SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 4249 / October 30, 2015

Admin. Proc. File No. 3-15263

In the Matter of

ZPR INVESTMENT MANAGEMENT, INC.,
and MAX E. ZAVANELLI

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Fraud

Negligent misrepresentations

Registered investment adviser and its owner and principal made misrepresentations in advertisements regarding, among other things, compliance with Global Investment Performance Standards. *Held*, it is in the public interest to impose an industry bar on principal, censure investment adviser, order respondents to cease and desist from further violations, and assess a $250,000 civil money penalty on investment adviser and a $570,000 civil money penalty on principal.

APPEARANCES

Philip J. Snyderburn and *K. Michael Swann* of Snyderburn, Rishoi & Swann, LLP, for ZPR Investment Management, Inc., and Max E. Zavanelli.

Amie Riggle Berlin for the Division of Enforcement.

Appeal filed: June 30, 2014
Last brief received: October 6, 2014
Oral argument held: October 26, 2015

I.

Respondents ZPR Investment Management, Inc., a registered investment adviser ("ZPRIM"), and Max E. Zavanelli ("Zavanelli"), ZPRIM's former president and owner, appeal from an administrative law judge's initial decision.[1] The law judge found that ZPRIM violated Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940,[2] and Advisers Act Rule 206(4)-1(a)(5),[3] by misrepresenting compliance with the Global Investment Performance Standards ("GIPS") in magazine advertisements and investment report newsletters, and that Zavanelli aided, abetted, and caused each of ZPRIM's violations based on these misrepresentations and was primarily liable for violating Sections 206(1) and (2). The law judge also found that ZPRIM violated Sections 206(2) and (4) and Rule 206(4)-1(a)(5) by negligently claiming in a Morningstar report for the period ended September 30, 2010 that (a) an independent third party had verified ZPRIM's compliance with GIPS "to the present," and (b) ZPRIM was not under Commission investigation. In addition, the law judge found that ZPRIM violated Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) by repeating its false claim that it was not under Commission investigation in a Morningstar report for the period ended March 31, 2011. The initial decision found that Zavanelli had caused each of ZPRIM's Morningstar violations but had not aided and abetted them. As sanctions, the law judge permanently barred Zavanelli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization; censured ZPRIM; issued cease-and-desist orders with respect to each Respondent; and imposed civil money penalties of $250,000 against ZPRIM and $660,000 against Zavanelli. For the reasons explained below, we sustain the law judge's findings with the exception of the finding that Zavanelli caused ZPRIM's misrepresentations in the Morningstar reports, and we reduce the civil money penalties assessed against him accordingly. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.[4]

II.

This case concerns the Division of Enforcement's claims that ZPR Investment Management, Inc., (a) falsely claimed that it complied with the Global Investment Performance

---

[1] *ZPR Inv. Mgmt., Inc.*, Initial Decision Release No. 602, 2014 WL 2191006 (May 27, 2014).

[2] 15 U.S.C. § 80b-6(1), (2), and (4).

[3] 17 C.F.R. § 275.206(4)-1(a)(5).

[4] The Division did not appeal the law judge's findings that (a) ZPRIM did not act with scienter with respect to the 2010 Morningstar report and thus did not violate Section 206(1) in connection with it, and (b) Zavanelli did not aid and abet ZPRIM's Morningstar violations or himself commit them. We also note that Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioner Aguilar has made the requisite review.

Standards in 2008 and 2011 magazine advertisements and 2009 investment newsletters that failed to provide the returns required by the GIPS Advertising Guidelines; (b) falsely claimed in a Morningstar report for the period ended September 30, 2010 that ZPRIM's GIPS compliance had been verified "to the present," although its GIPS verification firm had resigned months earlier; and (c) falsely stated in the same Morningstar report – and a subsequent report for the period ended March 31, 2011 – that it was not under Commission investigation, although it had been notified in writing to the contrary. The Division also seeks to hold Zavanelli responsible for the magazine advertisements and newsletters and for aiding and abetting and/or causing each of his firm's violations.

We find ZPRIM and Zavanelli liable for the misrepresentations at issue as follows. ZPRIM violated Advisers Act Sections 206(1), (2), and (4), and Advisers Act Rule 206(4)-1(a)(5) through its false or misleading claims of GIPS compliance in the magazine articles and newsletters, and its false claim that it was not under Commission investigation in its Morningstar report for the period ended March 31, 2011. ZPRIM also violated Sections 206(2) and (4) and Rule 206(4)-1(a)(5) through its false claims of GIPS compliance and lack of any Commission investigation in the Morningstar report for the period ended September 30, 2010. We find that Zavanelli violated Sections 206(1) and (2) with respect to the magazine articles and newsletters, and that he aided, abetted, and caused all of ZPRIM's violations other than those relating to the Morningstar reports.

For this conduct, we bar Zavanelli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization; censure ZPRIM; impose cease-and-desist orders; and order ZPRIM to pay a civil money penalty of $250,000 and Zavanelli to pay a civil money penalty of $570,000.

III.

A. Zavanelli owned and controlled ZPR Investment Management, Inc., during the relevant period.

ZPR Investment Management, Inc., is an investment adviser registered with the Commission and located in Orange City, Florida. It was formed in 1994 as a successor to Zavanelli Portfolio Research. ZPRIM was first registered with the Commission in 1994 and has been registered continuously as an investment adviser since 2006.

During the relevant period, Zavanelli was ZPRIM's president and sole shareholder. Zavanelli's former spouse, Ruth Ann Fay, served as ZPRIM's corporate secretary and was its chief compliance officer from April 2006 to April 2009, when Zavanelli assumed the position. ZPRIM also employed Ted Bauchle as its operations manager from 1999 until early 2013, when Zavanelli terminated him following a dispute regarding the content of Bauchle's investigative testimony in this matter. Zavanelli considered Bauchle to be an officer of ZPRIM. ZPRIM also contracted with ZPR Client Management, a separate entity wholly owned by David Sappir, to provide marketing and client communication services.

Zavanelli had ultimate authority over all aspects of ZPRIM's advisory business, including its advertising. As Ted Bauchle testified, Zavanelli was ZPRIM's "boss man" who "made all the decisions." Bauchle explained that it "was difficult to disagree" with Zavanelli "because he was under the impression that the company should be run his way and that he was always correct."

In October 2011, Zavanelli's son, Mark Zavanelli, joined ZPRIM as president and chief compliance officer. Through a series of transactions, Mark Zavanelli now owns 100% of ZPRIM. According to Max Zavanelli, Mark Zavanelli currently makes all final, non-investment decisions for ZPRIM. But Max Zavanelli continues to make investment decisions for ZPRIM and receives daily reports from ZPRIM on performance and valuation. He also retains significant input into various other ZPRIM decisions, including GIPS compliance.

B. The Global Investment Performance Standards are voluntary standards for quantifying and presenting investment performance.

The Global Investment Performance Standards are "universal, voluntary standards to be used by investment managers for quantifying and presenting investment performance that ensure fair representation, full disclosure, and apples-to-apples comparisons."[5] GIPS has two principal components: the Performance Standards and the Advertising Guidelines. Among other things, the Performance Standards specify how a firm constructs composites, calculates their performance, and presents that performance in formal GIPS-compliant presentations. As defined in GIPS, a composite is an "aggregation of one or more PORTFOLIOS into a single group that represents a particular investment objective or strategy."[6] The accounts in a composite are separately maintained but follow the same strategy.

Under GIPS, if a firm chooses to advertise that it is GIPS-compliant, it must comply with the GIPS Advertising Guidelines in addition to the Performance Standards.[7] The Guidelines require the disclosure of certain basic information regarding the firm in all advertisements claiming GIPS compliance.[8] In addition, where a firm discloses performance data in an advertisement claiming GIPS compliance, the Guidelines require the firm to disclose specific forms of returns. If a firm does not advertise GIPS compliance, the Guidelines do not apply.

---

5 *See* What Are the GIPS Standards?, http://www.gipsstandards.org/about/documents/factsheet.pdf.

6 2005 GIPS at 6, http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2005.n5.4002. All references to GIPS refer to the 2005 version, which is applicable to the statements at issue in this case.

7 2005 GIPS at 33; *see also* 2005 GIPS at iii (explaining that GIPS "includes guidelines for claiming compliance with the GIPS standards in advertisements").

