SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 4566 / November 7, 2016

Admin. Proc. File No. 3-16047

In the Matter of

THE ROBARE GROUP, LTD., MARK L. ROBARE, and JACK L. JONES, JR.

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Failure to Disclose Material Conflict of Interest

Misrepresentations on Forms ADV

Registered investment adviser and its principal, owner, and chief compliance officer failed to disclose material conflict of interest to the adviser's clients, and a principal, owner, and associated person of the adviser caused these violations. Respondents also made material misrepresentations or omissions on Forms ADV. *Held*, it is in the public interest to impose a cease-and-desist order on respondents and order civil money penalties.

APPEARANCES:

Alan M. Wolper and *Heidi VonderHeide*, of Ulmer & Berne LLP, for Respondents.

Janie L. Frank, for the Division of Enforcement.

Appeal filed: June 26, 2015
Last brief received: October 26, 2015

The Division of Enforcement appeals the initial decision of an administrative law judge dismissing this proceeding against the Robare Group, Ltd. ("TRG" or "the Firm"), a registered investment adviser, and two of its principals, Mark Robare and Jack Jones (collectively, Respondents). The Division alleged that Respondents failed to adequately disclose to their clients conflicts of interest inherent in an arrangement whereby the Firm received compensation from Fidelity Investments ("Fidelity"), the custodian of its clients' accounts, for maintaining client assets in certain investments. Although TRG was required to disclose this arrangement, its Form ADV—the registration and disclosure form investment advisers file with the Commission—failed for many years to mention the arrangement and, even after identifying the arrangement, failed to disclose the relevant conflicts of interest. The law judge dismissed the proceeding principally on the ground that the Division failed to prove that Respondents acted with scienter or negligence. Although we agree with the law judge that the record does not support a finding of scienter, we find that Respondents were negligent by failing to fully and fairly disclose conflicts of interest to their clients.

Based upon our independent review of the record, we find that TRG and Robare violated Section 206(2) of the Investment Advisers Act of 1940 and that Jones caused the violations of Section 206(2). We also find that Respondents violated Section 207 of the Advisers Act by filing Forms ADV with material misrepresentations or omissions. Given these violations, we find that it is in the public interest to impose a cease-and-desist order on Respondents and to order each of them to pay a $50,000 civil money penalty.

I. Facts

Robare is the president and CEO of Robare Asset Management, TRG's general partner. He is a limited partner and 83% owner of TRG and its chief compliance officer. Jones, Robare's son-in-law, is a TRG limited partner and part owner and a financial adviser and planner for the Firm. TRG became an independent investment adviser in 2003[1] and decided to "align" itself with Fidelity as the custodian for its clients' accounts and with Triad Advisers ("Triad") as its broker-dealer. Robare and Jones are both registered representatives of Triad.

A. TRG entered into a revenue sharing arrangement with Fidelity in 2004.

TRG offers its clients a number of model portfolios depending on the client's investment goals. These portfolios consist almost entirely of non-transaction fee mutual funds offered on Fidelity's on-line platform. In early 2004, TRG entered into a "revenue sharing arrangement" with Fidelity (the "Arrangement"), pursuant to which Fidelity paid TRG "shareholder servicing fees" when its clients, using the on-line platform, invested in certain "eligible" non-Fidelity, non-transaction fee funds. Fidelity would pay between two and twelve basis points, in an increasing formula, based on the value of eligible assets under management. The fees were paid to the Firm through Triad, which itself received 10 percent of the payments. As explicitly stated in its

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[1] As of the hearing before the law judge, TRG had approximately $150 million in assets under management and managed approximately 350 separate accounts for about 300 households, which is about twice the number of clients the Firm had in the early 2000s.

agreement with Fidelity, TRG acknowledged that it was "responsible for reviewing and determining whether additional disclosure is necessary in [its] Form ADV."

In October 2012, Fidelity presented to TRG a new version of the revenue sharing agreement. The new agreement provided that Fidelity would pay the fees directly to TRG. Although Jones testified that TRG was hesitant to sign the new agreement because the Firm did not want to "cut [Triad] out of the revenue," the Firm signed on May 23, 2013.[2] The new agreement specified that TRG would provide "back-office, administrative, custodial support and clerical services" for Fidelity in exchange for the fees. As with the earlier agreement, TRG agreed that it had "made and will continue to make all appropriate disclosures to Clients . . . with regard to any conflicts of interest that may arise from" the Arrangement.

Between September 2005 and September 2013, TRG was paid approximately $400,000 under the Arrangement, which was approximately 2.5% of the Firm's gross revenue.

B. TRG's Forms ADV did not adequately disclose the Arrangement until at least April 2014.

TRG did not modify the disclosure it provided clients in its Form ADV[3] until August 2005, more than a year after executing the agreement with Fidelity, despite the form's express requirement in Part II, Item 13, that the adviser "describe the arrangements" whereby the firm or related persons were given "cash . . . or . . . some economic benefit . . . from a non-client in connection with giving advice to clients." Instead, the Firm's March 2005 Form ADV left unaltered its previous disclosure that its representatives "may sell securities . . . for sales commissions." When TRG finally expanded its response to Item 13 in August 2005, it nevertheless failed to describe the Arrangement accurately or completely. TRG stated that "[c]ertain investment adviser representatives of the Robare Group, when acting as registered representatives of a broker-dealer, may receive selling compensation from such broker-dealer as a result of the facilitation of certain securities transactions on Client's behalf through such

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[2] Respondents were also apparently hesitant because, by this time, the Commission was investigating TRG about its disclosures related to the Arrangement. Jones asked Fidelity if they needed to sign the agreement given the pending investigation, but Fidelity informed Jones in early May 2013 that payments under the program would be suspended until TRG signed the new agreement and that Fidelity could not make an exception based on the pending Commission investigation. TRG signed the new agreement shortly thereafter.

