

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5344 / September 13, 2019

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4075 / September 13, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19448

In the Matter of

**ED CAPITAL MANAGEMENT,
LLC d/b/a DANILOFF CAPITAL
MANAGEMENT, LLC
and ELLIOT DANILOFF a/k/a
ILYA OLEGOVICH DANILOV,**

Respondents.

**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 ED Capital Management, LLC d/b/a Daniloff Capital Management, LLC (“ED Capital”), and Elliot Daniloff a/k/a Ilya Olegovich Danilov (“Daniloff”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, the Respondents have submitted Offers of Settlement (“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, the Respondents consent 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 Respondents' Offers, the Commission finds that:

Summary

1. ED Capital, which was registered with the Commission as an investment adviser from 2012 through 2017, has failed to distribute annual audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP") to the investors in the largest private fund that it advised in each fiscal year from 2012 through 2016, in violation of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, commonly referred to as the "custody rule." In addition, the related sections of ED Capital's Forms ADV, signed and submitted on its behalf by Daniloff, were inaccurate starting with the 2013 fiscal year filing, resulting in violations of Section 207 of the Advisers Act.

2. ED Capital also failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder, and failed to conduct the requisite annual reviews of its written policies and procedures to ensure that its written policies and procedures were adequate and effective, a violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

3. Daniloff, ED Capital's managing member and sole owner, was responsible for the foregoing violations by ED Capital.

Respondents

4. ED Capital is a Delaware limited liability company with its principal place of business in New York, New York. ED Capital was registered with the Commission as an investment adviser under the Advisers Act from March 2012 until September 2017, when it filed a Form ADV-W. During the relevant period, ED Capital managed and served as investment adviser to five private funds organized under master-feeder structures.

5. Daniloff is ED Capital's managing member and sole owner and, beginning in late 2013, also served as its chief compliance officer. He previously held Series 7, 31, 55, 63 and 65 licenses. Daniloff is 42 years old, maintains dual Russian and United States citizenship and currently resides in Brooklyn, New York.

Facts

6. ED Capital's largest private fund is Synergy Hybrid Fund Ltd, which, along with its feeder fund, Synergy Hybrid Feeder Fund Ltd (collectively "Synergy"), accounted for approximately 85% of the reported assets under ED Capital's management during the relevant period. As of December 31, 2016, ED Capital reported approximately \$51 million in assets under management. Synergy's stated investment strategy focuses on private agricultural investments in Russia.

7. The custody rule is designed to protect investment advisory clients from the misuse or misappropriation of their funds and securities. It requires that registered advisers who have custody of client funds or securities implement an enumerated set of requirements to prevent loss, misuse, or misappropriation of those assets.

8. An investment adviser has custody of client assets if it holds, directly or indirectly, client funds or securities, or if it has the ability to obtain possession of those assets. *See* Rule 206(4)-2(d)(2).

9. ED Capital had custody of Synergy's assets as defined in Rule 206(4)-2. An investment adviser who has custody of client assets must, among other things: (i) ensure that a qualified custodian maintains the client assets; (ii) notify the client in writing of accounts opened by the adviser at a qualified custodian on the client's behalf; (iii) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients, except if the client is a limited partnership for which the adviser or a related person is a general partner, the account statements must be sent to each limited partner; and (iv) ensure that client funds and securities are verified by actual examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser. *See* Rule 206(4)-2(a)(1) - (5).

10. The custody rule provides an alternative to complying with the requirements of Rule 206(4)-2(a)(2), (3) and (4) for investment advisers to limited partnerships or other types of pooled investment vehicles, such as Synergy. The custody rule provides that an investment adviser "shall be deemed to have complied with" the independent verification requirement and is not required to satisfy the notification and accounts statements delivery requirements with respect to a fund if the fund is subject to audit at least annually and the adviser "distributes [the fund's] audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners . . . within 120 days of the end of [the fund's] fiscal year" ("Audited Financials Alternative"). *See* Rule 206(4)-2(b)(4). The accountant performing the audit must be an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB"). *See* Rule 206(4)-2(b)(4)(ii). An investment adviser to a limited partnership that fails to meet the requirements of the Audited Financials Alternative to timely distribute audited financial statements prepared in accordance with GAAP would need to satisfy all of the requirements of Rule 206(4)-2(a) in order to avoid violating the custody rule.

