

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5319 / August 13, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19334

In the Matter of

MVP MANAGER LLC,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 203(e) AND
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against MVP Manager LLC (“MVP” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-And-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

These proceedings arise out of MVP personnel's receipt of brokerage commissions from counterparties to certain transactions with MVP's advisory-client funds without adequate disclosure to those MVP clients or to investors in the client funds. MVP's clients are private funds that it formed to invest in venture-backed companies that have not yet conducted an initial public offering ("pre-IPO companies") that MVP projects have a potential for liquidity within two to five years by sale or public listing. In three instances, MVP personnel arranged to receive a brokerage commission from the counterparty that was selling pre-IPO company securities to MVP's advisory client. The arrangement created a potential or actual conflict of interest for MVP in advising its client funds, which MVP failed to adequately disclose.

Respondent

MVP, which previously did business as MVP OF Manager LLC, is a Delaware limited liability company with its principal place of business in New York, New York. MVP files reports with the Commission as an exempt reporting adviser, reporting that it qualifies for exemption from registration because it acts as an adviser to private funds and has assets under management of less than \$150 million. MVP is the investment adviser to and manager of MVP Opportunity Fund LLC ("Fund I") and the MVP Opportunity Fund II LLC ("Fund II," and together with Fund I, the "Funds"). The Funds are limited liability companies that offer interests to investors by series, with each series investing in a single pre-IPO company and remaining segregated from all other series. At all relevant times, principals of MVP and other personnel also operated an office of supervisory jurisdiction of a registered broker-dealer (the "Broker"). These MVP personnel were registered representatives of the Broker, and a principal of MVP was the supervisor of the office of supervisory jurisdiction.

Background

1. As the manager of and investment adviser to the Funds, MVP's practice was to form a new series of interests in one of the Funds, conduct an offering of that series, and invest the proceeds in shares of a specified pre-IPO company—typically by advising, negotiating, and arranging for the fund to enter into a stock purchase agreement with a secondary market seller.
2. MVP provided prospective investors with a Fund I or Fund II private placement memorandum ("Fund PPM") and a PPM series supplement ("Series Supplement") specific to the series of the Fund that was then being offered to the investor. The Fund PPM described the series structure of the Fund, its management, general conflicts and risks, and that a Series Supplement would describe the terms applicable to that series. Each Series Supplement disclosed the specific pre-IPO company in which that series would invest and the fees and expenses that would be payable in connection with the series. The Series Supplement disclosed the amounts of two types of up-front, one-time fees that would be paid out of the series offering proceeds: a two percent "management fee" to MVP and a six percent "placement fee" to the

Broker, which ultimately would be paid out to MVP personnel in their capacities as registered representatives of the Broker. It also disclosed payments that would be made at the conclusion of the investment of the actual expenses attributable to the series and an eight percent carried interest distribution to MVP.

MVP Personnel Received Additional Undisclosed Compensation in Certain Instances

3. Between January 2015 and January 2016, in connection with advising on the purchase of pre-IPO securities by three different series of the Funds, MVP personnel, including its principals, had dual roles with respect to MVP's client Funds. The MVP personnel represented each seller in their capacities as registered representatives of the Broker, and they received a brokerage commission from the seller out of the gross sales proceeds that the Fund paid to the seller. This arrangement created a conflict of interest for MVP in advising the Funds to purchase the securities from the seller.

4. In two of the three instances, MVP personnel arranged for the counterparty seller to retain the Broker, using agreements that specified both the price at which the shares would be sold and a per-share commission payable to the Broker out of the gross sales proceeds. The third instance was substantially similar, except it involved a commission sharing arrangement between the Broker and another unrelated broker. All three agreements (the "Counterparty Commission Agreements") were executed by a principal of MVP, acting in his capacity as a principal of the Broker. In each instance, the Counterparty Commission Agreements resulted in the seller agreeing to receive a net purchase price that was 3-4% lower than the gross purchase price paid by the buyer Fund. These Counterparty Commission Agreements created an actual or potential conflict of interest for MVP in acting as an investment adviser to the relevant Fund.

5. The Funds did not have an investor committee or other independent entity that was authorized to approve any conflicts of interest on their behalf. Although MVP personnel were also simultaneously soliciting investors who might be interested in investing in the Fund series offering and advising the relevant Fund on investing the proceeds of such an offering, none of the disclosure documents provided to investors revealed the existence of the relevant Counterparty Commission Agreement or MVP's attendant conflicts of interest.

6. When MVP found a sufficient number of investors to invest in the new series of the relevant Fund series offering, it closed on the transactions. The investors purchased interests in the series of the relevant Fund, and the series offering proceeds were used to purchase the pre-IPO Company securities at the gross purchase price that MVP had arranged with the seller pursuant to the relevant Counterparty Commission Agreement. The seller paid the brokerage commission to the Broker out of the gross purchase price it received from the Fund, and the Broker then paid the commission out to MVP personnel, including MVP's principals.

