

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4163 / August 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16735

In the Matter of

**GUGGENHEIM PARTNERS
INVESTMENT 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 Guggenheim Partners Investment Management, LLC (“Respondent” or “GPIM”).

II.

In anticipation of the institution of these proceedings, GPIM 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, GPIM 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 GPIM's Offer, the Commission finds¹ that:

Summary

These proceedings arise out of a breach of fiduciary duty and Advisers Act violations by GPIM. First, GPIM breached its fiduciary duty by failing to disclose that one of its senior executives approached an advisory client and received a \$50 million loan in order for him to participate personally in an acquisition led by Guggenheim Partners, LLC (GPIM's corporate parent). The loan created a potential conflict of interest whereby GPIM might then place that client's interests over those of GPIM's other clients. GPIM failed to disclose the senior executive's loan when it then invested certain of its other clients in two transactions in which the client who made the loan invested on different terms. Second, GPIM violated the Advisers Act when it inadvertently billed a client for asset management fees on non-managed assets. GPIM had inaccurately coded these non-managed assets on its books and records, leading to their inclusion in the calculation of asset management fees for the investments GPIM actually did manage for that client. Finally, GPIM failed to implement certain of its compliance policies and procedures, enforce its code of ethics, and maintain certain required books and records.

Respondent

1. GPIM is an investment adviser registered with the Commission, with offices in Chicago, New York, and Santa Monica. GPIM provides investment management services primarily to institutional clients, high net worth individuals, and private funds. GPIM is a wholly owned, indirect subsidiary of Guggenheim Partners, LLC, a private financial services firm headquartered in Chicago and New York.²

Facts

A. GPIM Executive Receives a Loan from a GPIM Client

2. On July 29, 2010, a GPIM client ("Client A") made a \$50 million loan to a senior executive of GPIM ("GPIM Executive").³ Client A maintained accounts managed by GPIM and non-managed accounts outside of GPIM. The loan was negotiated and made by Client A, through one of his affiliates, as principal and not by GPIM on Client A's behalf. The GPIM

¹ The findings herein are made pursuant to the Offer and are not binding on any other person or entity in this or any other proceeding.

² GPIM was formed on June 30, 2012. It was known previously as Guggenheim Partners Asset Management, LLC, an entity that merged with Guggenheim Investment Management, LLC on June 30, 2012.

³ The GPIM Executive is no longer associated with GPIM, but remains within the Guggenheim Partners organization.

Executive used the proceeds of the loan to participate personally in an acquisition led by Guggenheim Partners.

3. The GPIM Executive's loan was evidenced by a promissory note and secured by certain assets of the GPIM Executive, including his residence, and a personal guaranty. The loan had a two-year term. Client A could demand full payment under the note at any time after August 30, 2010. The GPIM Executive was at all times current on the payments under the note. On October 3, 2011, the GPIM Executive refinanced the loan with a different lender, at which time Client A received payment in full.

4. At the time of the loan, GPIM's Code of Ethics & Insider Trading Policy (the "Code") stated, "This Code is based upon the principle that [GPIM's] employees owe a fiduciary duty to [GPIM's] clients to conduct their affairs . . . in such manner to avoid . . . any actual or potential conflicts of interest[.]" The Code further directed that employees be familiar with GPIM's compliance manual. The compliance manual explained the requirement that GPIM, as a fiduciary, "make full and fair disclosure of all material facts, including potential conflicts of interest," to its clients. GPIM's Code also referred its employees to the guidance in a code of conduct for one of its affiliates, which prohibited employees from accepting loans from clients. With respect to the implementation, administration and oversight of GPIM's compliance program, GPIM's compliance manual stated that Guggenheim Partners (its corporate parent) would provide legal and compliance assistance to GPIM.

