

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4283 / November 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16974

In the Matter of

ALPHA FIDUCIARY, INC.,
and ARTHUR T. DOGLIONE,

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e), 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 Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Alpha Fiduciary, Inc. (“AFI”) and Arthur T. Doglione (“Doglione”) (collectively, “the Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 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 Respondents' Offers, the Commission finds¹ that:

Summary

1. From at least August 2010 until March 2013, Respondents and AFI's former vice president and business development director 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. Doglione 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. AFI's former vice president and business development director also created performance advertising 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.

2. AFI also failed to implement written compliance policies and procedures reasonably designed to prevent its employees from presenting performance advertising to clients or prospective clients that violated the Advisers Act and its rules.

Respondents

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.

4. Arthur T. Doglione, age 53, is a resident of Scottsdale, Arizona. Doglione is the majority owner, managing member, and president of AFI, and until April 2014, its chief compliance officer.

¹ The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Background

5. Doglione formed AFI in November 2006 and registered it 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.

6. Beginning in 2010, Respondents 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. Respondents 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.

7. Respondents 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. Respondents and/or AFI's former vice president and business development director 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.

8. 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.

9. 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.

10. AFI employees knew that the GTMACS' performance data was hypothetical and based on a static, back-tested allocation of seven to nine indices. Nevertheless, AFI's former vice president and business development director emailed a handful of clients and prospective clients the GTMACS' hypothetical performance data without including even the disclosure about "certain hypothetical performance and portfolio information." In several e-mails to prospective clients,

AFI's former vice president and business development director also made misleading statements suggesting the hypothetical GTMACS' model performance data represented actual past performance.

11. AFI's advertising materials also contained 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.

12. AFI, through its former vice president and business development director, also provided prospective clients with a redacted report of an existing client's portfolio, one of which, for example, presented a 14.4% return net of fees over a six-month period. Respondents selected the sample client portfolio without considering whether it was representative of the performance of other AFI clients.

13. AFI adopted its Compliance and Procedures Manual before the firm began using performance advertising in 2010, but the Manual was not updated until December 2013. Before December 2013, AFI's Manual contained a section entitled "Marketing Materials and Advertising" that described Rule 206(4)-1 of the Advisers Act and stated that "particular care must be taken to ensure that materials presenting the composite performance of [AFI's] accounts meet SEC rules and interpretations." AFI's Manual required the chief compliance officer's prior review and approval of any marketing materials or advertising published or circulated to clients or prospective clients. Doglione exercised sole authority over AFI's policies and procedures, and he was solely responsible for the review and approval of AFI's marketing materials prior to their distribution to clients or prospective clients.

Violations

14. 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)).

15. 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

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)).

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.

16. As a result of the conduct described above, AFI also willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require that registered advisers adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules adopted by the Commission under the Act. A violation of Section 206(4) and the rules thereunder do not require scienter. *Steadman*, 967 F.2d at 647.

17. As a result of the conduct described above, Doglione 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. Doglione 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 marketing materials to mislead clients and prospective clients about AFI's actual performance. He also knowingly or recklessly provided substantial assistance to AFI's primary violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) & (5) thereunder by creating the GTMACS' hypothetical performance data, co-authoring and/or approving the marketing materials that contained the misleading presentation of the GTMACS' model performance, and choosing the client portfolios used in advertising without determining whether those portfolios' returns were representative of AFI's performance.

18. As a result of the conduct described above, Doglione willfully aided and abetted and caused AFI's violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Doglione knew or was generally aware that AFI failed to implement procedures reasonably designed to prevent violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1(a)(2) & (5) thereunder. By failing to consult the applicable sources of guidance as specified in AFI's compliance manual for the review and approval of advertising materials, Doglione knowingly or recklessly provided substantial assistance to AFI's primary violation of Rule 206(4)-7.

AFI's Remedial Efforts

19. In determining to accept Respondents' Offers, the Commission considered remedial acts undertaken by Respondents and cooperation afforded the Commission staff.

