

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

**SECURITIES ACT OF 1933**

**Release No. 10283 / January 18, 2017**

**SECURITIES EXCHANGE ACT OF 1934**

**Release No. 79823 / January 18, 2017**

**ACCOUNTING AND AUDITING ENFORCEMENT**

**Release No. 3849 / January 18, 2017**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-17795**

**In the Matter of**

**MDC PARTNERS INC.,**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against MDC Partners Inc. (“MDCA” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. This matter arises from two sets of federal securities laws violations involving MDC Partners Inc., a publicly-traded marketing firm. First, for several years, MDCA failed to disclose significant amounts of compensation paid to its then Chairman and Chief Executive Officer, Miles S. Nadal, in the form of a wide range of perquisites and personal benefits. After MDCA conducted an in-depth internal investigation in response to inquiries from the Commission staff, Nadal resigned and agreed to return \$10.582 million in cash bonus awards and to pay back \$11.285 million worth of perquisites, personal expense reimbursements and other items of value that he improperly received from 2009 through 2014.

2. Second, MDCA violated the disclosure requirements concerning non-GAAP financial measures contained in Regulation G and Item 10(e) of Regulation S-K.<sup>2</sup> Despite agreeing to comply with non-GAAP financial measure disclosure rules in December 2012 correspondence with the Commission's Division of Corporation Finance, MDCA continued to violate those rules for six quarters by failing to afford equal or greater prominence to GAAP measures in earnings release presentations containing non-GAAP financial measures. Furthermore, for seven quarters between mid-2012 and early-2014, MDCA did not reconcile "organic revenue growth," which as calculated by MDCA was a non-GAAP financial measure, to GAAP revenue.

#### Respondent and Relevant Individual

3. Respondent **MDC Partners Inc.** is a Canadian corporation headquartered in New York, New York, engaged in the advertising, marketing and communications businesses. MDC Partners Inc.'s common stock is registered under Section 12(b) of the Exchange Act and trades on the NASDAQ National Market under the ticker symbol "MDCA."

4. Miles S. Nadal was the Chairman of the Board, Chief Executive Officer and President of MDCA from 1986 until July 2015.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> "GAAP" refers to U.S. generally accepted accounting principles.

## Facts

### **MDCA's Failure to Disclose Compensation Paid to Nadal**

5. From 2009 through 2014, MDCA paid \$11.285 million worth of perquisites and personal benefits to Miles S. Nadal, its then Chairman and CEO, without disclosing such items as compensation in its definitive proxy statements. Items that MDCA paid for on Nadal's behalf, but did not disclose, include, but are not limited to, private aircraft usage, cosmetic surgery, yacht-and-sports-car-related expenses, jewelry, cash for tips and gratuities, medical expenses for Nadal, family members and others, charitable donations in Nadal's name, pet care, vacation and personal travel expenses, and club memberships.

6. In definitive proxy statements for 2009 through 2014, MDCA disclosed approximately \$3.87 million worth of perquisites and personal benefits provided to Nadal. MDCA disclosed an annual \$500,000 perquisite allowance; interest benefits received on interest free loans in 2009, 2010, 2011 and 2012; disability, medical, life insurance benefits in 2009 and 2010; and legal fees and the use of company aircraft and apartment in 2014.

7. However, MDCA's definitive proxy statements for 2009 through 2014 failed to disclose an annual average of approximately \$1.88 million worth of additional perquisites and personal benefits provided to Nadal, thereby understating the perquisites and personal benefits portion of Nadal's compensation by an average of almost 300% each year.

8. MDCA incorporated its definitive proxy statements into its annual reports by reference.

9. From March 2013 through April 2014, MDCA sold \$735 million in debt securities. MDCA's offering documents concerning these debt issuances incorporated by reference the deficient executive compensation disclosures in MDCA's April 2012 and April 2013 definitive proxy statements.

10. From 2009 through 2014, MDCA incorrectly recorded payments for the benefit of, and reimbursements to, Nadal as business expenses, and not compensation. As a result, its books, records, and accounts did not, in reasonable detail, accurately and fairly reflect its disposition of assets.

11. In addition, MDCA failed to devise and maintain internal accounting controls relating to payments for the benefit of, and reimbursements to, Nadal that were sufficient to provide reasonable assurances that transactions were recorded as necessary to maintain the accountability of assets. These failures included, for instance, MDCA's practice of reimbursing Nadal several thousands of dollars a month for cash payments of "tips and gratuities," based solely on a line item in Nadal's monthly expense submissions. By way of further example, MDCA paid more than \$1.5 million for the benefit of Nadal outside of its monthly expense reimbursement process.

12. After MDCA's internal investigation, which was launched upon receipt of a subpoena from the Commission staff and continued after additional staff inquiries, Nadal resigned

and agreed to return \$10.582 million in cash bonus awards and to pay back \$11.285 million worth of perquisites, personal expense reimbursements and other items of value that he improperly received from 2009 through 2014.

### **MDCA's Failure to Comply with Non-GAAP Financial Measure Disclosure Requirements**

13. Instruction 2 of Item 2.02 of Form 8-K requires an issuer to comply with Item 10(e)(1)(i) of Regulation S-K when it makes a public earnings announcement or other disclosure of material non-public information regarding its results of operations or financial condition for a completed fiscal year or quarter. Item 10(e)(1)(i)(A) of Regulation S-K provides that an issuer, when disclosing a non-GAAP financial measure subject to the item, must include a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP. Item 10(e)(1)(i)(B) of Regulation S-K requires an issuer, when disclosing a non-GAAP financial measure subject to the item, to include a reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed or released with the most comparable financial measure or measures calculated and presented in accordance with GAAP.

14. Prior to July 2014, MDCA's earnings releases failed to comply with the prominence requirement set forth in Item 10(e)(1)(i)(A) of Regulation S-K. In a letter to MDCA dated November 27, 2012, staff in the Commission's Division of Corporation Finance expressed concerns about MDCA's compliance with the prominence requirement in its November 5, 2012 earnings release, and directed MDCA's attention to Item 10(e) of Regulation S-K. MDCA responded in a letter dated December 10, 2012, indicating that it would comply with Item 10(e) of Regulation S-K in future earnings releases.

15. Notwithstanding its representation to the Commission staff, MDCA, in its subsequent earnings release dated February 21, 2013, and in quarterly earnings releases thereafter through April 24, 2014, failed to comply with the prominence requirement. For instance, MDCA repeatedly emphasized non-GAAP financial measures such as EBITDA, EBITDA margin, and free cash flow without giving equal or greater prominence to the comparable GAAP measures.

16. In addition to its failure to comply with the prominence requirement, from July 30, 2012 through March 10, 2014, MDCA also failed to comply with non-GAAP financial measure disclosure requirements when it made disclosures concerning "organic revenue growth," a non-GAAP financial measure that MDCA utilized in communications with market participants.

17. According to its public statements, MDCA's "organic revenue growth" represented growth in revenue, excluding the effects of two reconciling items: acquisitions and foreign exchange impacts. However, with respect to its second quarter 2012 through year end 2013 results, MDCA incorporated a third reconciling item into its calculation of "organic revenue growth." MDCA did not disclose in earnings releases or filings on Forms 10-Q and 10-K the existence of this third reconciling item.

18. MDCA's undisclosed reconciling item had an impact on the amount of "organic revenue growth" MDCA publicized in connection with its results for the second quarter of 2012

through the end of 2013. Had MDCA calculated “organic revenue growth” consistent with its filings with the Commission, *i.e.* by comparing period over period growth in MDCA’s recorded GAAP revenue, and excluding the effects of acquisitions and foreign exchange impacts, MDCA’s “organic revenue growth” would have been lower.

19. MDCA’s undisclosed reconciling item arose out of the Company’s change, during the second quarter of 2012, to its presentation of revenue derived from a shift to net revenue from gross revenue accounting for two partner-firm subsidiaries. In its “organic revenue growth” calculations for the second quarter 2012 through the first quarter of 2013, MDCA made adjustments to revenue for the corresponding prior periods (the second quarter of 2011 through the first quarter of 2012) in order to derive revenue figures that MDCA would have obtained had it presented revenue the same way it began presenting it for two partner-firm subsidiaries in the second quarter of 2012. MDCA’s adjustments also affected its “organic revenue growth” calculations for the six months ended June 30, 2013, the nine months ended September 30, 2013, and the year ended December 31, 2013.

20. During the time period in which MDCA included the undisclosed reconciling item in its “organic revenue growth” calculations, MDCA’s earnings releases and filings on Forms 10-Q and 10-K did not include tabular reconciliations to GAAP revenue.

### **Violations**

21. Section 14(a) of the Exchange Act makes it unlawful to solicit any proxy in respect of any security (other than an exempted security) registered pursuant to Section 12 of the Exchange Act in contravention of such rules and regulations as the Commission may prescribe. Rule 14a-3 prohibits issuers with securities registered pursuant to Section 12 of the Exchange Act from soliciting proxies without furnishing proxy statements containing the information specified in Schedule 14A, including executive compensation disclosures pursuant to Item 402 of Regulation S-K. Item 402 of Regulation S-K requires disclosure of the total value of all perquisites and other personal benefits provided to named executive officers (including CEOs) who receive at least \$10,000 worth of such items in a given year. Item 402 of Regulation S-K also requires disclosure of all perquisites and personal benefits by type, and specific identification of any perquisite or personal benefit that exceeds the greater of \$25,000 or 10% of the total perquisites. Rule 14a-9 prohibits the use of proxy statements containing materially false or misleading statements or materially misleading omissions. As a result of the conduct described above, MDCA violated Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 thereunder.

22. Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11 and 13a-13 thereunder require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission, among other things, annual, quarterly and current reports as the Commission may require. As a result of its failure to comply with the non-GAAP financial measure disclosure requirements under Item 10(e) of Regulation S-K and the incorporation of deficient proxy statements by reference in its annual reports, MDCA violated Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11 and 13a-13 thereunder.

23. As a result of the conduct described above, MDCA violated Rule 12b-20 under the Exchange Act, which requires that, in addition to the information expressly required to be included in a statement or report filed with the Commission, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

24. As a result of the conduct described above, MDCA violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

25. As a result of the conduct described above, MDCA violated Section 13(b)(2)(B) of the Exchange Act, which requires reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to maintain accountability for assets.

26. As a result of the conduct described above, MDCA violated Section 17(a)(2) of the Securities Act, which prohibits any person from obtaining money or property in the offer or sale of securities by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

27. As a result of the conduct described above, MDCA violated Rule 100(a)(2) of Regulation G, which requires an issuer of a class of securities registered pursuant to Section 12 of the Exchange Act, when publicly disclosing material information that includes a non-GAAP financial measure, to accompany that non-GAAP financial measure with a reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed or released with the most comparable financial measure or measures calculated and presented in accordance with GAAP.

### **Undertakings**

28. Respondent undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent undertakes:

a. To produce, without service or notice of subpoena, any and all documents and other information reasonably requested by the Commission's staff, with a custodian declaration as to their authenticity, if requested;

b. To use its best efforts to cause Respondent's current and former employees, officers and directors to be interviewed by the Commission's staff at such times and places as the staff reasonably may direct;

c. To use its best efforts to cause Respondent's current and former employees, officers and directors to appear and testify truthfully and completely without service of a notice or

subpoena in such investigations, depositions, hearings or trials as may be reasonably requested by the Commission's staff; and

d. In connection with any interviews of Respondent's current and former employees, officers and directors to be conducted pursuant to this undertaking, requests for such interviews may be provided by the Commission's staff by regular or electronic mail to Paul C. Curnin, Esq., Simpson Thacher & Bartlett LLP, 425 Lexington Ave., New York, NY 10017, pcurnin@stblaw.com, or such other counsel that may be substituted by Respondent.

29. In determining whether to accept the Offer, the Commission has considered these undertakings.

#### **MDCA's Remedial Efforts**

30. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff. Specifically, MDCA undertook remedial efforts, including (i) the formation of an independent Special Committee of MDCA's Board of Directors, who engaged outside counsel and an independent forensic accounting firm to conduct an in-depth investigation; (ii) replacing its Chief Executive Officer and Chief Accounting Officer; (iii) collecting more than \$21.7 million in repayments from the former Chief Executive Officer; (iv) adding three new independent directors to the Board of Directors, as well as a new Senior Vice President of Internal Controls and Compliance; and (v) implementing new internal control and compliance policies and procedures, and executive training programs, concerning expense reimbursement, accounts payable processing, and travel and entertainment.

#### **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent MDC Partners Inc. shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act; Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13, 14a-3 and 14a-9 thereunder; and Rule 100(a)(2) of Regulation G.

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1.5 million to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

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

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

Payments by check or money order must be accompanied by a cover letter identifying MDC Partners Inc. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Brendan P. McGlynn, Assistant Regional Director, Philadelphia Regional Office, Division of Enforcement, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103.

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

D. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of \$1.5 million based upon its cooperation in a Commission investigation and related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty.



Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields  
Secretary