

SIDLEY

SIDLEY AUSTIN LLP
60 STATE STREET
36TH FLOOR
BOSTON, MA 02109
+1 617 223 0300
+1 617 223 0301 FAX

EMARINO@SIDLEY.COM
+1 617 223 0362

AMERICA • ASIA PACIFIC • EUROPE

May 29, 2019

By Email and Overnight Courier

Timothy Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: *In the Matter of Deer Park Road Management Company, L.P. and Scott E. Burg,*

Dear Mr. Henseler:

We are writing on behalf of Deer Park Road Management Company, L.P. (“Deer Park”) in connection with the anticipated settlement with the Securities and Exchange Commission (“SEC” or “Commission”) relating to *In the Matter of Deer Park Road Management Company, L.P. and Scott E. Burg*. The settlement would result in an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”) against Deer Park.

On behalf of Deer Park, we hereby respectfully request a waiver of any disqualification that will arise pursuant to Rule 506 of Regulation D under the Securities Act of 1933 (the “Securities Act”) with respect to Deer Park or any of its affiliates as a result of the entry of the Order.

BACKGROUND

Deer Park has engaged in settlement discussions with the Division of Enforcement in connection with the above-referenced administrative proceeding. As a result of these discussions, Deer Park expects to submit an Offer of Settlement that will agree to the Order, which will be presented by the Staff to the Commission.

Sidley Austin (NY) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

ACTIVE 237295552

Deer Park is registered with the Commission as an investment adviser under the Advisers Act.

The Order will arise out of violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder by Deer Park for failing to adopt and implement reasonably designed compliance policies and procedures relating to valuation of fund assets. The Order will find that (1) Deer Park's policies failed to address sufficiently how to conform the firm's valuations with Generally Accepted Accounting Principles ("GAAP"); (2) Deer Park's policies were not reasonably designed for its business practices, given its use of valuation models and pricing vendors, and the potential conflict of interest arising from traders' ability to determine the fair value of a portion of the positions they manage; and (3) Deer Park failed to implement its existing policy. The Order will find that Deer Park, at times, failed to ensure that certain residential mortgage-backed securities ("RMBS") were valued in accordance with GAAP. Specifically, Deer Park may have undervalued certain client assets by failing to maximize relevant observable inputs, such as trade prices.

The Order will find Deer Park willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.¹

Without admitting or denying the findings in the Order, except as to the Commission's jurisdiction over Deer Park and the subject matter of the proceeding, Deer Park will consent to the issuance of the Order and to (i) cease and desist from committing or causing any violations and any future violations of Sections 206(4) of the Advisers Act and Rules 206(4)-7 thereunder, (ii) be censured, (iii) pay a civil money penalty in the amount of \$5 million, and (iv) comply with certain undertakings enumerated in the Order.²

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)). Proof of scienter is not required to establish a violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

² In the Order, the Commission also charged Deer Park's current Chief Investment Officer and co-portfolio manager ("CIO") with being a cause of Deer Park's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Without admitting or denying the findings in the Order, except as to the Commission's jurisdiction over the CIO and the subject matter of the proceeding, the CIO will consent to the issuance of the Order and to (i) cease and desist from committing or causing any violations and any future violations of Sections 206(4) of the Advisers Act and Rules 206(4)-7 thereunder, and (ii) pay a civil money penalty in the amount of \$250,000.

DISCUSSION

Deer Park understands that, absent a waiver, the entry of the Order will disqualify it, affiliated entities, and certain other issuers from relying on Rule 506 of Regulation D under the Securities Act. Deer Park is concerned that, if it or its affiliates are deemed to be an issuer, predecessor of an issuer, affiliated issuer, general partner or managing member of an issuer, or promoter of securities, or if it is deemed to be acting in any other capacity described in Rule 506 for purposes of Rule 506(d)(1), then Deer Park, its affiliates, and third parties that engage Deer Park and its affiliates to act in (or otherwise involve Deer Park in) one of the listed capacities in connection with their securities offerings would be prohibited from relying on Rule 506.

The Commission has the authority to waive this disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances.³ Deer Park requests that the Commission do so here, on the following grounds:

1. *The Violations in the Order Do Not Arise out of the Offer or Sale of Securities*

The Order arises solely out of the duties of a registered investment adviser, not the offer or sale of securities. Specifically, the conduct described in the Order arises out of Deer Park's failure to adopt and implement reasonably designed compliance policies and procedures relating to valuation of fund assets. The Order will find that (1) Deer Park's policies failed to address sufficiently how to conform the firm's valuations with Generally Accepted Accounting Principles ("GAAP"); (2) Deer Park's policies were not reasonably designed for its business practices, given its use of valuation models and pricing vendors, and the potential conflict of interest arising from traders' ability to determine the fair value of a portion of the positions they manage; and (3) Deer Park failed to implement its existing policy. As described herein and as noted in the Order, Deer Park has revised aspects of its valuation policy, revised its procedures so that, for example, trade information is automatically reported to its third party pricing vendors, and created and implemented new valuation and pricing surveillance reports that include, among other things, information and analyses on challenges to third party pricing vendor prices, changes of pricing sources, and internal valuations.