8 All advertisements claiming GIPS compliance must include (1) a "description of the FIRM"; (2) an explanation of how "an interested party can obtain a presentation that complies with the REQUIREMENTS of GIPS standards and/or a list and description of all FIRM COMPOSITES"; and (3) the specific "GIPS Advertising Guidelines compliance statement: [Insert name of firm] claims compliance with the Global Investment Performance Standards (GIPS®)."

GIPS compliance "provides a level of credibility to the performance results of investment management firms" that choose to comply with GIPS.[9] "Prospective clients have a greater level of confidence in the integrity of performance presentations as well as the general practices of a compliant firm."[10]

Firms can obtain additional benefits by choosing to have their claims of GIPS compliance verified. "Verification is the review of an investment management FIRM'S performance measurement processes and procedures by an independent third-party 'verifier.'"[11] Third-party verification provides "marketing advantages" and "brings credibility" to a firm's GIPS compliance claims.[12]

C. In 2006, ZPRIM retained Ashland Partners & Company LLP so that it could become GIPS-compliant and attract investors.

In early 2006, ZPRIM retained Ashland Partners & Company LLP to help ZPRIM create GIPS policies and procedures and to verify on a quarterly basis that ZPRIM complied with GIPS.[13] Nikola Feliz, a senior manager at Ashland Partners at the time of the hearing, testified that to receive serious consideration from institutional investors, a firm must comply with GIPS.[14] Feliz, who had responsibility for ZPRIM's account at times during the relevant period, also explained that verification of a firm's claim of GIPS compliance has become "almost mandatory" for firms seeking institutional clients.

According to Ted Bauchle, who was ZPRIM's primary contact with Ashland, ZPRIM decided to become GIPS-compliant so it could compete for institutional clients. Although Zavanelli disputed this, he agreed that being GIPS-compliant is "very important" for marketing to institutional clients, and he testified that he wanted to be "measured on a GIPS basis" so that ZPRIM could have "bragging rights" based on its performance, which he thought "very easily"

---

9 GIPS Standards FactSheet at 1; *see also id.* (stating that claims of GIPS compliance "assure prospective clients that the historical 'track record' they report is both complete and fairly presented").

10 GIPS Standards FactSheet at 1.

11 2005 GIPS at 21. Verification considers (a) "[w]hether the FIRM has complied with all the COMPOSITE construction REQUIREMENTS of the GIPS standards on a FIRM-wide basis" and (b) "[w]hether the FIRM'S processes and procedures are designed to calculate and present performance results in compliance with the GIPS standards." 2005 GIPS at 21.

12 2005 GIPS at 21.

13 A consultant that advised institutional investors with respect to the selection of investment managers previously had recommended to ZPRIM that it comply with GIPS and have that compliance verified.

14 *See also* GIPS Standards FactSheet at 1 ("Compliance enables the GIPS-compliant firm to participate in competitive bids against other compliant firms throughout the world.").

could have been "the best." Following Ashland's initial verification, ZPRIM began to represent to potential clients that it was GIPS-compliant.

D. By 2008, ZPRIM had begun to claim GIPS compliance in its advertisements.

By January 2008, ZPRIM had begun to claim compliance with GIPS in advertisements reporting financial performance. When a firm discloses returns information in an advertisement claiming GIPS compliance, the GIPS Advertising Guidelines require it to provide (1) period-to-date composite performance results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns.[15]

ZPRIM placed advertisements that claimed GIPS compliance in the January, February, and April 2008 issues of Smart Money Magazine and the January 2008 issue of Kiplinger. The advertisements included period-to-date returns and over five years of annual returns for ZPRIM's Small Cap Value ("SCV") composite, the Russell 2000 index (SCV's benchmark), and the S&P 500 index.[16]

Zavanelli created the format for those advertisements, which he prepared by consulting a template Ashland provided. Zavanelli also consulted the GIPS Advertising Guidelines, which provide sample advertisements disclosing financial results.[17] Zavanelli designed the advertisements to be GIPS-compliant and had final approval for everything that went in them.[18]

E. In late 2008, ZPRIM dramatically changed the format of its advertisements to remove information required by the GIPS Advertising Guidelines.

ZPRIM published additional advertisements in Smart Money magazine in October, November, and December 2008, which again claimed GIPS compliance. But the advertisements omitted (1) period-to-date performance, and (2) either five years of annual results or one-, three-, and five-year annualized results, as required by the GIPS Advertising Guidelines. ZPRIM's period-to-date results were negative and lagged the Russell 2000 Index, its benchmark.

Had ZPRIM followed the Guidelines and disclosed performance against its benchmark, it would have disclosed the following period-to-date results:

---

15 2005 GIPS at 34. Annual returns show the performance of a composite only during a particular year. Annualized returns express returns over a period other than a year on an annual basis.

16 Although the Division elicited testimony at the hearing tending to show that these advertisements did not comply with the GIPS Advertising Guidelines in some respects, the advertisements were not the basis of any claim asserted in the OIP.

17 2005 GIPS at 36-37.

18 Zavanelli also testified that ZPRIM ran advertisements in 2007 that claimed GIPS compliance and followed the same format as the January 2008 advertisement.

Advertisement date	End of period used in advertisement	ZPRIM SCV Return	Russell 2000 Index Return
October 2008	June 30, 2008	-17.02%	-9.38%
November 2008	August 31, 2008	-12.70%	-2.63%
December 2008	September 30, 2008[19]	-18.42%	-10.39%

Rather than publicize these unfavorable returns, ZPRIM disclosed compounded and annualized ten-year returns in the October and November advertisements and compounded five-, ten-, and twenty-year returns for its SCV composite in its December 2008 advertisement. ZPRIM's advertisements showed that, over these time periods, ZPRIM was beating the Russell 2000 and S&P 500 indices in all disclosed measures:

Advertisement date / Return period	ZPRIM SCV Returns	Russell 2000 Index Returns	S&P 500 Index Returns
October 2008			
10 year	277.60%	71.21%	32.87%
Annualized	14.21%	5.52%	2.88%
November 2008			
10 year	415.14%	148.39%	57.93%
Annualized	17.81%	9.53%	4.68%
December 2008			
20 year	1187.05%	509.76%	565.18%
10 year	357.82%	111.99%	35.20%
5 year	75.45%	47.92%	28.65%

Bauchle testified that ZPRIM revised its advertising format to omit unfavorable results. Before the late-2008 advertisements ran, Bauchle told Zavanelli that they did not comply with the GIPS Advertising Guidelines. In particular, Bauchle told Zavanelli that because the advertisements had been changed to use annualized results (rather than at least five years of annual results), they needed to include one-, three-, and five-year annualized returns. Zavanelli maintained that it was not necessary to include these results because ZPRIM would provide them to prospective clients before they invested. Although Ashland had reviewed and commented on ZPRIM's January 2008 advertisement, ZPRIM did not send the new advertisement format to Ashland for review. Because Zavanelli wanted to run the advertisements, ZPRIM published them even though they did not comply with the Guidelines.

---

[19] The December 2008 advertisement erroneously identified August 31, 2008 as the end of the period but disclosed returns calculated through September 30, 2008.

Bauchle also told Ruth Ann Fay, ZPRIM's chief compliance officer, that the late-2008 advertisements were not GIPS-compliant. Although Fay disputes Bauchle's testimony, her testimony is not convincing because, on September 2, 2008, Bauchle sent her an email raising the GIPS Advertising Guidelines requirement regarding one-, three-, and five-year annualized performance and attaching the 2005 GIPS.

For his part, Zavanelli testified that ZPRIM's late-2008 advertisements "dramatically changed the format" of its advertisements. Zavanelli attributed the failure of the late-2008 advertisements to comply with GIPS to his inattention, his busy work and travel schedule, and the mistakes of others.[20] But Zavanelli also testified that he "made the approval" of the late-2008 advertisements at issue – albeit "without thinking" – and he separately agreed that they were submitted to him.[21] Zavanelli also admitted that he directed that the footnote claiming GIPS compliance be retained during a telephone conference on which the late-2008 advertising format was discussed.

F. In late 2008, Ashland Partners advised ZPRIM that it needed to attach a GIPS-compliant presentation to its monthly investment report newsletters or follow the GIPS Advertising Guidelines.

Zavanelli wrote a monthly investment report newsletter for ZPRIM that, among other things, contained information regarding the performance of ZPRIM's composites, including the Small Cap Value, Global, and All Asian composites. ZPRIM distributed this newsletter to its clients, as well as to a group that Zavanelli testified consisted of "maybe 30 to 40 investment consultants, professionals, a lot of professors, economists, a lot of people that are never going to invest with me, some famous money managers," as well as friends and family. ZPRIM also posted its newsletters on its website but later removed them.

On multiple occasions beginning in late 2008, Ashland advised ZPRIM that, if it claimed GIPS compliance and reported composite performance in its newsletter, it needed to follow the Advertising Guidelines or attach a GIPS-compliant presentation to the newsletter.[22] A GIPS-compliant presentation is a formal performance presentation that contains financial returns

---

20 Zavanelli testified that "I lost sort of direct control. I was busy. I wasn't paying attention. I forgot this format was wrong." He also testified that he "was out of the country," "was busy," and "had lots of people advising on the ad."

21 Zavanelli answered the following question in the affirmative: "And you began using the new format that we see on pages 5 through 7 of DX-21 as the first advertisements running after you had – were submitted to you after you had known about March 2008 and ZPR's worst performance compared to its benchmarks, correct?"

22 In a November 24, 2008 email, Ashland told ZPRIM that it needed to follow one of these options and summarized the requirements of the Guidelines. In an undated letter sent sometime after June 2009, Ashland also told ZPRIM that its newsletter was subject to the Guidelines because it showed performance.

information specified in the GIPS Performance Standards.[23] It contains more detailed financial information than that required by the Advertising Guidelines but does not necessarily contain all the returns information in the form those guidelines require for advertisements.[24]

G. ZPRIM claimed GIPS compliance in 2009 newsletters without following the GIPS Advertising Guidelines or attaching a GIPS-compliant presentation.

In 2009, ZPRIM twice distributed monthly newsletters that claimed compliance with GIPS but did not follow the GIPS Advertising Guidelines or attach a GIPS-compliant presentation. First, as part of a discussion of the Small Cap Value composite returns in ZPRIM's April 2009 newsletter, Zavanelli stated that Ashland Partners had verified ZPRIM's GIPS compliance. But Zavanelli did not provide period-to-date results for the SCV composite or five years of annual data or each of one-, three-, and five-year annualized results.

Second, in a discussion of the performance of ZPRIM's International Equity Global and SCV composites in its December 2009 newsletter, Zavanelli claimed that "[a]ll numbers are GIPS compliant." Zavanelli boasted that the International Equity Global composite was "now #1 on the top 10 managers list of Morningstar for the World Stock Composite," and number six for the previous five years. He also wrote that the SCV composite "again made the top 10 list for 5 years." Zavanelli included in the newsletter one-year and five-year annualized returns for the International Equity Global composite and (only) five-year annualized returns for SCV, each compared to the other managers in the top ten.

But that discussion failed to include period-to-date results and either five years of annual data or each of one-, three-, and five-year annualized results.[25] Zavanelli asserted later in the same newsletter that "[t]he investment report you are reading is not GIPS compliant" and "was never intended to be nor can it be." Zavenelli explained that, because the newsletter was prepared shortly after the close of the prior month, it contained some estimated numbers that were not prepared consistent with GIPS. But that explanation did not apply to the numbers that Zavanelli specifically claimed *were* GIPS-compliant, which were not estimates and were not prepared immediately prior to finalizing the newsletter.

Zavanelli also indirectly addressed Ashland's advice that, if ZPRIM did not follow the GIPS Advertising Guidelines, it should distribute its GIPS-compliant presentation with the newsletter. Sometime before December 2009, Bauchle had distributed a copy of ZPRIM's GIPS-compliant presentation to newsletter recipients. When Zavanelli learned that Bauchle had done

---

[23] Under GIPS, firms must "make every reasonable effort to provide a compliant presentation to all prospective clients" but "[a]s long as a prospective client has received a compliant presentation within the previous 12 months, the FIRM has met this REQUIREMENT." 2005 GIPS at 8, Section II.0.A.11.

[24] Ashland provided ZPRIM with a checklist or summary of the GIPS Advertising Guidelines requirements.

[25] Specifically, the newsletter did not disclose the three-year annualized returns for either composite, and it also did not disclose one-year returns for the SCV composite.

so, he became upset because the presentation disclosed the firm's assets under management, which Zavanelli believed were not particularly large for a registered investment adviser.[26] Zavanelli thereafter ordered Bauchle not to distribute the GIPS-compliant presentation with the newsletter.

Zavanelli dismissed Ashland's concerns, writing in ZPRIM's December 2009 newsletter that "[i]n a panic after a call from the GIPS verifiers, [his] staff sent out disclosure statements to all who read the investment report without [his] knowledge." Zavanelli asserted that these "disclosure reports by themselves are highly misleading," "normally go only to clients," and "d[id] not reflect [ZPRIM's] true situation."[27]

H. Ashland resigned following attempts to secure ZPRIM's compliance with GIPS.

Ashland subsequently had several calls with ZPRIM regarding the need for ZPRIM's newsletters to follow the GIPS Advertising Guidelines, and in April 2010, Ashland sent Bauchle a letter providing options for GIPS compliance. When Ashland later reviewed a subsequent newsletter, it found that ZPRIM had not followed either of the options identified in Ashland's April letter.[28]

On July 9, 2010, Ashland resigned effective immediately. In its resignation letter, Ashland explained that it was unable to reach a comfort level sufficient to continue to attest to ZPRIM's claim of GIPS compliance and that its final verification report covered only the period from December 31, 2000 through December 31, 2009.[29]

I. ZPRIM promised corrective action after an examination identified ZPRIM's false claims of GIPS compliance in its December 2008 Smart Money advertisement.

In February 2009, Commission staff performed an on-site examination of ZPRIM. On January 28, 2010, staff sent a letter to Ruth Ann Fay stating the examination's conclusions.[30] Among other things, the letter stated that, although ZPRIM had claimed compliance with GIPS in its December 2008 Smart Money advertisement, it had not provided the period-to-date and

---

[26] *See* 2005 GIPS at 14, Section II.5.A. (generally requiring GIPS-compliant presentation to disclose the "number of PORTFOLIOS and amount of assets in the COMPOSITE, and either the percentage of the TOTAL FIRM ASSETS represented by the COMPOSITE or the amount of TOTAL FIRM ASSETS at the end of each annual period").

[27] In underlined text, Zavanelli asserted that "[t]hese GIPS tables are misleading since they don't go back prior [to] 2001 and begin at the bottom of the cycle for [ZPRIM's] investment management."

[28] The newsletter that Ashland reviewed is not in the record and was not the basis for any charge.

[29] ZPRIM later retained another verifier, which issued a verification report in early 2011 that covered 2010.

[30] The examination team had shared concerns with ZPRIM in a 2009 exit interview.

other results required by the Advertising Guidelines. Zavanelli testified that he read the deficiency letter in detail at the time.

On February 26, 2010, Fay responded to the staff letter on behalf of ZPRIM, asserting that

> ZPR did not intend to mislead with this ad. ZPR was unaware at the time we needed to show annualized returns as well as compounded. We thought that including more years was better than less. It shows that we have survived some bad markets even though we are small.

ZPRIM also stated that it had changed its advertisements to show the "1-3-5 year annualized returns" as a corrective action. ZPRIM generally followed this format in advertisements it placed between December 2009 and April 2010.

J. ZPRIM made three additional false statements in Morningstar reports for the periods ended September 30, 2010 and March 31, 2011.

ZPRIM made three additional false statements in Morningstar reports for the periods ended September 30, 2010 and March 31, 2011.[31] For many years, ZPRIM had submitted returns and other information to Morningstar for inclusion in a database of investment advisers. The information contained in the database was reflected in formal periodic reports, which ZPRIM at times distributed to investors through ZPR Client Management and circulated internally. These reports were also available to subscribers to Morningstar's institutional research product, Morningstar Direct. Bauchle, who was responsible for submitting information to Morningstar, testified that ZPRIM hoped to get institutional customers based on its submissions.

First, in its Morningstar report for the period ended September 30, 2010, ZPRIM falsely stated that its GIPS compliance had been verified "for the period December 31, 2000 to the present by Ashland Partners & Company LLP." In fact, Ashland had resigned as ZPRIM's verifier in July 2010 and its final verification report did not cover any period after December 31, 2009. Bauchle testified that he generally did not update the GIPS compliance statement in the Morningstar reports when he input new performance data each quarter. He explained that the website he used to input information to Morningstar had two sections: one included financial information, which he updated quarterly; the other included information that Bauchle updated less frequently, including the statement regarding GIPS verification. Bauchle drafted ZPRIM's

---

[31] According to its website, "Morningstar, Inc. is a leading provider of independent investment research" and offers "an extensive line of products and services for individual investors, financial advisors, asset managers, and retirement plan providers and sponsors." http://corporate.morningstar.com/US/documents/MarketingFactSheets/AboutMorningstarFactsheet.pdf.

GIPS verification disclosure to state that ZPRIM had been verified "to the present" so that he would not need to update the disclosure each quarter.[32]

Second, in its Morningstar report for the period ended September 30, 2010, ZPRIM also falsely stated that there was no "Pending SEC Investigation" of ZPRIM. But by August 16, 2010, Commission staff had notified ZPRIM in writing that the Miami Regional Office was conducting an investigation of ZPRIM. Bauchle acknowledged that he knew that the Morningstar database asked whether the firm was under investigation. But according to Bauchle, ZPRIM did not believe that the investigation was a "real investigation" until the order instituting proceedings[33] was issued in April 2013.[34]

Third, in its Morningstar report for the period ended March 31, 2011, ZPRIM repeated its false claim that it was not under Commission investigation even though Division counsel had specifically informed Bauchle during his October 14, 2010 investigative testimony that he was testifying in connection with a Commission investigation.

K. In early 2011, Zavanelli conceived of and approved additional magazine advertisements that claimed GIPS compliance but omitted required performance results.

In February, March, and May 2011, ZPRIM placed three additional advertisements in Smart Money and Barron's, each of which claimed compliance with the GIPS Advertising Guidelines. Zavanelli conceived of and approved the advertisements. He testified that because ZPRIM was "finishing first as the top manager" in Pensions & Investments magazine, he "wanted to reprint what [it] printed." ZPRIM entered into a contract with Pensions & Investments to reprint these favorable comparisons in ZPRIM's advertisements.

ZPRIM's 2011 advertisements showed its Global Equity composite as the best performing Global Equity composite among the "Top 10 Managers" identified in prior issues of Pensions & Investments, based on gross returns over one-year and five-year annualized returns. The advertisements also showed ZPRIM's All Asian composite as the best performing International Equity Composite based on one-year gross returns. Other than the results showing ZPRIM composites as the number one performing composite over the specified periods, the advertisements did not disclose any returns data. These advertisements did not comply with the GIPS Advertising Guidelines because ZPRIM failed to disclose three-year annualized returns or

---

[32] In practice, Ashland could not verify ZPRIM's GIPS compliance "to the present." Its verification process trailed the completion of each quarter.

[33] An order instituting proceedings or OIP "means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing." Rule of Practice 101(a)(7), 17 C.F.R. § 201.101(a)(7).

[34] ZPRIM referred to the investigation as an "inquiry" in minutes of a Board of Directors meeting held within weeks of formal notice of the investigation, and Mark Zavanelli, who joined ZPRIM in late 2011, testified that ZPRIM referred to the investigation as an inquiry when it spoke of it internally.

five years of annual returns for the Global Equity composite. ZPRIM also failed to disclose for the All Asian composite all performance information required by the Guidelines.[35]

At the hearing, Zavanelli conceded that he knew the requirements of GIPS in 2010. He initially contended that it would have been impossible for ZPRIM to have complied with the Guidelines for various reasons. But Zavanelli later conceded that he added the claim of GIPS compliance to the advertisements and that ZPRIM could have published them without it.

L. The law judge made findings against ZPRIM and Zavanelli and sanctioned them.

Following a seven-day hearing and post-hearing briefing, the law judge issued an initial decision finding ZPRIM and Zavanelli liable for the multiple statutory and regulatory violations summarized above. The law judge based his initial decision on the evidence in the record and denied the Division's request for an adverse inference against ZPRIM in connection with its failure to produce subpoenaed documents during the investigation.[36] The law judge imposed an industry bar against Zavanelli, censured ZPRIM, imposed cease-and-desist orders against them, and required each to pay civil money penalties. This appeal followed.[37]

---

[35] Because the All Asian composite had existed for less than five years, the GIPS Advertising Guidelines required that different data be disclosed in place of one-, three-, and five-year returns or five years of annual returns.

[36] The Division argued below that Respondents had operated a private email system (which ZPRIM called a portal) to shield communications from review by Commission staff. The Division's attention was drawn to the portal at a meeting with Bauchle shortly before the hearing. Bauchle testified that Respondents had not searched or produced documents from the portal before the hearing. On appeal, the Division has not renewed its request for an adverse inference, and the OIP does not charge Respondents with books and records violations.

[37] We deny Respondents' motion to supplement the record to introduce a number of documents that were not in existence at the conclusion of the hearing. As explained below, these documents are not material within the meaning of Rule of Practice 452, 17 C.F.R. § 201.452, and accordingly, were we to admit them, they would not change our conclusions herein. First, Respondents request that we admit Morningstar reports that did not exist at the time of the hearing as evidence of their disclosure of the Commission action against ZPRIM. But evidence of corrective steps taken after the law judge issued his initial decision is not persuasive. And the fact that ZPRIM retains a four-star Morningstar rating does not affect our determination of liability or sanctions. Second, Respondents argue that a GIPS verification report issued for the period ended December 31, 2013 is material because it shows that the firm is GIPS-compliant. But ZPRIM is not charged with violations arising after the OIP and, in any event, GIPS verification reports do not establish that a firm complies with the GIPS Advertising Guidelines. Finally, Respondents seek to introduce documents showing Zavanelli's resignation as an officer or director of ZPRIM. Zavanelli resigned well after the events at issue here, and, in any event, we evaluate his continuing role in ZPRIM regardless of his formal title.

IV.

A. ZPRIM violated the Advisers Act.

Advisers Act Sections 206(1), (2), and (4) respectively prohibit any investment adviser, through jurisdictional means,[38] from directly or indirectly (1) employing "any device, scheme, or artifice to defraud any client or prospective client";[39] (2) engaging in "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client";[40] or (4) engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[41] Scienter must be proven to establish a Section 206(1) violation, but negligence is sufficient for purposes of Sections 206(2) and (4).[42] Material misrepresentations made with the requisite scienter or negligence generally violate Sections 206(1), (2), and (4).[43]

We find that ZPRIM violated Advisers Act Sections 206(1), (2), and (4) through the charged magazine advertisements, newsletters, and Morningstar report for the period ended March 31, 2011.[44] With respect to ZPRIM's Morningstar report for the period ended September 30, 2010, we find ZPRIM liable under Sections 206(2) and (4). Because the Division did not appeal the law judge's determination that ZPRIM acted only negligently with respect to that

---

[38] 15 U.S.C. § 80b–6 (prohibiting specified acts by "investment adviser[s]" undertaken "by use of the mails or any means or instrumentality of interstate commerce").

[39] 15 U.S.C. § 80b–6(1).

[40] 15 U.S.C. § 80b–6(2).

[41] 15 U.S.C. § 80b–6(4).

[42] *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *8 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (holding that scienter is not required under Section 206(2)); *SEC v. Steadman*, 967 F.2d 636, 643 n.5, 647 (D.C. Cir. 1992) (observing that "a violation of [Section] 206(2) of the Investment Advisers Act may rest on a finding of simple negligence" and holding that "scienter is not required under [S]ection 206(4)"); *Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979) (holding that although "the Supreme Court has ruled that scienter is not required under section 206(2)," scienter is required under Section 206(1)), *aff'd on other grounds*, 450 U.S. 91 (1981)).

[43] *See Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *8-9 (Jan. 16, 2008). Although Section 206(4) expressly authorizes the Commission to define "such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative" through rule-making, violation of one of its associated rules is not a precondition to finding a Section 206(4) violation. *See id.*, at *1 n.3, *9 (finding a violation of Section 206(4) without an associated rule violation).

[44] It is undisputed, and we find, that ZPRIM is, and was at the time of the events at issue, an investment adviser and that its acts in question were undertaken through interstate commerce. The magazine advertisements at issue were disseminated through nationally circulated magazines. ZPRIM's newsletters and Morningstar reports were available through the Internet.

report, we do not address whether ZPRIM violated Section 206(1), which requires scienter. We explain separately below the basis for our findings with respect to (1) ZPRIM's 2008 and 2011 magazine advertisements, (2) Respondents' 2009 newsletters, and (3) ZPRIM's 2010 and 2011 Morningstar reports.[45]

1. Acting with scienter, ZPRIM made material misrepresentations in 2008 and 2011 magazine advertisements regarding its compliance with the GIPS Advertising Guidelines.