11. With respect to Synergy, ED Capital relied on the Audited Financials Alternative to attempt to comply with the custody rule during the relevant period but did not do so, as ED Capital failed to distribute the requisite audited financial statements to investors, either within 120 days of the fiscal year's end or at any time thereafter. ED Capital engaged a PCAOB-registered firm to conduct an annual audit of Synergy's financial statements for its fiscal years 2012 through 2015, as well as a third-party valuation firm to assist with the audit. However, for each of those years, the audit firm was never able to complete the audit and express an opinion on whether Synergy's financial statements were prepared in accordance with GAAP. For each of those years, the firm issued a report well after 120 days following the end of the fiscal year,

ranging from 321 to 420 days thereafter, in which the firm stated that it was “not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion” and therefore did “not express an opinion” on whether Synergy’s financial statements were prepared in accordance with GAAP. A disclaimer of opinion does not constitute the performance of an audit in accordance with Generally Accepted Auditing Standards and therefore, even if timely, cannot be used to satisfy the Audited Financials Alternative requirement that audited financial statements prepared in accordance with GAAP be distributed to all limited partners within the requisite time period. For the fiscal year 2016, ED Capital was unable to engage an accountant to audit Synergy’s financial statements. Accordingly, ED Capital did not satisfy the requirements of the Audited Financials Alternative in Rule 206(4)-2(b)(4) for Synergy for each fiscal year beginning in 2012 and was therefore obligated to comply with Rule 206(4)-2(a)(2), (3) and (4), which it also failed to do.

12. During the relevant period, Daniloff was aware of the foregoing circumstances and did not take timely corrective action to ensure that ED Capital complied with the custody rule.

13. During the relevant period, Daniloff, on behalf of ED Capital, signed and filed annual Forms ADV that contained untrue statements of material facts with respect to Synergy’s financial statements. In the Forms ADV for 2013 through 2016, which were filed from March 28, 2014 through March 31, 2017, ED Capital and Daniloff stated that audited financial statements prepared in accordance with GAAP are distributed to Synergy’s investors. Due to the circumstances described above, those statements were inaccurate. In the same Forms ADV, ED Capital and Daniloff also stated “Report Not Yet Received” in response to the question “Does the report prepared by the auditing firm contain an unqualified opinion?” and failed to file, as was required, an amended Form ADV updating the response to “No” after the reports disclaiming an audit opinion were received.

14. ED Capital also failed to comply with the requirement that every investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent the violations of the Advisers Act and the rules thereunder discussed above, and to conduct the required annual review of the adequacy and effectiveness of the adviser’s policies and procedures. *See* Rule 206(4)-7(a) and (b). Among other things, ED Capital lacked written policies and procedures reasonably designed to prevent violations of the custody rule. In addition, from the time ED Capital registered with the Commission through 2017, ED Capital failed to conduct at least annually the requisite review of its written policies and procedures to ensure that its policies and procedures were adequate and effective.

Violations

15. Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in acts, practices or courses of business that are fraudulent, deceptive, or manipulative, as defined by the Commission in rules and regulations promulgated under the statute. Proof of scienter is not required to establish a violation of Section 206(4) of the Advisers Act and the rules thereunder. *See SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992). Among other things, Rule 206(4)-2 requires registered investment advisers with custody of client assets to have independent public

accountants conduct surprise examinations of those client funds or securities, or to have private fund clients timely distribute to their investors annual audited financial statements prepared in accordance with GAAP. Rule 206(4)-7 requires, among other things, that an investment adviser registered with the Commission adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and rules thereunder, and to review, no less frequently than annually, the adequacy of such policies and procedures and the effectiveness of their implementation. Section 207 of the Advisers Act makes it “unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein.”

16. As a result of the conduct described above, ED Capital willfully violated, and Daniloff was a cause of ED Capital’s violations of, Sections 206(4) and 207 of the Advisers Act and Rules 206(4)-2 and 206(4)-7.

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

- A. Respondents cease and desist from committing or causing any violations and any future violations of Sections 206(4) and 207 of the Advisers Act and Rules 206(4)-2 and 206(4)-7.
- B. ED Capital is censured.
- C. Within 21 days of the entry of this Order, ED Capital shall pay a civil monetary penalty in the amount of \$75,000 and Daniloff shall pay a civil monetary penalty in the amount of \$25,000 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) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents 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) Respondents 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 ED Capital Management, LLC d/b/a Daniloff Capital Management, LLC and Elliot Daniloff a/k/a Ilya Olegovich Danilov, 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 Sanjay Wadhwa, Senior Associate Director, Securities and Exchange Commission, New York Regional Office, 200 Vesey Street, Suite 400, New York, NY 10281.

E. 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, Respondents agree that in any Related Investor Action, Respondents 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 Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree 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 Respondents 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.

Vanessa A. Countryman
Secretary