³ See Rule 506(d)(2)(ii).

2. *The Misconduct Does Not Involve Violations of Scierter-Based Statutory or Regulatory Provisions and Does Not Involve a Criminal Proceeding*

The violations in the Order are not criminal in nature and do not involve scierter-based fraud.

3. *Responsibility for the Misconduct*

With respect to who was responsible for the misconduct, the Division of Corporation Finance has stated that it would also consider, among other factors, whether (1) “the misconduct reflects more broadly on the entity as a whole” or (2) “the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation.”⁴

The conduct at issue in the Order does not reflect broadly on Deer Park. Rather, the conduct at issue in the Order involved a narrow policy and procedure violation and the Order provides that the CIO was a cause of the violation. The Order specifically provides that “[i]n determining to accept Deer Park’s Offer of Settlement, the Commission considered remedial measures undertaken by Deer Park.” Such remedial measures, as further described herein, are fulsome and were undertaken by Deer Park on its own initiative.

4. *Nature and Duration of the Misconduct*

The conduct described in the Order arises out of Deer Park’s failure, at times, from October 2012 through December 2015, to address in Deer Park’s policies how to conform the firm’s valuations with GAAP, implement its existing policy and ensure its policies were reasonably designed for its business practices. As discussed above, the compliance policy at issue has been revised and Deer Park has hired a new Chief Compliance Officer (“CCO”) with expertise in compliance and valuation. Furthermore, Deer Park has also created and implemented new valuation and pricing surveillance reports and hired a Consultant (defined below) to review, assess, and make recommendations with respect to its policies and procedures for valuing assets in its private funds.

⁴ See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

5. *Deer Park Has Taken Remedial Steps and Will Take Additional Steps*

Deer Park has taken substantial remedial steps, on its own initiative and prior to the entry of the Order, to address the conduct at issue in the Order, and it will take additional remedial steps to comply with the undertakings in the Order.

As noted in the Order, prior to the entry of the Order, Deer Park:

- Hired a new CCO with relevant expertise in compliance and valuation;
- Under the new CCO, revised aspects of its valuation policy and revised its procedures so that, for example, trade information is automatically reported to its third party pricing vendors;
- Created and implemented new valuation and pricing surveillance reports that include, among other things, information and analyses on challenges to third party pricing vendor prices, changes of pricing sources, and internal valuations. In addition to the Risk Management Committee, the CCO reviews the reports; and
- Created a new pricing committee to review all pricing prior to each month's final determination of net asset value ("NAV") and the CCO is a member of the pricing committee.

Deer Park has also implemented the following improvements to its valuation processes, including:

- Tabulating and reviewing monthly challenges for trends (*e.g.*, too high versus too low), frequency and other factors;
- Comparing internally marked bonds to vendor prices for variance tolerance;
- Reviewing total monthly pricing sources by number of line items and dollar value;
- Reviewing monthly price source changes;
- Testing for compliance with pricing policy limitations;
- Reviewing for variance of sales versus prior month's price; and

- Reviewing for variance of buys versus following month's price.

Deer Park has also, on its own initiative, engaged an independent compliance consultant ("Consultant") to review, assess, and make recommendations with respect to its policies and procedures for valuing assets in its private funds. The Consultant is focusing on Deer Park's processes relating to (i) generally ensuring that the valuation of RMBS would conform with GAAP and more specifically; (ii) Deer Park's use and documentation of observable inputs in valuation; (iii) the role of Deer Park's trading desk in valuation; (iv) Deer Park's use of internal and external pricing sources, including any changes in the use of such sources; and (v) Deer Park's training resources that address valuation. Furthermore, in connection with the Order, Deer Park will also agree to certain undertakings, including the following:

- Conclude its work with the Consultant, whom Deer Park hired during the Commission's investigation to conduct a comprehensive review of Deer Park's policies and procedures for valuing assets in its private funds and processes for complying with GAAP in such valuations. The schedule for completion of the Consultant's work includes:
 - Within 60 days after the date of entry of the Order, Deer Park has agreed to require the Consultant to submit a final report to Deer Park and Commission staff (the "Report"). The Report shall include a description of the review performed, the conclusions reached, the Consultant's recommendations for changes in or improvements to Deer Park's policies and procedures, and a procedure for implementing the recommended changes in or improvements to those policies and procedures.
 - Within 90 days of the Report, Deer Park shall adopt all recommendations contained in the report; provided, however, that within 30 days of Deer Park's receipt of the Report, Deer Park shall, in writing, advise the Consultant and the Commission staff of any recommendations that it considers unnecessary, unduly burdensome, impractical, or inappropriate. With respect to any such recommendation, Deer Park need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which Deer Park and the Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 30 days after Deer Park provides the written notice described above. In the event that Deer Park and the Consultant are unable to agree on an alternative proposal, Deer Park and the Consultant shall jointly confer with the Commission staff to resolve the matter. In the event that, after conferring with the Commission staff, Deer Park and

the Consultant are unable to agree on an alternative proposal, Deer Park will abide by the recommendation of the Consultant.