We find that ZPRIM violated Advisers Act Sections 206(1), (2), and (4) through the 2008 and 2011 magazine advertisements at issue. As explained below, in those advertisements, ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines; those misrepresentations were material; and ZPRIM made them with scienter.

a. ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines in each of the charged 2008 and 2011 magazine advertisements.

ZPRIM falsely claimed compliance with GIPS in its October, November, and December 2008 Smart Money advertisements, in which it failed to disclose as required by the GIPS Advertising Guidelines: (1) period-to-date composite performance, and (2) either one-, three-, and five-year cumulative annualized returns, or five years of annual returns. Instead, ZPRIM provided only compounded and annualized ten-year returns (October and November 2008 advertisements), or compounded five-, ten-, and twenty-year returns (December 2008 advertisements).

ZPRIM also falsely claimed GIPS compliance in its February and May 2011 Smart Money advertisements and its March 21, 2011 Barron's advertisement in which it failed to include financial information required by the 2005 GIPS Advertising Guidelines with respect to the composites discussed in those advertisements.[46] Although the Guidelines required ZPRIM to disclose either one-, three-, and five-year cumulative annualized returns, or five years of annual returns, ZPRIM provided only one- and five-year annualized returns for its Global Equity composite in the 2011 advertisements. In addition, ZPRIM supplied only one-year returns for its

---

[45] We separately find in Section IV.B. below that ZPRIM violated Advisers Act Rule 206(4)-1(a)(5) for each of the charged misrepresentations. In Section IV.C. we discuss Zavanelli's liability.

[46] GIPS was amended in 2010, but the 2005 GIPS apply to ZPRIM's 2011 advertisements because they did not contain performance for periods beginning on or after January 1, 2011. *See* 2010 GIPS at 4 (stating that "[t]he effective date for the 2010 edition of the GIPS standards is 1 January 2011," but explaining that "[c]ompliant presentations that include performance for periods that begin on or after 1 January 2011 must be prepared in accordance with the 2010 edition of the GIPS standards").

All Asian composite in the same advertisements.[47] Thus, in each of the 2008 and 2011 magazine advertisements, ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines because it failed to provide all required information.

Respondents contend that their magazine advertisements were not false or misleading for three reasons, each of which we reject. First, Respondents assert that their GIPS claims were true because ZPRIM complied with the GIPS Performance Standards and independent third parties verified ZPRIM's compliance. But the OIP alleged that ZPRIM failed to comply with the GIPS Advertising Guidelines, not the GIPS Performance Standards. That a firm complies with the Performance Standards, or that a third party has verified that compliance, does not establish that the firm's advertisements comply with the Guidelines.[48] ZPRIM represented that it complied with the Guidelines by including the exact wording of the "GIPS Advertising Guidelines compliance statement" in its magazine advertisements.[49] As explained above, those representations were false.

Second, Respondents assert that because the financial information ZPRIM did include in its magazine advertisements was accurate, those advertisements were true and not misleading. But ZPRIM's false claims of compliance with the GIPS Advertising Guidelines are not rendered true simply because other statements in its advertisements were accurate.[50]

Finally, Respondents contend that ZPRIM's magazine advertisements complied with the GIPS Advertising Guidelines because ZPRIM "corrected" them by making the omitted financial information available on its website and in its GIPS-compliant presentation. We are not persuaded.

---

47 Because the All Asian composite existed for less than five years at the time of the advertisements, the Guidelines required somewhat different disclosure than what was required for the Global Equity composite. Nonetheless, there is no dispute that ZPRIM failed to provide it.

48 *See* 2005 GIPS at 33, Appendix C, Section A. (providing that the Advertising Guidelines "only apply to FIRMS that already satisfy all the REQUIREMENTS of the Standards on a FIRM-wide basis and claim compliance with the Standards").

49 *See* 2005 GIPS at 34, Appendix C, Section B.3. ("All advertisements that include a claim of compliance with the GIPS Advertising Guidelines MUST include . . . [t]he GIPS Advertising Guidelines compliance statement: [Insert name of FIRM] claims compliance with the Global Investment Performance Standards (GIPS®)."). ZPRIM's use of the GIPS Advertising Guidelines compliance statement belies its assertion that "if a firm claims in an advertisement that it is GIPS compliant, the representation only relates to the GIPS standards and not the GIPS Advertising Guidelines." The GIPS Performance Standards provide for a separate form of compliance statement applicable to performance presentations.

50 *See John J. Kenny*, Exchange Act Release No. 47847, 56 SEC 448, 2003 WL 21078085, at *7 (May 14, 2003) ("Although the letters contain some truthful statements, the letters are misleading because of the omitted information."), *aff'd*, 87 F. App'x 608 (8th Cir. 2004).

Respondents marshal three pieces of evidence to support their argument. First, they point to the testimony of Nikola Feliz of Ashland Partners. But Feliz highlighted that the GIPS Advertising Guidelines "specifically say that the disclosures [they mandate] need to be included within the ad."[51] She also agreed that it would be irrelevant to a claim of GIPS compliance if the omitted information required by the Guidelines was available through a website or otherwise. And although she did testify that a firm might be able to correct an advertisement, Feliz did not conclude that ZPRIM actually had corrected its magazine advertisements.

Second, Respondents rely on the GIPS Guidance Statement on Error Correction, which directed firms to establish error correction policies and procedures by January 1, 2010. The Guidance Statement acknowledges that even firms that maintain the "tightest of controls" may be "faced with situations in which errors are discovered that must be specifically addressed." But by its own terms, the Guidance Statement "does not address errors discovered in advertisements prepared following the GIPS Advertising Guidelines."[52] And even if the Guidance Statement did apply to ZPRIM's advertisements, Respondents do not contend that they complied with the requirements it articulates for the correction of material errors in performance presentations: material errors "must be corrected and disclosed in a corrected presentation" and "[e]very reasonable effort must be made to provide the corrected presentation to all prospective clients and other parties that received the erroneous presentation." Respondents never circulated revised advertisements.

Third, Respondents rely on a response to an email that ZPRIM's current GIPS verification firm sent to the GIPS Helpdesk in September 2013. The verifier asked if a firm could correct an advertisement that claimed GIPS compliance but omitted returns information required by the GIPS Advertising Guidelines by distributing a GIPS-compliant presentation containing the omitted information. The Helpdesk cautioned that firms "must remember that the fundamental principles of the GIPS standards are fair representation and full disclosure," and that the "objectives of the GIPS standards include presenting investment performance in a fair, comparable format that provides full disclosure." The Helpdesk highlighted that information contained in a GIPS-compliant performance presentation might cover different periods than an advertisement and that a presentation might not include period-to-date information required to be disclosed in an advertisement. In addition to these considerations, the Helpdesk urged that a "firm should also consider whether it is necessary to run a corrected advertisement."[53] In short, the GIPS Helpdesk did not endorse Respondents' argument.

Considering the evidence, we reject Respondents' argument. ZPRIM never publicly acknowledged (before this proceeding) that its claims of GIPS compliance were false, distributed

---

[51] *See also* 2005 GIPS at 34 (stating that advertisement claiming compliance "MUST include" specified information and stating that required financial information "MUST be *taken/derived* from a presentation that adheres to the REQUIREMENTS of the GIPS standards" (emphasis added)).

[52] The GIPS Guidance Statement on Error Correction (effective January 1, 2010), http://www.gipsstandards.org/standards/Documents/Develop/GS_Error_Correction_Final.pdf.

[53] The Helpdesk also referred ZPRIM's GIPS verifier to the OIP in this proceeding.

corrected advertisements addressing its false claims of GIPS compliance, or even directed recipients of its advertisement to the information required by the Guidelines that it omitted from the advertisements.[54] Instead, ZPRIM argues that actions it was already taking before the advertisements' publication, i.e., making available certain information on its website and distributing its GIPS-compliant presentation to investors and certain potential clients, cured its misrepresentations. In short, ZPRIM did not correct its false claims of compliance with the GIPS Advertising Guidelines.[55]

b. ZPRIM's misrepresentations in its magazine advertisements were material.

An omitted fact is material "if there is a substantial likelihood that a reasonable [investor] would consider it important" in making an investment decision.[56] "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[57] ZPRIM's misrepresentations regarding GIPS compliance in its magazine advertisements were material for two reasons.

First, as Bauchle and Feliz testified, many institutional investors will not consider investment advisers unless they provide GIPS-compliant returns.[58] Compliance with the GIPS Advertising Guidelines ensures that, where a firm claims compliance and discloses financial results, those results are complete, fairly presented,[59] and comparable to those of other

---

[54] Due to a typographical error, ZPRIM's December 2008 advertisement mistakenly identified the provided results as through August 31, 2008, rather than September 30, 2008. Bauchle testified that ZPRIM sent a correction of this narrow issue to individuals who inquired about becoming ZPRIM clients.