[3] Form ADV is the form investment advisers use to register with the Commission. *See* 17 C.F.R. §§ 275.203-1(a), 279.1. "Part 2 of Form ADV contains disclosure requirements for [a] firm's '"brochure," which advisers must provide to prospective clients initially and to existing clients annually.'" *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at * 2 (May 2, 2014) (quoting Amendments to Form ADV, Advisers Act Release No. 3060, 2010 WL 2957506, at *3 n.5 (Aug. 12, 2010)), *aff'd*, 793 F.3d 76 (D.C. Cir. 2015). Registered investment advisers are required to provide clients with "a brochure and one or more brochure supplements . . . that contains all information required by Part 2 of Form ADV." 17 C.F.R. § 275.204-3(a).

broker-dealer," and that these "arrangements may create a conflict of interest." But TRG did not disclose the existence of the Arrangement or provide any details about the conflict it presented.

TRG's disclosure for this item remained the same until the Commission changed Form ADV in 2010. As part of the change, what was previously Item 13 became Item 14. Item 14 directed advisers to disclose if anyone "who is not a client provides an economic benefit to you for providing investment advice or other advisory services to your clients." The form directed advisers to "generally describe the arrangement, explain the conflicts of interest, and describe how you address the conflicts of interest." TRG's first Form ADV after the change, dated March 2011, was similar to its earlier disclosure except that it identified Triad as its broker-dealer. It also added that selling compensation its investment adviser representatives received "[i]n connection with the placement of client funds into investment companies . . . may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof." Like the earlier disclosure, the March 2011 disclosure did not reveal the existence of the Arrangement or provide any details about the nature of the Arrangement or the conflict it presented.

In late 2011, Fidelity asked TRG to amend its Form ADV because it "did not find" the disclosure of the Arrangement in the Firm's Form ADV. Fidelity indicated that it would discontinue payments if the change was not made, and TRG updated its Form ADV around December 20, 2011. TRG added the following paragraph to its Form ADV:

> Additionally, we may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from your account with us.

Thereafter and prior to the commencement of the hearing, TRG made a few additional modifications to its disclosure in Item 14. For example, in June 2013 it added that the Arrangement "may give rise to conflicts of interest, or perceived conflicts of interest, with the Firm's decision to utilize Fidelity as our Custodian." It noted that "Robare's commitment to its clients and the policies and procedures it has adopted are designed to limit any interference with Robare's independent decision making when choosing the most appropriate custodian for our clients."

The Firm also added in April 2014 that "Fidelity Funds are excluded from this [A]rrangement," that the Arrangement "may give rise to conflicts of interest" because "Robare would benefit more by recommending, or investing in, [non-transaction fee] funds for clients," and that "this benefit may influence Robare's choice of Fidelity over custodian[s] that don't furnish similar benefits and [non-transaction fee] funds over funds not covered by this [A]rrangement."

C. Respondents testified at the hearing that the Arrangement did not influence their investment decisions, that their disclosures about the Arrangement were made after seeking advice from outside consultants, and that they believed the Arrangement was adequately disclosed.

At the hearing, Respondents conceded that the Arrangement created a potential conflict of interest. But both Robare and Jones denied that Fidelity's payments influenced their investment decisions. The record does not indicate that clients were disproportionately invested in eligible funds. Robare and Jones added that they did not know which particular funds were "eligible" to receive fees under the Arrangement. Although they knew that Fidelity funds were ineligible, they were uncertain about which non-Fidelity, non-transaction fee funds were part of the program.[4] The law judge found this testimony credible.

Respondents further testified that outside compliance consultants advised the Firm about the disclosures throughout the relevant period. According to Jones, a firm called Capital Markets Compliance ("CMC") advised them in connection with the first Form ADV that TRG filed after the Arrangement took effect. Jones, however, did not describe the substance of that advice or provide other details regarding this consultation. And although Robare testified that he discussed "all our agreements" with CMC, he could not recall providing the 2004 agreement with Fidelity to CMC. Indeed, Robare was unable to recall the specifics of any of his conversations with CMC about the Firm's disclosure obligations resulting from the Arrangement.

Robare testified that the Firm also retained Renaissance Regulatory Services ("Renaissance") in 2007 and consulted them about the disclosures. But Robare again did not provide any specifics about the advice the Firm received, and neither Robare nor Jones recalled giving Renaissance a copy of the 2004 Fidelity agreement. There is also no evidence of any written communication between TRG and Renaissance about the Arrangement prior to late 2011. Bart McDonald, an executive vice president at Renaissance who worked with TRG, testified that he typically "would have discussed compensation arrangements" like the one with Fidelity with clients but that he had no specific recollection of doing so with TRG. McDonald also testified that he did not recall ever seeing the 2004 Fidelity agreement before the Division showed it to him in May 2014 and that the agreement was not in Renaissance's files.

Respondents also believed Triad was responsible for supervising their disclosure obligations. Triad's chief compliance officer testified that Triad "review[ed] and approve[ed]" TRG's Forms ADV; Triad also audited TRG annually, and none of the audits raised any issue regarding the Firm's disclosure of the Arrangement. But in a January 2013 letter to the

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[4] At one point, TRG asked Fidelity which funds paid fees, after which Fidelity provided what Robare testified was a "virtually unintelligible" spreadsheet. Based on this, Robare concluded that it was "too difficult to determine" what funds were paying fees and did not pursue the matter. Jones testified similarly that "it's not worth our time" to determine which funds paid fees. Although a Fidelity senior vice president testified that all non-Fidelity, non-transaction fee funds on the Fidelity platform paid fees, Robare and Jones testified that they did not appreciate this.

Commission, Triad represented that it was "unaware if the service fees [paid under the Arrangement] were disclosed to the clients of the Robare Group."

Respondents claimed they believed the fees they received under the Arrangement were 12b-1 fees[5] and commissions, and therefore were adequately disclosed by TRG's reference in its Forms ADV to "sales commissions" and "selling compensation." But Melissa Morganti Zizza, a Fidelity senior vice president, testified that the fees paid by Fidelity to TRG were not 12b-1 fees, "commissions," or "selling compensation." And although the 2013 agreement did not include Triad and included new details about the services TRG performed for the fees, Zizza testified that the program "stayed the same" from Fidelity's perspective. Fidelity was paying TRG for the same shareholder services it had always performed, but it was "being very explicit in this contract" about the bases for the payments.[6]

Robare also testified that he provided new clients a Fidelity custodial agreement that they had to execute at the time they opened their accounts. The Fidelity custodial agreement stated that Fidelity "may pay your advisor for performing certain back-office, administrative, custodial support, and clerical services for [Fidelity] in connection with client accounts for which [Fidelity] act[s] as custodian" and noted that "[t]hese payments may create an incentive for your advisor to favor certain types of investments over others." Robare did not testify and does not now claim that he specifically told clients, either during the account opening process or thereafter, about the Arrangement. It is also undisputed that these disclosures were not added to the Fidelity custodial agreement until December 2005, after many of the Firm's clients had opened accounts. There is also no evidence that these existing account holders were ever provided with the December 2005 Fidelity custodial agreement.

II. Analysis

Advisers Act Section 206(1) makes it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client."[7] Section 206(2) makes it unlawful "to engage in any transaction, practice, or course of business which operates

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[5] Authorized by Rule 12b-1 under the Investment Company Act of 1940, 12b-1 fees are fees "paid by a mutual fund out of fund assets to cover distribution expenses and sometimes shareholder service expenses." *See* https://www.sec.gov/answers/12b-1fees.htm. *See generally Bearing of Distribution Expenses by Mutual Funds*, Investment Company Act Release No. 11414, 1980 WL 386856 (Oct. 28, 1980), 45 Fed. Reg. 73898 (Nov. 7, 1980).

[6] In any case, Robare and Jones testified that after TRG's 2013 agreement with Fidelity—which removed Triad—they became uncertain about the nature of the compensation. Robare said that he still believed the payments were sourced from 12b-1 fees but admitted that he could not definitively say after 2013 whether they were commissions. Jones also said that following the 2013 agreement, he did not know now how to characterize the payments.

[7] 15 U.S.C. § 80b-6(1).

as a fraud or deceit upon any client or prospective client."[8] A violation of Section 206(1) requires a finding of scienter; negligence is sufficient for a violation of Section 206(2).[9]

A "fundamental purpose of [the Advisers Act is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[10] Accordingly, Section 206 imposes "federal fiduciary standards" on investment advisers,[11] which means they have "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts.'"[12] Because Section 206 was designed "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,"[13] the "[f]ailure by an investment adviser to disclose potential conflicts of interest to its clients constitutes fraud within the meaning of Sections 206(1) and (2)."[14]

Upon our de novo review of the record, we find that TRG and Robare, as investment advisers with fiduciary obligations to their clients, failed adequately to disclose material conflicts of interest. We further find that in so doing they acted negligently (but without scienter) and thus violated Section 206(2) of the Advisers Act (but not Section 206(1)). We also find that Jones caused the violations of Section 206(2) and is therefore liable under Section 203(k).[15]

A. TRG and Robare violated Advisers Act Section 206 by failing to adequately disclose material conflicts of interest to their clients.

1. The Arrangement involved material conflicts of interest.

We conclude that the Arrangement was material and needed to be disclosed to TRG's clients. "[E]conomic conflicts of interest, such as undisclosed compensation, are material facts

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[8] 15 U.S.C. § 80b-6(2).

[9] *David Henry Disraeli*, Advisers Act Rel. No. 2686, 2007 WL 4481515, at *8 (Dec. 21, 2007) (citations omitted), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009).

[10] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

[11] *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (internal quotation marks and citation omitted).

[12] *Capital Gains*, 375 U.S. at 194; *see also Montford & Co., Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *13 (May 2, 2014) ("Section 206 prohibits 'failures to disclose material information, not just affirmative frauds.'" (quoting *SEC v. Wash. Inv. Network,* 475 F.3d 392, 395 (D.C. Cir. 2007))), *petition denied*, 793 F.3d 76 (2015).

[13] *Capital Gains*, 375 U.S. at 191-92.

[14] *Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 2003 WL 21658248, at *15 (July 15, 2003).

[15] 15 U.S.C. § 80b-3(k).

that must be disclosed" by investment advisers.[16] "[P]otential conflicts of interest," which are "indisputabl[y] . . . 'material' facts with respect to clients," must also be disclosed.[17] Here, reasonable investors would have considered the payments TRG received from Fidelity under the Arrangement important information in evaluating the investment decisions being made on their behalf. Respondents concede that these payments presented, at a minimum, a potential conflict of interest because they could have "a tendency to slant" TRG's advice to increase revenue.[18]

2. TRG and Robare failed to adequately disclose the Arrangement to their clients.

TRG and Robare did not adequately disclose the Arrangement to their clients. An investment adviser must "disclose any potential conflicts of interest accurately and completely."[19] This includes disclosing "any financial interest the adviser may have in the transaction[s]" the adviser undertakes for its clients.[20] We find that TRG's Form ADV disclosure was plainly inadequate before December 2011 because it did not disclose the Arrangement at all. And although TRG identified the Arrangement beginning with its December 2011 Form ADV, its Form ADV disclosure continued to be inadequate until at least April 2014.

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[16] *IMS/CPAs & Assocs.*, Exchange Act Release No. 45019, 2001 WL 1359521, at *8 (Nov. 5, 2001) (recognizing that a "fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision"), *aff'd sub nom.*, *Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003); *accord Capital Gains Research Bureau, Inc.*, 375 U.S. at 200-201.

[17] *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003).

[18] Respondents do not challenge the law judge's determination that the Arrangement was material. Although they contended before the law judge that the payments were immaterial because they represented a small percentage of their business income, we have held that "because of the fiduciary relationship between an adviser and its client, the percentage or absolute amount of commissions involved is not" determinative of materiality. *Kingsley, Jennison, McNulty & Morse, Inc.*, Advisers Act Rel. No. 1396, 1993 WL 538935, at *4 (Dec. 23, 1993). We adhere to that view here; indeed, Respondents' expert admitted that "the fact of the arrangement itself is, in most instances, going to be material and should be disclosed."

[19] *Vernazza*, 327 F.3d at 860; *see also Capital Gains*, 375 U.S. at 201 (noting that an investment adviser must "fully and fairly reveal[] his personal interests in [his] recommendations to his clients"); *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 835 (5th Cir. 1990) ("[A]n investment adviser is a fiduciary and therefore has an affirmative duty of utmost good faith to avoid misleading clients. This duty includes disclosure of all material facts and all possible conflicts of interest."); *Montford & Co., Inc.*, Advisers Act Rel. No. 3829, 2014 WL 1744130, at *13 (May 2, 2014) ("[A]dvisers owe their clients a duty to . . . disclose information that would expose any conflicts of interest, including even . . . a potential conflict." (internal quotation marks omitted)).

[20] *Feeley & Willcox Asset Mgmt. Corp.*, Exchange Act Release No. 48162, 2003 WL 22680907, at *11 (July 10, 2003).

i. TRG's pre-December 2011 Forms ADV failed to disclose the Arrangement.

TRG's pre-December 2011 Form ADV disclosure was inadequate because it failed to disclose the Arrangement. For over a year after TRG entered into the Arrangement, the relevant language in the Firm's Form ADV consisted of one sentence indicating that its registered adviser representatives "may sell securities . . . for sales commissions." And between August 2005 and March 2011, TRG added only that its investment adviser representatives "may receive selling compensation" from a broker-dealer when they are "acting as registered representatives of [that] broker-dealer." This boilerplate disclosure about possible "sales commissions" and "selling compensation" did not constitute the "full and fair" disclosure that the law requires.[21] TRG did not disclose that it had entered into an Arrangement under which it received payments from Fidelity for maintaining client investments in certain funds Fidelity offered. TRG's clients thus did not know about TRG's financial incentive to purchase certain mutual funds over others—and to maintain client assets in those funds—or to prefer investments offered on the Fidelity platform over those that were not.

Respondents contend that the compensation TRG received from Fidelity was 12b-1 fees, which necessarily makes them "commissions," and that therefore their disclosure about receiving "selling compensation" was adequate. As discussed above, the disclosure that TRG may receive commissions or compensation from a broker-dealer in no way alerted its clients to the potential conflicts of interest presented by the undisclosed Arrangement. Moreover, the compensation that TRG received from Fidelity under the Arrangement was neither a "sales commission" from "sell[ing] securities" to its clients nor "selling compensation" from Triad "as a result of the facilitation of certain securities transactions." Under the 2004 agreement with Fidelity, TRG would be paid "shareholder servicing fees" based on the amount of client "assets" invested in "eligible [non-transaction fee] mutual funds." The compensation therefore was based on eligible client assets under management and was not paid per transaction. Indeed, TRG was not paid for *selling* certain mutual funds to its clients under the agreement but for *maintaining* its client's assets in certain mutual funds. The disclosure about possible compensation based on sales in the Forms ADV ("sales commissions" and "selling compensation") could not alert clients to the actual source of the conflict in this situation.

Additionally, the payments Fidelity made to TRG were not based on TRG's investment adviser representatives "acting as registered representatives" of Triad and were not generated by transactions "facilitat[ed] . . . through" Triad. Robare agreed that TRG's compensation under the Arrangement was "based on decisions [he] made related to the clients' advised assets" and did not relate to work he did for Triad. Jones likewise confirmed that TRG received compensation from Fidelity "when [he] placed [his] advisory clients' money into particular mutual funds in connection with [his] advisory business" rather than while acting as a registered representative of

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[21] *See Capital Gains*, 375 U.S. at 194; *cf. Daniel R. Lehl*, Securities Act Release No. 8102, 2002 WL 1315552, at * 11(May 17, 2002) (finding that "the disclosure that persons associated with CFS and WSW 'may' receive compensation . . . is misleading and inadequate when they in fact received or contracted to receive compensation").

Triad. Finally, Jones confirmed that Triad was not "facilitating the actual securities transaction[s] of placing [TRG'] clients' funds into eligible mutual funds with Fidelity."

Respondents nonetheless insist that, particularly after the March 2011 Form ADV added that TRG's investment adviser representatives may receive selling compensation in the form of 12b-1 fees, that the payments were 12b-1fees and therefore adequately disclosed. Regardless of whether the source of the payments were 12b-1 fees, TRG's disclosure that it *may* receive selling compensation in the form of 12b-1 fees in no way revealed that TRG actually had an arrangement with Fidelity, that it received fees pursuant to the arrangement, and that the arrangement presented at least a potential conflict of interest.

Indeed, we find it telling that after looking at TRG's March 2011 Form ADV Fidelity "did not find" the disclosure of the Arrangement and requested that TRG disclose it. Although Respondents suggest that Fidelity's request was about improving TRG's existing disclosure of the Arrangement rather than adding disclosure of the Arrangement that was wholly absent, the record belies this understanding. The Fidelity account representative testified that Fidelity believed the disclosure of the Arrangement "was not there," and Robare himself conceded that Fidelity told TRG that it "had made no disclosure about the fee agreement." Ultimately, we agree with the Division that with respect to the pre-December 2011 Forms ADV "no reasonable client reading" them "could have discerned the existence—let alone the details—of the Arrangement."[22] Accordingly, we find that the pre-December 2011 Form ADV disclosure was inadequate to fulfill TRG's obligations as an investment adviser.

ii. Although TRG identified the Arrangement in its December 2011 Form ADV, its disclosure continued to be inadequate.

After Fidelity's request to update its disclosure, TRG added a new paragraph in its December 2011 Form ADV mentioning the Arrangement for the first time. The new paragraph identified Fidelity as the source of compensation and provided an abbreviated description of the basis for the payments—payments based on "no transaction fee mutual fund assets in custody with Fidelity." Nonetheless, TRG's disclosure continued to be inadequate.

First, this disclosure failed to explain that TRG received compensation based on its selection of certain non-transaction fee mutual funds over others. Because it failed to mention that not all "no transaction fee mutual fund assets in custody with Fidelity" resulted in fees, the disclosure failed to reveal that TRG had an economic incentive to put client assets into eligible

[22] S*ee, e.g.*, *Marc N. Geman*, Exchange Act Release No. 43963, 2001 WL 124847, at *8 (Feb. 14, 2001) (rejecting respondent's contention that the Firm's disclosure of "its principal status on its customer trade confirmations" was adequate because the Firm "had an obligation to appraise its customers not only of its principal status but of the implications of that status, *i.e.*, that it was trading as principal because it believed it could obtain better prices than the NBBO" at which it executed customer orders), *aff'd*, 334 F.3d 1183 (10th Cir. 2003).

non-Fidelity, non-transaction fee funds over other funds available on the Fidelity platform. Without this information, TRG's clients could not properly assess the relevant conflicts.[23]

Second, TRG asserted for the first time in the December 2011 Form ADV that "We do not receive an economic benefit from a non-client for providing investment advice or other advisory services to our clients." That was false—the Fidelity compensation was an "economic benefit from a non-client" for "other advisory services to [TRG's] clients."[24]

iii. TRG's non-Form ADV disclosure was also inadequate.

Respondents contend that TRG adequately disclosed the Arrangement to its clients by means other than its Forms ADV. They highlight the Fidelity custodial agreement and TRG's General Information and Disclosure Brochure, which TRG gave clients when they opened their accounts. We disagree that providing these documents fulfilled Respondents' fiduciary duties.

First, a large proportion of TRG's clients never received the December 2005 version of the Fidelity custodial agreement that Respondents highlight. Robare acknowledged that the individuals who became clients before December 2005 would not have received it. TRG's client retention rate is 97%, and TRG now has about twice the number of clients it had when it became an independent investment adviser; therefore, approximately 150 of its current clients would not have received the disclosure in the Fidelity custodial agreement.

Second, the December 2005 version of the Fidelity custodial agreement did not provide adequate disclosure even for those clients that received the agreement.[25] The Fidelity custodial agreement stated that Fidelity "may pay your advisor for performing certain back-office, administrative, custodial support, and clerical services for [Fidelity] in connection with client accounts for which [Fidelity] act[s] as custodian," and that "[t]hese payments may create an incentive for your advisor to favor certain types of investments over others." But there was no

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[23] Respondents note that they filed an updated Form ADV in April 2013 that further revised the disclosure and assert that "each revision" was "intended to . . . disclose" the conflict of interest. But only in its April 2014 Form ADV did TRG disclose that the arrangement excluded Fidelity funds and that the payments "may influence Robare's choice . . . of [non-transaction fee] funds over funds not covered by this agreement." The April 2014 Form ADV also continued to maintain that TRG did "not receive an economic benefit from a non-client for providing . . . other advisory services to our clients."

[24] Although the Item 14 disclosure went on to state that TRG received compensation from Fidelity "in the form of custodial support services" (and TRG supplied more details of the arrangement and the attendant conflicts in subsequent Forms ADV), the statement that TRG did "not receive an economic benefit from a non-client for providing . . . other advisory services to our clients" was at the very least confusing and misleading to TRG's clients and potential clients.

[25] Respondents also cite Robare's testimony that he "reviewed" the Fidelity custodial agreement with new clients and would generally discuss with them how TRG got paid. Nothing in his testimony establishes that he adequately disclosed to clients—or even mentioned—the Arrangement.

way for a TRG client to know from the Fidelity custodial agreement itself that TRG had, in fact, entered into an agreement with Fidelity to receive these payments.[26]

Likewise, TRG's General Information and Disclosure Brochure did not disclose the Arrangement to clients. The brochure mentions "other money managers pay[ing TRG] a portion of the fees generated by . . . referred clients." This vague reference to referral fees did not provide full and fair disclosure of the Arrangement.

3. TRG and Robare acted negligently but not with scienter.

i. TRG and Robare failed to exercise reasonable care.

We do not find that TRG and Robare acted with scienter when they failed to adequately disclose the Arrangement. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[27] Here, the law judge made a demeanor-based credibility determination that Robare's and Jones's testimony belied the notion that they were "trying to defraud anyone, let alone their investment clients." We give significant weight to this credibility determination,[28] and the evidence in the record does not establish that Respondents' investment decisions on behalf of their clients were influenced by the fees they received from Fidelity. Accordingly, we do not find that Respondents acted intentionally or recklessly.

Nevertheless, we find that TRG and Robare acted negligently. Negligence is "the failure to exercise reasonable care or competence."[29] TRG's and Robare's conduct demonstrated a clear failure to reasonably fulfill the disclosure obligations of investment advisers. Although aware of their duty to disclose and that the Arrangement presented at least potential conflicts of interest, TRG and Robare for many years provided inadequate disclosure.[30] They should have known the disclosure was inadequate because, as discussed above, it plainly failed to provide their clients with the information they needed to assess the relevant conflicts of interest and did not even, at a minimum, satisfy the specific disclosure requirements of Form ADV.[31] Because TRG and

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[26] Respondents contend that the Division conceded "that the language used in the Fidelity [custodial agreement] was adequate." But we find no such concession in the record.

[27] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[28] *See Robert M. Fuller*, Exchange Act Release No. 48406, 2003 WL 22016309, at *7 (Aug. 25, 2003), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004).

[29] *Byron G. Borgardt*, Securities Act Release No. 8274, 2003 WL 22016313, at *10 (Aug. 25, 2003)

[30] *See id.* ("In failing to see that appropriate disclosures were made, Respondents were negligent.").

[31] *See SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) (applying a "should have known" standard for a negligent omission of disclosure under Section 206(2)).

Robare failed "to use the 'degree of care that a reasonably careful person would use under like circumstances'" and "'should have' acted differently," they were negligent.[32]

ii. Respondents' alleged reliance on others does not negate a negligence finding.

Respondents contend that they did not act negligently because they relied upon Triad as well as "experienced and competent compliance consultants to help ensure that they complied completely with their disclosure requirements." The law judge found that Respondents "relied in good faith on the advice of compliance firms, including Triad." We disagree.

Neither Respondents nor the law judge cite any case recognizing a defense of reliance on compliance consultants.[33] And even were such a defense available on grounds analogous to a reliance on counsel defense, we find that Respondents cannot establish it. To establish a defense of reliance on counsel, a defendant must demonstrate "that he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith."[34] No evidence exists that TRG specifically sought or received advice from Triad about how to disclose the Arrangement to its clients. Indeed, Triad's Chief Compliance Officer—who reviewed TRG's Forms ADV—represented to the Commission in 2013 that Triad was "unaware if the service fees [paid under the Arrangement] were disclosed to the clients of the Robare Group."

As to its compliance consultants, the record also does not contain convincing evidence that TRG specifically sought or received advice from its consultants about how to disclose the Arrangement and relied on that advice in good faith.[35] Robare's vague references to discussions with consultants do not establish that TRG received and followed advice about the disclosure of the Arrangement. And although TRG received advice about the disclosure of the Arrangement from Renaissance in connection with the December 2011 Form ADV and thereafter, an executive vice president at Renaissance testified that Renaissance did not receive a copy of the 2004 Fidelity agreement until he was interviewed by the Commission in 2014. He further testified that he would typically discuss compensation sources with clients but did not recall discussing the Arrangement with TRG and that Renaissance did not approve TRG's disclosures. TRG and Robare also cite no advice Renaissance gave that explains the continued failure in

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[32] *See SEC v. Nutmeg Grp., LLC*, 162 F. Supp. 3d, 754, 775 (N.D. Ill. Feb. 18, 2016) (citing *Steadman*, 967 F.2d at 643).

[33] *Cf. Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *6 (May 27, 2016) (assuming *arguendo* "that engagement of compliance professionals—as compared to counsel— might under some circumstances mitigate the egregiousness of a wrongdoer's misconduct," but concluding that the alleged reliance was, in fact, not mitigating).

[34] *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994).

[35] *See United States v. Masat*, 948 F.2d 923, 930 (5th Cir. 1992) (rejecting a reliance on professionals defense because the defendant did not "clearly articulate how he relied on these professionals").

TRG's Item 14 disclosure to "explain the conflicts of interest, and describe how [TRG] address[ed] the conflicts of interest" as Form ADV directed.

In any case, TRG and Robare could not reasonably rely on any advice that the disclosures were adequate because they knew their obligations as investment advisers, that they were required to disclose potential conflicts of interest, and that the Arrangement presented such a conflict but was not disclosed.[36] Because of the obvious inadequacy of TRG's disclosure, we find that any reliance by TRG on advice that its disclosure was adequate was not reasonable and thus does not negate our finding of negligence.[37]

Because TRG and Robare negligently failed to disclose a material conflict of interest, their conduct "operate[d] as a fraud or deceit upon [their] client[s]" and violated Section 206(2).

B. Jones caused the violations of Section 206(2) and is liable under Section 203(k).

Advisers Act Section 203(k) authorizes the Commission to institute proceedings against "any other person that . . . was . . . a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation."[38] "[N]egligence is sufficient to establish 'causing' liability . . . at least in cases in which a person is alleged to 'cause' a primary violation that does not require scienter."[39] Jones knew about the Arrangement, was significantly involved in the Firm's disclosure responsibilities, and signed each of the relevant Forms ADV. Jones acted negligently because he knew TRG was required to disclose conflicts of interest. Because Jones acted negligently in signing the forms without disclosing the conflicts of interest the Arrangement presented, he was a cause of TRG's and Robare's violations of Section 206(2).

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[36] *See SEC v. Goldfield Deep Mines*, 758 F.2d 459, 467 (9th Cir. 1986) ("If a company officer knows that the financial statements are false or misleading and yet proceeds to file them, the willingness of an accountant to give an unqualified opinion with respect to them does not negate the existence of the requisite intent or establish good faith reliance.").

[37] We also reject Respondents' suggestion that a 2008 examination by the Commission's Fort Worth Regional Office, which resulted in a "no further action letter," is a basis for finding that they acted reasonably. The no further action letter expressly stated that "the fact that we are not making any specific comments should not be construed as any indication that the [Robare Group's] activities are in full compliance with the federal securities law or other applicable rules and regulations."

[38] 15 U.S.C. § 80b-3(k). There is no dispute that both TRG and Robare meet the definition of an "investment adviser" under the Advisers Act and can be primarily liable for a violation of Section 206(2). *See* 15 U.S.C. § 80b-2(a)(11) (defining an "investment adviser" as including "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities").

[39] *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *19 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002). Given our finding that Jones caused these violations, we need not decide whether Jones also aided and abetted the violations.

C. Respondents violated Advisers Act Section 207 by willfully omitting material facts from TRG's Forms ADV.

Advisers Act Section 207 prohibits any person from "'willfully making false statements of material fact, or material omissions, in . . . a Form ADV.'"[40] A material omission is failing to supply "any material fact which is required to be stated" in the Form ADV.[41] Scienter is not required to find a violation of this provision.[42] Because Form ADV embodies "a basic and vital part in our administration of the [Advisers] Act," "it is essential in the public interest that the information required by [Form ADV] be supplied completely and accurately."[43]

As detailed above, between 2005 and 2013 Respondents failed to provide the material facts regarding the Arrangement and its attendant conflicts of interest as directed by the relevant Forms ADV.[44] Both Robare and Jones were responsible for the content of TRG's Forms ADV during this time—they both reviewed each of the Forms ADV before filing, Robare had ultimate authority over their content, and Jones signed each of them. We thus find that Respondents violated Section 207 by willfully omitting material facts from TRG's Forms ADV.

III. Sanctions

A. Cease-and-desist order

Advisers Act Section 203(k) authorizes us to issue a cease-and-desist order against any person who "is violating, has violated, or is about to violate" the Advisers Act or against "any other person that is, was, or would be a cause of the violation."[45] In determining whether a cease-and-desist order is appropriate, we consider the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[46] In addition, we consider "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the

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40 *Montford*, 2014 WL 1744130, at *16 (citing *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003)); *see generally* 15 U.S.C. § 80b-7. Willfulness means that the person intended to commit an act that constitutes a violation, not that he also be aware that he is violating any statutes or regulations. *See, e.g.*, *Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *40 (May 29, 2015) (citing *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)).

41 15 U.S.C. § 80b-7.

42 *Montford*, 2014 WL 1744130, at *16.

43 *Id.* (citation omitted).

44 *See supra* at 3-4.

45 15 U.S.C. § 80b-3(k).

46 *Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *20-21 (May 16, 2014) (citations omitted), *aff'd in relevant part*, 793 F.3d 147 (D.C. Cir. 2015).

remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[47] We also consider whether there is a reasonable likelihood of future violations, although the required showing of a risk of future violations in the context of a cease-and-desist order is significantly less than that required for an injunction, and "in the ordinary case, a finding of a past violation is sufficient to demonstrate a risk of future ones."[48] Our inquiry is flexible, and no single factor is dispositive.[49]

Based on our consideration of the relevant factors, we conclude that a cease-and-desist order is appropriate. Respondents failed in their fundamental fiduciary duty to provide full and fair disclosure of all material facts. This failure occurred over several years. Although we do not find that Respondents acted with scienter, they acted unreasonably in their role as fiduciaries and should have known that their disclosures were inadequate. The Division has not demonstrated any concrete economic harm to TRG's clients, but those clients were unknowingly deprived of conflict-free advice from their investment adviser. Given Respondents' continuing responsibilities in the investment advisory industry (and as registered representatives of a broker-dealer), we find there is a sufficient risk of future violations to order Respondents to cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(2) and 207.[50]

B. Civil money penalties

Advisers Act Section 203(i) authorizes us to impose civil money penalties in cease-and-desist proceedings on any person who has violated any provision of the Advisers Act or who "was a cause of the violation."[51] In considering whether a civil penalty is in the public interest, we consider (1) whether the act or omission involved fraud; (2) whether the act or omission resulted in harm to others; (3) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (4) whether the individual has committed previous violations; (5) the need to deter such person and others from committing violations; and (6) such other matters as justice may require.[52] Second-tier penalties are appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[53]

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[47] *KPMG Peat Marwick LLP*, 2001 WL 47245, at *26.

[48] *Id.*

[49] *Id.*

[50] Although it did not seek a bar before the law judge, the Division raised the possibility of a bar for the first time in a footnote to its brief before the Commission. Based on the current record and briefing, we decline to impose a bar.

[51] 15 U.S.C. § 80b-3(i)(1)(B).

[52] *Id.* § 80b-3(i)(3).

[53] *Id.* § 80b-3(i)(2).

In light of the relevant factors, we will impose a $50,000 second-tier penalty on each Respondent (TRG, Robare, and Jones) based on their failure to provide any disclosure of the Arrangement before December 2011.[54] Although we do not find that they acted with scienter, Respondents' conduct involved fraud and constituted a fundamental breach of their fiduciary duties to their clients. Respondents' conduct also harmed their clients by depriving them of conflict-free advice. Given the serious nature of the violations of the Advisers Act, a second-tier civil penalty is appropriate to deter future misconduct by Respondents and others. The maximum second-tier penalty for each act or omission is $50,000 for a natural person or $250,000 for an entity.[55] Accordingly, we impose one maximum $50,000 second-tier penalty on each of Robare and Jones and one $50,000 second-tier penalty on TRG.[56]

An appropriate order will issue.[57]

By the Commission (Chair WHITE and Commissioner STEIN; Commissioner PIWOWAR, concurring in part and dissenting in part).

Brent J. Fields
Secretary

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[54] In determining the appropriate civil money penalty, we have considered only the conduct which took place within five years of the Order Instituting Proceedings on September 3, 2014.

[55] 15 U.S.C. § 80b-3(i)(2).

[56] We decline to order disgorgement. The Division has not put forward evidence to support disgorgement other than with respect to the Fidelity fees. But the Division did not establish that there was a causal connection between the Respondents' failure to disclose the Arrangement and the fees they received from Fidelity. Specifically, there is no evidence in the record that, absent Respondents' failure to disclose the conflicts of interest, they would not have received the Fidelity fees either because their clients would have decided to withdraw their money or would have insisted upon investments that did not pay the fees.

[57] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Commissioner PIWOWAR, concurring in part and dissenting in part:

Commissioner Piwowar concurs with the opinion, other than the imposition of civil penalties on Respondents as set forth in Section III.B.

Section III.B of the opinion lists six factors the Commission considered in deciding both whether to impose a civil penalty on each Respondent and the amount of any such penalty. Of the six factors, only one weighs in favor of imposing civil penalties: the act or omission involved fraud. The other five factors weigh against a civil penalty: there was no harm to others, none of the Respondents was unjustly enriched, none of the Respondents has committed previous violations, there are no other matters as justice may require that would lead one to conclude that civil penalties are appropriate in this matter, and there has been no showing that we need to deter such persons, based on the findings of the administrative law judge and the record before us.

Therefore, I do not believe that a civil penalty should be imposed on any of the Respondents.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 4566 / November 7, 2016

Admin. Proc. File No. 3-16047

In the Matter of

THE ROBARE GROUP, LTD., MARK L. ROBARE, and JACK L. JONES, JR.

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the Robare Group, Ltd. ("TRG"), Mark L. Robare, and Jack L. Jones, Jr., cease and desist from committing or causing any violations or future violations of the Sections 206(2) and 207 of the Investment Advisers Act of 1940; and it is further

ORDERED that TRG, Robare, and Jones each pay a civil money penalty of $50,000.

Payment of the civil penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary