

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 76528 / November 30, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4284 / November 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16975

In the Matter of

MICHAEL L. SHEA

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 15(b)(6) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTIONS 203(f) 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 Section 15(b)(6) of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Michael L. Shea (“Shea” 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 him 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 Section 15(b)(6) of the Securities Exchange Act of 1934 and Sections 203(f) 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:

Summary

1. From September 2009 until July 2013, Shea was a vice president and the business development director at Alpha Fiduciary, Inc. ("AFI"), a registered investment adviser based in Phoenix, Arizona. From at least August 2010 until March 2013, AFI, its principal, and Shea created and distributed to clients and prospective clients performance advertising that failed to disclose with sufficient prominence and detail that AFI's Global Tactical Multi Asset Class Strategies' ("GTMACS") advertised performance was hypothetical rather than actual. AFI's principal created the GTMACS' performance data by back-testing static models dating back to 1999 and consisting of indices that generated minimized volatility and maximized returns, before either AFI or the GTMACS existed. While AFI provided several pieces of performance advertising generally disclosing its use of "certain hypothetical performance and portfolio information," that disclosure was imprecise, often not on the same page as the hypothetical performance data, and contrary to other statements indicating that the GTMACS' performance data represented actual rather than hypothetical returns. Shea also generated some performance advertising e-mails without any disclosure language and distributed it to a limited number of prospective clients. In addition, AFI's advertising included examples of favorable investment decisions showing returns of up to 58.62% without providing or offering to provide all the firm's investment decisions, and select client portfolios showing over 28% in annualized gains without determining whether those gains represented all AFI clients.

Respondent

2. Michael L. Shea, age 44, is a resident of Pleasant Hill, California. Shea was AFI's vice president and business development director from September 2009 until his termination in July 2013. He is currently associated with both a registered investment adviser and a dually registered broker-dealer and investment adviser.

Other Relevant Entity

3. Alpha Fiduciary, Inc. (SEC File No. 801-68218) is an Arizona corporation based in Phoenix, Arizona. AFI has been registered with the Commission as an investment adviser since 2007. As of May 29, 2015, AFI had \$737 million in assets under management held in 731 accounts.

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.

Background

4. AFI was formed in November 2006 and registered as an investment adviser with the Commission in August 2007. In 2010, AFI began marketing its GTMACS as an investment strategy designed to reduce portfolio volatility and enhance returns by investing in seven to ten global, diversified asset classes.

5. Beginning in 2010, AFI's principal designed models for the Balanced, Conservative, Growth, and Income GTMACS consisting of seven to nine equity, bond, commodity, and hedge fund indices representing ten asset classes. AFI's principal created the GTMACS' hypothetical performance by selecting a static allocation of seven to nine indices to maximize returns and minimize volatility when back-tested to 1999. The static GTMACS' model portfolios never represented the holdings of any AFI account, nor could they. Many of the indices comprising the models had no corresponding tracking product like a mutual fund or exchange-traded fund, making replication of the back-tested holdings impossible.

6. AFI's principal or Shea included the hypothetical performance of the GTMACS in charts and tables in AFI's various advertising pieces, such as two-page executive summaries, 25-page firm profiles, 60-page presentations, and website. AFI's principal and/or Shea periodically updated the GTMACS' performance data to the then most recent quarter, with comparisons to the performance of the S&P 500 index. For example, AFI's advertising materials presented that the GTMACS' Balanced model returned 163.34% from January 1999 through September 2012, compared to a 17.20% return by the S&P 500 during that same period.

7. AFI's executive summaries, firm profiles, and presentations disclosed that they contained "certain hypothetical performance and portfolio information," but did not disclose that all of the GTMACS' performance data was completely hypothetical. In AFI's firm profiles and presentations, the disclosure language did not appear on the same page as the hypothetical performance data, but at or near the end of a 25 or 60 page document.

8. In fact, AFI's advertising materials contained statements suggesting that the GTMACS' hypothetical performance data represented actual returns. For example, AFI's firm profile stated "[s]ince January 1999 our Balanced GTMAC Strategy Index has produced a 6.98% annualized rate of return. Similarly, AFI's presentation invited prospective clients to "Try it on!" and indicated that "if you would have invested with Alpha Fiduciary over the last ten years," a one million dollar investment would have increased to almost \$2.4 million, representing a 119.61% rate of return.

9. Shea knew that the GTMACS' performance data was hypothetical and based on a static, back-tested allocation of seven to nine indices. Nevertheless, Shea emailed a handful of clients and prospective clients the GTMACS' hypothetical performance data without including the disclosure about "certain hypothetical performance and portfolio information." In several emails to prospective clients, Shea also made misleading statements suggesting the hypothetical GTMACS' model performance data represented actual past performance.

10. AFI's advertising materials also contained seven examples of investment decisions made using the GTMACS in 2009 and 2010 generating realized or unrealized gains of 5.51% to 58.62%. All of the advertised investment decisions were profitable, yet some of AFI's investment decisions during those two years were not profitable. AFI never provided, or offered to provide, a list of all its profitable and unprofitable investment decisions during that time period to prospective clients.

11. AFI, through Shea, also provided prospective clients with a report of an existing client's portfolio, selected by AFI's principal, one of which, for example, presented a 14.4% return net of fees over a six-month period, without taking any steps to determine whether it was representative of the performance of other AFI clients.

Violations

12. As a result of the conduct described above, AFI willfully violated² Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act, but may rest on a finding of simple 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, 195 (1963)).

13. As a result of the conduct described above, AFI willfully violated Section 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) & (5) thereunder. Section 206(4) prohibits any investment adviser from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and authorizes the Commission to prescribe rules designed to prevent such conduct. Rule 206(4)-1(a)(2) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business for a registered investment adviser to publish, circulate, or distribute any advertisement which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person without offering to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year. Rule 206(4)-1(a)(5) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business for a registered investment adviser to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.

14. As a result of the conduct described above, Shea willfully aided and abetted and caused AFI's violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) & (5) thereunder. Shea knew or was generally aware of the potential of the hypothetical GTMACS' model performance, tactical applications of the GTMACS, and sample client portfolios in AFI's

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

marketing materials to mislead clients and prospective clients about AFI's actual performance. Shea also knowingly or recklessly provided substantial assistance to AFI's primary antifraud and advertising violations by co-authoring AFI's advertising materials and creating and distributing performance advertising without any disclosure that the GTMACS' model performance data was hypothetical.

Civil Penalties

15. Shea has submitted a sworn Statement of Financial Condition dated May 21, 2015 and other evidence and has asserted his inability to pay a civil penalty.

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 Section 15(b)(6) of the Exchange Act and Sections 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Shea 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)-1 promulgated thereunder.

B. Respondent Shea is censured.

C. Respondent Shea shall pay a civil penalty of \$25,000 to the Securities and Exchange for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments:

- (1) \$5,000 within ten (10) days of entry of this Order;
- (2) \$5,000 within 180 days of entry of this Order;
- (3) \$5,000 within 360 days of entry of this Order;
- (4) \$5,000 within 540 days of entry of this Order; and
- (5) \$5,000 within 720 days of entry of this Order.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application. 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 Shea 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 Shea 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 Lorraine B. Echavarria, Associate Regional Director, Los Angeles Regional Office, Securities and Exchange Commission, 444 S. Flower Street, Suite 900, Los Angeles, CA 90071.

D. Based upon Respondent Shea's sworn representations in his Statement of Financial Condition dated May 21, 2015 and other documents submitted to the Commission, the Commission is not imposing a penalty greater than \$25,000 against him.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent Shea provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields
Secretary