

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6437 / September 28, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21747

In the Matter of

APEXIMUM FINANCIAL LP,

Respondent.

**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 Apexium Financial LP (“Apexium” 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 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 Respondent's Offer, the Commission finds that:

Summary

1. Apexium, a registered investment adviser, failed to manage a conflict of interest in a manner consistent with its representations in its firm brochures from 2018 through 2020. More specifically, Apexium disclosed that it had a financial conflict of interest when selecting an affiliated firm to manage certain clients' assets and stated that Apexium would manage this conflict by documenting why it was in the client's best interest to use the affiliated firm. As described below, Apexium did not document, as stated in its firm brochures, best interest determinations concerning the use of the affiliated firm, thereby violating Section 206(2) of the Advisers Act. A violation of Section 206(2) does not require scienter; a finding of negligence is sufficient. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, (1963)).

2. Apexium also violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder by failing to adopt and implement written policies and procedures reasonably designed to ensure that it acted in accordance with the representations in its firm brochures, and by failing to conduct an annual review of its compliance policies and procedures, as required by Rule 206(4)-7 under the Advisers Act, for 2018 and 2019.

Respondent

3. **Apexium** is a Delaware limited partnership with its principal place of business in Rye, New York. It has been a registered investment adviser since 2016. According to its Form ADV filed on March 31, 2023, Apexium has approximately \$2.2 billion in regulatory assets under management.

Relevant Entity

4. The **Affiliated Manager** is a Connecticut limited liability company with its principal place of business in Rowayton, Connecticut. It has been a registered investment adviser since 2014. During the time of the conduct at issue here and continuing to the present, the Affiliated Manager has been under common ownership and control with Apexium. The Affiliated Manager is owned by four individuals and two entities. Two of those individuals and the individual who is the sole owner of one of those entities are also beneficial owners of Apexium. The two individuals are also managing members of the Affiliated Manager.

Facts

5. Apexium used the Affiliated Manager to manage certain clients' assets and had a financial conflict of interest in making the determination to do so as a result of Apexium's common ownership and control with the Affiliated Manager. From March 2018 through June 2020 (the "Relevant Period"), Apexium disclosed the conflict of interest relating to the Affiliated Manager in its firm brochure and stated as follows concerning how it managed that conflict:

Because of Apexium's affiliation with [the Affiliated Manager], a conflict exists because we could have an economic incentive to recommend this manager over another. *We overcome this potential conflict by documenting why [the Affiliated Manager] is in the best interest of the client* and after full disclosure. The client is free to use a different manager, one of its own choice. (Emphasis added).

6. During the Relevant Period, Apexium further stated as follows in its firm brochure about its conflict of interest relating to the Affiliated Manager and how it managed that conflict:

Apexium recommends that [the Affiliated Manager] act as an Independent Manager for certain Apexium clients. A conflict of interest exists to the extent that Apexium recommends [the Affiliated Manager's] investment advisory services because Apexium's Supervised Persons will profit due to their ownership in [the Affiliated Manager]. *We overcome this conflict by evaluating alternatives to [the Affiliated Manager] and document[ing] when selecting [the Affiliated Manager] why this investment is in the client's best interest* and identifying to the client other alternatives, should the client choose not to invest with [the Affiliated Manager]. Apexium will only utilize [the Affiliated Manager] as an Independent Manager where it is in the best interest of clients. (Emphasis added).

7. Notwithstanding the foregoing statements in its firm brochure during the Relevant Period, Apexium did not, when selecting the Affiliated Manager to manage a client's assets, "document why [the Affiliated Manager] is in the best interest of the client." While Apexium conducted initial and ongoing due diligence on the Affiliated Manager and alternatives and created client suitability profiles that it used in connection with providing investment advice, Apexium did not document why investing with the Affiliated Manager was in the best interest of any particular client or group of clients at the time Apexium selected the Affiliated Manager as the investment manager over the available alternatives.

8. In addition, Apexium did not adopt and implement policies and procedures reasonably designed to ensure that Apexium operated in the manner stated in its firm brochure during the Relevant Period.

9. Apexium also failed to conduct an annual review of the adequacy of its written compliance policies and procedures and the effectiveness of their implementation for the years 2018 and 2019.

10. Prior to the institution of this proceeding, Apexium revised its compliance policies and procedures to address the issues raised by the facts described above.

Violations

11. As a result of the conduct described above, Apexium willfully¹ violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Section 206(2) of the Advisers Act makes its “unlawful for any investment adviser . . . to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” Section 206(4) of the Advisers Act makes it “unlawful for any investment adviser . . . to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.” Rule 206(4)-7 requires registered investment advisers to “[a]dopt and implement written policies and procedures reasonably designed to prevent violation . . . of the [Advisers] Act and the rules that the Commission has adopted under the [Advisers] Act,” and to “[r]eview, no less frequently than annually, the adequacy of the[ir] policies and procedures . . . and the effectiveness of their implementation.” Scierter is not required to prove violations of Sections 206(2) or 206(4) of the Advisers Act or the rules thereunder; a finding of negligence is sufficient. *SEC v. Steadman*, 967 F.2d 636, 647, 648 n.5 (D.C. Cir. 1992); *see also Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent’s Offer.

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

- A. Apexium cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and 206(4)-7 promulgated thereunder.
- B. Apexium is censured.

¹ “Willfully,” for purposes of imposing relief under Sections 203(e) and 203(f) of the Advisers Act, “means no more than 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.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has “willfully omit[ted]” material information from a required disclosure in violation of Section 207 of the Advisers Act).

C. Apexium shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$150,000 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.

D. 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

E. Payments by check or money order must be accompanied by a cover letter identifying Apexium Financial LP 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 George Stepaniuk, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 100 Pearl Street, Suite 20-100, New York, New York 10004-2616.

F. 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.

By the Commission.

Vanessa A. Countryman
Secretary