5. GPIM did not act reasonably in connection with the GPIM Executive's loan from Client A because it failed to adopt measures to provide meaningful oversight of the GPIM Executive's non-advisory business dealings that impacted GPIM's obligations as a registered investment adviser. For example, GPIM lacked policies and procedures to make its compliance staff aware of the circumstances surrounding the GPIM Executive's loan from Client A, which related to an acquisition led by Guggenheim Partners. Multiple senior individuals within Guggenheim Partners and GPIM knew about the loan. Yet there was an insufficient compliance process in place, and none of these individuals at Guggenheim Partners and GPIM who knew of the loan communicated its existence to GPIM compliance staff. As a result, GPIM did not inform its clients of the potential conflict of interest created by the loan.

B. Transactions Following Loan

6. Following the GPIM Executive's receipt of the loan from Client A, GPIM exercised its discretionary authority to invest other GPIM clients in two transactions in which Client A also participated. In each transaction, Client A acted as a principal, and his investments were made through accounts not managed by GPIM. Each transaction involved investments in companies for which Client A and the other GPIM clients had existing positions.

1. The LLC Transaction

7. Beginning in 2007, GPIM made several investments on behalf of its clients in a privately-held company ("Company 1"). At or around the same time, the GPIM Executive introduced the opportunity to invest directly in Company 1 to Client A, who in turn invested in Company 1's equity and debt through non-managed accounts.

8. In or around late 2009, Client A sought to exit his Company 1-related investments. Client A expressed his “fatigue” with the sustained poor performance of Company 1 to the GPIM Executive. GPIM, on the other hand, held a view – endorsed by the GPIM Executive – that despite the sustained prior negative performance, Company 1’s performance would soon improve and generate positive returns for its investors.

9. In January 2010, Client A and GPIM began negotiating a transaction to restructure Client A’s and the GPIM clients’ investments in Company 1. In August 2010, approximately three weeks after the GPIM Executive’s receipt of the loan from Client A, Client A and nine other GPIM clients (through discretionary accounts managed by GPIM) restructured their existing investments in Company 1 by contributing their respective Company 1-related investments to a newly-formed limited liability company (the “LLC”) organized by Client A’s representatives. Company 1 did not participate in the transaction, and the funding of the LLC did not change Company 1’s capital structure.

10. The LLC then issued senior notes to Client A and junior notes to the GPIM clients. Overall, the effect of this transaction gave Client A less potential upside gain on Company 1 investments and greater protection against losses on those investments. GPIM’s clients received the converse position.

11. GPIM did not disclose the GPIM Executive’s loan from Client A to the other clients that participated in the LLC transaction.

2. *The Warrant “Swap” Transaction*

12. Beginning in 2009, GPIM made multiple investments on behalf of its clients in another privately-held company (“Company 2”). Client A invested in Company 2 through accounts managed by GPIM as well as non-managed accounts.

13. In August 2010, Company 2 refinanced its debt through a secured note offering that was co-underwritten by Guggenheim Securities, LLC, a GPIM affiliate. GPIM clients (via discretionary accounts managed by GPIM) and Client A (through non-managed accounts), among others, participated in that offering.

14. Shortly before the offering, the GPIM Executive communicated with two existing third party holders of Company 2 debt in an effort to secure their participation in the offering. The third party debt holders informed GPIM that, prior to making any such commitment, they wanted to receive value for warrants for common equity they held in Company 2. (Those warrants represented an approximately 5.25% equity stake in Company 2.) In response to this request, GPIM, through the GPIM Executive, promised the third party debt holders that it would arrange for them to receive \$10 million for their warrants within 90 days of the debt offering. With that promise in place, the third party debt holders agreed to participate in the offering.

15. Following the offering, Client A informed the GPIM Executive that he was interested in purchasing equity in Company 2 should GPIM learn of any such acquisition opportunity.

16. In November 2010, the third party debt holders requested that GPIM make arrangements for the purchase of the warrants. After that, a managing director at GPIM took steps to find a buyer for the warrants.

17. GPIM's managing director approached Client A to see if he was interested in buying the warrants from the third party debt holders. Client A responded that while he remained interested in an equity position in Company 2, he wanted it in the form of preferred equity – not warrants for common equity.

18. GPIM expected that Client A would soon agree to assume the equity position represented by the warrants, albeit in the form of preferred equity. GPIM arranged for Company 2 to take the warrants and “swap” them into preferred equity and common equity to be acquired by Client A.

19. During the time GPIM negotiated terms for the “swap,” it elected to place the warrants into discretionary client accounts. Specifically, on December 10 and 16, 2010, GPIM fulfilled the promise to the third party debt holders by arranging for five GPIM advisory clients to purchase the warrants for the agreed-upon \$10 million. At the time of the warrant acquisition, GPIM did not disclose the GPIM Executive's loan from Client A to the five clients that participated in the transaction.

20. On December 22, 2010, GPIM, Client A, and Company 2 agreed in principle to enter into the transactions that would “swap” the warrants into preferred equity to be acquired by Client A. The “swap” transaction was facilitated by GPIM's managing director and was not presented to GPIM's investment committee.

21. The transactions closed on February 18, 2011, when Company 2 repurchased the warrants from the GPIM clients for \$10,150,951, which reflected a return of the GPIM clients' cost basis in the warrants plus interest. Simultaneously, Company 2 issued \$10 million of par preferred equity and a 2.25% share of common equity to Client A for \$10,150,951. At the time of this “swap,” GPIM did not disclose the GPIM Executive's loan from Client A to the five clients that participated in the transaction.

22. Investment management agreements for the GPIM clients who were impacted by the “swap” transaction stated that GPIM had an obligation to avoid conflicts of interest, and to notify its clients of even potential conflicts of interest. GPIM's Code also stated that “the interests of clients are at all times paramount to the interest of any . . . [GPIM employee].”

C. Advisory Fees Charged on Non-Managed Assets

23. During a multi-year period beginning in 2009, for one institutional client, GPIM inadvertently charged approximately \$6.5 million in asset management fees for investments it did not manage. These investments involved hundreds of millions of dollars of trades initiated by the client – not GPIM. For these investments, GPIM provided non-advisory services, such as back office processing and trade reconciliation, pricing, recordkeeping, and accounting functions. For these services, GPIM charged the client an operational services fee that was lower than the asset management fee it charged for discretionary investments.

24. The charges resulted from inaccurate coding of the investments on GPIM's books and records. That coding, in turn, caused GPIM's accounting system to interpret the investments – incorrectly – as investments managed by GPIM on behalf of the client.

25. GPIM identified the coding issue internally in or around January 2013, and questions were raised within GPIM regarding its impact on GPIM's asset management fee calculation. GPIM brought the matter to the attention of the client in January 2014 and corrected its error in November 2014 via a credit on management fees owed.

D. Compliance Policies and Procedures and Code of Ethics

1. Loans Involving Clients

26. As described above, in July 2010, the GPIM Executive received a loan from Client A. This loan was not disclosed, in contravention of GPIM's Code, to GPIM's clients involved in Company 1 and Company 2 transactions described above. Records maintained by GPIM's compliance department for any gifts, loans, and favors do not reflect that the GPIM Executive received the loan from Client A.

27. As a result of the foregoing, GPIM failed to enforce its Code and implement its compliance policies and procedures regarding conflicts of interest.

2. Gifts and Entertainment

28. GPIM's Code stated that "Supervised Persons may only accept appropriate and reasonable gifts and entertainment of a de minimis value as provided in GPIM's Gifts and Entertainment Policy." GPIM's Code further defined de minimis as having a value of \$250 or less. GPIM's policies and procedures required the chief compliance officer to approve any exceptions to the gift and entertainment limitation on a case-by-case basis.

29. Between 2009 and 2012, at least 7 GPIM employees took at least 44 unreported flights on the private planes of GPIM clients. During this period, GPIM's compliance logs only reflected one such flight, which had been mentioned to GPIM's chief compliance officer after the flight occurred.

30. As a result of the foregoing, GPIM failed to enforce its Code with respect to gifts and entertainment and implement its compliance policies and procedures regarding gifts and entertainment.

3. Trade Errors

31. According to GPIM's policies and procedures, GPIM was obligated to investigate any trade errors and prepare documentation that included "the date of the error, date/time detected, reason for delay in detecting the error (if applicable), the cause of the error, steps taken to resolve the error, and any monetary damages to the client or [GPIM]." An example of a trade error includes any "allocation of securities . . . to the wrong or unintended account(s)."

32. In September 2010, GPIM entered an order for \$80 million worth of bonds of a particular issuer and allocated them across ten client accounts in a manner that conflicted with the underwriter's minimum allocation requirement.

33. When the underwriter contacted GPIM regarding its non-compliant allocation, GPIM asked the underwriter to make an exception, which was denied. GPIM then re-allocated the trade to three clients in a manner consistent with the minimum allocation requirement.

34. In December 2010, GPIM's compliance department investigated the issue. GPIM documented the error, but labeled it a "trade fail" and also a "trade revision." A "trade fail" is not defined in the compliance manual. A "trade revision" is defined in the compliance manual as a revision to a trade prior to settlement. Moreover, GPIM's memorandum documenting the error did not include all of the information required under GPIM's policies and procedures.

35. As a result of the foregoing, GPIM failed to implement its compliance policies and procedures regarding trade errors.

E. Books and Records

36. As a registered investment adviser, GPIM was required to comply with Rule 204-2(a), which requires that investment advisers maintain certain books and records, including bills or statements related to the adviser's business and order memoranda.

37. As described above, for one institutional client, certain assets that were not managed by GPIM appeared in the adviser's books and records, including order memoranda and bills and statements sent to that client. GPIM's order memoranda for these non-managed assets designated the trades as having been entered pursuant to GPIM's discretionary authority when, in fact, the client initiated these trades. As described above, GPIM's invoices to the client reflected approximately \$6.5 million in unearned asset management fees on these investments.

38. Moreover, the inclusion of these non-managed investments in adviser books and records resulted in the production of inaccurate information in response to requests from Commission staff.

Violations

39. Section 206(2) of the Advisers Act prohibits any 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. Section 206(2) likewise imposes a fiduciary duty on investment advisers obligating them to disclose all material information to their clients or to refrain from engaging in a conflicted transaction when the client cannot give meaningful consent.

As a result of the negligent conduct described above, GPIM willfully⁴ violated Section 206(2) of the Advisers Act.

40. Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, among other things, makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act to fail to adopt and implement such written policies or procedures reasonably designed to prevent violation of the Advisers Act and the rules promulgated thereunder. As a result of the negligent conduct described above, GPIM willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

41. Section 204(a) of the Advisers Act requires investment advisers to make and keep certain records as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204-2 under the Advisers Act requires investment advisers registered or required to be registered to make and keep certain true, accurate and current various books, including order memoranda and bills or statements relating to the adviser's business. As a result of the conduct described above, GPIM willfully violated Section 204(a) of the Advisers Act and Rule 204-2(a)(3) and 204-2(a)(5) thereunder.

42. Section 204A of the Advisers Act and Rule 204A-1 thereunder requires an investment adviser registered or required to be registered with the Commission to establish, maintain and enforce a written code of ethics that, among other things, sets forth procedures and limitations governing the business conduct of associated persons under the principle that an adviser's employees owe a fiduciary duty to clients. As a result of the conduct described above, GPIM willfully violated Section 204A of the Advisers Act and Rule 204A-1 thereunder.

IV.

GPIM's Remedial Efforts

43. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by GPIM and cooperation afforded the Commission staff.