[55] *Cf. Seaboard Inv. Advisers*, Investment Advisers Act Release No. 1918, 54 SEC 1111, 2001 WL 23178, at *4 n.21 (Jan. 10, 2001) (rejecting claim that "correction letter" cured misrepresentation where letter failed to acknowledge error).

[56] *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[57] *Basic*, 485 U.S. at 231-32 (quoting *TSC*, 426 U.S. at 449).

[58] *See also* 2005 GIPS at 5, Section I.G.22. ("Compliance with the GIPS standards will provide FIRMS with a 'right of access' to be considered alongside all investment managers, thereby allowing all FIRMS to be evaluated on equal terms."); 2005 GIPS at 5, Section I.G.19. ("GIPS compliance provides FIRMS with a 'passport' and creates a level playing field where all FIRMS can compete on equal footing.").

[59] 2005 GIPS at 1, Section I.A.3. (preamble) ("Requiring investment management firms to adhere to performance presentation standards will help assure investors that the performance information is both complete and fairly presented."); *see also* 2005 GIPS at 2, Section I.D.10.b. (reciting that one of "several key characteristics" of GIPS is that "[t]he GIPS standards are ethical standards for investment performance presentation to ensure *fair representation and full disclosure* of a FIRM'S performance.") (emphasis added).

firms.[60] Yet, ZPRIM disclosed only those results that it determined presented its composites in the most positive light. In deciding whether to entrust their money to ZPRIM, potential clients would have considered it significant that ZPRIM had not complied with the Advertising Guidelines (as it had represented) and had not disclosed a track record of performance comparable to a firm that had done so.

Second, ZPRIM's false claim of compliance with GIPS in its 2008 magazine advertisements is also material because if ZPRIM had complied with the Advertising Guidelines, it would have disclosed that its SCV composite was losing money and significantly underperforming its benchmark, the Russell 2000. Instead, ZPRIM presented only favorable long-term performance in these advertisements. A reasonable investor would have considered the omitted performance information significant to its investment decision.

We are not persuaded by Respondents' arguments that their false claims of GIPS compliance in their magazine advertisements were not material:

Availability of omitted information through other means: Respondents contend that their misrepresentations were not material because ZPRIM posted the omitted information on its website or sent it to clients or prospective clients in its GIPS-compliant presentation.[61] But that argument cannot be squared with a fundamental purpose of the Guidelines: requiring the disclosure, in advertisements representing GIPS compliance and disclosing financial performance data, of information intended to assure comparability of performance numbers among financial advisers.[62] Investors should not be required to search for additional information that a firm represents it has already provided through its claims of GIPS compliance.[63]

---

[60] *See* 2005 GIPS at 1, Section I.C.6. (explaining that one GIPS objective is "[t]o obtain worldwide acceptance of a standard for the calculation and presentation of investment performance in a fair, comparable format that provides full disclosure"); 2005 GIPS at 33, Appendix C – GIPS Advertising Guidelines, Section A. (explaining that GIPS provides "greater uniformity and comparability among investment managers . . . to facilitate a dialogue between FIRMS and their prospective clients about the critical issues of how the FIRM achieved historical performance results and determines future investment strategies").

[61] Under GIPS, firms must "make every reasonable effort to provide a compliant presentation to all prospective clients" but "[a]s long as a prospective client has received a compliant presentation within the previous 12 months, the FIRM has met this REQUIREMENT." 2005 GIPS at 8, Section II.0.A.11.

[62] *See* 2005 GIPS at 33 ("The guidelines are mandatory for FIRMS that include a claim of compliance with the GIPS Advertising Guidelines in their advertisements.").

[63] *Cf. Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *9 (July 13, 2006) (declining to include information disclosed in local media accounts in total mix of information), *petition denied*, 512 F.3d 634, 641 (D.C. Cir. 2008); *Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *10 (Feb. 20, 2007) (rejecting "Applicants' argument that the research reports did not need to disclose the omitted facts because they believed a reasonable investor would read the company's public filings and obtain the

(*continued . . .*)

Even if we were inclined to consider information outside the advertisements and found that the exact information omitted from the advertisements was available online or otherwise, we do not believe that ZPRIM adequately drew attention to it here. As one court has explained, "[t]he way information is disclosed can be as important as its content."[64] In that case, the Eleventh Circuit found that the defendant's "weak, or non-existent, distribution of written disclosures," did not render contrary oral misrepresentations immaterial as a matter of law.[65]

Like the defendant in *Morgan Keegan*, ZPRIM failed to direct investors' attention to the written disclosures it now contends rendered its false claims of GIPS compliance immaterial. ZPRIM did not mention that its website contained financial information that it had omitted from its magazine advertisements.[66] Those advertisements also did not explain that ZPRIM's GIPS-compliant presentation was available on request.[67] Athough ZPRIM did send prospective investors its GIPS-compliant presentation, it did not do so until investors received contracts to retain ZPRIM. It would have been important to potential investors to receive the information at issue to be able to compare performance numbers before they reached this advanced stage with ZPRIM. We find that ZPRIM did not sufficiently bring to investors' attention the information it contends cures its misrepresentations.[68]

(. . . *continued*)
information from those filings and because some reports provided a hyperlink to the Commission's website where those filings were available"); *Richmark Capital Corp.*, Exchange Act Release No. 48758, 57 SEC 1, 2003 WL 22570712, at *7 (Nov. 7, 2003) (finding that letter to stockholders, press release, and brief mentions of relevant contract in "media reports were not part of the 'total mix' of information reasonably available" to respondent's customers).

[64] *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1250 (11th Cir. 2012).

[65] *Id.* at 1252.

[66] ZPRIM generically referenced its website in its advertisements but did not specify what information was available on the website or otherwise direct investors to it for specific information.

[67] The GIPS Advertising Guidelines provide that a firm claiming compliance in an advertisement must specify "[h]ow an interested party can obtain a presentation that complies with the REQUIREMENTS of GIPS standards *and/or* a list and description of all FIRM COMPOSITES." 2005 GIPS at 34, Appendix C, Section B.2. (emphasis added). The sample GIPS-compliant advertisements attached to the Guidelines explain how to obtain both. Respondents disclosed how to obtain a list and description of composites only and contend that this is all that is required by the Guidelines. Regardless of the validity of Respondents' position – an issue we need not and do not reach – we find it significant that ZPRIM did not disclose that the presentation it now contends cures its misrepresentations was available on request.

[68] *Cf. Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (explaining in the context of the "truth on the market" defense in a private securities action that "the corrective information must be conveyed to the public 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements" (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989))).

Lack of harm from 2008 magazine advertisements: We also reject Respondents' argument that ZPRIM's false claims of GIPS compliance in its 2008 advertisements were immaterial because "no investor retained the firm in the fall of 2008 after the advertisements were published." Even accepting Respondents' factual predicate, on which the record is unclear, their argument fails because the Division is not required to establish investor reliance or loss to prevail on its claims.[69] Moreover, the issue of materiality is "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[70] Thus, "the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective."[71] ZPRIM's failure to disclose the information required by the GIPS Advertising Guidelines would have been material to a reasonable investor, particularly given that the omitted information would have disclosed the poor performance of the SCV composite over 2008.

2011 magazine advertisements omitted positive information: Finally, Respondents argue that ZPRIM's false claims of GIPS compliance in its 2011 advertisements were immaterial because the omitted information would have shown that ZPRIM's composites were exceeding their benchmarks. But Respondents miss the point. The GIPS Advertising Guidelines require disclosure of specified financial results to facilitate full disclosure and comparability of performance information disclosed in advertisements.[72] Prospective clients can then evaluate this information, rather than rely on firms to determine its importance. Because Respondents chose to disclose only the three measures published in Pensions & Investments in which ZPRIM had finished first and omitted results required by the Guidelines, their omissions were material.

---

[69] *Charles K. Seavey*, Advisers Act Release No. 2119, 56 SEC 357, 2003 WL 1561440, at *5 n.20 (Mar. 27, 2003) (holding that the Division "need not show reliance by investors to find a violation of Sections 206(1) and (2)," and that "proof of injury by the fraudulent practice" is not "a necessary element of the violation" (citations omitted)); *see also Morgan Keegan & Co.*, 678 F.3d at 1244 ("'Justifiable reliance . . . is not an element of an SEC enforcement action because Congress designated the SEC as the primary enforcer of the securities laws, and a private plaintiff's 'reliance' does not bear on the determination of whether the securities laws were violated, only whether that private plaintiff may recover damages."); *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000) ("[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm.").

