INITIAL DECISION RELEASE NO. 806
ADMINISTRATIVE PROCEEDING
File No. 3-16047

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

In the Matter of THE ROBARE GROUP, LTD., MARK L. ROBARE, AND JACK L. JONES, JR.	INITIAL DECISION June 4, 2015

APPEARANCES: Janie L. Frank and Jessica B. Magee for the Division of Enforcement, Securities and Exchange Commission

Alan M. Wolper and Heidi VonderHeide, Ulmer & Berne LLP, for Respondents The Robare Group, Ltd., Mark L. Robare, and Jack L. Jones, Jr.

BEFORE: James E. Grimes, Administrative Law Judge

Summary

In this Initial Decision, I find that the Division of Enforcement failed to carry its burden to show that Respondents The Robare Group, Ltd. (the Robare Group or TRG), Mark L. Robare, and Jack L. Jones, Jr. (collectively Respondents), violated Sections 206(1), 206(2), and 207 of the Investment Advisers Act of 1940. The allegations against Respondents are therefore dismissed.

Introduction

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). As authority, the OIP cited Section 15(b)(6) of the Securities Exchange Act of 1934, Section 203(e), (f), and (k) of the Advisers Act, and Section 9(b) of the Investment Company Act of 1940. The OIP alleges that the Robare Group and Mr. Robare are liable for primary violations of subsections (1) and (2) of Section 206 of the Advisers Act and that Mr. Jones aided and abetted and caused those same violations. The OIP also alleges that Respondents violated Section 207 of the Advisers Act.

I held a hearing in this matter in Houston, Texas, on February 9 through 11, 2015. During the hearing, the parties called a number of witnesses, including Mr. Robare and Mr. Jones. Having received the parties' stipulation at the hearing, I admitted all but four of the exhibits they offered into evidence.[1] Tr. 6.

Findings of Fact

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). All arguments and proposed findings of fact that are inconsistent with this decision are rejected.

1.1 Background regarding Form ADV

This case concerns the adequacy of certain disclosures Respondents made to their clients, primarily in TRG's Forms ADV. By way of background, Form ADV is the form used by an investment adviser to register with the Commission. *See* 17 C.F.R. §§ 275.203-1(a), 279.1. Registered investment advisers are required to provide clients with "a brochure and one or more brochure supplements . . . that contains all information required by Part 2 of Form ADV." 17 C.F.R. § 275.204-3(a); *see* 17 C.F.R. § 275.204-3(a) (2008) (requiring an investment adviser to provide "a written disclosure statement which may be either a copy of Part II of its form ADV . . . or a written document containing at least the information then so required by Part II of Form ADV."). "Part 2[[2]] of Form ADV contains disclosure requirements for [a] firm's 'brochure, which advisers must provide to prospective clients initially and to existing clients annually.'" *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *6-7 (May 2, 2014) (quoting Amendments to Form ADV, Advisers Act Release No. 3060, 2010 SEC LEXIS 2679, at *7 n.5 (Aug. 12, 2010), available at 75 Fed. Reg. 49,234). Schedule F of Part 2 is a continuation sheet that allows a firm to provide complete responses to the questions in Part 2. Part 2 and Schedule F provide a method for investment advisers to disclose conflicts of interest. Amendments to Form ADV, 2010 SEC LEXIS 2679, at *7-8 & n.7.

---

[1] I declined to admit Division Exhibit 84. *Robare Grp. Ltd.*, Admin. Proc. Rulings Release No. 2379, 2015 SEC LEXIS 882 (Mar. 4, 2015). The Division also withdrew Exhibits 51, 54, and 85. Division Exhibits 57 through 60 were admitted for impeachment purposes only. Tr. 931. Citations to the Division's Exhibits and Respondents' Exhibits are noted as "Div. Ex. ___," and "Resp. Ex. ___," respectively. Respondents' and the Division's posthearing briefs are noted as "Resp. Br. at ___," and "Div. Br. at ___," respectively. Citations to the transcript of the hearing are noted as "Tr. __.".

[2] In 2010, the Commission officially recognized the fall of the Roman Empire and switched from a Roman to an Arabic numbering convention. *See* Amendments to Form ADV, Advisers Act Release No. 3060, 2010 SEC LEXIS 2679, at *7 n.5 (Aug. 12, 2010). What was Part II thus became Part 2. *Id.* I follow suit in numbering the sections in this Initial Decision.

What is currently Item 14 in Part 2 directs firms to explain whether anyone "who is not a *client* provides an economic benefit to you for providing investment advice or other advisory services to your *clients*," and to "describe how you address the conflicts of interest." Div. Ex. 90 at 93 (attested as current through January 15, 2015). Notably, the requirements governing the current version of Part 2 have only been in place since the Commission amended Form ADV effective October 12, 2010. *See* Amendments to Form ADV, 2010 SEC LEXIS 2679, at *146. Prior to October 12, 2010, this disclosure was covered by Item 13, which required firms to explain arrangements in which the firm or related people were given "cash . . . or . . . some economic benefit (including commissions, equipment or non-research services) from a non-client in connection with giving advice to clients." Div. Ex. 88 at 68.

The previous Part II did not include instructions and was organized in a check-the-box format. The current version of Form ADV, including its subparts and attached schedules is 109 pages long. Parts 2 and 2A come with five pages of instructions. These include the instructions to advisers to "[w]rite your brochure and supplements in plain English, taking into consideration your clients' level of financial sophistication," and to make the adviser's "brochure . . . concise and direct." Div. Ex. 90 at 81. It also instructs advisers to "discuss only conflicts the adviser has or is reasonably likely to have, and practices in which it engages or is reasonably likely to engage." *Id.* Melissa Harke, a branch chief in the Commission's Division of Investment Management,[3] testified that advisers are expected to disclose material conflicts and should conversely not throw in everything just to "cover" themselves "for legal purposes." Tr. 280.

1.2 The Respondents: The Robare Group, Mark Robare, and Jack Jones

The Robare Group is an investment adviser located in Houston. Stipulations of Fact (Stip.) ¶ 1. It has approximately $150 million in assets under management and manages roughly 350 separate accounts. *Id.* The Robare Group's current client base is primarily comprised of about 300 households, which is about twice what it was in the early 2000s. Tr. 301-02, 663. Its typical client is a person who has retired from an executive or management position in the energy industry or is within five years of retirement. Tr. 302. The Robare Group's clients are "highly educated" and "sophisticated." Tr. 302-03. Mr. Jones testified that the Robare Group's clients come to it "[e]xclusively through referrals." Tr. 661. The Robare Group's client retention rate is about 97% over the past ten years.[4] Tr. 304, 713-14. Its clients' portfolios generally range between $500,000 and $800,000. Tr. 300.

The Robare Group offers its clients a number of model portfolios depending on the client's investment goals. Stip. ¶ 4; Tr. 299-301. These portfolios are largely comprised of

---

[3] Ms. Harke has worked for the Commission since 2008. Tr. 261. She is a branch chief in the Commission's Division of Investment Management. Tr. 260–61. From 2008 to 2013, she dealt with rulemaking regarding investment advisers. Tr. 262.

[4] Ninety-seven percent is apparently an admirable figure. *See* Suzanne McGee, *2010 Top 1,000 Advisors*, Barron's, Feb. 22, 2010, http://online.barrons.com/articles/SB126662296193648683?tesla=y.

non-transaction fee mutual funds offered on Fidelity's on-line platform. Stip. ¶ 4; *see* Tr. 300, 306, 670. The Robare Group places its clients' investments in mutual funds because they allow clients to "broadly diversify in multiple asset classes and management styles." Tr. 300. And it relies on non-transaction fee funds "[b]ecause they're cheaper to use."[5] Tr. 307. Mr. Jones explained that the Robare Group tries to keep transaction costs and overall fees low. Tr. 669. He said that using non-transaction fee funds fits within these goals. Tr. 669.

Mark Robare is sixty-two and moved to Houston from Michigan in the 1970s. Tr. 285; Stip. ¶ 2. He owns 83% of the Robare Group and is its chief compliance officer. Tr. 514; Stip. ¶ 2. Mr. Robare is a limited partner in the Robare Group. Tr. 514. He is also the president and CEO of the Robare Group's general partner, Robare Asset Management. Tr. 514-15; Stip. ¶¶ 1-2. Mr. Robare holds three professional designations: chartered life underwriter, certified financial planner, and chartered financial consultant. Tr. 286. Over time, he has passed the series 6, 7, 22, 24, 63, and 65 examinations. Tr. 287-89; Resp. Ex. 110 at 6.[6] Aside from this pending proceeding, Mr. Robare has no disciplinary history. Tr. 292; Resp. Ex. 110 at 10-12. Since 1987, Mr. Robare has had a total of two customer complaints, one in 2003 that was resolved within ninety days, and one involving a client's second spouse who complained about a beneficiary designation. Tr. 292. Both complaints were dismissed. Tr. 292.

After working in the insurance industry in the 1970s and 1980s, Mr. Robare transitioned to the securities industry in 1987. Tr. 287-88. In the 1990s, Mr. Robare was affiliated with Allmerica Financial, which later became Veravest. Tr. 288, 293-94, 659. While working for Allmerica, Mr. Robare provided investment advisory services through Allmerica's registered investment adviser. Tr. 296.

Mr. Jones is Mr. Robare's son-in-law. Tr. 658. He is forty-three and has series 6, 7, 63, and 65 licenses. Tr. 658; Stip. ¶ 3; Resp. Ex. 109 at 5. He began working for Allmerica Financial in 1994. Tr. 657. Mr. Jones helped form the Robare Group in 2000, but remained a registered representative with Veravest until 2003 when the Robare Group became an independent firm. Tr. 659-60; Resp. Ex. 109 at 6. Currently, he is a Robare Group limited partner and owner, and serves as a financial adviser and planner. Tr. 660-61; Stip. ¶ 3. Aside from this pending proceeding, Mr. Jones has no disciplinary history. Tr. 660; Resp. Ex. 109 at 9-11.

---

5 Mr. Robare testified that TRG ran a historical comparison between clients' non-transaction fee investments and transaction fee equivalents, applying a "35-dollar transaction fee," and "found that even if you could [find an equivalent] transaction fee fund," the fees "created probably three times the cost that the differential between a no[-]transaction fee fund and a transaction fee fund would have as an internal expense." Tr. 307-08.

6 In general, because many exhibits lack or contain multiple sequences of pagination, page numbers of exhibits refer to the page number indicated by the PDF reader used to view the exhibits.

1.3 Mr. Robare and Mr. Jones form The Robare Group

While at Allmerica, Mr. Robare worked closely with Fidelity, Tr. 297, which provided clearing and custody services for Allmerica clients, Tr. 356. He had a high opinion of Fidelity because it "had great technology," Tr. 297, "a good platform, [and] great execution," Tr. 356. Additionally, its employees were very helpful. Tr. 297, 356.

In the late 1990s, Mr. Robare and Mr. Jones decided to create their own investment advisory firm, the Robare Group. Tr. 294-96. Allmerica was helpful, suggesting that the Robare Group use National Regulatory Services, a professional consulting firm, to help it through the process. Tr. 294-95. Fidelity also remained very helpful during that process. Tr. 297-98. It referred the Robare Group to a number of broker-dealers, including Triad Advisers. Tr. 298. After investigating the matter, the Robare Group decided to "align" itself with Fidelity as its custodian and Triad as its broker-dealer. Tr. 298. Mr. Robare and Mr. Jones signed an agreement affiliating themselves with Triad in October 2002. *See* Resp. Ex. 16. They became registered representatives with Triad in February 2003. Stip. ¶ 7. At the same time, Fidelity agreed to serve as custodian for the Robare Group's clients. Stip. ¶ 6. The Robare Group became an independent investment adviser in 2003, after Allmerica ran into financial difficulties. Tr. 297, 737.

The Robare Group's transition to being an independent investment adviser involved a lot of paperwork for each client. Tr. 809-10. Mr. Jones and Mr. Robare were "comfortable with [Fidelity's] technology and tools." Tr. 809. That level of comfort and familiarity with Fidelity eased the Robare Group's transition to being an independent investment adviser. Tr. 809-10. Staying with Fidelity also made for a smoother transition for existing clients. *See* Tr. 810-12.

The Robare Group initially registered as an investment adviser with the state of Texas. Tr. 310-11. After acquiring enough assets under management, it registered with the Commission in 2003. Tr. 311; Stip. ¶ 5. It amended its Form ADV to reflect the change. Tr. 311. In May 2003, the Robare Group sent Triad "a copy of [its] updated ADV Part[s] I and II indicating that" it was "under SEC registration for [its] registered investment adviser." Resp. Ex. 37 at 3. The Robare Group also sent Triad its "disclosure agreement which [it] use[d] with [its] clients." *Id.* As explained by Mr. Robare, the Robare Group routinely informed Triad "[w]henever [it] updated anything." Tr. 398.

1.4 The Robare Group's account opening process

Because Fidelity provides custody services for the Robare Group's clients, *see* Tr. 356; Stip. ¶ 6, the Robare Group's clients each have a brokerage agreement with Fidelity, Tr. 356; *see* Resp. Ex. 75-79. Because the Robare Group is "charged with opening" "and servicing" "the [client's] account," the Robare Group gives Fidelity's brokerage agreement to the Robare Group's clients as part of its account-opening process. Tr. 357. Mr. Robare reviews the Fidelity agreement with customers before they sign it. Tr. 357-58. The Robare Group, however, does not send clients a new copy of Fidelity's agreement every time Fidelity updates it. Tr. 479-80. This is so because the Robare Group's clients operate under the agreement they originally signed. Tr. 480-81.

During the account-opening process, Mr. Robare gives his prospective clients "an overview about how [the Robare Group and its principals] get paid." Tr. 358; *see* Tr. 664. Clients are given the Form ADV Part 2 during this phase of the process, as well as the Robare Group's brochure, fee agreement, the new account agreement the client signs with Fidelity, and disclosure documents. Tr. 664-65, *see* Resp. Ex. 97. Mr. Robare or Mr. Jones also explain the Robare Group's business practices, its fees, and the fact that it earns both fees and commissions. Tr. 665. According to Mr. Robare, the Robare Group is different from many investment advisers because it is a "hybrid," in that it receives both fees and commissions. Tr. 358. He discusses this arrangement with potential clients because it could lead to conflicts of interest. *Id.*

Respondents' Exhibit 76, Fidelity's December 2005 "Brokerage Account Client Agreement," is one example of a document clients receive. Tr. 358. Mr. Robare reviews this agreement with clients. Tr. 357. On its first page, set off in a separate box, the agreement states that Fidelity "may pay" the Robare Group for "performing certain back-office, administrative, custodial support, and clerical services for [Fidelity] in connection with client accounts for which [Fidelity] act[s] as custodian." Resp. Ex. 76 at 1. It continues by adding that these payments "may create an incentive for" the client's adviser "to favor certain types of investments over others." *Id.*; *see* Resp. Ex. 76 at 1; *see also* Resp. Ex. 77 at 1; Resp. Ex. 78 at 1; Resp. Ex. 79 at 1. Mr. Robare was aware of the foregoing language and "consider[ed] [it] to be part of the universe of disclosures that" he makes to his clients. Tr. 359-60.

