

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 4777 / September 26, 2017**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-18214**

**In the Matter of**

**360 Financial, Inc.**

**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 360 Financial, Inc. (“Respondent” or “360 Financial”).

**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 them 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 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 Respondent’s Offer, the Commission finds<sup>1</sup> that:

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<sup>1</sup> 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.

## **SUMMARY**

1. This matter involves the failure of 360 Financial – a registered investment adviser – to disclose to clients that it received a forgivable loan of \$446,356 from a broker-dealer (the “Broker-Dealer”) and a separate non-forgivable loan from a broker that provides clearing and custody services for 360 Financial’s advisory clients. 360 Financial did not disclose the loan or the conflict of interest arising from this compensation in Commission filings or otherwise to clients. By failing to disclose its conflict of interest completely and accurately, the adviser violated Section 206(2) of the Advisers Act. The adviser also violated Section 207 of the Advisers Act by omitting material facts from its Commission filings concerning its relationship with the Broker-Dealer.

## **RESPONDENT**

2. 360 Financial is a Minnesota corporation located in Minnetonka, Minnesota. Since August 30, 2013, 360 Financial has been registered with the Commission as an investment adviser.

## **BACKGROUND**

3. 360 Financial provides financial planning, consulting, and investment management services to a variety of clients, including individuals, trusts, estates, corporations, and pension and profit sharing plans.

4. In August 2013, 360 Financial entered into an agreement with the Broker-Dealer to provide execution of trades, custody of assets, and reporting services for 360 Financial’s advisory clients.

5. In connection with its agreement, the Broker-Dealer made a forgivable loan to 360 Financial’s owner in the amount of \$446,356 in September 2013 (the “Forgivable Loan”), which was based on the recipient’s gross production from client accounts at a prior broker-dealer. The Broker-Dealer made a second loan to 360 Financial’s owner in the amount of \$127,530 in October 2013 (the “Non-Forgivable Loan”). The Forgivable Loan and Non-Forgivable Loan were used to cover operational costs, including costs associated with transitioning its business from its prior broker-dealer to the Broker-Dealer.

6. Under its terms, the Broker-Dealer would forgive the Forgivable Loan over a three-year period on a straight-line basis, in the amount of \$148,785.33 plus interest, per year on the anniversary date of the agreement, so long as 360 Financial’s owner continued to be associated as a registered representative with the Broker-Dealer and complied with his contractual obligations with the Broker-Dealer. The Non-Forgivable Loan was interest-free for six months and then bore an interest rate of 4.25% until its maturity date approximately three years after the loan was made. Because each of the loans required 360 Financial’s owner to be associated as a registered representative with the Broker-Dealer, they presented a conflict of interest for 360 Financial.

7. As part of the transition to Broker-Dealer, 360 Financial retained an outside law firm to help prepare its Form ADV. 360 Financial was required to file and did file Forms ADV and annual amendments with the Commission. 360 Financial also retained the law firm's affiliated compliance consulting firm to assist with ongoing compliance obligations.

8. In its Form ADV Part 2A Brochures filed after selecting the Broker-Dealer, 360 Financial disclosed certain aspects of its new relationship with the Broker-Dealer and the services the Broker-Dealer may provide to 360 Financial's clients. Specifically, 360 Financial disclosed that the Broker-Dealer provided execution of trades and custody of assets for 360 Financial's clients, and that certain 360 Financial executive officers and Investment Adviser Representatives are also registered representatives of Broker-Dealer. According to the Form ADV Brochures, these individuals – as registered representatives – “may offer securities and receive normal and customary commissions as a result of securities transactions,” which “[p]resents a conflict of interest.” 360 Financial did not seek counsel's advice on whether the loans to 360 Financial's owner had to be disclosed as a conflict of interest in the Form ADV.

9. 360 Financial did not disclose the loans to its advisory clients, either in its Forms ADV filed with the Commission or otherwise. 360 Financial also did not disclose the conflict of interest inherent in the fact that 360 Financial's owner received compensation from the Broker-Dealer in the form of forgiveness of the Forgivable Loan and in the form of an initial six-month interest-free period for the Non-Forgivable Loan, while at the same time using the Broker-Dealer for execution, custody and reporting services, recommending that clients open brokerage accounts with the Broker-Dealer, and obtaining investment research from the Broker-Dealer. The Forgivable Loan and the Non-Forgivable Loan created a financial incentive for 360 Financial to use the Broker-Dealer and a disclosure should have been included in Part 2A and Part 2B of 360 Financial's Form ADV.

## VIOLATIONS

10. Section 206(2) of the Advisers Act makes it unlawful for an adviser to use instruments of interstate commerce to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Scierter is not required to establish a violation of Section 206(2), but rather may rest on a finding of 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, 194-95 (1963)).

11. Section 207 of the Advisers Act, among other things, makes it unlawful for a person to “willfully to omit to state... material fact[s]” in registration applications and reports filed with the Commission.

12. As a result of the negligent conduct described above, 360 Financial willfully<sup>2</sup> violated Sections 206(2) and 207 of the Advisers Act.

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

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 207 of the Advisers Act.

B. Respondent shall be and hereby is censured.

C. Respondent shall, within fourteen (14) days of the entry of this Order, pay a civil money penalty in the amount of \$40,000 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. 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

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<sup>2</sup> 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)).

Payments by check or money order must be accompanied by a cover letter identifying Respondent 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 Paul A. Montoya, Assistant Regional Director, Asset Management Unit, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL, 60604.

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