[70] *Disraeli*, 2007 WL 4481515, at *6 & n.29 (citing *Richmark Capital Corp.*, 2003 WL 22570712, at *5 (citing *TSC Indus.*, 426 U.S. at 445)); *accord S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *6 (Dec. 5, 2014).

[71] *Disraeli*, 2007 WL 4481515, at *6 & n.30; *cf. Amgen v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191, 568 U.S. --- (2013) (explaining that because "materiality is judged according to an objective standard, the materiality of [defendant's] alleged misrepresentations and omissions is a question common to all members of the class" in private securities class action and that in "no event will the individual circumstances of particular class members bear on the inquiry").

[72] *See supra* notes 59 and 60 and accompanying text.

c. ZPRIM, through Zavanelli, acted with scienter with respect to the charged magazine advertisements.

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud,"[73] and "includes recklessness, defined as conduct that is 'an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it.'"[74] Scienter may be proven by "inference from circumstantial evidence," which "can be more than sufficient" to establish the requisite state of mind.[75] "The scienter of a corporation's officers and directors establishes the scienter of the corporation for purposes of the antifraud provisions."[76] As explained below, ZPRIM acted with scienter with respect to the 2008 and 2011 magazine advertisements.

2008 magazine advertisements: We find that ZPRIM, through Zavanelli, made the misrepresentations in the 2008 magazine advertisements with scienter. Bauchle testified that, although he informed Zavanelli that the 2008 magazine advertisements did not comply with the GIPS Advertising Guidelines, Zavanelli determined to go ahead with them anyway. Bauchle also testified that ZPRIM changed the format of the advertisements to conceal its poor performance in 2008, including that it was underperforming its benchmark. These facts establish Zavanelli's scienter.

Even aside from Bauchle's testimony, the record includes compelling evidence that Zavanelli acted with scienter. Zavanelli testified that he was responsible for ZPRIM's advertising and, ultimately, its GIPS compliance.[77] He also claimed a certain level of expertise with GIPS, testifying that he had "been involved [with GIPS] and kn[e]w [it] from the beginning," in its previous iteration as AIMR. Zavanelli also testified that he first read the GIPS Advertising Guidelines in 2006 and read GIPS "[n]umerous times . . . forward and backward," and he agreed that he was "very familiar" with GIPS in 2008 through 2011.[78] Indeed, in his

---

[73] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[74] *S.W. Hatfield, CPA*, 2014 WL 6850921, at *7 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

[75] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

[76] *See Disraeli*, 2007 WL 4481515, at *5 n.25 (internal quotation marks and citation omitted); *accord SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1992).

[77] In his investigative testimony, which the law judge admitted in its entirety, Zavanelli testified as follows: "Q. Who is responsible at ZPR for ensuring that marketing materials are GIPS-compliant. A. I am. Q. Anyone else? A. No. Ted is not responsible. . . ." But at the hearing, Zavanelli inconsistently testified as follows: "I didn't make GIPS decisions. Ashland is our expert. They're making GIPS decisions for us with Ted." But Zavanelli also admitted that with respect to GIPS, he was the "final guy" and that the "buck stops with [him]."

[78] Zavanelli acknowledged that he read the 2005 GIPS when it came out in 2005 and before ZPRIM started advertising in 2008. Zavanelli also read the 2010 GIPS shortly after it was released.

investigative testimony, Zavanelli represented that he was "more than familiar" with GIPS and the "closest thing to an expert" on it present.

In late 2008, ZPRIM dramatically changed the format of its advertisements in a way that excluded the recent poor performance of ZPRIM's SCV composite. Although the new format of the financial results disclosure looked nothing like that used in ZPRIM's prior advertisements or the sample advertisements provided with the GIPS Advertising Guidelines, ZPRIM did not consult with Ashland about it. Because he participated in a telephone conference that discussed the changes to the advertisements, Zavanelli knew the advertisements would diverge from the format specified in the Guidelines. But he specifically instructed the other participants to retain the footnote claiming GIPS compliance. In sum, Zavanelli (and thus ZPRIM) knowingly approved ZPRIM's false claims of GIPS compliance in its late-2008 magazine advertisements.

Respondents make several arguments against a scienter finding; we reject each of them.

Availability of omitted information: Respondents contend that they did not intend to mislead because ZPRIM disclosed the returns information that it omitted from its advertisements on its website and in its GIPS-compliant presentation. We disagree. Respondents claimed GIPS compliance despite knowing that they had not provided the information required by the GIPS Advertising Guidelines. Their claims of GIPS compliance therefore were knowingly false. That investors might otherwise have discovered the information Respondents omitted from the advertisements does not negate their scienter.

Accuracy of disclosed financial returns: Respondents argue that they were at most negligent with respect to the magazine advertisements because all the financial results disclosed in them were true. But the question is whether Respondents acted with scienter with respect to their claim of GIPS compliance, not whether they made additional misrepresentations.

Motivation for revising advertisement format: Respondents contend, based on Zavanelli's testimony, that ZPRIM changed its 2008 magazine advertisements' format to ensure that they would fit the publication space ZPRIM purchased, not to conceal its poor performance. Respondents ask us to reject Bauchle's contrary testimony, but we find no reason to credit Zavanelli's testimony over Bauchle's on this point. Although the law judge discounted Bauchle's testimony on some points, he found that Bauchle was a "generally believable" witness and explained that "[h]is demeanor on the stand was straightforward and matter-of-fact, and he answered questions with nowhere near the evasiveness and discursiveness of Max Zavanelli."[79] We accordingly credit Bauchle's testimony over Zavanelli's here.

---

[79] *See Robert M. Fuller*, Exchange Act Release No. 48406, 56 SEC 976, 2003 WL 22016309, at *7 (Aug. 25, 2003) ("We give considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor." (internal quotation marks and citation omitted)), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004); *see also Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 WL 507860, at *6 (July 20, 1999) (same).

We also do not find Zavanelli's account credible. He contends that the decision to revise the format of the late-2008 magazine advertisements was a last-minute decision on the day that the advertisements needed to be submitted for publication. But in 2008, advertising was a matter of critical importance to ZPRIM. It was experiencing some of its worst performance and ultimately realized income of less than $7,000 in 2008. Given Zavanelli's level of involvement in ZPRIM's operations and the importance of the advertisements, we find it highly unlikely that he would have left the final decision on their format to the eleventh hour and entrusted it to others. We also find, contrary to Zavanelli's assertion, that ZPRIM could have revised its advertisements to comply with GIPS and still fit the available magazine advertising space that it had purchased.

Zavanelli's claim of "no involvement" in 2008 advertisement creation: Respondents argue that they did not act with scienter because Zavanelli had "no involvement" in creating the late-2008 advertisements. Relying on Zavanelli's testimony, Respondents assert that others designed the advertisements, Zavanelli told Bauchle to use the prior format for the late-2008 advertisements but he failed to do so, and Zavanelli never saw the final advertisements until the 2009 examination of ZPRIM.

Even were we to credit each of these factual claims, the record still would disprove Zavanelli's claim of "no involvement" in the advertisements' creation. When David Sappir of ZPR Client Management initially prepared several mockups of advertisements in June 2008, he specifically asked that they be shared with Zavanelli. Zavanelli admits that he discussed the format of the advertisements on a telephone conference and that he approved them. Based on Zavanelli's account of the call, it is clear that he understood that the late-2008 advertisements would not contain the information required by the Guidelines. But Zavanelli instructed that the footnote claiming GIPS compliance be retained. Whether he saw the final advertisements or not,[80] Zavanelli knew that they would not comply with GIPS.[81]

Challenge to credibility of specific Bauchle testimony: Respondents challenge the credibility of Bauchle's testimony that he told Zavanelli that the late-2008 advertisements did not comply with the GIPS Advertising Guidelines before they were published. Respondents contend that Bauchle could not have done so because, in January 2008, he raised a GIPS issue with Zavanelli that was not actually a problem under the Guidelines. Bauchle testified that he told Zavanelli that the January 2008 advertisement was not GIPS-compliant because it did not contain one-, three-, and five-year annualized returns. Zavanelli responded that annualized

---

[80] Given Zavanelli's level of involvement with and control over ZPRIM's business and the importance of the advertisements, we do not find credible his testimony that he never saw the late-2008 advertisements until after the 2009 examination.