Undertakings

20. Respondent AFI has undertaken to:
21. Order Notification
- a. Within thirty (30) days of the issuance of this Order, AFI shall mail to each of its existing clients a copy of the Form ADV which incorporates the paragraphs contained in Section III of this Order, and which specifies that the Order will be posted on the homepage of AFI's website;
 - b. Provide a copy of the Form ADV which incorporates the paragraphs contained in Section III of Order to any prospective client for a period of one (1) year after entry of this Order; and
 - c. Within thirty (30) days of the issuance of this Order, AFI shall post a copy of this Order on the homepage of AFI's website and maintain it there for a period of six (6) months.
22. Independent Compliance Consultant
- a. AFI shall retain, within thirty (30) days of the issuance of this Order, the services of an Independent Compliance Consultant not unacceptable to the staff of the Commission's Los Angeles Regional Office. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by AFI. AFI shall require the Independent Compliance Consultant to conduct a review of AFI's compliance program, including its policies and procedures relating to the publication, circulation, or distribution of advertisements under Section 206(4) of the Advisers Act and Rule 206(4)-1(a) thereunder. AFI shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to any of its files, books, records and personnel as reasonably requested for review; provided, however, that AFI need not provide access to materials as to which AFI may assert a valid claim of attorney-client privilege;
 - b. At the conclusion of the review, which in no event shall be more than four (4) months after the issuance of this Order, AFI shall require the Independent Compliance Consultant to submit an Initial Report to AFI and to the staff of the Commission's Los Angeles Regional Office. The Initial Report shall describe the review performed, the conclusions reached, and shall include any recommendations deemed necessary to make the policies and procedures adequate;

- c. Within fifteen (15) days after receipt of the Independent Compliance Consultant's Initial Report, AFI shall in writing advise the Independent Compliance Consultant and the staff of the Commission's Los Angeles Regional Office of any recommendations that it considers to be unnecessary or inappropriate. AFI may suggest an alternative procedure designed to achieve the same objective or purpose as that of the recommendation of the Independent Compliance Consultant. The Independent Compliance Consultant shall evaluate any alternative procedure proposed by AFI. However, AFI shall abide by the Independent Compliance Consultant's final recommendation;
- d. Within six (6) months after the issuance of this Order, AFI shall, in writing, advise the Independent Compliance Consultant and the staff of the Commission's Los Angeles Regional Office of the recommendations it is adopting;
- e. Within nine (9) months after the issuance of this Order, AFI shall require the Independent Compliance Consultant to complete its review and submit a written final report to the staff of the Commission's Los Angeles Regional Office. The Final Report shall describe the review made of AFI's compliance policies and procedures; set forth the conclusions reached and the recommendations made by the Independent Compliance Consultant, as well as any proposals made by AFI; and describe how AFI is implementing the Independent Compliance Consultant's final recommendations;
- f. AFI shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Independent Compliance Consultant's Final Report; and
- g. AFI shall require the Independent Compliance Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Compliance Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with AFI, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Compliance Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Compliance Consultant in performance of his/her duties under this Order shall not, without prior written consent of the staff of the Commission's Los Angeles Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with AFI, 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.

23. For good cause shown and upon timely application by the Independent Compliance Consultant or AFI, the staff of the Commission's Los Angeles Regional Office may extend any of the deadlines set forth in these undertakings.

24. AFI shall 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 AFI agrees to provide such evidence. The certification and supporting material shall be submitted to Spencer E. Bendell, Assistant Regional Director, Los Angeles Regional Office, Securities and Exchange Commission, 444 S. Flower Street, 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.

IV.

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

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

A. Respondent AFI 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 Rules 206(4)-1 and 206(4)-7 promulgated thereunder.

B. Respondent Doglione 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 Rules 206(4)-1 and 206(4)-7 promulgated thereunder.

C. Respondents AFI and Doglione are censured.

D. Respondents shall pay civil penalties of \$250,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Securities Exchange Act of 1934, Section 21F(g)(3). Payment shall be made in the following installments:

- (1) \$100,000 within ten (10) days of entry of this Order;
- (2) \$50,000 within 180 days of entry of this Order;
- (3) \$50,000 within 270 days of entry of this Order; and
- (4) \$50,000 within 360 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. Respondents AFI and Doglione are jointly and severally liable for all payments required to be made by this paragraph. Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying AFI and Doglione as Respondents 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. Echavarría, Associate Regional Director, Los Angeles Regional Office, Securities and Exchange Commission, 444 S. Flower Street, Suite 900, Los Angeles, CA 90071.

E. Respondent AFI shall comply with the undertakings enumerated in Section III, paragraphs 21-24 above.

By the Commission.

Brent J. Fields
Secretary