- Within 30 days of Deer Park's adoption of all of the recommendations in the Report, Deer Park shall certify in writing to the Consultant and the Commission staff that it had adopted and implemented all of the Consultant's recommendations in the Report.

Deer Park thus has taken and will continue to take concrete steps to remediate the conduct at issue in the Order. The steps are designed to enhance Deer Park's overall compliance program going forward. Accordingly, it is not necessary to disqualify Deer Park and its affiliates from relying on Rule 506 in connection with an offering.

6. *Disqualification Would Have a Material and Disproportionate Impact on Deer Park and its Clients*

Deer Park and its affiliates serve as the management company, investment adviser or sub-adviser for pooled investment vehicles. Deer Park's inability to engage in private placements pursuant to Rule 506 would be extremely damaging to Deer Park, its advisory clients that are pooled investment vehicles and the investors in such pooled investment vehicles. Currently, Deer Park serves as investment manager to two private pooled investment vehicles ("Private Funds"), both of which raise capital in the United States in exempt offerings in reliance on Rule 506.⁵ The Private Funds are structured as Master Feeder vehicles with on-shore and off-shore investment options. Because of Deer Park's role with respect to these vehicles, these Private Funds would be disqualified from relying on Rule 506 to raise new capital if the Order is issued and there is no waiver. Many Private Funds rely on an ongoing offering of interests to increase the amount of new assets that can be deployed, and investors in Deer Park's Private Funds would be harmed if the Order is issued and there is no waiver for future capital raises. While Section 4(a)(2) of the Securities Act is theoretically available to these Private Funds, the compliance with state "blue sky" requirements in a Section 4(a)(2) offering can be costly and even prohibitive when timely access to new capital is needed. Market practice favors (and in some cases requires) the use of Rule 506 because it provides issuers and market participants with the benefit of a safe harbor, so Deer Park's inability to participate in Rule 506 offerings could lead to the loss of numerous Private Fund opportunities and could potentially put the firm out of business.

Private Funds managed by Deer Park are an integral part of its product offerings for investors and comprise approximately 77% of its business. As of October 31, 2018, the regulatory assets under management ("RAUM") for Deer Park was approximately \$3.23 billion, and of that amount the RAUM associated with Private Funds was approximately \$2.5 billion—

⁵ Deer Park also serves as sub-adviser and discretionary manager of one registered mutual fund.

approximately 77% of Deer Park's total RAUM.⁶ Furthermore, over the past three years (from October 31, 2015 to October 31, 2018), Deer Park offered two Private Funds⁷ that raised approximately \$1 billion from over 500 qualified high net worth and institutional clients.⁸ Deer Park currently manages both of the above referenced Private Funds that have relied on Rule 506 and such funds continue to conduct periodic offerings pursuant to Rule 506.

The inability to participate in Rule 506 offerings would place Deer Park at a competitive disadvantage compared to its peer firms that can engage in such activities, and it could put the firm in jeopardy. Moreover, as demonstrated above, Deer Park's Private Fund business comprises a large percentage of Deer Park's AUM.

7. *Deer Park Has Never Been the Subject of an SEC or State Enforcement Action*

Deer Park was founded in 2003 and has never been the subject of an SEC or state enforcement action.

8. *Disclosure of Written Description of Order to Investors*

If this requested waiver is granted, until Deer Park provides to the Commission the certification described above and detailed in the Order, Deer Park agrees to furnish (or cause to be furnished) to each purchaser in a Rule 506 offering that would otherwise be subject to the disqualification under Rule 506(d)(1) as a result of the Order, a description in writing of the Order a reasonable time prior to sale.

REQUEST FOR WAIVER

In light of the nature of the violations in the Order, the enforcement remedies that already will be obtained by entry of the Order, the remedial measures Deer Park has taken and will take, and the fact that the disqualification would have a material and disproportionate negative impact

⁶ The total assets under management ("AUM") associated with Private Funds stated above includes the AUM of certain offshore funds that rely on both Rule 506 with respect to sales to U.S. persons and Regulation S with respect to sales to non-U.S. persons. These offshore funds are often related to other Private Funds, typically as part of a master-feeder fund structure.

⁷ Each Private Fund consists of two feeder funds: an onshore feeder fund and an offshore feeder fund.

⁸ The investors in the Private Funds may include some or all of the following: institutional investors, pension and profit sharing plans, trusts, estates, charitable organizations, high net worth individuals, corporations or business entities other than those listed previously, private investment funds or other entities.

SIDLEY

Page 9

on Deer Park's Rule 506 business, Deer Park respectfully submits that it has shown good cause that relief from the Rule 506 disqualification should be granted.

Accordingly, we respectfully urge the Division, on behalf of the Commission, or the Commission, pursuant to Rule 506(d)(2)(ii), to waive the disqualification provisions in Rule 506 under the Securities Act to the extent they may be applicable to Deer Park and its affiliates as a result of the entry of the Order.

We appreciate your consideration of this request. Please feel free to contact me with any questions.

Very truly yours,



Elizabeth A. Marino