

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4746 / August 16, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-18113

In the Matter of

Capital Dynamics, Inc.,

Respondent.

**ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Capital Dynamics, Inc. (“CDI” 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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing 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. This matter arises from CDI's improper allocation of certain expenses to a private equity fund client. Respondent is an investment adviser that has at all relevant times acted as the manager of the Capital Dynamics US Solar Energy, L.P., along with its parallel funds (collectively, the "Solar Fund"). Between March 2011 and July 2015, CDI allocated to, and caused the Solar Fund to pay for, \$1,273,148 of certain legal, hiring and consulting expenses which, pursuant to the fund's organizational documents, should not have been borne by the fund. As a result, CDI violated Section 206(2) of the Advisers Act in connection with its breach of a fiduciary duty to the Solar Fund and also violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

2. Respondent also failed to adopt written policies or procedures reasonably designed to prevent violations of the Advisers Act arising from the improper expense allocations. Accordingly, Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

RESPONDENT

3. **Capital Dynamics, Inc.** ("CDI" or "**Respondent**") is a Delaware corporation with its principal place of business in New York, New York. It is an investment adviser registered with the Commission since June 2008. CDI has approximately \$2.8 billion of regulatory assets under management as of March 30, 2017.

RELEVANT ENTITIES

4. **Capital Dynamics US Solar Energy, L.P. and its parallel investment funds** (collectively, the "**Solar Fund**"), are Delaware limited partnerships formed in 2010 and 2012, respectively, to invest in large solar photo-voltaic projects in the United States. Respondent serves as the manager and Respondent's affiliates serve as the general partners (collectively, the "**Solar Fund GPs**") of the Solar Fund.

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.

FACTS

5. In 2010, CDI sought to introduce a new investment program focused on clean energy and infrastructure, with the Solar Fund as the initial private fund under the program. In furtherance of this initiative, CDI and its affiliates entered into an Umbrella Agreement with certain employees managing the Solar Fund (the “Umbrella Agreement”); established certain partnerships for incentive purposes; and engaged various contractors.

6. The investors in the Solar Fund (each, a “Limited Partner”) made a commitment to contribute approximately \$282 million to the Solar Fund for the purpose of investing in solar energy assets and businesses located primarily in the United States. Investments in the Solar Fund are primarily governed by three documents: a Private Placement Memorandum, a Limited Partnership Agreement, and a Management Agreement (collectively, the “Organizational Documents”). The fund’s initial closing occurred in December 2010, and its final closing in June 2012.

7. The Organizational Documents provided that CDI and the Solar Fund GPs were responsible for paying their own “normal operating expenses,” including “all routine, recurring expenses incident to” their own operations, including employee expenses, as well as fees and expenses for certain consultants that provided services to CDI.

8. The Organizational Documents further provided that the Solar Fund would be responsible for expenses incurred in connection with the establishment and sale of the fund as well as direct and indirect expenses “incurred in relation to the administration and operations” of the fund.

9. CDI improperly allocated certain expenses to the Solar Fund that were not provided for in the Organizational Documents.

10. For example, beginning in June 2012 and continuing through November 2013, CDI and certain of its employees incurred legal expenses in connection with negotiations concerning the Umbrella Agreement. CDI improperly allocated those expenses to the Solar Fund. In total, CDI improperly allocated \$797,257 of such legal expenses to the Solar Fund.

11. Beginning in March 2011 and continuing through April 2015, CDI incurred employee expenses and consultant costs that were not properly allocable to the Solar Fund pursuant to the terms of the Organizational Documents. In total, CDI improperly allocated \$475,891 of such expenses to the Solar Fund.

12. In sum, between March 2011 and July 2015, CDI improperly allocated to the Solar Fund, and caused the Solar Fund to pay for, a total of \$1,273,148 in expenses that should not have been charged to the fund pursuant to the terms of the Organizational Documents.

13. In addition, CDI failed to adopt written policies or procedures reasonably designed to prevent violations of the Advisers Act arising from improper allocation of expenses to the Solar

Fund. The allocation of expenses to the Respondent and the Solar Fund GPs, on the one hand, and to the Solar Fund, on the other hand, are governed by the Organizational Documents as well as by an internal document known as the “Solar Fund Bible.” The Solar Fund Bible contained insufficient guidance about the approval of expenses and provided for little or no review of approved invoices, including for legal expenses purportedly incurred on behalf of the fund. In addition, the Solar Fund Bible failed to establish a mechanism through which Respondent could oversee and approve of expenses charged to the Solar Fund by its investment personnel.

14. CDI voluntarily undertook several remedial measures to improve its compliance program, including by retaining additional compliance staff and enhancing employee training. For example, in January 2014, CDI named a new chief compliance officer who led a compliance initiative to evaluate CDI’s expense approval and review procedures. This initiative included internal compliance testing and, beginning in 2014, review of historical expense allocations by an outside law firm and a compliance consulting firm.

15. Also in 2014, CDI revised its policies and procedures, including by replacing the Solar Fund Bible with comprehensive expense allocation policies and procedures that, among other things, established multiple levels of review for expense allocations; escalation procedures to the compliance department if differences arose regarding the allocation of expenses; and increased oversight of expenses charged by investment personnel.

16. In December 2014, the Division of Enforcement staff contacted CDI. Between December 2015 and July 2016, CDI voluntarily reimbursed the Solar Fund a total of \$1,405,537, including interest, for expenses improperly charged to the Solar Fund.

VIOLATIONS

1. Section 206(2) of the Advisers Act prohibits investment advisers from directly or indirectly engaging “in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” A violation of Section 206(2) of the Advisers Act 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)). Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. *Id.* As a result of the conduct described above, Respondent violated Section 206(2) of the Advisers Act.

2. Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder make it unlawful for any investment adviser to a pooled investment vehicle to “[m]ake any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle” or “engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.” Proof of scienter is not required to establish a violation of Section 206(4) of the Advisers Act. *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992). As a result of the conduct described above, Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

3. Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder require registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules. As a result of the conduct described above, Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

RESPONDENT'S COOPERATION AND REMEDIAL EFFORTS

In determining to accept Respondent's Offer, the Commission considered remedial acts taken by Respondent and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

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

- A. Respondent 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)-7 and 206(4)-8 thereunder.
- B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$275,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.
- C. 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 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 Capital Dynamics, Inc. 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 C. Dabney O’Riordan, Co-Chief, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 444 South Flower Street, Suite 900, Los Angeles, CA 90071.

- D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary