

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5035 / September 18, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18779

In the Matter of

CREATIVE PLANNING, INC.
AND PETER A. MALLOUK,

Respondents.

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

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Creative Planning, Inc. (“CPI”) and Peter A. Mallouk (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 him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

1. This matter involves violations of the Advisers Act and certain rules thereunder by CPI, a registered investment adviser, that: (i) distributed hundreds of radio advertisements that contained prohibited client testimonials; (ii) failed to enforce the firm's code of ethics ("Code of Ethics") with regard to the radio advertisements and the reporting and review of certain securities accounts in which the firm's president had a beneficial interest; (iii) failed to keep true and accurate books and records; and (iv) failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act. Mallouk, the firm's president and majority owner, caused certain of CPI's Code of Ethics violations.

2. In August 2015, CPI engaged a local radio station to air live and pre-recorded radio advertisements regarding CPI through two radio hosts in the Kansas City area. In January 2016, one of the radio hosts became a client of CPI, and shortly thereafter independently began including testimonials regarding his personal experiences with CPI during his live radio endorsements. The live personal testimonials aired until October 2017. In March 2017, the radio station created a pre-recorded spot containing a client testimonial that also aired until October 2017. Although CPI's policies and procedures required the firm to pre-approve and maintain copies of all of its advertisements, CPI did not monitor adequately the live and pre-recorded radio advertisements. CPI did not obtain copies of the live radio spots from August 2015 through October 2017, and did not obtain a copy of the March 2017 pre-recorded radio spot until October 2017.

3. In addition, from July 2013 through November 2015, Mallouk did not report securities holdings and transactions from three personal securities accounts held for the benefit of his family and over which he exercised control to CPI's chief compliance officer ("CCO"), in contravention of CPI's Code of Ethics.

4. As a result of the conduct described above, CPI willfully violated Sections 204, 204A, and 206(4) of the Advisers Act and Rules 204-2(a)(11), 204A-1, 206(4)-1(a)(1), and 206(4)-7 thereunder, and Mallouk caused CPI's violations of Section 204A of the Advisers Act and Rule 204A-1 thereunder.²

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

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

Respondents

5. **Creative Planning, Inc.** is a Missouri corporation with its principal place of business in Overland Park, Kansas. CPI has been registered with the Commission as an investment adviser since 1983. As of July 23, 2018, CPI had approximately \$36.2 billion in reported regulatory assets under management.

6. **Peter A. Mallouk**, age 48, is a resident of Overland Park, Kansas. Mallouk is the president of CPI and has been CPI's majority owner since 2003.

Background

A. CPI Distributed Radio Advertisements That Contained Prohibited Client Testimonials

7. In July 2015, CPI contacted a local radio station regarding potential options for airing radio advertisements in the Kansas City area, and purchased a certain number of live and pre-recorded 60-second radio spots. All of the radio spots were to be produced by a pair of radio hosts that had their own show that aired every weekday morning. CPI provided the radio station with copy points for the advertisements. Shortly thereafter, CPI approved a 60-second pre-recorded spot that the two radio hosts had recorded. On August 3, 2015, the radio station began airing live and pre-recorded spots for CPI. The radio campaign ran from August 2015 through October 2017.

8. In January 2016, one of the radio hosts became a client of CPI. Beginning in early 2016 and continuing through the fall of 2017, during his live radio spots, the radio host regularly provided client testimonials by mentioning his client relationship with CPI, praising his CPI wealth manager by name, and detailing his satisfaction with the advisory services he received from CPI. During this time period, the radio station aired over 250 live spots for CPI.

9. In March 2017, the radio station created a new 60-second pre-recorded radio spot for CPI to replace the pre-recorded spot that had aired from August 2015 through mid-March 2017. CPI provided the radio station with updated copy points for the advertisement, which did not mention whether the radio host should give a testimonial. In the final version of the March 2017 pre-recorded spot, the radio host highlighted his personal client experiences with CPI in a positive light. From March 2017 through October 2017, the new pre-recorded spot aired over 200 times.

10. From August 2015 through October 2017, no one at CPI told the radio station or the radio host that they could not air testimonials in radio advertisements for CPI, and CPI did not listen to, monitor, or obtain copies of any of the live spots that the radio station aired for CPI. CPI did not listen to or obtain a copy of the March 2017 pre-recorded spot until the end of October 2017. Additionally, CPI did not adopt any written policies or procedures that focused on CPI's live radio endorsement spots and that were specifically designed to prevent CPI's live radio endorsement spots from containing testimonials.

11. The radio station never provided CPI with recordings of any of the live spots, and CPI never followed up to obtain them. In February 2016, the radio station offered to provide CPI with transcripts of some of the live spots, but CPI declined the offer.

12. In December 2013, CPI adopted written policies and procedures to govern the firm's use of marketing materials and advertisements, which were in effect throughout the relevant time period. CPI's policies instructed that "[b]efore any marketing materials or advertising concerning the Firm or its services is published or distributed to . . . clients or prospective clients . . . the material must be reviewed and approved by the CCO or President." Additionally, CPI's policies stated that the firm was "required to keep and maintain certain books and records," including "a copy of each . . . advertisement . . . circulated or distributed, directly or indirectly, to 10 or more persons."

13. Regarding testimonials, CPI's policies stated that "[d]etailed rules under the [Advisers Act] govern the use of advertising and sales literature by the Firm. In particular, Rule 206(4)-1 prohibits an investment adviser from using advertising or sales literature that . . . refers to any testimonial concerning the investment adviser or any service rendered by the investment adviser." CPI's policies further provided that "[m]arketing materials cannot refer, directly or indirectly, to a testimonial of any kind concerning [CPI], or any advice, analysis, report or other service it provides. Testimonials are generally defined as any form of endorsement relating to the adviser's services or performance."

14. CPI's Code of Ethics instructed that "[CPI] . . . will not engage in any . . . unethical conduct including . . . [p]ublishing, circulating, or distributing any advertisement that has not been approved and that does not comply with the proper regulatory requirements."

B. CPI Failed To Enforce Its Code Of Ethics With Regard To The Reporting And Review Of Certain Of Mallouk's Personal Securities Holdings And Transactions

15. In April 2010, CPI adopted a written Code of Ethics, which was in effect throughout the relevant time period. The Code of Ethics stated that CPI's "Executive Officers," which included the firm's president, were responsible for "establishing procedures to prevent and detect any violations of firm or regulatory rules and regulations" and "establishing and enforcing risk management policies that are designed to ensure that advisory activities are conducted in accordance with this Code." The Code of Ethics further provided that CPI's supervised persons were required to review the Code on an annual basis.

16. The Code of Ethics contained a section titled "Personal Securities Transactions" that required access persons to "report trades implemented for a personal account, an account of any household family member (spouse, minor children or other adults)."³ The Code of Ethics further stated that "[a] report of all personal securities holdings must be submitted . . . at least

³ Rule 204A-1(e)(1) under the Advisers Act defines "access persons" to include certain of an adviser's supervised persons. When providing investment advice is the primary business of an adviser, all of the adviser's officers are presumed to be access persons. Rule 204A-1(e)(1)(ii).

annually.” CPI’s Code of Ethics also required that all access persons transfer their personal accounts to an approved broker-dealer under a master account accessible by CPI’s CCO. The Code of Ethics provided that the CCO was to review the personal securities reports to assess whether an access person was following the firm’s policies and procedures, was trading in securities that were on the firm’s restricted list, or was trading alongside clients at terms that were more favorable for the access person.

17. In July 2013 and January 2014, Mallouk, a CPI access person, opened three personal securities accounts for the benefit of his immediate family members. Mallouk funded the three accounts and exercised trading authority over the accounts.

18. From July 2013 through November 2015, Mallouk did not report to CPI the existence of the three personal securities accounts, and did not report to CPI the holdings and transactions in those three accounts. None of the three accounts was part of a master brokerage account accessible by CPI’s CCO. CPI’s CCO did not become aware of the three accounts until November 2015, when the issue was raised by the Commission’s staff, and no one at CPI reviewed the accounts from July 2013 through November 2015.

Violations

19. As a result of the conduct described above, CPI willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(1) thereunder, which states that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser registered or required to be registered under the Advisers Act, directly or indirectly, to publish, circulate, or distribute any advertisement which, among other things, refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report, or other service rendered by such investment adviser.

20. As a result of the conduct described above, CPI willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require registered investment advisers to adopt and implement written policies or procedures reasonably designed to prevent violation of the Advisers Act and the rules promulgated thereunder.

21. As a result of the conduct described above, CPI willfully violated Section 204A of the Advisers Act and Rule 204A-1 thereunder, which require an investment adviser to establish, maintain, and enforce a written code of ethics that, among other things: (i) includes a standard of business conduct of supervised persons that reflects the adviser’s fiduciary obligations and those of its supervised persons; and (ii) requires that access persons report, and the adviser review, their personal securities holdings and transactions.

22. As a result of the conduct described above, CPI willfully violated Section 204 of the Advisers Act and Rule 204-2(a)(11) thereunder. Section 204(a) of the Advisers Act and Rule 204-2 thereunder require an investment adviser to make and keep “true, accurate and current” copies of certain books and records for a period of not less than five years. Rule 204-2(a)(11) under the Advisers Act requires an investment adviser to maintain a copy of each advertisement that the adviser distributes, directly or indirectly, to 10 or more persons.

23. As a result of the conduct described above, Mallouk caused CPI's violations of Section 204A of the Advisers Act and Rule 204A-1 thereunder.

IV.

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

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

A. Respondent CPI cease and desist from committing or causing any violations and any future violations of Sections 204, 204A, and 206(4) of the Advisers Act and Rules 204-2(a)(11), 204A-1, 206(4)-1(a)(1), and 206(4)-7 thereunder.

B. Respondent Mallouk cease and desist from committing or causing any violations and any future violations of Section 204A of the Advisers Act and Rule 204A-1 thereunder.

C. Respondent CPI is censured.

D. Respondent CPI shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$200,000 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.

E. Respondent Mallouk shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 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.

F. Payments must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents 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) Respondents 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 the payor 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 Mary S. Brady, Assistant Director, Division of Enforcement, Denver Regional Office, U.S. Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, Colorado 80294-1961.

G. 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, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 Respondents 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent Mallouk, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Mallouk under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Mallouk of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary