

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6568 / March 6, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-21892

In the Matter of

**3D/L Capital Management,
LLC,**

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 3D/L Capital Management, LLC (“Respondent” or “3D/L”).

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 finds¹ that:

¹ 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.

Summary

1. 3D/L is an investment adviser registered with the Commission. These proceedings arise out of 3D/L's failure to fully and fairly disclose material facts and conflicts of interest relating to its agreements with an investment manager for certain exchange traded funds (the "ETF Manager"). 3D/L offers to its clients the opportunity to invest in proprietary model portfolios comprised of investments in ETFs and other securities. In October 2020, the ETF Manager agreed to pay 3D/L an "onboarding fee" in exchange for 3D/L making the ETF Manager's funds available for potential use in the model portfolios. 3D/L did not charge any other manager an "onboarding fee" in order for their investment products to be considered for the model portfolios. In November 2020, 3D/L became the sub-adviser to a fund managed by the ETF Manager. Under the sub-advisory agreement, the ETF Manager agreed to pay 3D/L a sub-advisory fee that was based on net revenues earned from the fund. Both of these agreements created conflicts of interest, because they created an incentive for 3D/L to use funds managed by the ETF Manager in 3D/L's model portfolios. 3D/L did not fully and fairly disclose the "onboarding fee" and the related conflicts of interest until March 2023 and did not fully and fairly disclose terms of the sub-advisory agreement and the related conflicts of interest until August 2022.

Respondent

2. **3D/L Capital Management LLC** is a registered investment adviser with its principal place of business in Hartford, CT. Its Form ADV filed on December 22, 2023, reports \$574,113,231 in regulatory assets under management.

Background

3. 3D/L was created in late 2020 through the combination of two existing registered investment advisers: 3D Asset Management Inc. (3D) and Lee Capital Management, LP (LCM). 3D/L succeeded to LCM's registration with the Commission in December 2020. The new merged entity describes itself as, among other things, offering administrative and investment advisory services to investment advisers and their clients through a platform branded as the "3D/L Managed Account Program" or "3D/L MAP." The investment solutions include model portfolios comprised of investments in ETFs and other securities.

4. As an investment adviser, 3D/L has a fiduciary duty under the Advisers Act to disclose all material facts to its advisory clients, including any conflicts of interest between itself and its clients. 3D/L is also obligated to disclose all material facts relating to how those conflicts could affect the advice that 3D/L provides to its clients. To meet this fiduciary duty, 3D/L is required to provide its advisory clients with full and fair disclosure that is sufficiently specific such that clients can understand the conflicts of interest concerning 3D/L's investment advice and have an informed basis upon which they can consent to or reject the conflicts.

Failure To Disclose Onboarding Fee Paid by The ETF Manager

5. On October 30, 2020, 3D/L and the ETF Manager entered into a Platform Services Agreement. The agreement provided that, in exchange for the ETF Manager's payment of a fee that the parties referred to as an "onboarding fee," 3D/L would permit the ETF Manager's funds to be available on the 3D/L MAP platform and available for potential use in the 3D/L model portfolios. The payments were not contingent on 3D/L clients purchasing the ETF Manager's funds. The ETF Manager was the only fund manager whose funds were available on the 3D/L platform or that were used in the 3D/L model portfolios that paid 3D/L an onboarding fee.

6. The onboarding fee created a conflict of interest, because it created an incentive for 3D/L to allocate funds managed by the ETF Manager to the 3D/L model portfolios. 3D/L initially failed to disclose the existence of the onboarding fee until August 2022. In August 2022, the firm disclosed in its Form ADV, Part 2A, filed with the Commission, that 3D/L had entered into the Platform Services Agreement and the ETF Manager had paid an "onboarding fee to make ETFs available for inclusion in 3D/L's composite portfolios." While this disclosure exposed the existence of the fee, it further stated that "[t]his [p]rogram may create a potential conflict of interest." This disclosure was inadequate because the payment of the onboarding fee created an actual conflict of interest. Several months later, in its March 31, 2023 Form ADV, Part 2A, 3D/L made explicit that the "onboarding fee . . . results in a conflict of interest."

Failure To Fully and Fairly Disclose Terms of Sub-Advisory Agreement

7. On November 19, 2020, 3D/L entered into a Sub-Advisory Agreement with the ETF Manager whereby 3D/L was engaged to be a non-discretionary sub-adviser to one of the ETF Manager's funds. Under the Sub-Advisory Agreement, the ETF Manager agreed to pay 3D/L twenty-five percent of net revenue earned by the manager from the fund. In addition, for any month where the net assets in the fund averaged \$150 million or more, the ETF Manager agreed to pay 3D/L thirty percent of net revenue received by the manager from the fund. Because the ETF Manager did not earn net revenue from the fund, 3D/L did not earn a sub-adviser fee during the relevant time period.

8. The potential payments under the Sub-Advisory Agreement created a conflict of interest, because they created an incentive for 3D/L to use the ETF Manager's fund in its model portfolios. However, 3D/L did not make any disclosure of the Sub-Advisory Agreement until in or about April 2021, when it provided current clients its 2021 Q1 Quarterly Performance Reports. The performance reports disclosed that 3D/L served as a non-discretionary sub-adviser to the ETF Manager's fund and earned a sub-advisory fee equal to 25% of "net revenue." The disclosure explained that the asset-based fee provided an "incentive to recommend investments in our proprietary model portfolios that include shares of the Fund as well as in individual client portfolios." This disclosure, however, did not include the potential for the 30% step-up fee for any month where the net assets in the fund averaged \$150 million or more.

9. The firm did not disclose the Sub-Advisory Agreement in its Form ADV, Part 2A filed with the Commission, for almost another year. As a result, the Form ADV omitted the

disclosure provided in the quarterly performance reports about the conflicts arising from the Sub-Advisory Agreement. When the firm disclosed the agreement in the March 31, 2022, Form ADV, Part 2A filed with the Commission, the disclosure again omitted the potential for a 30% step up fee. 3D/L fully disclosed the potential for the 30% step-up fee in the August 9, 2022 Form ADV, Part 2A.

10. Soon after entering these agreements, 3D/L's investment committee began including funds managed by the ETF Manager in the 3D/L model portfolios. For example, in November 2020, 3D/L's investment committee decided to add the fund for which 3D/L acted as non-discretionary sub-adviser to some of its model portfolios, with as much as a 5.25% allocation. And, in January 2021, 3D/L's investment committee decided to add an all China ETF managed by the ETF Manager to some of its model portfolios with as much as a 3.75% allocation, and an emerging markets excluding China ETF managed by the ETF Manager to some of its model portfolios with as much as a 5.75% allocation. As a result of these model allocation changes, 3D/L client accounts invested in those model portfolios purchased funds managed by the ETF Manager, and 3D/L earned investment advisory fees on those assets.

Compliance Deficiencies

11. 3D/L's policies and procedures provided that the firm was required to disclose its conflicts of interest in its Form ADV, and that it was the firm's policy to "review and update [the] Form ADV as frequently as necessary, and to provide full and complete disclosure to clients." Although the Sub-Advisory Agreement created an actual conflict of interest that needed to be disclosed, 3D/L did not update the Form ADV until March of 2022. In addition, although the onboarding fee created an actual conflict of interest that needed to be disclosed, 3D/L did not update the Form ADV until August 2022. As a result, 3D/L failed to implement its policies and procedures relating to the Form ADV.

Violations

12. As a result of the conduct described above, 3D/L willfully² violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to "engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client." Scienter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of negligence. *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, 194-95 (1963)).

² "Willfully," for purposes of imposing relief under Section 203(e) 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[ed]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

13. As a result of the conduct described above, 3D/L willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

Disgorgement

14. The disgorgement and prejudgment interest ordered in Section IV.C. is consistent with equitable principles and does not exceed Respondent's net profits from its violations, and will be distributed to harmed investors to the extent feasible. Upon approval of the distribution final accounting by the Commission staff, any amounts remaining that are infeasible to return to investors, and any amounts returned to the Commission in the future that are infeasible to return to investors, may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Undertakings

Respondent undertakes to:

15. Within 30 days of the entry of this Order, notify affected investors of the terms of this Order by sending a copy of this Order to each affected investor via mail, email, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.

16. Within 45 days of the entry of this Order, certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Celia Moore, Assistant Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, Massachusetts 02110, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

17. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in 3D/L's Offer.

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

A. Respondent 3D/L shall 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 Rule 206(4)-7 promulgated thereunder.

B. 3D/L is censured.

C. 3D/L shall pay disgorgement, prejudgment interest, and a civil penalty, totaling \$285,607, as follows:

- (i) 3D/L shall pay disgorgement of \$153,069 and prejudgment interest of \$7,538, consistent with the provisions of this Subsection C.
- (ii) 3D/L shall pay a civil penalty in the amount of \$125,000, consistent with the provisions of this Subsection C.
- (iii) 3D/L shall pay the disgorgement, prejudgment interest, and civil penalty ordered in this subsection in the following installments: within 10 days of entry of this Order, Respondent shall pay \$185,607; within 90 days of entry of this Order, Respondent shall pay \$25,000; within 180 days of entry of this Order, Respondent shall pay \$25,000; within 270 days of entry of this Order, Respondent shall pay \$25,000; and within 360 days of entry of this Order, Respondent shall pay \$25,000, plus all accrued interest. Respondent shall deposit the payments of disgorgement, prejudgment interest, and civil penalty into an escrow account at a financial institution not unacceptable to the Commission staff, and Respondent shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. The account holding the assets of the Fair Fund shall bear the name and the taxpayer identification number of the Fair Fund. Payments shall be applied first to post order interest, which accrues pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] and 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.
- (iv) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to affected investors.

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 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.

- (v) A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§1.468B.1-1.468B.5. Respondent agrees to be responsible for all tax compliance responsibilities associated with the Fair Fund's status as a QSF, including but not limited to: (1) tax returns for the Fair Fund; (2) information return reporting regarding the payments to investors, as required by applicable codes and regulations; and (3) obligations resulting from compliance with the Foreign Account Tax Compliance Act ("FATCA"). Respondent may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent and shall not be paid out of the Fair Fund.
- (vi) 3D/L shall be responsible for administering the Fair Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by 3D/L and shall not be paid out of the Fair Fund.
- (vii) 3D/L shall distribute from the Fair Fund to each affected investor an amount representing the advisory fees paid on the ETF Manager's funds during the relevant period pursuant to a disbursement calculation (the "Calculation") that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection C. If there are insufficient funds to fully compensate affected advisory clients for these amounts, the Fair Fund will be distributed to affected advisory clients whose losses meet the *de minimis* threshold in a *pro rata* fashion. If sufficient funds are available, reasonable interest will be paid on such

amounts. No portion of the Fair Fund shall be paid to any affected investor account in which 3D/L, or any of its current or former officers or directors, has a financial interest.

- (viii) 3D/L shall, within thirty (30) days of the entry of this Order, submit the Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the Commission staff, 3D/L shall make itself available, and shall require any third-parties or professionals retained by 3D/L to assist in formulating the methodology for the Calculation and/or administration of the distribution to be available, for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the Commission staff with an opportunity to ask questions. 3D/L also shall provide the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to 3D/L's proposed Calculation or any of its information or supporting documentation, 3D/L shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within ten (10) days of the date that the Commission staff notifies 3D/L of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.
- (ix) 3D/L shall, within ninety (90) days of the written approval of the Calculation by the Commission staff, submit a payment file (the "Payment File") for review and acceptance by the Commission staff demonstrating the application of the methodology to each affected investor. The Payment File should identify, at a minimum, (1) the name of each affected investor; (2) the exact amount of the payment to be made; (3) the amount of any *de minimis* threshold to be applied; and (4) the amount of reasonable interest paid. The Respondent shall exclude from the payee file all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.³
- (x) 3D/L shall complete the disbursement of all amounts payable to affected investors within ninety (90) days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in Paragraph (xiii) of this Subsection C. 3D/L shall notify the Commission staff of the date and the amount paid in the initial distribution.
- (xi) Within one hundred eighty (180) days of completing disbursements payable to affected investors, 3D/L shall submit to the Commission staff a

³ <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (1) the amount paid to each payee, with the reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that 3D/L has made payments from the Fair Fund to affected investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to Commission staff, shall be sent to Celia Moore, Assistant Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide. 3D/L shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request, and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

- (xii) If Respondent is unable to distribute any portion of the Fair Fund for any reason, including an inability to locate an affected investor or a beneficial owner of an affected investor or any other factors beyond Respondent's control, 3D/L shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Exchange Act. Payment must be made in one of the following ways:
- (a) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
 - (b) 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
 - (c) 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 3D/L as the 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 Celia Moore, Assistant Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide.

- (xiii) The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Fair Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

D. 3D/L shall comply with the undertakings enumerated in Section III, paragraphs 15-17, above.

By the Commission.

Vanessa A. Countryman
Secretary