Prior to December 2005, Fidelity's brokerage account agreement did not contain the above language. *See* Resp. Ex. 75. Given the Robare Group's 97% client retention rate and the fact that it does not give existing clients updates to Fidelity's brokerage agreement, the approximately 150 clients it had before December 2005 who are still with the firm, *see* Tr. 423, have not received the disclosure in the December 2005 or later brokerage agreements.

Mr. Robare also gives his new clients a "disclosure brochure," which he said "basically describes who we are and how we get paid and how we work." Tr. 362; *see* Resp. Ex. 97. According to Mr. Robare, a compliance adviser suggested that he give new clients the brochure and the Form ADV. Tr. 363-64. The brochure discloses that Mr. Robare and Mr. Jones "are also stockbrokers . . . who may earn sales commissions when [clients] purchase securities . . . through TRG." Resp. Ex. 97 at 1; *see also* Resp. Exs. 98, 99. The Robare Group also discloses that it "may select and monitor other money managers" for its clients. Resp. Ex. 97 at 3; Resp. Ex. 99 at 4. In doing so, the Robare Group informs clients that "the other money managers pay us a portion of the fees generated by the referred clients" who "do not pay us directly for this service." Resp. Ex. 97 at 1; Resp. Ex. 99 at 4; Tr. 367-68 (testifying that the Robare Group has been giving this information to clients "from the beginning"). The Robare Group's disclosure brochure then adds that clients "should be aware that a conflict may exist between [the client's] interests and those of the Robare Group." Resp. Ex. 97 at 1.

1.5 The Robare Group enters into a compensation arrangement with Fidelity

At some point after the Robare Group registered with the Commission, Mr. Robare met with Mark Mettelman, Triad's CEO. Tr. 310, 312. Mr. Mettelman knew that the Robare Group used Fidelity as a custodian and was familiar with the portfolios the Robare Group had developed. Tr. 312. During their discussions, Mr. Mettelman asked Mr. Robare whether Mr. Robare knew "that Fidelity had a revenue sharing arrangement for advisers like" the Robare Group. Tr. 312. Because Mr. Robare was unaware of this program, Mr. Mettelmen suggested that he contact Fidelity about it. Tr. 312.

Soon afterwards, Mr. Robare phoned his point of contact at Fidelity and learned that, in fact, it did have a "revenue sharing arrangement." Tr. 312-13. The nature of this agreement and the Robare Group's disclosure of it lie at the heart of this case. As eventually constituted, under the revenue sharing arrangement (the Program or Program Agreement), Fidelity would remit payments to the Robare Group when the Robare Group's clients invested on Fidelity's platform in certain "eligible" non-Fidelity non-transaction fee funds; "Fidelity Retail Funds [were] excluded from the" Program. *See* Resp. Ex. 1 at 1. The term "eligible" was undefined in the Program agreement. *See id.* at 1-4. To Mr. Jones, the use of the word "eligible" suggested that some non-Fidelity funds were not "eligible" and thus not included in the Program. Tr. 669.

Under the Program, Fidelity would pay the Robare Group between two and twelve basis points, in an increasing formula, based on the value of eligible assets under management. Resp. Ex. 1 at 1-2; Stip. ¶ 12. As assets under management in qualifying funds increased above set thresholds, the basis points would increase. Resp. Ex. 1 at 1-2.

After the Robare Group's contact at Fidelity confirmed the program's existence, Mr. Robare asked whether the Robare Group's participation in the program would lead to extra costs for its clients. Tr. 314-15, 523; *see* Tr. 667. Fidelity said that it would not. Tr. 314-15; *see* Tr. 84. Mr. Robare also confirmed that the Robare Group's participation would not force it to alter the way in which it constructed its portfolios for its clients. Tr. 315-16, 523, 667. Mr. Jones testified that if entering into the Program would have added costs to the Robare Group's clients, the Robare Group would not have participated in the Program. Tr. 667. Mr. Robare and Mr. Jones both noted that they and the Robare Group were judged and paid based on performance. Tr. 339-40, 343, 667. Extra costs cut into performance. Tr. 667. Both Mr. Robare and Mr. Jones denied that payments under the Program influenced their investment decisions. Tr. 343, 415, 671, 814.

After Mr. Robare confirmed that the Robare Group's participation in the program would not affect the Robare Group's clients, Fidelity sent the Robare Group a Program Agreement for its review. Tr. 317. The Robare Group sent the Program Agreement to Triad for compliance review. Tr. 317. Once Triad approved, the Robare Group signed the Agreement. Tr. 317. Mr. Mettelman signed the agreement on Triad's behalf on April 16, 2004, and Mr. Robare signed it on the Robare Group's behalf three days later. Resp. Ex. 1 at 3. Fidelity signed on May 3, 2004. *Id.*

The Program Agreement is entitled "Investment Advisor Commission Schedule and Servicing Fee Agreement." Resp. Ex. 1 at 1. It interposed Triad between Fidelity and TRG for purposes of payment. *See* Resp. Ex. 1 at 2; Tr. 372-73. Fidelity's payments under the Program were initially made to Triad. Resp. Ex. 1 at 2. Triad then retained ten percent of those payments and forwarded the remaining ninety percent to TRG. Tr. 375. Without contradiction, Mr.

Robare testified that it was Fidelity's idea to interpose Triad. Tr. 317-19. He emphatically said that "[t]here was no negotiation" and "no discussion," and that he and Mr. Jones "thought that was the only agreement . . . there was." Tr. 319. A Fidelity senior vice president affirmed that Fidelity drafted the agreement. Tr. 77. There being no contrary evidence, I find that it was Fidelity's idea to interpose Triad between Fidelity and the Robare Group.

In the Program Agreement, TRG affirmed its understanding that the underlying mutual funds could change or suspend payments at any time. Tr. 83; *see* Tr. 186; Resp. Ex. 1 at 2. The funds could also cancel their participation, after an initial twenty-four month window, at any time on thirty days' notice. Resp. Ex. 1 at 2. Based on this, TRG understood that the underlying mutual fund companies could stop paying fees at any time. Tr. 355. The Agreement also made TRG responsible for determining what it needed to disclose in its Form ADV. Resp. Ex. 1 at 2.

The Robare Group's payments through the Program were reflected on commission statements it received from Triad. Tr. 373; *see, e.g.*, Resp. Ex. 29 at 3. Relevant to this fact, TRG's original contract with Triad (original Triad contract), which was signed in 2002, provided under a bullet-point titled "Commission Business," that TRG would receive a 90% "payout" on "Packaged Products," which "include[d] Mutual Funds, Variable Insurance, 12b-1 [fees] and other trails."[7] Resp. Ex. 16 at 1. Mr. Robare testified that a "12b-1 [fee] is a commission that's passed through from the mutual fund company . . . for placing and servicing that mutual fund." Tr. 376; *see* Tr. 381. Likewise, Charles Strauss, Triad's chief compliance officer, testified that Triad considered payments under the Program to be 12b-1 fees, which he said were commissions. Tr. 614-15. And when Triad received the funds from Fidelity, Fidelity characterized them as 12b-1 fees. Tr. 619. TRG thus thought fees paid under the Program were 12b-1 fees or commissions. Tr. 757, 815. As a factual matter, I find that until 2013, when Fidelity changed the Program Agreement, *see infra*, Fidelity and Triad considered payments under the Program to be 12b-1 fees.

Mr. Robare understood that the 90/10 split applied to all commissions that flowed through Triad. Tr. 427. Mr. Robare explained that no one had to tell him that Program payments were commissions; that fact was obvious or "self-evident" insofar as Program payments had to be paid through a broker-dealer. Tr. 429, 432. And Triad told TRG that all commissions, no matter the source, had to be paid through it. Tr. 431.

Respondents' Exhibit 29 is a 2004 compensation summary issued by Triad to Mr. Robare. It reflects a net commission payout of $18,875.59. Resp. Ex. 29 at 2. The payment from Fidelity under the Program is described on a page titled "commission production report" as

---

[7] The nature of 12b-1 fees and who may permissibly receive them was of some importance to the parties during the hearing. More on the latter point below. As to the former point, 12b-1 fees are authorized by Rule 12b-1 under the Investment Company Act. *See* 17 C.F.R. § 270.12b-1. The rule permits a fund to pay "distribution" expenses, including broker's commissions, and shareholder service expenses from fund assets. For a history of the rule, see Mutual Fund Distribution Fees; Confirmations, Exchange Act Release No. 62544, 2010 WL 2860109 (July 21, 2010).

"Fidelity 12B-1." *Id.* at 3; Tr. 380-81, 619; *see* Tr. 384-86. Other compensation summaries also included payments from Fidelity that were listed as 12b-1 fees. *See* Resp. Ex. 30 at 3 (May 2005); Resp. Ex. 31 at 2 (August 2006). In 2007, Triad continued to report payments under the Program as 12b-1 fees associated with Fidelity. *See* Tr. 386; Resp. Ex. 32 at 2. Whereas, in 2006 Triad listed the payment under the category "mutual funds," Resp. Ex. 31 at 2, in 2007, Triad listed the payment under a category called "direct fees," Tr. 386; Resp. Ex. 32 at 2. In 2008, Triad moved the payment back to the mutual funds category, but called it "Trails Fidelity-ACH." Tr. 387; Resp. Ex. 33 at 1. In 2009, TRG's commission statement from Triad listed the payments under "other revenue" and called them "direct fees." Tr. 387; Resp. Ex. 34 at 1.

From September 2005 through September 2013, what the Division calls "the relevant period," Div. Br. at 46, the Robare Group was paid roughly $401,778.54 under the Program, *see* Div. Ex. 35; Tr. 502-03.[8] This amounts to about $50,000 per year or nearly $4,200 per month. Without contradiction, Mr. Robare testified that payments under the Program amounted to 2.5% of TRG's gross revenue. Tr. 413-14, 504. This means that TRG's gross revenue during the relevant period was roughly $16,000,000, which works out to about $2 million annually or about $167,000 per month.

Respondents concede that payments were a potential conflict of interest. Stip ¶ 30; Tr. 442. Mr. Robare does not believe, however, that they are an actual conflict of interest. Tr. 442.

1.6 The Robare Group's Forms ADV

An investment adviser's material conflicts of interest must be disclosed to clients. As noted, Part 2 of Form ADV is an appropriate place to make that disclosure. Notably, however, it is not the only way in which conflicts can be disclosed. The Form itself says that a firm "may disclose this additional information to clients in [the firm's] brochure or by some other means." Div. Ex. 89 at 66; *see* 17 C.F.R. § 275.204-3(a) (2008).

In its 2003 Form ADV Part II, TRG checked a box in item 9 indicating that it "or a related person" acting as a "broker or agent[,] effects securities transactions for compensation for any client." Resp. Ex. 4 at 5. In 2003, TRG's schedule F was two pages long. *See id.* at 7-8. In the explanation in Schedule F corresponding to item 9, TRG said that a conflict of interest existed between it and clients and that clients were not obliged to follow TRG's advice. *Id.* at 7.

TRG also checked a box in item 13 indicating that it was "paid cash by or receives some economic benefit (including commissions, equipment or non-research services) from a non-client in connection with giving advice to clients." Resp. Ex. 4 at 6. In the corresponding explanation in Schedule F to the Form, TRG stated that "Mark Robare . . . & Jack Jones may sell securities

---

[8] The OIP charged that the Robare Group received about $441,000 "[f]rom September 2005 through September 30, 2013." OIP ¶ 13. The Division now says the amount was $401,778.54. Div. Br. at 46. During the hearing, Mr. Robare agreed this latter figure was "reasonable." Tr. 502.

and insurance products for sales commissions." *Id.* at 8. Inasmuch as TRG was not participating in the Program in 2003, this statement was not a reference to the Program. Tr. 453.

TRG filed a new Form ADV in March 2005, after it began participating in the Program. *See* Div. Ex. 12; Tr. 455. TRG, however, did not amend the language in Schedule F corresponding to item 13. *See* Div. Ex. 12 at 10; Tr. 455-56.

TRG's next revision occurred in August 2005. *See* Resp. Ex. 6. Its Schedule F was eleven pages long. *See id.* at 7-17. According to Mr. Robare, the increased length of TRG's Schedule F resulted from advice it received from its compliance consultant, Capital Markets, whom it retained in mid-2005. Tr. 529. Mr. Jones likewise confirmed that the changes resulted from "collaborat[ion] with . . . Capital Markets Compliance." Tr. 676.

As before, TRG checked a box in item 9 indicating that it "or a related person" acting as a "broker or agent[,] effects securities transactions for compensation for any client." Resp. Ex. 6 at 5. In the corresponding portion of the attached Schedule F, TRG said that "[a]ny" "securities transactions related to [its] advisory services . . . may be facilitated through Triad, in its capacity as a registered broker-dealer." *Id.* at 14. It continued that "for the purposes of" the Form ADV and Schedule F, all securities transactions facilitated through Triad would be "considered 'broker-dealer activities.'" *Id.* TRG concluded that "[t]o the extent allowed by applicable law and/or regulation, individuals associated with [TRG] may receive compensation (*i.e.* commissions) for their broker-dealer activities." *Id.*

In regard to this disclosure, in item 12, TRG indicated that it or "any related person [had] authority to determine, without obtaining specific client consent, the: (1) securities to be bought or sold," and (2) "amount of the securities to be bought or sold." Div. Ex. 6 at 6. In the corresponding section of Schedule F, TRG identified National Financial Services, which Mr. Robare identified as being part of Fidelity's "family of companies," Tr. 531, as its recommended custodian and Triad as its recommended broker, Div. Ex. 6 at 17. TRG also disclosed that in exchange for using Triad and National Financial, it might "receive certain support services that may assist [TRG] in its investment decision-making process for all of [TRG's] clients." *Id.*

In the section of Schedule F corresponding to item 13, TRG said:

> Certain investment adviser representatives of [TRG], when acting as registered representatives of a broker-dealer, may receive selling compensation from such broker-dealer as a result of the facilitation of certain securities transactions on Client's behalf through such broker-dealer.
>
> . . . .
>
> These other arrangements may create a conflict of interest.[9]

---

[9] The omitted language concerned insurance products. Resp. Ex. 6 at 17. Mr. Robare conceded this language was not relevant. Tr. 456-57.