7. For example, in approximately December 2014, MVP personnel began to form and prepare an offering of Series D-2 of Fund I for the purpose of purchasing securities interests in a certain pre-IPO company ("Company A"). The purchase of Company A securities involved several interrelated steps by MVP and its personnel:

a. At approximately the same time as the Series D-2 offering was being prepared, MVP personnel, including its principals, engaged in negotiations with a potential counterparty (“Counterparty-1”). The negotiations included entering into a Counterparty Commission Agreement between Counterparty-1 and the Broker providing that the Broker would be engaged to “assist” with the direct or indirect sale of Company A securities at a gross purchase price of \$7.15 per share, with payment of a commission equal to \$0.22 per share to the Broker, resulting in a per share price to Counterparty-1 of \$6.93 per share. As stated in an email to Counterparty-1 by a principal of MVP in early January 2015, “I want to make sure we are clear on the economics. MVP will be [indirectly buying] shares of [Company A] at \$7.15. [Counterparty-1] will pay [the Broker] \$0.22 per share for identifying this buyer. I will prepare a fee agreement to this effect. That leaves \$6.93 per share for [Counterparty-1]....”

b. The Series D-2 Fund I supplement provided to prospective investors in early January 2015 specified that the Fund intended to purchase Company A securities for a maximum average purchase price of \$7.15 per share, and disclosed the following fees: (i) an up-front, one-time two percent “management fee” to MVP; (ii) an up-front, one-time six percent “placement fee” to the Broker, which ultimately would be paid out to MVP personnel in their capacities as registered representatives of the Broker; and (iii) payments, at the conclusion of the investment, of the actual expenses attributable to the series and an eight percent carried interest distribution to MVP. None of the disclosure documents revealed the existence of the Counterparty Commission Agreement, that MVP personnel arranged to receive of \$0.22 per share in commissions out of the \$7.15 purchase price per share (approximately 3.1% of the purchase price), or MVP’s attendant conflicts of interest.

c. Once sufficient investor funds had been raised for the Series D-2 Fund I offering, MVP, as the adviser to Fund I, closed on the securities purchase agreement between Fund I and Counterparty-1 relating to 435,742 shares of Company A at a price of \$7.15 per share, for a total of \$3,115,555.30. Out of the gross proceeds, Counterparty-1 paid the commission set forth in the Counterparty Commission Agreement of \$0.22 per share for a total of \$95,863.20 to the Broker (approximately 3.1% of the purchase price). The Broker in turn remitted the commission to MVP personnel.

8. The other two instances involved substantially similar arrangements:

a. In approximately July 2015, MVP advised Series EE-1 of Fund II in the purchase of 416 shares of a certain pre-IPO company (“Company B”) from a counterparty (“Counterparty-2”) at a purchase price of \$1,945 per share for a total of \$809,120, while arranging a Counterparty Commission Agreement under which the Broker received a commission of \$30,255.68 out of the proceeds (approximately 3.7% of the purchase price paid by Fund II).

b. In approximately December 2015, MVP advised Series EE-2 of Fund II in the purchase of 315 shares of Company B at a purchase price of \$1,900 per share for a

total of \$598,500, while arranging a Counterparty Commission Agreement under which the Broker received a commission of \$23,940 out of the proceeds (approximately 4% of the purchase price paid by Fund II).

9. The net effect of these transactions was that MVP and its personnel were paid, either directly or through the Broker, up-front fees of between eleven and twelve percent, rather than the disclosed eight percent. The Counterparty Commission Agreements created an undisclosed potential or actual conflict of interest because MVP and its personnel had an economic incentive to recommend that the Funds purchase the securities at the prices it negotiated with the counterparties, which would trigger their receipt of commissions through the Broker.

10. None of the disclosure documents revealed the existence of the relevant Counterparty Commission Agreement or MVP's attendant conflicts of interest. The Series Supplement—which provided the definitive details on fees and expenses for the series—made no mention of the arrangement. Although the more general Fund PPM disclosed as a “potential” conflict of interest that the Broker “may receive a placement agency fee or brokerage commission in connection with the purchase of securities of Portfolio Companies ... [,] provided, however, that such placement agency fee or brokerage commission will be paid only by the seller of such securities and not by the Fund,” this was not adequate given the actual arrangements in the Counterparty Commission Agreements. Nor did MVP disclose these facts orally to investors. As a result, MVP failed to adequately disclose the Counterparty Commission Agreements and the attendant conflicts created, and due to its conflict, could not consent on behalf of the Funds.

Violations

11. Section 206(2) of the Advisers Act prohibits investment advisers from directly or indirectly engaging “in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” A violation of Section 206(2) of the Advisers Act may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)). Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. *Id.* As a result of the conduct described above, MVP willfully¹ violated Section 206(2) of the Advisers Act.

12. Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder make it unlawful for any investment adviser to a pooled investment vehicle to “make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle” or to “engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in

¹ A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

the pooled investment vehicle.” Proof of scienter is not required to establish a violation of Section 206(4) of the Advisers Act or the rules thereunder. *Steadman*, 967 F.2d at 647. As a result of the conduct described above, MVP willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent MVP’s Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent MVP cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder.

B. Respondent MVP is censured.

C. MVP shall, within 21 days of the entry of this Order, pay disgorgement of \$150,058.88, prejudgment interest of \$19,681.42, and a civil money penalty in the amount of \$80,000 to the Securities and Exchange Commission. If timely payment of disgorgement and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier’s check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying MVP as a Respondent in these proceedings, and the file number of these proceedings; a copy of

the cover letter and check or money order must be sent to Sanjay Wadhwa, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 200 Vesey St., Suite 400, New York, NY 10281.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, prejudgment interest, and penalties referenced in paragraph C above. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary