

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 63006 / September 29, 2010**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 3090 / September 29, 2010**

**ADMINISTRATIVE PROCEEDINGS**  
**File No. 3-14072**

**In the Matter of**

**VALENTINE CAPITAL  
ASSET MANAGEMENT, INC.  
and JOHN LEO VALENTINE**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS  
PURSUANT TO SECTION 15(b)(6) OF THE  
SECURITIES EXCHANGE ACT OF 1934  
AND SECTIONS 203(e), 203(f) AND 203(k) OF  
THE INVESTMENT ADVISERS ACT OF  
1940, MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS AND CEASE-AND-  
DESIST ORDERS**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Valentine Capital Asset Management, Inc. (“VCAM”) and John Leo Valentine (“Valentine”) (collectively “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

#### **Summary**

This matter involves an investment adviser's failure to fully and adequately disclose a material conflict of interest relating to the commissions received as a result of an investment recommendation. The adviser, Respondent VCAM, and its principal, Respondent Valentine, failed to fully disclose to clients that Valentine would receive additional commissions through Valentine's association with the registered broker-dealer that executed the clients' transactions, if clients accepted the recommendation to exchange one series of a managed futures fund (the "Fund") for another series of the Fund. Respondents also failed to fully and adequately disclose that these exchanges would cost clients additional commissions. Respondents received nearly \$400,000 in additional revenue as a result of commissions from the clients' exchanges.

Respondents' failure to fully disclose these conflicts of interest relating to the receipt of commissions violated Section 206(2) of the Advisers Act.

#### **Respondents**

1. Respondent VCAM, a California corporation located in San Ramon, California, is an investment adviser registered with the Commission. In its most recent Form ADV, VCAM disclosed that it had approximately \$211 million in assets under management and over 500 clients.

2. Respondent Valentine, age 48, is the president and owner of VCAM and has been since the firm's inception. At the end of 2007, Valentine also managed an additional \$400 million in assets as a registered representative with an independent broker-dealer. Valentine recommended that his clients open brokerage accounts at this broker-dealer to hold their investments in the Fund, among other holdings. Valentine provided investment advice in connection with these accounts. The broker-dealer executed the Fund transactions and paid commissions to Valentine.

#### **Background**

3. The Fund is a managed futures fund and commodity pool with both Series A and Series B limited partnership units. Series A and Series B follow the same investment philosophy and typically hold the same investments, with leverage as the primary difference between the two series. Series A of the Fund invests 20% of its assets in commodities futures and keeps the remaining 80% in cash and cash instruments, while Series B invests 30% of its assets in commodities futures and keeps the remaining 70% in cash and cash instruments. In other words, Series B has 50% greater exposure to commodities than Series A, but with increased risk, volatility, and a 17% increase in costs.

4. Investors paid to the Fund a 4% annual commission, which was capped once it reached a total of 10% of the initial investment. The broker-dealer that executed the Fund transactions passed on this commission to Valentine, the selling agent in this case. Investors reached the 10% commissions cap after holding the Fund for approximately 2.5 years. Once an investor paid the maximum in total commissions, the Fund then no longer passed commissions on to the selling agent. Instead, the Fund collected the commissions monthly and then simultaneously returned them to investors in-kind in the form of additional Fund units.

5. Valentine first learned of the Fund in mid-2005, when searching for non-correlated investments that were designed to perform independently of broader markets. After considering the alternatives, Valentine advised his clients to invest in Series A of the Fund. As of August 2007, two-thirds of Valentine's client base had invested in the Fund, the vast majority of which was in Series A. Approximately 450 of Valentine's 700 clients had invested over \$40 million in Series A, with Valentine's firm earning approximately \$3 million in commissions from these transactions. Only 10 of Valentine's clients were invested in Series B, for less than \$1 million in total investments.

### **The Fund Exchanges**

6. In December 2007, Valentine began advising many of his clients to exchange at least some portion of their Series A holdings for Series B. During the staff's investigation, Valentine indicated that he had been monitoring the housing and banking markets for some time and decided that reallocation was appropriate due to those factors and others. Accordingly, Valentine advised many of his clients to exchange their Series A shares for Series B to increase the leverage on their positions and thus increase their exposure to expected gains in the non-correlated investment sector.

7. Over the next few months, Valentine and his advisory representatives met with clients to receive their consent for the exchange from Series A to Series B. Between December 2007 and May 2008, approximately 140 clients switched from Series A to Series B. The vast majority of these clients had reached or were very close to reaching their 10% commissions limit. VCAM periodically received data on which investors had reached or would soon reach the 10% commissions cap.

8. For any client who had reached the 10% commissions limit on Series A, switching to Series B reset the clock on commissions, and any rebates that they were receiving from the Fund ceased. This also meant that they began paying a new commission on reallocated assets of 4% annually with a 10% maximum. For clients who had not yet reached the commissions cap when they switched from Series A to Series B, they lost any progress they had made in their Series A investment towards the commissions limit. For these investors, many of whom were within a few months of reaching the commissions cap when they switched from Series A to Series B of the Fund, the exchanges increased the amount of commission that Valentine received.

## **VCAM and Valentine Failed to Fully and Adequately Disclose Their Conflict of Interest**

9. Section 206 of the Advisers Act prohibits fraud by investment advisers against clients and prospective clients. Investment advisers owe a fiduciary duty to their clients under Section 206. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963). As such, they must act in “utmost good faith,” use reasonable care to avoid misleading clients, and fully and fairly disclose conflicts of interest. *Id.* at 194, 201. “[A] violation of Section 206(2) of the Advisers Act may rest on a finding of simple negligence.” SEC v. Steadman, 967 F.2d 636, 643 n. 5 (D.C. Cir. 1992) (citing Capital Gains, 375 U.S. at 195).

10. An investment adviser has a duty to fully disclose to its clients all material information that is intended “to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice which was not disinterested.” Capital Gains, 375 U.S. at 191-92; *see also Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (stating that “[i]t is indisputable that potential conflicts of interest are ‘material’ facts with respect to clients”). Failure to disclose an economic self-interest constitutes a breach of an investment adviser’s fiduciary duty under Section 206. SEC v. Wall Street Publ’g Inst., Inc., 591 F. Supp. 1070, 1084 (D.D.C. 1984). Similarly, an investment adviser has a duty to disclose to clients all material information that might affect an investment adviser’s ability to render unbiased advice. In re Renaissance Cap. Advisors, Inc., Investment Advisers Act Rel. No. 1688, 1997 WL 794479, at \*3 (Dec. 22, 1997).

11. Valentine was aware that his advice to his clients to exchange Series A shares for Series B shares would increase the brokerage commissions he received. Valentine’s clients expected VCAM and Valentine to act as fiduciaries in connection with these investment recommendations. However, despite this, VCAM and Valentine failed to fully disclose their conflict to their clients.

12. The Fund’s Prospectus and exchange paperwork disclosed information about the switches. For example, the Fund’s Prospectus stated that once an investor reached the 10% cap on commissions, the investor would receive rebated units from the Fund equal to the value of the monthly commissions. Similarly, the Fund’s Series Exchange Subscription Agreement contained language informing investors that they would be charged the maximum 10% commissions for Series B regardless of any previous investment in Series A. Each client who made the switch signed the Series Exchange Subscription Agreement. However, VCAM and Valentine were still required to make full and clear disclosures about any conflict of interest in recommending the exchanges.

13. As a result of the conduct described above, VCAM and Valentine willfully<sup>1</sup> violated Section 206(2) of the Advisers Act, which makes it unlawful for an adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client.

---

<sup>1</sup> A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor

## Undertakings

14. Within thirty (30) days of the issuance of this Order, Respondents undertake to mail a copy of the Form ADV which incorporates the paragraphs contained in the Summary section of this Order to each of VCAM's existing clients, and specify that the entire Order will be posted on VCAM's website. Within thirty (30) days of the issuance of this Order, Respondents also undertake to post a copy of this Order on VCAM's website and maintain this copy of the Order on VCAM's website for a period of six (6) months. Respondents shall also provide a copy of the Form ADV to any new client that engages VCAM or Valentine within one (1) year of the date of this Order.

## IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent VCAM's and Valentine's Offers.

Accordingly, pursuant to Section 15(b)(6) of the Exchange Act and Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents Valentine Capital Asset Management, Inc. and John Leo Valentine cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act;

B. Respondents Valentine Capital Asset Management, Inc. and John Leo Valentine are censured.

C. Respondent Valentine Capital Asset Management, Inc. shall, within 6 months of the entry of this Order, pay disgorgement of \$394,710.82 and prejudgment interest of \$37,296.71 to the affected advisory clients who invested in the Fund during the relevant period, through a distribution calculation which has been reviewed and approved by the staff of the Commission. Said calculation must be submitted to the staff within 90 days from the entry of this Order and must include specific information as to each client's investment amount, investment timeline, and amount to be paid. Proof and documentation of such payment (whether in the form of fee credits, cancelled checks, or otherwise) shall be submitted within 14 days of payment under cover letter that identifies Valentine Capital Asset Management, Inc. as a Respondent in these proceedings and the file number of these proceedings, to Marc J. Fagel, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. In the event that Respondent fails to complete the distribution under the terms set forth in this Order, payment of the full distribution amount (or the balance thereof) shall be due and payable immediately to the Commission, without further application.

---

“also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

D. Respondent John Leo Valentine shall pay a civil money penalty in the amount of \$70,000.00 to the United States Treasury. Payment shall be made in the following installments: (1) \$25,000.00 within thirty (30) days of entry of this Order and (2) the remaining \$45,000.00 within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies John Leo Valentine as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Marc J. Fagel, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, California 94104.

E. Valentine Capital Asset Management, Inc. and John Leo Valentine shall comply with the undertakings enumerated in Section III, Paragraph 14 above.

By the Commission.

Elizabeth M. Murphy  
Secretary

Service List

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders ("Order") on the Respondents and their legal agent.

The attached Order has been sent to the following parties and other persons entitled to notice:

Honorable Brenda P. Murray  
Chief Administrative Law Judge  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-2557

Sahil W. Desai, Esq.  
San Francisco Regional Office  
Securities and Exchange Commission  
44 Montgomery Street, Suite 2600  
San Francisco, CA 94104

Valentine Capital Asset Management, Inc.  
c/o David Bayless, Esq.  
Covington & Burling LLP  
One Front Street  
San Francisco, CA 94111

John Leo Valentine  
c/o David Bayless, Esq.  
Covington & Burling LLP  
One Front Street  
San Francisco, CA 94111

David Bayless, Esq.  
Covington & Burling LLP  
One Front Street  
San Francisco, CA 94111  
(Counsel for Valentine Capital Asset Management, Inc. and John Leo Valentine)