Id. According to Mr. Robare, the first paragraph regarding item 13 referred to any commissions TRG received through Triad. Tr. 457; *see* Tr. 532. He conceded, however, that the disclosure referenced actions as a registered representative, not as an investment adviser. Tr. 457, 459. He also conceded that payments under the Program were made in relation to TRG's "clients' advised assets." Tr. 460.

Mr. Jones testified that the first paragraph disclosed "[t]hat every commission that we received was received through the broker-dealer, and that we had commission business in addition to fee business." Tr. 675. He "believed [the paragraph] describes accurately all the elements of the relationship" between TRG and Fidelity under the Program. Tr. 677. Specifically, it provided "[t]hat certain investment advisers, that would be us, acting as reps of the broker-dealer may receive commission from the broker-dealer, which we did in the form of 12b-1, as a result of facilitation of certain, meaning eligible [non-transaction fee] funds, securities transactions, on our client's behalf through the broker-dealer." Tr. 677. Mr. Jones opined that Program compensation had to be disclosed in this manner because "the mechanics of [the] compensation" involved "a commission . . . with the entity through whom we'd get paid each and every commission, [and] that we were registered representatives of." Tr. 781. Mr. Jones also opined that the program was disclosed through TRG's disclosure brochure and elsewhere in Schedule F. Tr. 678.

The Robare Group's Forms ADV issued in January 2006, January 2008, and April 2008 retained this same language. *See* Div. Ex. 13 at 17; Resp. Ex. 9 at 14; Div. Ex. 14 at 20. Mr. Robare maintained that through its Schedule F, TRG attempted "to disclose all of [its] commission arrangements" and that its disclosures were based on advice received from outside compliance consultants. Tr. 532.

As noted in section 1.1, *supra*, the Commission changed Part 2 in 2010. Amendments to Form ADV, 2010 SEC LEXIS 2679. The relevant disclosure in item 13 of the old Form ADV moved to item 14 in the new Form ADV. *See* Div. Ex. 23 at 25. In the prior form, item 13 simply asked whether the:

> applicant or a related person have any arrangements, oral or in writing, where it is paid cash by or receives some economic benefit (including commissions, equipment or non- research services) from a non-client in connection with giving advice to clients.

Div. Ex. 88 at 68. The new version, which is governed by five new pages of general instructions, *see* Div. Ex. 89 at 65-69, directs that:

> If someone who is not a client provides an economic benefit to you for providing investment advice or other advisory services to your clients, generally describe the arrangement, explain the conflicts of interest, and describe how you address the conflicts of interest. For purposes of this Item, economic benefits include any sales awards or other prizes.

Div. Ex. 89 at 77.

Following these changes, the Robare Group amended its Form ADV.[10] In the explanation corresponding to item 14 in its Schedule F issued in March 2011, the Robare Group now disclosed:

> We do not have any arrangement under which it or its related person compensates, or receives compensation from, another for client referrals at this time.
>
> Certain of our [Investment Advisor Representatives], when acting as registered representatives of Triad, may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.

Div. Ex. 23 at 25.

Mr. Jones testified that this amendment was made with the assistance of the Robare Group's compliance consultant, Renaissance Regulatory Services. Tr. 681, 683, 686. He said that Renaissance helped by "coming up with and approving all of [TRG's] disclosure documents," including the Form ADV. Tr. 683. Mr. Jones thought this language disclosed the payments under the Program because TRG had always believed the payments were 12b-1 fees. Tr. 684. In addition, he felt that TRG's disclosure brochure, Fidelity's account "agreement [clients] would sign with the custodian," and TRG's fee agreement, also provided disclosure to clients. Tr. 684-85. Although he thought the 2011 disclosure was better than the 2005 disclosure, he did not believe the 2011 disclosure disclosed anything new. Tr. 685. Mr. Jones explained that TRG continuously tries to improve its disclosures and make them more accurate. Tr. 686.

As a result of concerns raised by Fidelity, *see infra* § 1.11, TRG amended its Form ADV again in December 2011. Tr. 468-69, 689. In item 14, it provided:

> We do not receive an economic benefit from a non-client for providing investment advice or other advisory services to our clients. Additionally, we do not have any arrangement under which we, or a related person, directly or indirectly compensate

[10] Registered advisers were required to update their disclosures by March 31, 2011. Amendments to Form ADV, 2010 SEC LEXIS 2679, at *147.

> any person, who is not our supervised person, or receive compensation from another for client referrals at this time.
>
> Certain of our [Investment Advisor Representatives], when acting as registered representatives of Triad, may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.
>
> Additionally, we *may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity*. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from your accounts to us.

Div. Ex. 25 at 27 (emphasis added).

Mr. Robare testified that TRG used the word "may" in the emphasized language because the original Program agreement provided that the underlying mutual funds could stop payments at any time. Tr. 469-70; *see* Resp. Ex. 1 at 2. Mr. Jones added that any party to the Program agreement could cancel it at any time. Tr. 783. TRG maintained the same language in its March 2012 Form ADV. *See* Div. Ex. 26 at 27; Tr. 471-72. Mr. Jones testified that he did not believe the 2011 Schedule F disclosed anything that previously had not been disclosed. Tr. 694, 821. He explained, however, that TRG's philosophy was to rely on Triad, Fidelity, and its compliance consultants "to tell [TRG] how to improve disclosure." Tr. 694. According to Mr. Jones, "when anybody said anything, we acted on it." Tr. 694. He added that "Fidelity is an important partner to us. They made a suggestion. We wanted to in good faith respond and take their advice." Tr. 695. Obviously, TRG was also concerned that Fidelity would withhold payments under the Program. Tr. 697. Mr. Jones testified that he and Mr. Robare thought Fidelity was asking TRG to provide additional disclosure beyond what was strictly necessary. Tr. 701. He said TRG was "more than happy to accommodate [Fidelity's] request." Tr. 701.

TRG amended its Form ADV again in April 2013. *See* Div. Ex. 28. In item 14, it said:

> We do not receive an economic benefit from a non-client for providing investment advice or other advisory services to our clients. Additionally, we do not have any arrangement under which we, or a related person, directly or indirectly compensate any person, who is not our supervised person, or receive compensation from another for client referrals at this time.

> However, certain mutual fund issuers may sponsor and pay for client luncheons, or other events, that Robare hosts. These arrangements may give rise to conflicts of interest, or perceived conflicts of interest, with the firm's clients in connection with Robare's recommendation of certain mutual funds. However, Robare's commitment to its clients and the policies and procedures it has adopted are designed to limit any interference with Robare's independent decision making when choosing the best mutual funds for our clients.
>
> Certain of our [Investment Advisor Representatives], when acting as registered representatives of Triad, may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.
>
> Additionally, we may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from your accounts to us.

Div. Ex. 28 at 22. According to Mr. Jones, in this new disclosure, TRG intended "to disclose . . . the fact that we received compensation from Fidelity . . . and that either a perceived or real conflict of interest may exist. And we continued to add the Fidelity suggested language that you'll see in the bottom beginning with additionally." Tr. 707. Mr. Jones conceded that at this point, TRG was under investigation by the Commission. Tr. 709. He said that TRG "continued . . . to try to meet a standard that we didn't know exactly how to meet by adding additional disclosures." Tr. 709. It was thus the case that, although TRG did not specifically know what the Commission's concerns were, its principals were trying to address what they thought the concerns might have been.[11] Tr. 709-10.

[11] As is discussed below, the Robare Group signed a new Program Agreement with Fidelity in 2013. *See infra* § 1.12. The second Program Agreement provided that either party could terminate the agreement on 120 days' notice or immediately if one of two conditions were met. Div. Ex. 33 at 4. Division counsel and Mr. Jones quibbled about whether this language meant that the use of the word "may" in TRG's Form ADV was inaccurate. Tr. 785-88.

Two months later, TRG amended its Form ADV again. *See* Tr. 473-74 (explaining that although the Form was dated April 2013, it was filed in June 2013); Div. Ex. 29. Item 14 now read:

> We do not receive an economic benefit from a non-client for providing investment advice or other advisory services to our clients. Additionally, we do not have any arrangement under which we, or a related person, directly or indirectly compensate any person, who is not our supervised person, or receive compensation from another for client referrals at this time. However, certain mutual fund issuers may sponsor and pay for client luncheons, or other events, that Robare hosts. These arrangements may give rise to conflicts of interest, or perceived conflicts of interest, with the firm's clients in connection with Robare's recommendation of certain mutual funds. However, Robare's commitment to its clients and the policies and procedures it has adopted are designed to limit any interference with Robare's independent decision making when choosing the best mutual funds for our clients.
>
> Certain of our [Investment Advisor Representatives], when acting as registered representatives of Triad, may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.
>
> Additionally, we may receive additional compensation in the form of back-office, administrative, custodial support and clerical services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. Similar to the luncheons and events described above, this arrangement may give rise to conflicts of interest, or perceived conflicts of interest, with the Firm's decision to utilize Fidelity as our Custodian. However, Robare's commitment to its clients and the policies and procedures it has adopted are designed to limit any interference with Robare's independent decision making when choosing the most appropriate custodian for our clients. In addition, this additional compensation does not represent additional fees from your accounts to us, and we are committed to utilizing these fees to enhance our services to you.

Div. Ex. 29 at 22. Finally, TRG issued a Form ADV in August 2013 that was not materially different from the one issued in June 2013. *See* Tr. 476; Div. Ex. 31 at 22.

Mr. Robare agreed that he always tried to make TRG's disclosures "as complete and as detailed as necessary," and said he never intentionally omitted anything to avoid disclosing revenue from Fidelity or conflicts of interest. Tr. 414.

1.7 TRG's relationship with Triad

The Robare Group's principals' original agreement with Triad made Triad "responsible for supervising [TRG's] outside [registered investment adviser] business." Resp. Ex. 16 at 2. Under the contract, TRG paid Triad a $1,500 quarterly fee for its supervision. *Id.*; *see* Tr. 388.

Mr. Robare and Mr. Jones each had their own individual agreements with Triad. Tr. 389-90, 491-92; *see* Resp. Exs. 17 (Robare manager agreement), 18 (Robare investment adviser agreement), 19 (Jones registered representative agreement). Those individual agreements gave Triad "full and complete authority to supervise" Mr. Robare and Mr. Jones to insure "compliance with federal and state securities and investor protection laws and regulations." Resp. Ex. 19 at 1; Resp. Ex. 21 at 2; Tr. 391. They also provided that "Triad has compliance responsibilities relative to" Mr. Robare's and Mr. Jones's "investment advisory business, even if such business is conducted as or through" an adviser "not affiliated with Triad."[12] Resp. Ex. 19 at 6; *see* Resp. Ex. 17 at 17-18. Mr. Robare agreed that he believed that Triad was responsible for "assur[ing] his compliance" with regulatory requirements. Tr. 392. Under his manager agreement, Mr. Robare was required to "use his best efforts to ensure that all registered representatives in his [office] conduct their investment advisory business in accordance with all Regulatory Requirements and Compliance Standards." Resp. Ex. 17 at 18.

Mr. Robare's manager agreement made him responsible for supervising registered representatives in his office who were associated with Triad. Resp. Ex. 17 at 3, 15. The agreement also gave Triad the authority to "control or direct" Mr. Robare with respect to "enforcing Regulatory Requirements and in promulgating and enforcing Compliance Standards." *Id.* at 4; *see id.* at 8 (giving Triad authority to "promulgate" or change "Compliance Standards").

[12] According to Triad's chief compliance officer:

> because Mr. Robare and Mr. Jones are registered reps, they fall under the purview of certain FINRA regulation. Those regulations dictate that because of their registered rep duties, any sort of outside business activity or private securities transaction inclusive of investment advisory business, even if it's not affiliated with Triad, that Triad has a responsibility to supervise those activities and again, record those transactions and treat them as if they were their own transactions.

Tr. 603.

It also placed Mr. Robare "under the oversight of Triad's Compliance Department." *Id.* at 6. The agreement provided that Triad would "receive all commissions and fees earned by or through the securities activities of [Mr. Robare] and any registered representative in" his office and would pay Mr. Robare in accordance with a separate schedule.[13] *Id.* at 9. According to Triad's chief compliance officer, this provision governed any commission TRG or its principals earned through *any* securities activities. Tr. 645.

As part of Triad's supervision of TRG, TRG was subject to an annual audit by Triad. Tr. 393; *see* Tr. 606-11. As part of the audit process, TRG supplied the auditors with copies of TRG's Form ADV. Tr. 393-94. Each audit concluded with an exit interview and with the auditor providing TRG with items to be addressed. Tr. 394-95; *see* Resp. Ex. 22 (2004 exit interview notes). Although Triad was a party to the Program Agreement, it never raised any concerns about TRG's disclosures regarding the Program. Tr. 395. In 2004, after TRG's first audit, Triad's auditor instructed TRG to provide Form ADV Parts I and II to TRG's clients, once it was updated. Tr. 396-97, 399-400; Resp. Ex. 22 at 2; Resp. Ex. 23 at 2.

By 2008, the auditor raised only four issues, none of which concerned Form ADV. *See* Resp. Ex. 24 at 2; Tr. 401. The audits in 2011 and 2012 resulted in no findings that TRG needed to address. Resp. Ex. 25 at 14; Resp. Ex. 26 at 23; Tr. 402-03. The 2013 auditor identified areas to be addressed but did not raise any issues concerning TRG's disclosures concerning the Program. Tr. 405; *see* Resp. Ex. 27 at 2. The same was true with respect to the 2014 audit. Tr. 405; *see* Resp. Ex. 28 at 2. Apart from the issues raised in the Triad audits, none of which pertained to disclosure of the Program, Triad never identified another disclosure issue to TRG. Tr. 405-06.

In 2005, Mr. Robare signed, on behalf of TRG, a registered investment adviser agreement with Triad. *See* Resp. Ex. 18. The adviser agreement required Triad to give TRG Triad's brochure or Form ADV Part II and required TRG to provide the brochure or Form ADV Part II to TRG's clients. *Id.* at 4, 7. It also required TRG to give its clients TRG's "disclosure documents or Form ADV Part II." *Id.* at 7. In the adviser agreement, TRG agreed that it was "aware that Triad . . . has certain supervisory obligations with respect to [TRG's] participation in" Triad's "advisory services." *Id.* at 1, 7. The adviser agreement also provided that Triad would "oversee[], monitor[] and enforce[]" "Regulatory Requirements and Compliance Standards." *Id.* at 8.

1.8 TRG's use of compliance advisers

Since forming TRG, Mr. Robare has never filed a Form ADV without consulting with "an independent professional securities consultant." Tr. 370. Mr. Robare testified that he relied on compliance professionals in crafting his disclosures. Tr. 406-07, 412.

---

13 Mr. Robare testified that the upshot of the language above was that Triad delegated responsibility to him to supervise compliance with respect to conduct in his office of people acting as registered representatives, not as investment advisers. Tr. 495. Based on the language, I agree.

1.8.1 Outside Compliance Consultants

TRG attempted to meet its responsibility for determining what it needed to disclose in its Form ADV by hiring outside consultants. Tr. 368. When TRG first started, it used National Regulatory Services, to which it had been referred by Allmerica. Tr. 369. National Regulatory Services assisted TRG with its first Form ADV and with the disclosures necessary when TRG first registered with the Commission. Tr. 369. In 2004, Mr. Robare decided to switch to a compliance consultant that understood TRG's situation as a small, hybrid investment adviser. Tr. 369. TRG used a firm called Capital Markets, referred to it by Triad, from 2005 to 2007 and then moved to Renaissance in 2007. Tr. 369, 507. TRG switched to Renaissance because Mr. Jones and Mr. Robare "knew some people from Triad that had gone to work for Renaissance." Tr. 682. Mr. Jones and Mr. Robare "met them . . . at a conference" and "felt confident about them and their reputation." Tr. 682. Mr. Jones testified that the reputation of their compliance consultant mattered because compliance was not TRG's "area of specialization." Tr. 682-83. Renaissance remains TRG's compliance consultant. Tr. 550.

Mr. Robare testified that he discussed the Program Agreement with National Regulatory Services and Capital Markets. Tr. 507-09. He conceded however that he could not remember giving Capital Markets a copy of the Program Agreement or asking Capital Markets about how to disclose TRG's participation in the Program. Tr. 509. He also could not remember "giving [Renaissance] a physical copy of the [Program] [A]greement." Tr. 510. Mr. Robare nonetheless asserted that he did discuss the matter with Renaissance. Tr. 510. He then speculated that his discussion led to changes in 2008 in TRG's Form ADV. Tr. 510. Mr. Robare quickly retracted this comment when he realized that TRG had not changed its Form ADV in 2008. Tr. 510. Because of the lapse of time, he also could not specifically recall his discussions with Renaissance. Tr. 511.

According to TRG's agreement with Renaissance, TRG was "solely responsible for the adequacy and accuracy of any information or documentation provided to" Renaissance and that Renaissance had "no responsibility to verify the accuracy of any information [TRG] provided" it. Div. Ex. 16 at 6.

Bartholomew McDonald is an executive vice president with Renaissance. Tr. 540. He was employed by the Commission from January 2004 through December 2006 as an examiner. Tr. 541. Mr. McDonald testified that Renaissance is a regulatory consulting firm whose clients are investment advisers, broker-dealers, investment companies, and banks. Tr. 542. Among the services Renaissance provides are mock examinations, reviewing or creating internal policies and procedures, and "ongoing compliance support," including helping firms with their Forms ADV. Tr. 542-43. Renaissance has provided regulatory compliance services to TRG, under different proposals, from 2007 until the present. Tr. 550.

Mr. McDonald testified that as part of his job, he is required to be familiar with Form ADV. Tr. 543-44. In November 2007, Mr. McDonald sent Mr. Jones a letter proposing that TRG hire Renaissance to "provide ongoing compliance services." Tr. 545; *see* Resp. Ex. 43 at 1-3. On Renaissance's behalf, Mr. McDonald offered to "provide up to 24 annual hours of compliance support to [TRG's chief compliance officer] in administering [the Robare Group's] compliance program." Resp. Ex. 43 at 1. He thus proposed to assist TRG's chief compliance officer in "meet[ing] [TRG's] annual review requirements under [Rule] 206(4)-7," to include "disclosures/Advisory Arrangements," among other matters. *Id.* He also proposed to address Form ADV and stated that Renaissance would "review and update the Form ADV on an annual basis." *Id.* at 2. During the hearing, Mr. McDonald affirmed that he provided this latter service to TRG. Tr. 548. In 2008, Renaissance drafted TRG's compliance manual. Tr. 564.

Renaissance's 2009 proposal contained similar language relating to its provision of compliance support and to Form ADV. *See* Resp. Ex. 44 at 1. In 2012, Renaissance proposed "Tier II" support, which would include "the assignment of a dedicated Compliance Administrator," who would provide "monthly support services" regarding, *inter alia*, Form ADV, and an annual Form ADV update. Resp. Ex. 45 at 2; *see also* Resp. Ex. 46 (2013 proposal).

Mr. McDonald explained that after a client firm signs with Renaissance, he discusses the client's business with the client in hopes of achieving a better understanding of how the business was run. Tr. 548-49. He would ask "how they're compensated, where their revenues are coming from." Tr. 549. Mr. McDonald opined that it was "very important" for a client to describe all of its "sources of income." Tr. 549. To Mr. McDonald, it is important to understand a client's sources of income because he was trained while at the Commission "to follow the money." Tr. 549. Following the money helps him understand the business and to see whether there are disclosure issues to be addressed. Tr. 549-50.

Although Mr. McDonald did not specifically recall his initial discussions with TRG, he said that discussing its compensation would have been "standard operating procedure." Tr. 550. Although Mr. McDonald never received a copy of the 2004 Program Agreement, Tr. 554, 578, he affirmed that while he did not specifically remember discussing the Program, he typically would have discussed something of that nature with a client, Tr. 555. He was also aware of the 2012 Program Agreement. Tr. 554, 556. Mr. McDonald explained that assuming a thorough discussion, it would not have been strictly necessary to see the 2004 Program agreement. Tr. 580-81; *see* Tr. 586-87.

As a factual matter, I find that Renaissance was aware of the Program. Mr. Robare testified that he discussed it with Renaissance. Tr. 510. Mr. McDonald testified that he investigated the sources of the Robare Group's income and "follow[ed] the money." Tr. 549. Inasmuch as Program payments were listed as a separate line item on the commission statements the Robare Group received from Triad, it would have been difficult for Mr. McDonald to miss the payments. As no party claimed Mr. McDonald was incompetent, I infer that even if Mr. Robare did not mention the Program to him, Mr. McDonald would have discovered the payments the Robare Group received in the course of "follow[ing] the money."

This finding is supported by Mr. McDonald's testimony that Mr. Robare and Mr. Jones were "very good" to work with regarding the Form ADV. Tr. 557. He said "[t]hey were very involved and proactive and interested in trying to get it right." Tr. 557. On those occasions Mr. McDonald needed additional information, Mr. Robare and Mr. Jones provided the requested information "right away" and were "very forthcoming." Tr. 558; *see* Tr. 587 (agreeing they were "full, frank[,] and timely in providing information"). He added that they were "never hesitant" to respond or "vague" in their responses. Tr. 559.

During cross-examination, Mr. McDonald affirmed that Renaissance's role was to support TRG's compliance program, not to provide the program or to act as an outside chief compliance officer. Tr. 563. He also said that without amending the Form ADV, Mr. Robare could not delegate the responsibility for being the chief compliance officer. Tr. 565-66. Mr. McDonald denied that Renaissance "approved" TRG's disclosures. Tr. 568. Rather, he said Renaissance provided "guidance and advice." Tr. 568.

The Robare Group, however, thought Renaissance did approve the language it used. As is discussed below, *see* § 1.12, in December 2011, Mr. Jones attempted to address Fidelity's demand that TRG amend its Form ADV disclosure about the Program. *See* Div. Ex. 44. Mr. Jones told Timothy Fahey, his point of contact at Fidelity, that whatever language TRG used would first have "to be *approved* by [TRG's] ADV consultant and [its] broker-dealer, Triad Advisors." *Id.* at 1 (emphasis added). Mr. Jones sent proposed language to Lisa Paygane at Renaissance, who edited the proposed language. Div. Ex. 46 at 4. That Ms. Paygane did not respond by expressing surprise about TRG's participation in the Program or by asking for a copy of the Program Agreement circumstantially supports my determination that Renaissance was aware of it.

In the end, it is sufficient that when TRG's principals paid Renaissance for support "in administering [TRG's] compliance program," assistance in preparing TRG's disclosures, and review and updating of its Form ADV, Resp. Ex. 43 at 1-2, those principals reasonably thought they were getting what they paid for, *see* Tr. 412. No doubt, Mr. Robare and Mr. Jones paid Renaissance in hopes of avoiding the very proceeding of which they are now the subject.

1.8.2 Triad

Charles Strauss has worked for Triad since 2006 and has been its chief compliance officer since 2010. Tr. 596. Before Triad, Mr. Strauss worked at Capital Markets Compliance. Tr. 597. Before that, he was an examiner with what is now the Financial Industry Regulatory Authority. Tr. 597.

Mr. Strauss supervises a compliance staff of nine subordinates. Tr. 604. He testified that he and his staff use the authority given to Triad in its agreements with Mr. Robare and Mr. Jones to monitor TRG's securities activities. Tr. 603-04; *see* Resp. Ex. 19 at 6. He and his staff can and do request TRG's investment advisory "book and records." Tr. 604-05. Mr. Strauss has "never had any issue obtaining" documents from Mr. Robare or Mr. Jones. Tr. 605. Like Mr. McDonald, he testified that "they've been prompt in their response[s] and full in their response[s]." Tr. 605.

Mr. Strauss confirmed that Triad subjected TRG to annual audits. Tr. 606, 608-09. An audit "consist[s] of looking [at] everything from [TRG's] blotters to [its] [Form] ADV to customer accounts to . . . advertising." Tr. 606. It involves "anything that's securities related [and] anything that's related to outside business activities." Tr. 606. The audit would also involve review of bank statements and client accounts, even if the client were not a client of Triad. Tr. 607.

Triad's audit involves review of the current Form ADV because Triad identifies the firm's activities and arrangements with its custodian and wants to ensure that the disclosures in Parts 1 and 2 and Schedule F are accurate. Tr. 607-08; *see* Tr. 687 (Mr. Jones affirming that Triad received a copy of Form ADV as part of the audit). If Triad discovers a deficiency in a firm's disclosures, it raises the issue with the firm and then, if the problem is one of general applicability, makes other firms aware of the issue. Tr. 608-09. Triad then follows up with the firm to ensure that the deficiency has been addressed. Tr. 609-10. The foregoing steps were taken with TRG. Tr. 610, 630; *see* Resp. Ex. 22 (2004 post-audit interview notes); Resp. Ex. 23 (2004 audit final interview form noting deficiencies).

Deficiencies in TRG's Form ADV would have been noted on an audit final interview form. Tr. 612; *see* Resp. Ex. 23 at 2. Mr. Strauss reviewed the Robare Group's audit final interview forms and did not notice any deficiencies noted by Triad about TRG's Form ADV. Tr. 612. He was likewise unaware of Triad having advised TRG of a problem with its Form ADV. Tr. 612-13, 616. Mr. Jones confirmed that Triad had never alerted TRG to a deficiency in its Form ADV. Tr. 687-88. Mr. Strauss confirmed that because it was a party to the Program Agreement, Triad was aware of the Program agreement. Tr. 615.

Mr. Strauss also confirmed that Triad "review[ed] and approve[d]" TRG's Form ADV. Tr. 630. Additionally, Mr. Strauss did not disagree that Triad "oversaw all aspects of [TRG's] compliance, including a review of the adequacy of [TRG's] disclosures." Tr. 631. Mr. Strauss affirmed that as of each time it reviewed TRG's Form ADV, Triad represented to TRG that TRG's disclosures were adequate and in compliance with then-current requirements.[14] Tr. 637-40. He phrased things in this manner because he believed the Commission's position as to what constitutes adequate disclosure is a "moving target." Tr. 637-39.

1.9 TRG's investment advice in relation to the Program agreement

At some point TRG asked Morningstar how many non-transaction fee mutual funds were on Fidelity's trading platform. Tr. 350. TRG learned that there were over 6600 such funds. Tr. 350. Of these, 450 were Fidelity funds. *Id.* Fidelity funds—those that did not pay fees under the Program—thus comprised less than 7% of those available on Fidelity's platform. *Id.* In other words, about 93% of the non-transaction fee funds on Fidelity's platform were potentially funds that could pay fees under the Program, though not all of those 93% actually paid fees. Tr. 354.

On questioning from counsel, Mr. Robare explained that over time, rather than 7%, his clients had averaged about 20% of their funds invested in Fidelity non-transaction fee funds. Tr. 351-52. Both he and Mr. Jones denied that payments under the Program influenced investment decisions. Tr. 343, 415, 671.

---

14 Mr. Jones agreed that TRG believed Triad "could provide [TRG with] independent advice about how or whether to disclose" the Program. Tr. 771-72.

The Division's evidence supported this assertion. According to one Division exhibit that covered July 2010 through November 2013, TRG's clients' investments never hit the 93% threshold. *See* Div. Ex. 78. Instead, the percentage of assets TRG's clients had in funds that paid fees under the Program varied between a low of 69% in August 2012 and 91% in July 2010. *Id.*; *see* Tr. 346-47. Mr. Robare attributed this variation to his assertion that fund choices were not based on whether the funds paid fees. Tr. 348.

During the economic downturn in 2007 and 2008, the Robare Group increased its clients' investments in Fidelity funds, *i.e.*, those funds for which the Robare Group would not receive fees from Fidelity. Tr. 337, 341. Specifically, TRG put his clients in Fidelity index funds because Mr. Robare wanted to keep his clients exposed to the market in anticipation of a rebound. Tr. 338, 341. And he choose Fidelity index funds, as opposed to any number of others, because he felt that they were less expensive for his clients.[15] Tr. 339.

At some point, TRG asked Fidelity to give it information about which funds paid fees, *i.e.*, those non-Fidelity funds that were "eligible." Tr. 342. On cross-examination, Mr. Robare explained that he asked for "the underlying breakdown" of the 12b-1 "line items" from the commission statement Triad sent TRG. Tr. 481. In response, TRG received a "virtually unintelligible" spreadsheet. Tr. 342. The spreadsheet was comprised of about 100 pages and thousands of rows of data that reflected the most recent payments under the Program. Tr. 816. It only showed current holdings and not all eligible funds. Tr. 816-18. The information was thus retrospective reflecting only past payments, not funds that could potentially pay fees.

