovered in a related action against the representative and DFFS.

On May 16, 2011, the Commission instituted administrative proceedings pursuant to Section 203(f) of the Advisers Act against Frishberg, based on the injunction entered in the civil action, and, pursuant to his offer of settlement, barred him from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.[2]

Subsequently, Frishberg failed to comply with the court-ordered payment plan. In 2014, he entered into a revised payment plan, but, to date, Frishberg has not complied with that plan and part of the civil penalty remains unpaid.

B. Frishberg Sought Consent to Associate with an Investment Adviser.

On August 9, 2019, Frishberg filed an uncaptioned document with the Commission, in which he stated:

> I am requesting to be allowed to be reinstated as a registered investment advisor. I now live in Florida, and I request permission from the Commission to apply for reinstatement of my license to practice in Florida and Texas.

On October 2, 2019, Frishberg was ordered to provide additional written information clarifying whether he was "seeking to modify or vacate his associational bar, or whether he is seeking consent to associate with a registered entity not regulated by a self-regulatory organization, such as an investment adviser, pursuant to Commission Rule of Practice 193."[3]

On November 26, 2019, Frishberg filed a response in which he said he was "requesting the government's permission to associate with a Registered Investment Advisory Firm." Frishberg further stated: "I have not finalized an agreement at this point with any firm, however I have identified a firm, in good standing, with whom I am now in contact."

Because the substance of Frishberg's response appeared to indicate that he was filing his application pursuant to Rule 193, the Division of Enforcement informed him, by letter dated January 13, 2020, that his filing was deficient because, among other things, it failed to identify a proposed employer. Frishberg replied the following day with a letter representing that he had an offer of employment from an SEC-registered investment adviser, and that supporting documentation from the proposed employer would follow. However, Frishberg subsequently

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2 *Daniel Sholom Frishberg*, Advisers Act Release No. 3206, 2011 WL 1847063 (May 16, 2011).

3 *Daniel Sholom Frishberg*, Advisers Act Release No. 5399, 2019 WL 4858219 (Oct. 2, 2019).

informed the Division, by letter dated January 30, 2020, that the adviser had withdrawn its offer and that he needed additional time to provide information about an unspecified, alternative employer.

Because Frishberg did not provide that additional information, the Division, on April 8, 2020, informed him that it intended to recommend denial of his application, and provided a statement of reasons for its proposed recommendation.

On May 5, 2020, Frishberg submitted a response in which he represented that he had a new offer of employment from a state-registered investment adviser, where he would be supervised by an individual whom Frishberg described as the firm's chief executive officer and chief investment officer. He also provided a statement from the proposed employer.

II. DISCUSSION

A. Applicable Standard of Review

Because Frishberg seeks consent to associate with a state-registered adviser, we review his request under Section 203(f) of the Advisers Act, which provides that a barred individual must obtain Commission consent prior to re-association with any adviser, including those that are state-registered.[4] We apply the same standard for applications under Section 203(f) as under Rule 193 – whether the applicant "make[s] a showing satisfactory to the Commission that the proposed association would be consistent with the public interest."[5] In making this determination, we consider the factors concerning the proposed association that are identified in Rule 193.[6] In addition, when, as in this case, a bar is unqualified, the applicant must demonstrate "extraordinary circumstances" to meet the public interest standard. In *Victor Teicher*, we stated:

> [W]e have made clear that, when an unqualified bar has been imposed, as is the case here, this "evidences [our] conclusion that the public interest is served by permanently excluding the barred person from the securities industry . . . [and that], absent extraordinary circumstances, a person subject to an unqualified bar will be unable to establish that it is in the public interest to permit reentry to the securities industry."[7]

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[4] Although the application was filed under Rule 193, that rule is limited to requests to associate with Commission-registered entities that are not SRO members.

[5] *See Eric David Wanger*, Exchange Act Release No. 81111, 2017 WL 2953369, at *3 n.6 (July 10, 2017), *petition for review dismissed as untimely, Wanger v. SEC*, 720 Fed. Appx. 792 (7th Cir. 2018); *Kenneth W. Corba*, Advisers Act Release No. 2732, 2008 WL 1902077, at *2 (Apri1 30, 2008).

[6] *See Eric David Wanger*, *supra*, 2017 WL 2953369, at *2-4 & n.6.

[7] *Victor Teicher*, Exchange Act Release No. 58789, 2008 WL 458735, at *2 (Oct. 15, 2008) (quoting *Unqualified Bar Order*s, Exchange Act Release No. 34720, 1994 WL 761717, at *1 (Sept. 13, 1994) (emphasis in original)). *See also Reuben D. Peters*, Exchange Act Release No. 51237, 2005 WL 424918, at *2 (Feb. 22, 2005) (when an application is filed by an individual subject to an unqualified bar, "[n]othing more than the nature and seriousness of the underlying conduct that led to the statutory disqualification and bar as assessed by the Commission is necessarily required to deny the application.").

Our decisions indicate that the requirement to demonstrate "extraordinary circumstances" is extremely difficult to meet.[8]

B. Frishberg Has Not Shown Extraordinary Circumstances or that His Proposed Association is Otherwise Consistent with the Public Interest

First, although Frishberg's bar is unqualified, his application does not directly address the need to demonstrate "extraordinary circumstances" or why he believes he has satisfied that requirement. Rather, he offers two reasons for granting relief: (1) he would be able to earn a living and thereby pay his outstanding civil penalty more quickly than if he was not employed in the securities industry; and (2) the services he would offer to clients would benefit the community.

Frishberg's focus on the possibility that he will be able to pay (or pay more quickly) the outstanding balance on the civil penalty imposed in 2011, and the possible resulting benefit to investors injured by his misconduct, is insufficient to demonstrate extraordinary circumstances. *See Matthew D. Sample, supra*, 2015 WL 5305992, at *7 (finding no extraordinary circumstances where applicant argued he would be more likely to be in position to repay injured investors if his application were granted). More generally, we have not found the financial consequences of lack of employment in the securities industry to be a persuasive reason for granting consent to associate.[9] And while investment advisory services can be beneficial to investors, the additional benefit to the public of one additional associated person at a state-registered adviser is not a sufficient basis for granting relief.

Second, even if Frishberg could demonstrate extraordinary circumstances, his affidavit does not provide sufficient information to show that the proposed association is otherwise consistent with the public interest. Frishberg does not provide details of how he would be employed by the adviser or how he would be interacting with investors, and does not provide a plan for supervision to prevent recurrence of his violative conduct. We addressed similar deficiencies in the application of Brett Thomas Graham, in which we found that "[b]y not providing any information concerning what he would be doing or what interactions he would have with investors or other market participants, his application fails to demonstrate that the proposed association is reasonably designed to prevent a recurrence of the conduct that led to

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[8] *See Matthew D. Sample*, Exchange Act Release No. 75893, 2015 WL 5305992, at *5-7 (Sept. 10, 2015); *Teicher, supra*, 2008 WL 458735, at *3; *Stephanie J. Hibler*, Exchange Act Release No. 22067, 1985 WL 548465, at *2 (May 23, 1985).

[9] *See Eric David Wanger*, Securities Exchange Act Release No. 81111, 2017 WL 2953369 (July 10, 2017) ("Although Wanger contends that the bar has made it 'impossible' for him to identify a sponsoring firm and thus satisfy Rule 193's requirements, difficulty finding suitable employment is 'among … the natural and foreseeable consequences that flow from a ban on employment in the securities industry'" (citing *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4 & n.20 (Sept. 10, 2015). *See also Edward I. Frankel*, Exchange Act Release No. 38378, 1997 WL 103785, at *2 (negative stigma that has been an impediment to work inside and outside the securities industry is a "natural consequence of the action taken against" respondent) (quoting *William H. Pike*, Investment Company Act Release No. 20417, 1994 WL 389872, at *2 (July 20, 1994)).

imposition of the bar and thus fails to demonstrate that the requested relief would be consistent with the public interest."[10]

His statement does not give the Commission the type of detailed information necessary to conclude that his proposed activities would be carried out in a manner designed to avoid or mitigate the possibility that the misconduct that led to his bar will recur.

Furthermore, the employer's statement does not detail the terms and conditions of employment or the supervision to be exercised over Frishberg, and is limited to generalities. The employer represents that the firm does "not allow borrowing money from clients for any reason" and that Frishberg's proposed supervisor examines and approves "every document and contract submitted to or signed by clients." In addition, "all investment decisions are made in writing," and the supervisor "personally approve[s] the recommendations as well as all investment decisions made with discretion on behalf of the clients of our firm." But the statement does not detail the terms and conditions of the proposed employment or describe the day-to-day means by which Frishberg would be supervised.[11]

Finally, Frishberg's failure to satisfy the outstanding judgment in the Commission's civil enforcement action is an additional factor indicating that the proposed association would not be consistent with the public interest.

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[10] *Brett Thomas Graham*, Exchange Act Release No. 84526, 2018 WL 5734348, at *3 (Nov. 2, 2018). *See also, Wanger*, 2017 WL 2953369 at *3 ("Wanger's application offers no evidence that his unidentified future activities would be conducted in a manner designed to "prevent a recurrence of the conduct that led to the imposition of the bar" in the first place, and provides us with no basis on which to conclude that granting his request would be "consistent with the public interest."); *Matthew D. Sample*, Exchange Act Release No. 75893, 2015 WL 5305992, at *4 (Sept. 10, 2015) (respondent's failure to show that proposed supervision was reasonably designed to prevent a recurrence of the misconduct that led to the bar is "standing alone … a sufficient basis for us to deny his application as inconsistent with the public interest"); *Sidney I. Shupack*, Advisers Act Release No. 1061, 1987 WL 757575, at *4 (Mar. 23, 1987) (denying relief "when no effective supervision would be exercised over his activities").

[11] Although disciplinary history of the firm and supervisor should be included in the employer's statement, Frishberg's affidavit avers that, "The firm has no disciplinary events to disclose and the CEO of the firm and Chief Investment Officer … has had no disciplinary history or compliance issues with any regulator, and he or the firm have never been barred." The firm's current Form ADV does not disclose any disciplinary history.

For the foregoing reasons, having considered Frishberg's application as supplemented and his response to the Division's notice, we find that Frishberg has not demonstrated that the proposed association would be consistent with the public interest.

Accordingly, IT IS ORDERED that the application of Daniel Sholom Frishberg for consent to associate be, and it hereby is, DENIED.

By the Commission.

Vanessa A. Countryman
Secretary