Undertakings

GPIM undertakes to:

44. Retain, within 30 days of the date of entry of this Order, the services of an Independent Consultant not unacceptable to the Commission staff. The Independent Consultant's compensation and expenses shall be borne exclusively by GPIM. GPIM shall require the Independent Consultant to conduct a comprehensive review of, and recommend

⁴ A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

corrective measures concerning, GPIM's compliance and other policies and procedures with respect to: (1) GPIM personnel who are involved in the business transactions of Guggenheim Partners and its affiliates, and consideration of that involvement to GPIM's advisory obligations, including whether such policies and procedures effectively detail Guggenheim Partners' role; (2) conflicts of interest; (3) trade errors; and (4) gifts and entertainment. GPIM shall cooperate fully with the Independent Consultant and provide the Independent Consultant with access to files, books, records, and personnel as reasonably requested for the review.

45. Provide to the Commission staff, within 30 days of retaining the Independent Consultant, a copy of an engagement letter detailing the Independent Consultant's responsibility, which shall include the reviews described in paragraph 44 above.

46. No more than 120 days after the date of entry of this Order, submit to the Commission's staff a written report that GPIM will obtain from the Independent Consultant regarding GPIM's policies and procedures. The Report shall address the issues described in paragraph 44 above, and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes in or improvements to policies and procedures for GPIM, and a procedure for implementing the recommended changes in or improvements to those policies and procedures.

47. Adopt all recommendations contained in the Report of the Independent Consultant; provided, however, that, within 150 days after the date of entry of this Order, GPIM shall, in writing, advise the Independent Consultant and the staff of the Commission of any recommendations that it considers to be unnecessary, unduly burdensome, impractical, or inappropriate. With respect to any such recommendation, GPIM need not adopt that recommendation at that time but shall propose, in writing, an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation with respect to GPIM's policies and procedures on which GPIM and the Independent Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 180 days of the date of entry of this Order. In the event GPIM and the Independent Consultant are unable to agree on an alternative proposal, GPIM shall abide by the determinations of the Independent Consultant.

48. Ensure the independence of the Independent Consultant in that: GPIM shall not terminate the Independent Consultant or substitute another independent compliance consultant for the initial Independent Consultant without the prior written approval of the staff of the Commission; shall compensate the Independent Consultant for services rendered pursuant to this Order at its reasonable and customary rates; and shall not be in or have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports, or documents to the staff of the Commission.

49. Require the Independent Consultant, for the period of the engagement and for a period of two years from completion of the engagement, to enter into an agreement that provides that the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with GPIM or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. GPIM shall require that

any firm with which the Independent Consultant is affiliated in the performance of his, her or its duties under this Order shall not, without prior written consent of the staff of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with GPIM or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

50. Certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, 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 GPIM agrees to provide such evidence. The certification and supporting material shall be submitted to Diana Tani, Assistant Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 S. Flower St., Suite 900, Los Angeles, CA 90071, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

51. Preserve for a period not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of their compliance with the undertakings set forth in this Order.

52. Provide notice of these proceedings as follows:

a. Within 30 days of the date of entry of this Order, provide a copy of the Order to each of its current advisory clients; and

b. For a period of one year from the date of entry of this Order, to the extent that GPIM is required to deliver a brochure to a client and/or prospective client pursuant to Rule 204-3 of the Advisers Act, provide a copy of this Order to such client and/or prospective client at the same time that GPIM delivers the brochure.

V.

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

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

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

B. GPIM is censured.

C. GPIM shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$20 million to the Securities and Exchange Commission for transfer to the general fund of United States Treasury in accordance with Exchange Act Section 21F(g)(3).

If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) GPIM may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) GPIM 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) GPIM 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 Guggenheim Partners Investment Management, LLC 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 Diana Tani, Assistant Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 S. Flower St., Suite 900, Los Angeles, CA 90071.

D. GPIM shall comply with the undertakings enumerated in paragraphs 44 through 52 above.

By the Commission.

Brent J. Fields
Secretary