Without contradiction, Mr. Robare testified that he decided it was "too difficult to determine" what funds were paying fees. Tr. 343. Because it was too confusing, he did not determine which funds paid fees. Tr. 481-82. Mr. Jones agreed. *See* Tr. 752 ("it's not worth our time"). Mr. Robare, therefore, did not know which funds actually paid fees. Tr. 537. He testified that in any event he did not care which funds paid fees. Tr. 343. Mr. Jones similarly said that information was unimportant because TRG "made independent investment decisions [based] on objective criteria" and was not concerned with whether a fund was an "eligible" fund. Tr. 752. TRG never received a list from Fidelity of eligible funds and never asked for one. Tr. 482. At some later point, TRG asked Fidelity what it meant to be an "eligible" non-transaction fee fund for purposes of the Program. Tr. 482. As Mr. Robare and Mr. Jones were credible and the Division presented neither evidence that Fidelity was more effusive on this point than Mr. Robare and Mr. Jones claimed, nor copies of Fidelity's spreadsheet, I accept the testimony about how difficult it would have been to determine what funds were "eligible."

The fact that Mr. Robare and Mr. Jones did not know what funds paid Program fees is supported the fact that in late October 2012, Kathy White from TRG e-mailed Mr. Fahey to ask "what funds and types of funds" paid fees under the Program. Resp. Ex. 88 at 8; Tr. 180. According to Mr. Fahey, Mr. Jones or Mr. Robare had asked a number of times about the funds that paid fees. Tr. 180-81. Based on that fact, Mr. Fahey surmised that TRG's principals did not know what funds paid fees. Tr. 180-81.

---

15 Mr. Robare said the Robare Group determined during the downturn that the "extra expense [of] active management" was not worth the added cost. Tr. 337-38.

Mr. Robare understood that the source of Program payments was 12b-1 distribution fees paid by non-Fidelity funds to Fidelity. Tr. 350; *see* Resp. Ex. 123. But Fidelity, at least in 2015, did not think they were 12b-1 fees. Tr. 190. Mr. Robare testified that he read the prospectus for every fund he recommended to his clients. Tr. 308, 352-53. According to Mr. Robare, the funds' prospectuses disclosed fees as either "12b-1 . . . distribution fees," or "shareholder servicing fees-distribution expenses paid to the distributor." Tr. 353. He opined that these characterizations amounted to the same thing. Tr. 353. Mr. Robare also said that investment advisers are not permitted to receive 12b-1 fees but that registered representatives are. Tr. 418.

After this proceeding was initiated, TRG sent a copy of the OIP to its clients. Tr. 413; *see* Resp. Ex. 120. Mr. Jones said the TRG did this in order to "fully inform [its] clients." Tr. 711. According to Mr. Robare, TRG quickly received "a number of [supportive] e-mails" from clients. Tr. 413. Mr. Jones testified that no clients left TRG as a result of the OIP and that clients responded in an "[o]verwhelmingly positive" manner. Tr. 712; *see* Resp. Ex. 108.

As noted, Mr. Jones and Mr. Robare concede that payments under the Program represent a potential conflict of interest. Tr. 719-20, 728; Stip. ¶ 30. Mr. Jones conceded that as a fiduciary, he is required to disclose actual or potential conflicts of interest. Tr. 720, 727-28. Mr. Robare acknowledged that he was ultimately responsible for the adequacy of TRG's disclosures. Tr. 371.

1.10 Fidelity's perspective

Melissa Morganti Zizza has worked at Fidelity for twenty-five years. Tr. 26. Since 2010, she has been a senior vice president in a division of Fidelity called Institutional Wealth Services. Tr. 25; *see* Tr. 37. Ms. Morganti Zizza has worked in that division for nine years. Tr. 26. Institutional Wealth Services serves as the custodian of client assets for registered investment advisers. Tr. 25. Its clients, therefore, are the registered investment advisers. Tr. 26.

Ms. Morganti Zizza testified that the ultimate investors actually have an account with Fidelity and are required to sign an agreement with it. Tr. 28. The investors and the adviser are each given access to the investor's Fidelity account and the investors, although clients of the advisers, can view their account on Fidelity's on-line platform. Tr. 28. She confirmed that Fidelity's platform offers access to both Fidelity and non-Fidelity mutual funds. Tr. 29.

As part of her responsibility, Ms. Morganti Zizza manages the Program. *See* Tr. 33, 37. Ms. Morganti Zizza testified that in some cases, Fidelity receives payments from the other mutual fund companies when investors invest in those companies' non-transaction fee funds through Fidelity. Tr. 31. In those cases, Fidelity is generally paid "basis points on the assets associated with those funds for servicing of the [funds'] customers." Tr. 31. Ms. Morganti Zizza opined that, although Fidelity does receive 12b-1 fees, the compensation it pays to advisers in relation to non-transaction fee funds are not 12b-1 fees. Tr. 31-32, 63-64, 70; *see* Tr. 91 ("We do not pay [12b-1 fees] to investment advisers"); *see also* Tr. 190. Instead, she said such fees are "shareholder service fees." Tr. 32, 70. Ms. Morganti Zizza, however, had not reviewed the prospectuses of the funds for which Fidelity paid compensation and thus did not know how those funds characterized the payments remitted to Fidelity. Tr. 71-73. She also did not know how Triad characterized the funds it transferred under the program to TRG. Tr. 73.

Ms. Morganti Zizza testified that through the Program, Fidelity compensates certain investment advisers for providing shareholder administrative services "that [Fidelity is] normally on the hook for" providing.[16] Tr. 33; *see* Tr. 34-35. "[I]n return," for providing those services, Fidelity "share[s]" some of the "revenue" it receives from other mutual fund companies. Tr. 33; *see* Tr. 36-37 ("It's sharing of our revenue that we receive for shareholder services to the investment advisor for those services."), 56-57. Fees under the program are calculated as basis points based on total assets. Tr. 35. The greater the assets, the greater the basis points. Tr. 36; *see* Div. Ex. 9 at 1; Tr. 48-49.

Ms. Morganti Zizza said that Fidelity does not currently consider fees paid under the Program to be commissions or a type of selling compensation. Tr. 36. On cross-examination, Ms. Morganti Zizza conceded that the administrative services for which investment advisers are compensated under the Program are the same services that advisers provide for investments outside the program. Tr. 69. In other words, despite providing exactly the same services, advisers received no compensation for investments outside the program. Ms. Morganti Zizza nonetheless denied that payments under the program were "sales[-]related." Tr. 69-70.

Although the basic Program has stayed the same during Ms. Morganti Zizza's tenure as senior vice president, the contract has changed. Tr. 38. The current contract changed the phrase "eligible NTF mutual funds" to "Non-Fidelity NTF mutual funds." Tr. 75. The word "eligible" was undefined. Tr. 75-76. Ms. Morganti Zizza inferred that the word eligible referred to non-Fidelity, non-transaction fee funds. Tr. 95-96.

Ms. Morganti Zizza said that the three-party agreement, in which fees were passed through Triad, was "unique," at least since 2010. Tr. 53, 80-81. She later amended her testimony and said that she had been told of other three-party agreements. Tr. 97-98. She did not know why Triad was inserted in the agreement. Tr. 53, 81. Based on her experience, it was "unusual for an advisor to work with the broker-dealer." Tr. 80.

Division Exhibit 33 is the current agreement with TRG. Tr. 55. It replaced Division Exhibit 9. Tr. 55. The current contract omits Triad as an intermediary. Tr. 56. As part of that contract, TRG warranted to Fidelity that it had:

---

[16] Ms. Morganti Zizza said:

> the registered investment advisers are opening new accounts. They're dealing with a lot of that paperwork on behalf of Fidelity. They're maintaining those accounts associated with Fidelity accounts. Money movement requests for customers that they may need to move in and out of funds, et cetera. So it's a lot of the administrative operational activities associated with that.

Tr. 68.

> made and will continue to make all appropriate disclosures to Clients (and obtained any necessary Client consents) with regard to any conflicts of interest that may arise from the arrangements contemplated by this Agreement and Adviser's relationship with Fidelity, including without limitation . . . any incentive arising in connection with Adviser's receipt (or prospective receipt) of fees on Non-Fidelity no-transaction fee ("NTF") mutual funds to favor those types of investments over others.

Div. Ex. 33 at 3. From Fidelity's perspective, it did not matter whether TRG fulfilled its disclosure responsibility through its Form ADV or through another method. Tr. 77.

Ms. Morganti Zizza testified that the language regarding the Program contained in Fidelity's December 2005 brokerage agreement was included to disclose potential conflicts for Fidelity created by the Program. Tr. 44-45; *see supra* § 1.4. She agreed that Fidelity's brokerage agreement "also disclose[d] the conflicts that [the Program] create[d] for" the Robare Group. Tr. 85; *see* Tr. 86-87.

1.11 Fidelity tells the Robare Group to change its Form ADV

As noted in section 1.6, *supra*, in 2011, Fidelity asked the Robare Group to change its Form ADV. That year, Fidelity reviewed the Forms ADV for all forty firms that participated in the Program to determine whether the firms were disclosing the Program.[17] Tr. 64, 89-90. One of Ms. Morganti Zizza's subordinates, Dennis Hawley, reviewed TRG's Form ADV and concluded that it did not disclose the program. Tr. 64; *see* Tr. 66 (stating that in Mr. Hawley's "opinion, it was not there"). According to Ms. Morganti Zizza, Fidelity directed its "relationship managers" to contact those investment advisers whose Forms ADV inadequately disclosed the program. Tr. 65. The relationship managers told the investment advisers to update their Forms ADV "in a quick manner" on pain of payments potentially being suspended. *Id.*

Timothy Fahey has since 2011 been employed by Fidelity as a vice president of relationship management in Institutional Wealth Services. Tr. 103-04, 106. In that role, he primarily serves as a liaison between Fidelity and principals of investment adviser firms that work with Fidelity. Tr. 105-06, 108. TRG is one of Mr. Fahey's clients. Tr. 107.

In 2011, Mr. Hawley instructed relationship managers to contact investment adviser clients if he deemed that the advisers' disclosure of the program was insufficient. Tr. 110-11. Mr. Fahey described Mr. Hawley as "the director of risk," or Legal Risk Compliance, within Institutional Wealth Services. Tr. 111. Mr. Fahey testified that Legal Risk Compliance

[17] This review was prompted by the Commission's investigation of a separate investment adviser's compensation arrangement, apparently also with Fidelity, *see* Tr. 898, that was not disclosed, Tr. 89-90; *see Focus Point Solutions*, Advisers Act Release No. 3458, 2012 WL 3863221 (Sept. 6, 2012).

"cursor[ily] review[ed]" TRG's Form ADV, found it deficient, and instructed Mr. Fahey to contact TRG about it. Tr. 113, 159.

To that end, Mr. Fahey phoned Mr. Jones on December 1, 2011, to discuss TRG's disclosure in its Form ADV. *See* Div. Ex. 41 at 1; Tr. 115-16. The next day, Mr. Fahey e-mailed Mr. Jones sample disclosure language provided by Legal Risk Compliance. Tr. 116; *see* Div. Ex. 41. Mr. Jones explained that the language Mr. Fahey sent was clearly boilerplate and that it used broker-dealer language that could cause confusion. Tr. 692. It also did not address Triad's part in the Program Agreement. Tr. 692. Mr. Jones opined that simply posting the suggested language in its entirety would not have resulted in an accurate disclosure. Tr. 693.

One week later, on December 9, 2011, Mr. Fahey e-mailed Mr. Jones to say that Fidelity's "legal team ha[d] escalated th[e] issue and" directed that changes to TRG's Form ADV occur by December 16, 2011. Div. Ex. 43. Mr. Fahey quoted language forwarded to him from the legal team indicating that TRG needed to make the requested changes by December 16, 2011, in order "to ensure that" payments under the program "continue without interruption." *Id.*; Tr. 121. Mr. Fahey and Mr. Jones spoke by telephone about this matter around this time. Tr. 122. On cross-examination, Mr. Fahey clarified that he, not Mr. Jones, raised the issue of interruption of payments under the Program. Tr. 162. Mr. Jones testified that the accelerated timeframe was a concern because TRG was "just in front of a new disclosure period" and had little time to act on Fidelity's request. Tr. 696. Despite this, Mr. Fahey opined that Mr. Jones was cooperative, "very appreciative[,] and took [the matter] seriously." Tr. 122, 159, 161.

On Sunday, December 11, 2011, Mr. Jones responded with proposed language.[18] Div. Ex. 44 at 1. He also asked "how strictly Fidelity" would be "requiring specific language" and noted that whatever language TRG used, the language would first have to be approved by TRG's "ADV consultant and its broker-dealer, Triad Advisors." *Id.*

Mr. Fahey forwarded Mr. Jones's proposed language to Mr. Hawley and asked, "[w]ill this work?" Div. Ex. 45 at 1. Mr. Hawley responded on December 12, saying "I don't approve or disapprove any language, but if that was on their ADV I would think that would be great."[19]

---

[18] Mr. Jones proposed to say:

> The Robare Group, Ltd. may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay The Robare Group, Ltd. a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from client accounts to The Robare Group, Ltd.

Div. Ex. 44 at 1.

[19] Despite his non-approval approval, it appears that Mr. Hawley is not an attorney. Tr. 196-97.

Id. Mr. Fahey then forwarded Mr. Hawley's e-mail to Mr. Jones and said that although Fidelity could neither approve nor disapprove any specific language, Mr. Jones "seem[ed] to have the language nailed." *Id.* Mr. Jones understood Mr. Fahey's e-mail to mean that TRG "had met or exceeded [Fidelity's] request." Tr. 700.

On December 13, Mr. Jones e-mailed Lisa Paygane, who worked for Renaissance. *See* Div. Ex. 46 at 4-5. Mr. Jones forwarded the language in footnote 18, *supra*, explained that Fidelity had asked that TRG include "something like" the language, and asked Ms. Paygane to "advise regarding [the] language . . . and [the] steps [TRG] need[ed] to take to update" the Form ADV. *Id.* at 5.

On December 15, Mr. Jones e-mailed Mr. Fahey to say that he had sent the disclosure language "to our back office team who does our ADV." Div. Ex. 47 at 2. He also advised that TRG would not be able to implement the changes until after the December 16 deadline and asked how best to inform Mr. Fahey that the change had been implemented "so this can be reinstated." *Id.* Mr. Fahey responded that:

> They are strongly enforcing the deadline, so there will be a temporary disruption in payment until this becomes available. I am still checking to see if the revenue will be accrued and paid or if it is lost altogether (temporarily). Either way, once you notify me that the update has been made, my understanding is that [payments under the Program] will be reinstated.

Id. at 1.

Ms. Paygane sent suggested language to Mr. Jones on Monday, December 19. Div. Ex. 46 at 3. After some back and forth, Mr. Jones told Ms. Paygane on December 20 that her language "[l]ook[ed] good to us," and said he wanted to update the Form ADV "as soon as possible." *Id.* at 1.

At some point in the next two days, Mr. Jones advised Mr. Fahey that TRG had updated its Form ADV. *See* Div. Ex. 47 at 1. According to Mr. Fahey, although TRG did not meet the December 16 deadline, Fidelity took into account the efforts TRG made and did not interrupt payments under the Program. Tr. 137.

1.12 Fidelity changes the Program Agreement

At some point in 2012, Fidelity decided to change the Program contract. Tr. 138-39; *see* Resp. Ex. 87. It thus drafted a new version of the contract, which Mr. Fahey sent in October to TRG for its review. Tr. 139-40, 172; *see* Resp. Ex. 87. The new contract did not interpose Triad between Fidelity and TRG. Tr. 140-41, 173; *see* Div. Ex. 33.

On reviewing the new contract, Mr. Jones and Mr. Robare noticed the omission of Triad. Tr. 172-73, 196, 702. Mr. Jones and Mr. Robare were concerned about this omission because Triad was TRG's partner and TRG did not wish to "cut them out of the [Program] revenue." Tr.

702-03, 818. Mr. Jones and Mr. Robare thus asked Mr. Fahey about the absence of Triad from the contract. Tr. 141, 196. Mr. Fahey could not immediately tell TRG why Fidelity omitted Triad from the contract. Tr. 703.

Mr. Jones and Mr. Robare discussed the issue with Triad, which "said it was okay." Tr. 703, 818. Triad did not suggest that the new agreement violated any law. Tr. 819. Renaissance also said that it would assist in crafting new language for TRG's disclosures. Tr. 704.

On investigating the matter, Mr. Fahey learned that Legal Risk Compliance had determined that interposing Triad was not necessary. Tr. 141-42. The Robare Group and Fidelity did not engage in a dialogue or negotiation over the new contract. Tr. 172.

In April 2013, Mr. Jones e-mailed Mr. Fahey because TRG had not received payments under the Program for March or April. Resp. Ex. 92 at 9; Tr. 143-44. Mr. Fahey investigated and learned that Fidelity was "still crediting [TRG's] account." Resp. Ex. 92 at 7.

Mr. Fahey informed Mr. Jones in late April that payments under the Program would be suspended until TRG signed the new agreement. Tr. 148; Resp. Ex. 92 at 5. Mr. Jones asked whether Fidelity could make an exception due the fact that the Commission was investigating TRG about TRG's disclosures related to the Program. Resp. Ex. 92 at 4. Mr. Fahey responded that Fidelity could not make an exception but understood TRG's position. *Id.* at 3.

In early May, Mr. Jones asked Mr. Fahey to explain the source of payments under the Program and "the net result to [TRG's] clients if [TRG did not] continue" in the Program. Resp. Ex. 92 at 2; Tr. 150-51, 183. After investigating, *see* Tr. 151, Mr. Fahey responded that:

> Fidelity receives a very small portion management fee from the mutual fund companies for distribution through Fidelity's platform, primarily for operational and distribution expense. Under [the Program], we share a portion of that fee (for certain funds) with certain advisers to cover a portion of related fund distribution expenses.

Resp. Ex. 92 at 1-2; Tr. 151. Mr. Robare testified that he understood Mr. Fahey's use of the word "share" to indicate that the payments TRG received under the Program came from the "pool of money" Fidelity received from mutual fund companies. Tr. 520. During the hearing, Mr. Fahey testified that he was "clearly" mistaken when he told Mr. Jones that the fees covered "fund distribution expenses." Tr. 152. Instead, they covered shareholder services. Tr. 151-52. Mr. Fahey did not know whether he told Mr. Jones about his mistaken advice. Tr. 184.

TRG signed a new agreement with Fidelity in May 2013. Tr. 434. Fidelity then began paying TRG directly under the Program. Tr. 506. Up until that point, Mr. Robare thought Program payments were commissions. Tr. 434-36. The omission of Triad from the new agreement gave him pause regarding how to characterize the payments. Tr. 434-35. He believed the payments were sourced from 12b-1 fees but could not definitively say whether they were commissions. Tr. 434-35. Mr. Robare believed the underlying source had not changed. Tr.

435-36. Of course, he could not say how Fidelity accounted internally for payments from mutual fund companies. Tr. 439.

Although he previously thought payments under the Program were commissions, Tr. 757-58, Fidelity's omission of Triad from the second Program agreement made Mr. Jones uncertain, *see* Tr. 760. On questioning, he said that he did not know how to characterize the payments. Tr. 761; *see* Tr. 762-63.

1.13 The Commission examines the Robare Group

From 2004 to 2012, Karyn Mysliwiec worked in the Commission's regional office in Fort Worth. Tr. 199. From 2004 to 2007, she was an examiner focused primarily on investment advisers and investment companies. Tr. 200. In 2007, she was promoted to a branch chief position. Tr. 199.

TRG was examined in 2008 by Ms. Mysliwiec's subordinate, Valeria Buschfort. Tr. 211. In preparation for that exam, Ms. Buschfort sent TRG a letter informing it of the exam. Tr. 223; Resp. Ex. 93. Among other things, Ms. Buschfort instructed TRG to provide copies of Part II of its Form ADV. Resp. Ex. 93 at 5; *see* Tr. 233-34. Evidence presented showed that Ms. Buschfort retrieved or received a copy of TRG's Form ADV, including schedule F. Resp. Exs. 94, 96 at 1; Tr. 235-45, 408-09. An examinee is not told about the various types of exams to which an examinee might be subject. Tr. 245-46. But the request form does detail the examination types. Tr. 249; Resp. Ex. 93 at 13-16. Ms. Mysliwiec did not know whether TRG was informed of the limited scope of the exam. Tr. 257-58. Mr. Robare testified that he did not know the difference between types of exams. Tr. 411. He explained that he had nothing "to compare it to." *Id.*

According to Ms. Buschfort's report of the exam she performed on TRG in 2008, she spent one day at TRG for the exam. Tr. 213; Div. Ex. 80 at 2. Ms. Mysliwiec characterized the exam as "short" and said it appeared to have been "a risk assessment verification exam." Tr. 215. It was not "thorough." Tr. 216.

Ms. Mysliwiec testified that an examiner typically would review a firm's Form ADV as part of an exam. Tr. 218. According to Mr. Robare, neither Ms. Buschfort nor any other Commission employee raised a concern with Mr. Robare during the exam about the adequacy of TRG's disclosures in its Form ADV. Tr. 409-10.

Following the exam, the Commission issued TRG a no further action letter. Resp. Ex. 95; Tr. 226. The letter informed TRG that the Commission had "concluded the examination[] and no written response . . . is necessary." Resp. Ex. 95 at 1; *see* Tr. 246-47. The letter cautioned, however, that the fact the Commission was taking no further action "should not be construed as any indication that [TRG's] activities are in full compliance with the federal securities laws or other applicable rules and regulations." Resp. Ex. 95 at 1. The letter did not mention a deficiency in the Form ADV. Tr. 247; *see* Resp. Ex. 95. Receipt of a letter indicating that the Commission intended to take no further action is the best possible result for an adviser following an exam. *See* Tr. 257-58.

Despite the admonition that he should not rely on the letter, Mr. Robare concluded that "in general . . . things were well." Tr. 410. He assumed that he would have been told if the Commission found fault with his Form ADV disclosures. *Id.*

1.14 Industry perspective

Miriam Lefkowitz testified regarding the adequacy of TRG's disclosures. *See* Tr. 826-928. She also provided an expert report. *See* Lefkowitz Report. Ms. Lefkowitz is a graduate of Columbia Law School. Lefkowitz Report at 3. She currently serves as a "compliance and regulatory adviser to small and regional SEC-registered retail-focused investment advisers and broker dealers." *Id.* at 2. Since 2002, she has been responsible for drafting Forms ADV for such firms or for advising firms about such drafting. *Id.* Ms. Lefkowitz previously worked in the Commission's enforcement division. *Id.*

Ms. Lefkowitz opined that investment advisers "struggle[] to determine what is sufficient disclosure." Lefkowitz Report at 4. She believes that the reason for this struggle is a lack of clear and consistent guidance. *Id.* Specifically, Ms. Lefkowitz feels there is an irreconcilable conflict between guidance to both fully disclose and to be concise. *Id.* at 6. In her experience, "this dilemma" has led investment advisers to seek the assistance of compliance professionals. *Id.* And, while some firms favor more "lengthy, complicated disclosures," others provide shorter disclosures that they believe are "more likely [to be] read and understood." *Id.* On the whole, Ms. Lefkowitz believes that no investment adviser or consultant can confidently say whether a given disclosure is sufficient. *Id.* Ms. Lefkowitz's testimony is consistent with Mr. Strauss's testimony that the Commission's position as to what constitutes adequate disclosure is a "moving target." Tr. 637-39.

The Division called no witnesses to rebut Ms. Lefkowitz's or Mr. Strauss's testimony. Absent such testimony, I am compelled to conclude, *for purposes of this matter*, that investment advisers operate in an uncertain regulatory environment in respect to disclosing potential conflicts of interest.

With reference to Commission guidance, Ms. Lefkowitz explained that 12b-1 fees fall into two categories. Tr. 923-24. The first category concerns "reimburse[ments] . . . for marketing and selling." Tr. 923. That sort of "transaction-based compensation" may only be paid to broker-dealers. Tr. 923-24. The second category concerns "shareholder service fees" that are paid in order to reimburse firms for "respond[ing] to investor inquiries and provid[ing] investors with information about their investments." Resp. Ex. 123. This second category of payments may be paid by a fund even if it does not have a 12b-1 plan. *Id.*; *see* Tr. 924-25. Recipients of payments of this latter type do not need to be broker-dealers. Tr. 925.

Ms. Lefkowitz testified that the Commission has expressly recognized that small and medium-sized firms will rely on compliance professionals. Tr. 928.

Issues

A. 1. Whether payments under the Program created a material conflict interest.

2. If so, whether the Respondents adequately disclosed the conflict of interest.

3. If the Respondents failed to adequately disclose any conflict of interest, whether the Division proved that the Respondents acted with scienter.

B. Whether Mr. Jones aided and abetted and caused violations of the Advisers Act.

C. Whether Respondents violated Section 207 of the Advisers Act.

Discussion and conclusions of law

2.1 Legal Principles

The Division alleged that Mr. Robare and the Robare Group willfully violated subsections (1) and (2) of Section 206 of the Advisers Act. OIP ¶ 14. It also alleged that Mr. Jones willfully aided and abetted and caused the same violations. *Id.* ¶ 15. Finally, the Division alleged that all three Respondents violated Section 207 of the Advisers Act. *Id.* ¶ 16.

Subsections (1) and (2) of Section 206 make it:

> unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or]
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. § 80b-6(1), (2).

"The 'fundamental purpose of [the Advisers Act is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus . . . achieve a high standard of business ethics in the securities industry.'" *Montford & Co.*, 2014 SEC LEXIS 1529, at *51-52 (quoting *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 186 (1963)). Section 206, therefore, "establishes 'federal fiduciary standards' to govern the conduct of investment advisers." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 471 n.11 (1977)). As a result, investment advisers must fully disclose all material facts and "employ reasonable care to avoid misleading [their] clients." *Montford & Co.*, 2014 SEC LEXIS 1529, at *50. To meet this obligation, an adviser must "disclose information that would expose any" actual or potential conflicts of interest. *Id.* at *51.

In order to establish liability under subsection (1) of Section 206, the Division must show that a respondent acted with scienter. *Montford & Co.*, 2014 SEC LEXIS 1529, at *55; *see SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). A showing of negligence, however, is sufficient to establish a violation of subsection (2). *Montford & Co.*, 2014 SEC LEXIS 1529, at *55-56. Scienter may be shown by evidence of recklessness. *Id.* at *56 n.108. In this context, recklessness is "an extreme departure from the standards of ordinary care . . . present[ing] a danger of misleading [clients] that is either known to the [actor] or is so obvious that the actor must have been aware of it.'" *Id.* (quoting *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 SEC LEXIS 3015, at *16 (Dec. 21, 2007)).

Negligence is the failure to exercise reasonable care. *IFG Network Sec.*, Exchange Act Release No. 54127, 2006 SEC LEXIS 1600, at *37 (July 11, 2006). Respondents were negligent if "they failed to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *SEC v. True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012). "[C]ompliance with industry standards is" a non-dispositive factor to consider in determining whether a Respondent was negligent. *Piper Capital Mgmt., Inc.*, Securities Act Release No. 8276, 2003 SEC LEXIS 2047, at *26 (Aug. 26, 2003).

Advisers Act Section 207 makes it:

> unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203, or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

15 U.S.C. § 80b-7. By rule, an investment adviser is required to amend and file with the Commission its Form ADV at least annually. 17 C.F.R. § 275.204-1(a). Any amendment to Form ADV is a "report" within the meaning of Section 207. 17 C.F.R. § 275.204-1(e). As a result of the statute and the rules, the Robare Group was required to annually file a Form ADV. As the plain language of Section 207 provides, filing a Form ADV in which an adviser "willfully . . . make[s] any untrue statement of a material fact . . . or willfully . . . omit[s] . . . any material fact," is a violation of Section 207.

To demonstrate liability for aiding, abetting, and causing, the Division must show

> (1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) knowledge of this violation on the part of the aider and abettor; and (3) "substantial assistance" by the aider and abettor in the achievement of the primary violation.

SEC v. Apuzzo, 689 F.3d 204, 211 (2d Cir. 2012). A person who aids and abets a violation is necessarily a cause of the violation. *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *33 (Feb. 27, 2012). Of note, "[a] company's scienter may be imputed from that of the individuals who control it." *Clark T. Blizzard*, Advisers Act Release No. 2253, 2004 WL 1416184, at *5 (June 23, 2004).

2.2. The nature of the payments under the Program Agreement

There is no dispute that investment advisers must disclose actual or potential material conflicts to investment clients. *See Montford & Co.*, 2014 SEC LEXIS 1529, at *51-52. The questions presented in this case are whether payments under the Program gave rise to an actual or potential *material* conflict of interest and, if so, whether the Robare Group adequately disclosed the conflict to its clients. The specific circumstances of this case make answering these questions more difficult than might otherwise be the case.

As an initial matter, the Division tacitly concedes that from 2005 onwards, the disclosure in *Fidelity's* brokerage agreement adequately disclosed the Program to the Robare Group's clients. *See* Div. Brief at 24-26. I discuss this more fully in section 2.4, below. Mr. Robare testified that he presented and reviewed the Fidelity agreement to each customer when the customer opened a new account. Tr. 357-60. Those clients who first came to the Robare Group in 2005 or later, were thus on notice of the Robare Group's participation in the Program.[20]

For purposes of this case, the problem is that about half of the Robare Group's clients have been clients since before 2005. They received a previous version of the Fidelity brokerage agreement that did not reference the Program. *See* Resp. Ex. 75. Because these pre-2005 clients did not receive the newer Fidelity brokerage agreements, they were not informed of the Program *through their brokerage agreements*. Whether they were entitled to disclosure otherwise, and if so, whether they received adequate disclosures are issues addressed below.[21]

In order to answer these questions, one must first consider the nature of the payments. More precisely, one must consider what the Robare Group in good faith believed the payments were. The Division repeatedly denies the payments were commissions. Instead, it asserts in a caption in its brief that the payments were "an asset-based fee." *See* Div. Br. at 5. The term

---

[20] The Division did not call any of the Robare Group's clients in an attempt to refute Mr. Robare's testimony that he reviewed the Fidelity brokerage agreement with his clients. *See* Tr. 357.

[21] In their post-hearing brief, Respondents argue that the general statute of limitations at 28 U.S.C. § 2462 bars the Division from relying on allegations that accrued more than five years before it filed the OIP on September 10, 2014. Resp. Br. at 45-46. Section 2462, however, only applies to actions brought for a "civil fine, penalty, or forfeiture." 28 U.S.C. § 2462. Actions seeking disgorgement and cease-and-desist orders are not subject to Section 2462. *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010) (cease-and-desist orders not subject to Section 2462); *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996) (disgorgement not a penalty for purposes of Section 2462).

"asset-based fee" is elsewhere undefined. It appears the Division's belief that the payments were not commissions is based on the fact that Ms. Morganti Zizza said the payments were not commissions, Div. Br. at 9, and that Fidelity now pays the Robare Group directly, which it could not do if the payments were commissions. The Division thus places great weight on what Fidelity thinks the payments represent.[22]

Respondents argue that the payments have always been 12b-1 fees or that at least, the Robare Group reasonably believed they were 12b-1 fees. I agree. For starters, until 2013, all relevant parties including Fidelity treated Program payments as 12b-1 fees. As late as April 2013, Mr. Fahey described the payments to Mr. Jones as fees that covered "fund distribution expenses." *See* Resp. Ex. 92 at 1-2. Fidelity also characterized them as 12b-1 fees to Triad and Triad did the same to the Robare Group. Tr. 619; Resp. Ex. 29. Triad reported the fees as 12b-1 fees on Robare Group's *commission* statement. Resp. Ex. 29 at 3; Resp. Ex. 30 at 3; Resp. Ex. 31 at 2. It is thus not surprising that the Robare Group thought the payments were 12b-1 fees, or commissions.[23]

Moreover, the Commission's own guidance to investors, on which Respondents rely, supports the parties' treatment of the payments as 12b-1 fees. The Commission's guidance says that 12b-1 fees fall into two categories. One of the two categories concerns "shareholder service fees." *See* Mutual Fund Fees and Expenses, http://www.sec.gov/answers/mffees.htm#distribution (last accessed May 28, 2015); Resp. Ex. 123. A fund may pay shareholder service fees without adopting a 12b-1 plan. *Id.* As Ms. Lefkowitz confirmed, this type of 12b-1 fee can be paid to investment advisers such as the Robare Group.[24] Tr. 925. The Division does not directly dispute

---

[22] The Division says that if the payments were commissions or 12b-1 fees, the current Program Agreement is illegal and thus unenforceable. Div. Br. at 12. Presumably, this assertion is based on 17 C.F.R. § 270.12b-1(h)(1)(ii), which prohibits payment of a 12b-1 fee as a commission for effecting a transaction through a broker. According to the Division, because no one thinks the current agreement is unenforceable, the payments must not be commissions or 12b-1 fees. I do not intend, however, to decide this matter based on whether Fidelity, Triad, or the Robare Group thinks the Program Agreement is unenforceable.

[23] Mr. Robare and Mr. Strauss both said 12b-1 fees were types of commissions. Tr. 376, 381, 614. The Division does not dispute this. Nor could it. *See* Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, 66 Fed. Reg. 27,760, 27,775 (May 18, 2001) ("We view Rule 12b-1 fees as commissions, and in fact, these fees are often described as trail commissions.").

[24] The other category concerns "distribution fees," which "include fees paid for marketing and selling fund shares, such as compensating brokers and others who sell fund shares, and paying for advertising, the printing and mailing of prospectuses to new investors, and the printing and mailing of sales literature." *See* http://www.sec.gov/answers/mffees.htm#distribution; Resp. Ex. 123. This type of 12b-1 fees can only be paid "if the fund has adopted a . . . 12b-1 plan." *Id.*

this testimony. The Robare Group thus reasonably believed that Program payments were 12b-1 fees, which it thought amounted to commissions.

The Division argues in its Statement of Facts that the fact that Triad was omitted from the second Program Agreement shows that payments under the Program could not have been commissions or 12b-1 fees because such payments cannot be paid directly by Fidelity to an adviser such as the Robare Group. Div. Br. at 12-13. It says there are only two options: either the Program agreement is illegal or the payments never were commissions and thus were not disclosed. *Id.* at 12-13.

But the Division's argument places far too much weight on Fidelity's unilateral decision to change the Program Agreement, as if Fidelity's determination of the nature of the fees is controlling. It is apparent that what happened was that (1) in 2004, Fidelity and Triad thought the payments were 12b-1 fees, which Triad and TRG both considered to be commissions, and thus had to be routed through Triad; and (2) Fidelity and Triad later both decided the payments were actually shareholder servicing fees that can be paid directly to the Robare Group. In other words, nothing untoward occurred. As the record shows, Fidelity presented the Robare Group with a take-it-or-leave contract that interposed Triad between Fidelity and the Robare Group. The Robare Group determined the payments originated as 12b-1 fees, because Mr. Robare read mutual fund prospectuses and Triad designated the payments as 12b-1 fees. Triad, which supervised the Robare Group's compliance, told the Robare Group this arrangement was acceptable.

In 2012, Fidelity told the Robare Group that there was no need to interpose Triad. And when Robare Group asked Triad—again, the firm that supervised the Robare Group on compliance issues—Triad blessed its own omission from the second contract. Tr. 703-04. Notably, the Robare Group also sent the new agreement to Renaissance. Tr. 703-04. Having operated for nine years under a regime in which Program payments were designated as 12b-1 fees, which the Robare Group and Triad considered to be commissions, it is not surprising that Mr. Robare and Mr. Jones were left scratching their heads when asked how to characterize payments under the second Program Agreement. *See* Tr. 429-36, 757-63.

This of course begs the question of why Fidelity first decided to interpose Triad and later decided Triad no longer needed to be involved. That question was not answered during the proceedings. In determining whether the Robare Group violated the Advisers Act, however, I do not place any weight on Fidelity's decisions.

2.3 Program payments are material

As noted, the parties agree that payments under the Program gave rise to a potential conflict of interest. They disagree whether the conflict was material. According to the Division, all conflicts of interest are material and must be disclosed. Respondents say that they need not disclose conflicts that amount to less than ten percent of their business income.[25] Resp. Br. at 24.

---

[25] Respondents glean this figure from guidance concerning disclosure by advisers of outside business activity. Resp. Br. at 23-24. The guidance creates a presumption that outside business

The Division has the better of this argument. First, "*full* disclosure" by investment advisers is the goal behind the Advisers Act. *Montford & Co.*, 2014 SEC LEXIS 1529, at *51-52 (emphasis added). Second, investment advisers are fiduciaries of their clients. *See Transamerica Mortg. Advisors*, 444 U.S. at 17. Third, "because of the fiduciary relationship between an adviser and its client, the percentage or absolute amount of commissions involved" is not determinative of whether a conflict should be disclosed. *Kingsley, Jennison, McNulty & Morse, Inc.*, Advisers Act Release No. 1396, 1993 SEC LEXIS 3551, at *14 (Dec. 23, 1993).

The rub in this case, of course, is that neither Mr. Robare nor Mr. Jones actually knew which funds would pay fees under the Program. This situation is perhaps unique. While this fact is certainly mitigating in terms of the question of harm, it does not change the fact that it is investment adviser clients who are entitled to know of potential conflicts of interest. Finding that this unique circumstance changes the analysis would provide a perverse disincentive for advisers to fully investigate potential conflicts. I therefore find that payments under the Program are material.

2.4 *Assuming certain of the Robare Group's disclosures were inadequate, the Division failed to show that the Robare Group or Mr. Robare acted with scienter*

2.4.1 *Time period of inadequate disclosures*

The current Form ADV instructs advisers that "[a]s . . . fiduciary[ies], [they] must seek to avoid conflicts of interest with [their] clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship." *See* Div. Ex. 90 at 81. It also provides that an adviser may satisfy this disclosure obligation in its firm's brochure "or by some other means." *Id.* at 82.

As noted above, the Division tacitly concedes that Fidelity's brokerage agreement from 2005 onwards adequately disclosed the potential conflict created by the Program. In language presented in a separate box in Fidelity's 2005 Brokerage agreement, Fidelity said, in relevant part, that:

---

activity that "represent[s] less than 10 percent of the [adviser's] time and income" is "not substantial" and need not be reported in item 4 of Form ADV. *See* Amendments to Form ADV, 2010 SEC LEXIS 2679.

A conflict that arises from outside business activity concerns the adviser's willingness and ability to devote his energies to his primary business of providing investment advice. Inasmuch as an adviser with more than one client can never devote 100% of his time and energy to one client's needs, some sort of distraction-type conflict is something a client might expect will always occur. Imposing a 10% threshold for an outside, distraction-type conflict of this nature is thus understandable. A distraction-type conflict, however, is different in kind from the sort of conflict at issue in this case, that might cause an adviser to recommend an investment not because it would benefit the client but because it would benefit the adviser.

> We may also make direct payments to your advisor. . . . We . . . may pay your advisor for performing certain back-office, administrative, custodial support and clerical services for [Fidelity] in connection with client accounts for which [Fidelity] act[s] as custodian. These payments may create an incentive for your advisor to favor certain types of investments over others.
>
> These and other services we furnish will provide benefits to your advisor and may be made available to your advisor, at no fee or a discounted fee, and the terms may vary among advisors depending upon the business they and their clients conduct with us and the other factors. Fidelity's provision of these services and other benefits to your advisor may be based on clients of your advisor placing a certain amount of assets in accounts with us within a certain period of time. Your advisor may be influenced by this in recommending or requiring that its clients establish accounts with us. These products and services may not necessarily benefit your account.

Resp. Ex. 76 at 1. According to Ms. Morganti Zizza, this language was included in the brokerage agreement to disclose potential conflicts for Fidelity created by the Program. Tr. 44-45. She agreed that Fidelity's Brokerage agreement " also disclose[d] the conflicts that [the Program] create[d] for" the Robare Group. Tr. 85; *see* Tr. 86-87.

In response to Mr. Robare's testimony that he presented Fidelity's brokerage agreement to clients and reviewed it with them and his testimony that this language disclosed the potential conflict to Robare Group clients, *see* Tr. 357-60, the Division argues that (1) the disclosure was not given to the approximately 150 clients who had accounts before 2005; (2) Fidelity cannot discharge the Robare Group's responsibility; and (3) the Robare Group could have included the Fidelity language in its own Form ADV. Div. Br. at 25-26. Notably, however, the Division does not dispute that Fidelity's brokerage agreement adequately disclosed the conflict created by the Program. Given that instructions for the Form ADV itself provide that advisers may disclose conflicts "by some other means," Div. Ex. 90 at 82, the Division's omission is telling.[26] Absent a contrary argument, I find that the Fidelity brokerage agreement from 2005 onwards adequately disclosed the potential conflict created by the Program.

As to the group of approximately 150 families who never saw the newer Fidelity brokerage agreement, the heart of the Division's argument is that Program payments were not

---

[26] The Division's points are all correct. Approximately 150 clients did not receive the Fidelity disclosure, the Robare Group's disclosure responsibilities are its to discharge, and the Robare Group could have added more language to its Forms ADV. But this does not amount to an argument that giving the Fidelity brokerage agreement to clients and discussing it with them was insufficient to disclose the potential conflict the Program created.

commissions. Inasmuch as they were not commissions, the Division says Robare Group failed to disclose them. Div. Br. at 12, 31-33.

To tighten the focus even more, the Robare Group's disclosure starting in December 2011 was plainly adequate. By December 2011, the Robare Group disclosed in its Form ADV that:

> Additionally, we may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from your accounts to us.

Div. Ex. 25 at 27. This language concisely encapsulates the Program. Although the Division suggests the use of the word "may" is misleading, I disagree. The Program Agreement informed the Robare Group that the underlying mutual funds could change or suspend payments at any time. Tr. 83; *see* Tr. 186; Resp. Ex. 1 at 2. It also provided that Fidelity, Robare Group, or Triad could cancel their participation in the Program, after an initial twenty-four month window, at any time on thirty days' notice. Resp. Ex. 1 at 2. Use of the word "may" thus accounts for the possible cessation of payments. *Cf.* Tr. 355.

The Division also says the relevant December 2011 disclosure begins with the false statement that the Robare Group did "not receive any economic benefit from a non-client for providing investment advice or other advisory services." Div. Br. at 21. This statement has to be read in context, however. *See* Div. Ex. 25 at 27. It is followed by language detailing economic benefits the Robare Group receives. It is therefore apparent that the statement is meant convey that no one other than clients pays the Robare Group *to give advice*.

The Division's case thus concerns the Robare Group's disclosures until December 2011 to its first approximately 150 clients.

2.4.2 The Division fails to establish scienter

Cutting to the chase, even assuming the Division is correct that the Robare Group failed adequately to disclose the Program until December 2011, the Division cannot prevail on its claim under Section 206(1) because it cannot show scienter. Scienter refers to "a mental state embracing intent to deceive, manipulate, or defraud." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 319 (2007)).

Here, the Division's evidence of scienter consists of nothing more than assertions that Mr. Robare was knowledgeable about the Program and possessed ultimate authority over TRG's Form ADV filings. Div. Br. at 33-34. These facts are not enough to meet the Division's burden to show scienter. Instead, the evidence developed at the hearing demonstrates that the Robare

Group and its principals did not act, at any time, with scienter or any intent to deceive, manipulate, or defraud.

First, in listening to Mr. Robare and Mr. Jones testify and observing their demeanor under cross-examination, it is difficult to imagine them trying to defraud anyone, let alone their investment clients. They came across as honest and committed to meeting their disclosure requirements. Indeed, their belt-and-suspenders approach to compliance, through which they relied on multiple firms, including Triad and Renaissance, to ensure the Robare Group was compliant with its disclosure obligations belies any argument that Mr. Robare or Mr. Jones acted with intent to deceive, manipulate, or defraud anyone.[27]

Second, Mr. Robare and Mr. Jones credibly testified that they did not know which funds paid fees under the Program. They also denied ever making an investment based on the information they lacked. The fact the percentage of client assets in non-paying funds always exceeded the percentage of available non-paying funds supports this testimony. And Mr. Robare's and Mr. Jones's testimony inferentially supports the determination that they did not act with the requisite ill intent.[28]

Third, even assuming that the Division had carried its threshold burden, which it has not, I find that Respondents relied in good faith on the advice of its compliance firms, including Triad and Renaissance. Respondents' reliance on the advice of compliance counsel "demonstrat[es] good faith and represents possible evidence of an absence of any intent to defraud." *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996); *see also Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (reliance on the advice of counsel is "evidence of good faith . . . relevant . . . in evaluating a defendant's scienter").

The Division contends that in order to negate evidence of scienter by showing they relied on compliance professionals, the Robare Group must show that its principals "made a complete disclosure to" the [compliance] professional, "sought advice as to the legality of" the Robare

---

[27] In the Statement of Facts section of its brief, the Division makes much of the fact that, when Mr. Fahey told Mr. Jones that the Robare Group needed to change its Form ADV, Mr. Jones did not respond by saying that TRG was already disclosing its participation in the Program. Div. Br. at 9. Implicitly, the Division suggests that this shows that Mr. Jones knew TRG had not adequately disclosed its participation in the Program. But Mr. Jones believed Fidelity was asking for additional disclosure and said he was happy to comply with whatever request Fidelity made. Tr. 701. And as a relatively smaller market participant, and one of 2,700 advisers using Fidelity's platform, it is plain that Mr. Jones judged it easier to get along by going along, rather than fight about an issue.

[28] In late October 2012, Kathy White from the Robare Group e-mailed Mr. Fahey to ask "what funds and types of funds" paid fees under the Program. Resp. Ex. 88; Tr. 180. According to Mr. Fahey, Mr. Jones or Mr. Robare had asked a number of times about the funds that paid fees. Tr. 180-81. Based on that fact, Mr. Fahey surmised that the Robare Group's principals did not know what funds paid fees. Tr. 180-81.

Group's conduct, "received advice that [its] conduct was legal, and then relied on that advice in good faith." Div. Br. at 35 (citing *SEC v. Savoy Indus.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981)). But the Division has not shown that Respondents operated with scienter in the first place, so there is nothing for Respondents to negate.

In any event, Respondents have established that they relied in good faith on compliance professionals. The Robare Group employed Renaissance to assist it with its disclosures. I have already determined that Renaissance was aware of the Program. *See supra*, § 1.8.1. Indeed, while it is true that the specific discussion could not be recalled seven to eight years after the fact, Mr. Robare testified that he told Renaissance about the Program, Tr. 510, and Mr. McDonald affirmed that it would have been a topic of discussion, Tr. 555. Mr. McDonald also opined based on this experience, that Mr. Robare and Mr. Jones were "very forthcoming," "involved[,] . . . proactive[,] and interested in trying to get it right." Tr. 557-58.

Triad also reviewed the Robare Group's disclosures and was also aware of the Program. *See supra*, § 1.8.2. In fact, Mr. Robare operated under the supervision of Triad's compliance department. Resp. Ex. 17 at 6. And, Triad "review[ed] and approve[d]" TRG's Form ADV. Tr. 630. Additionally, Mr. Strauss agreed that Triad "oversaw all aspects of [TRG's] compliance, including a review of the adequacy of [TRG's] disclosures." Tr. 631. Triad told the Robare Group that its disclosures were adequate and in compliance with then-current requirements.[29] Tr. 637-40.

And the advice the Robare Group received is readily apparent on the face of the Forms ADV it issued.

As to whether the Robare Group relied in good faith on the advice it received, its bears noting that the Robare Group is ultimately responsible for its disclosures. If a compliance professional advised the Robare Group to do something its principals knew to be unreasonable, neither the Robare Group nor its principals could escape liability by pointing a finger at the compliance professional. So long as the advice given is facially valid, however, and based on the Robare Group's full and honest disclosure, the Robare Group could rely on that advice in good faith. *Cf. Robert W. Armstrong, III*, Exchange Act Release No. 51920, 2005 SEC LEXIS 1497, at *37 (June 24, 2005) ("When a respondent knows financial statements are false and

[29] In a footnote, the Division says the Robare Group could not have validly relied on Triad's advice. It posits that although Triad was a party to the Program Agreement, there was no evidence that its auditors were aware of the Program Agreement. Div. Brief at 36 n.36. But the issue here is Mr. Robare's state of mind. And the Division offers no reason for Mr. Robare to have doubted that Triad, as a party to the very agreement at issue, was unaware of it. Surely, the fact that Triad's commission statement to the Robare Group contained a line item disclosing Program payments, would have been sufficient to alert Triad's auditor, even if that auditor was unaware of the Program or its payments. Indeed, Mr. Strauss said, among other things, that an audit would "involve looking at things such as maybe corporate bank statements as . . . minute as that might sound." Tr. 607. There can be little doubt that Triad would review sources of income.

misleading, he cannot 'rely' in good faith on an auditor's willingness to issue an unqualified audit opinion with respect to those statements.").

Here, during the relevant time frame, Triad and Fidelity both identified the payments as 12b-1 fees. Mr. Robare, seconded by Mr. Strauss, said 12b-1 fees amounted to commissions. The payments were designated as such on the Robare Group's commission statement. Viewed in this context, the Robare Group could validly rely on advice that they disclosed the payments as "selling compensation" or commissions received from Triad, which is the entity from which they were received. The Robare Group, therefore, could and did validly rely on the advice of Triad and Renaissance.

The Division's arguments that Respondents have not shown all the elements of a reliance on counsel defense are unconvincing, and, considering the Division's inability to meet its burden in establishing Respondents' scienter, ultimately irrelevant. For example, although Mr. Strauss and Mr. Jones testified that Triad annually audited the Robare Group, annually reviewed its Form ADV, and annually blessed its disclosures, the Division says these facts are irrelevant because the Robare Group presented no evidence that it "was specifically looking to [its compliance consultants] for advice on whether the particular disclosure" at issue was "accurate." Div. Br. at 36. But Mr. Strauss testified that Triad "review[ed] and approve[d]" the Robare Group's Form ADV, Tr. 630, and said that as of each time it reviewed the Robare Group's Form ADV, Triad represented to the Robare Group that its disclosures were adequate and in compliance with then-current requirements, Tr. 637-40. On these facts, neither Mr. Jones nor Mr. Robare were required to reject Triad's assessment and ask whether it really meant what it said as to each specific aspect of the Robare Group's Form ADV.

Changing tacks, the Division argues for the first time in its reply brief that Respondents could not rely on Triad in good faith because Triad was not disinterested and independent. In this regard, in their prehearing brief, Respondents argued that their lack of scienter is partly evidenced by their reliance on Triad. Resp. Prehearing Br. at 17. Their counsel referenced Respondents' reliance on Triad during his opening argument. Tr. 22. Mr. Jones testified that the Robare Group believed Triad "could provide [the Robare Group with] independent advice about how or whether to disclose" the Program. Tr. 771-72. The Division was thus on notice that Respondents' reliance on Triad was at issue. Because the Division failed to raise this argument earlier, when Respondents might have had an opportunity to respond to it, I find that the Division has waived any argument that Triad was not independent or that its alleged lack of independence means that Respondents could not have relied on Triad in good faith. *See Knighten v. Comm'r*, 702 F.2d 59, 60 n.1 (5th Cir. 1983) ("It is impermissible to mention an issue for the first time in a reply brief, because the appellee then has no opportunity to respond."); *cf. Anthony Fields*, Securities Act Release No. 9727, 2015 SEC LEXIS 662, at *79 & n.115 (Feb. 20, 2015) (holding that arguments supporting reversal are waived if first raised in a reply brief).

2.4.3 The Division fails to establish that Respondents were reckless

The Division says that "[a]t the very least, the Respondents' conduct was severely reckless" because they "fail[ed] to fully and accurately disclose . . . the" Program Agreement, payments under the Program, and the potential conflict the payments created. Div. Br. at 36. In this regard, "'[s]cienter includes recklessness,'" which is "'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Anthony Fields*, 2015 SEC LEXIS 662, at *44 (citations omitted); *see Abrams v. Baker Hughes Inc*., 292 F.3d 424, 430 (5th Cir. 2002). Although this definition "might not be the conceptual equivalent of intent as a matter of general philosophy," as a practical legal matter, it amounts to the same thing. *Sundstrand Corp. v. Sun Chem. Corp*., 553 F.2d 1033, 1045 (7th Cir. 1977). This is the case because this definition "measures conduct against an external standard which, under the circumstances of a given case, results in the conclusion that the reckless man should bear the risk of his omission." *Id.*

In a typical case, what constitutes ordinary care will be apparent without the presentation of evidence on the matter. Hiding one's head in the sand and ignoring red flags could amount to recklessness even without evidence of the relevant standard of care. *See Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000). Similarly, an assertion made "with utter disregard for whether there was a basis for the assertion[]" can amount to recklessness. *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir. 1978).

The relevant standard of ordinary care is not self-evident in this case, however. And the only evidence presented that arguably relates to the relevant standard of care came from Ms. Lefkowitz and Mr. Strauss. They testified without contradiction that, with respect to Form ADV disclosures, advisers operate in a difficult environment that presents challenges for even experienced compliance professionals. Lefkowitz Report at 4; Tr. 637-39. The Commission has recognized with approval the use of compliance experts to assist firms in meeting their disclosure obligations. *See* Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74,714, 74,724-25 & nn.105, 107, 74728 n.130 (Dec. 24, 2003). Ms. Lefkowitz testified that the Commission has expressly recognized that small and medium-sized firms will rely on compliance professionals. Tr. 928. And, according to Mr. Fahey, it "is very common" for an "adviser to employ a third party independent securities compliance consultant." Tr. 165. Absent evidence from the Division on this matter, I find that the relevant standard of care entails employing a compliance professional and following his or her advice. *Cf. Piper Capital Mgmt., Inc*., 2003 SEC LEXIS 2047, at *26-27 ("[C]ompliance with industry standards is" a non-dispositive factor to consider in determining whether a Respondent was negligent). The Robare Group relied on several compliance professionals and followed the advice it received. To say that it departed in an extreme fashion from the standards of ordinary care is to unhinge the word extreme from its ordinary definition. *See SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011) ("Depending on others to ensure the accuracy of disclosures . . . even if inexcusably negligent—is not severely reckless conduct"). The Division thus failed to show that Mr. Robare or the Robare Group acted with scienter. As a result, the Division has not demonstrated liability under Section 206(1).

2.5 The Division failed to show a negligent violation of Section 206(2)

The Division says the Robare Group and Mr. Robare are liable for negligent violations of Section 206(2). In this context, negligence is the failure to exercise reasonable care, *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at *114 (Jan. 31, 2008), "meaning that [Respondents] failed to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation," *True N. Fin. Corp.*, 909 F. Supp. 2d at 1122. As this test suggests, in order to show negligence, the Division must present some evidence of the applicable standard of reasonable care. *See Shanahan*, 646 F.3d at 546; *see also SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014).

As noted, *supra* § 2.4.3, in many cases, it is readily apparent that a person failed to act with reasonable care given the situation; no additional evidence is needed beyond that which reveals what occurred. In this case, however, where the Robare Group relied on multiple firms to guide its compliance efforts, some evidence as to the applicable standard of care is necessary.

In this regard, I am guided by the decision in *Shanahan*. *See* 646 F.3d 536. The issue in *Shanahan* concerned the propriety of a company's disclosures of certain back-dated options. *Id.* at 539-40, 544. Shanahan "had no personal expertise in" such matters, "he relied on the [company's] finance and accounting departments, outside and general counsel, and the company's independent auditors" to "appropriate[ly] and accurate[ly] disclos[e]" the back-dated options. *Id.* at 544. None of these professionals alerted Shanahan to any problem. *Id.* at 546. At trial, the Commission presented "no evidence, through expert or lay testimony, documentary evidence or otherwise with respect to the degree of care that an ordinarily careful person would use under the same or similar circumstances." *Id.* at 545. The Eighth Circuit held that absent evidence not presented that Shanahan "violated an applicable standard of reasonable care," the Commission could not prevail. *Id.* at 546.

The same result prevails here. Neither Mr. Robare nor Mr. Jones have expertise with respect to properly disclosing the information required by Form ADV. *See* Tr. 682-83. And, the Division did not dispute that compliance experts have difficulty with this issue. *See* Lefkowitz Report at 4; Tr. 637-39. Mr. Robare and Mr. Jones thus relied on experts, as did Shanahan. As with Shanahan, no one told the Robare Group there was a problem. In this circumstance, as in *Shanahan*, the Division's failure to present evidence that Respondents "violated an applicable standard of reasonable care [is] fatal to its case." *Shanahan*, 646 F.3d at 546; *see also Ginder*, 752 F.3d at 576 (relying on *Shanahan*).

2.6 Mr. Jones did not aid and abet and cause violations of subsections (1) and (2) of Section 206.

In order to find that Mr. Jones aided and abetted and caused violations of subsections (1) and (2) of Section 206, the Division was required to show, *inter alia*, a primary violation. *Clark T. Blizzard*, 2004 WL 1416184, at *5 n.10. I have determined that no primary violation occurred. As such, Mr. Jones is not liable for aiding, abetting, and causing violations of subsections (1) and (2) of Section 206.

2.7. No Respondent willfully violated Section 207

In order to show a violation of Section 207, the Division must show that Respondents "willfully . . . ma[d]e any untrue statement of a material fact in any" Form ADV "filed with the Commission . . . or willfully . . . omit[ted] to state in any such" Form ADV "any material fact which is required to be stated therein." 15 U.S.C. § 80b-7; 17 C.F.R. § 275.204-1(a), (e). The meaning of the term "willfully" depends on the context in which it is used. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). In the securities context, willfulness means that the respondent intentionally committed the act or omission that constituted the violation. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *see SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla. 2007) (applying this definition of willfulness to Section 207); *SEC. v. Moran*, 922 F. Supp. 867, 900 (S.D.N.Y. 1996) (same). Given Respondents' diligence and the Division's failure to show that they failed to act with reasonable care, it cannot be said that they willfully made an untrue statement of material fact or willfully omitted material facts in any Form ADV. The Section 207 charge therefore cannot be sustained.[30]

Order

Based on the findings and conclusions set forth above, I ORDER that this administrative proceeding is DISMISSED.

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 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 motion to correct 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.

James E. Grimes
Administrative Law Judge

[30] Even if I were to find that Respondents violated Section 207, I would conclude that no sanctions were appropriate. The 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), weigh in Respondents' favor and do not support the sanctions sought by the Division. Respondents did not act with scienter and their conduct was not egregious. Indeed they relied on compliance professionals in attempting to craft appropriate disclosures. Finally, the Division presented no evidence of any losses to Respondents' clients.