[81] Respondents also rely on Zavanelli's physical presence outside the United States as support for his lack of involvement with the new advertisement format. But this does not diminish his responsibility for the advertisements. As Bauchle testified, Zavanelli often worked from outside the United States and still remained in charge of the details of ZPRIM's operations as ZPRIM's "boss man."

returns were not necessary because the advertisement contained more than five years of annual returns, which the Guidelines authorized as an alternative.

Respondents' argument is puzzling. Bauchle may have been overzealous in identifying GIPS compliance issues in early 2008. But this does not mean he subsequently kept quiet about non-compliant advertisements. In any event, Bauchle's concern regarding one-, three-, and five-year annualized returns did apply to the late-2008 advertisements because they omitted both the relevant annualized returns and five years of annual returns. And based on his experience and knowledge of the GIPS Advertising Guidelines, Zavanelli knew that the late-2008 advertisements did not comply with the Guidelines. He did not need Bauchle to tell him so.

Respondents also assert that Bauchle could not have objected to the late-2008 advertisements because he did not raise any GIPS issues when he reviewed a non-compliant draft advertisement in July 2008. But although Bauchle initially did not object to that draft advertisement, the record shows that he did raise the GIPS requirement of one-, three-, and five-year annualized results in a September 2008 email regarding advertising on ZPRIM's website. Thus, Bauchle raised issues with ZPRIM's compliance with the Guidelines both before and after he viewed the non-compliant draft advertisement.

Claim that other compliant advertisements establish lack of scienter: Respondents assert that they could not have acted with scienter because advertisements that they published both before and after the late-2008 advertisements contained the financial results required by the Guidelines. But those advertisements support our finding of scienter because they show that Respondents knew how to comply with the Guidelines when they chose to do so.

Claim that Respondents did not intentionally stop sending advertisements to Ashland for review: Respondents assert that they did not intentionally stop sending advertisements to Ashland for review before running the late-2008 advertisements. Even if this is so, it is undisputed that ZPRIM chose not to consult with its GIPS expert before, as Zavanelli testified, it "dramatically changed the format" of its advertisements. And ZPRIM had sent a January 2008 advertisement to Ashland for review earlier in the year. Zavanelli's approval of the revised advertisement format, although ZPRIM had not consulted Ashland about the change, supports our finding of scienter.

2011 magazine advertisements: We also find that ZPRIM, acting through Zavanelli, made the misrepresentations in the 2011 magazine advertisements with scienter. Zavanelli admitted that he conceived of the format of these advertisements, added the claim of GIPS compliance, and ultimately approved them. He was familiar with the GIPS Advertising Guidelines. And nearly a year earlier, ZPRIM had promised Commission staff that it had taken corrective action to address its false claim of GIPS compliance in the December 2008 advertisements. Based on the facts set forth above, we conclude that Zavanelli intentionally claimed that the 2011 advertisements complied with the Guidelines even though he knew that they did not.

Respondents raise two additional arguments against a finding of scienter with respect to the 2011 magazine advertisements, neither of which we find persuasive. First, Respondents contend that the financial returns they omitted would have shown that ZPRIM had outperformed

its benchmarks. But Respondents miss the point. Their misrepresentations of GIPS compliance were false, and they knew them to be so. Rather than provide the information that their claims of GIPS compliance required, they chose to present only the information that presented the firm in the best light, i.e., returns that presented ZPRIM as a number one manager. And even if Respondents' misrepresentations had been unintentional, their conduct would still be reckless because, among other things, the requirements of the GIPS Advertising Guidelines were clear, Respondents had received prior warnings about compliance with the Guidelines from Ashland and Commission staff, and Respondents were not in any way reasonably mistaken as to the Guidelines' requirements.

Second, Respondents contend that "when the total mix of information being disclosed by ZPRIM is considered," a finding of scienter is inappropriate because "no potential harm or danger was created by the 2011 advertisements." Even accepting this assertion for the sake of argument, the Division is not required to establish economic harm to prevail on its claims.[82] Zavanelli's argument also fails because it confuses the concept of materiality, in which it is necessary to consider the total mix of information, with scienter.

2. Acting with scienter, Respondents made material misstatements in their April and December 2009 newsletters regarding GIPS compliance.

We also conclude that Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters; these misrepresentations were material; and Respondents made them with scienter.

a. Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters.

Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters, which Zavanelli authored. As explained below, although those newsletters were advertisements under the GIPS Advertising Guidelines that claimed GIPS compliance, Respondents failed to include the returns mandated by the Guidelines.

Under the plain language of the GIPS Advertising Guidelines, ZPRIM's newsletters are advertisements. The Guidelines define advertisement to include "any materials that are distributed to or designed for use in newspapers, magazines, FIRM brochures, letters, media, or any other written or electronic material addressed to more than one prospective client," as well as "[a]ny written material (other than one-on-one presentations and individual client reporting) distributed to maintain existing clients or solicit new clients."[83] ZPRIM posted its newsletters on its website and distributed them to persons other than clients, including industry participants who might be in a position to recommend ZPRIM to potential clients. Moreover, as Zavanelli agreed, the newsletters "helped [him] maintain [recipients] as clients."

---

[82] *See supra* note 69 and accompanying text.

[83] 2005 GIPS at 33, Appendix C (Definition of Advertisement).

Respondents claimed GIPS compliance in the newsletters. In the April 2009 newsletter, Respondents stated in a footnote linked to disclosure of performance results for the SCV composite that ZPRIM's "compliance with the Global Investment Performance Standards (GIPS®) ha[d] been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008." In the December 2009 newsletter, Respondents stated that "[a]ll numbers are GIPS compliant" in a section disclosing the performance of ZPRIM's International Equity Global and SCV composites. A reasonable investor[84] would have believed that, as advertisements disclosing performance information, the newsletters complied with the Advertising Guidelines.[85]

But the newsletters did not comply with the Guidelines because Respondents omitted financial results required by them. In the April 2009 newsletter, Respondents failed to include: (1) period-to-date results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns. In the December 2009 newsletter, Respondents failed to disclose period-to-date results for its International Equity Global and Fundamental Small Cap Value composites, as well as other required returns.[86] In the December 2009 newsletter, Respondents instead presented various results showing ZPRIM's composites as the best performing or a top ten performing composite over selected periods. Because Respondents did not comply with the GIPS Advertising Guidelines, their claims of GIPS compliance in the April and December 2009 newsletters were misleading.[87] We reject Respondents' contrary arguments for the reasons discussed below.

---

[84] *Cf. Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, 135 S. Ct. 1318, 1321, 575 U.S. --- (2015) ("[W]hether a statement is 'misleading' depends on the perspective of a reasonable investor: The inquiry (like the one into materiality) is objective.").

[85] *See* 2005 GIPS at 33 ("[S]hould a GIPS-compliant FIRM choose to advertise performance results, the FIRM MUST apply . . . the GIPS Advertising Guidelines in order to include a claim of compliance with the GIPS standards."); 2005 GIPS at iii (explaining that GIPS "includes guidelines for claiming compliance with the GIPS standards in advertisements").

[86] Respondents failed to disclose either three-year returns or five years of annual returns for the International Equity Global composite, either of which would have satisfied the Guidelines. Respondents also failed to disclose either three- and five-year returns or five years of annual returns for the SCV composite.

[87] ZPRIM's claim in its April 2009 newsletter that its compliance with GIPS had been verified "from December 31, 2000 through September 30, 2008" may have been literally true because Ashland did verify ZPRIM's GIPS compliance over that period. But a literally accurate statement may still be misleading. *McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) ("Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors."); *see also IFG Network Sec., Inc.*, Exchange Act Release No. 54127, 2006 WL 1976001, at *10 (July 11, 2006) (finding that although disclosed information was "literally true," it was misleading). We find that ZPRIM's April 2009 claim of GIPS compliance is such a statement because it conveyed that

(*continued . . .*)

April 2009 newsletter: Respondents assert that ZPRIM did not make a claim of GIPS-compliance in the April 2009 newsletter "in the context of being required to follow the GIPS Advertising Guidelines." Respondents contend that the "article" in the April 2009 newsletter that claimed GIPS compliance did not "promote ZPRIM or solicit any new clients." Rather, it "was simply designed to illustrate a point that was totally unrelated to marketing or advertising," i.e., that the elimination of the uptick rule affected the performance of ZPRIM's SCV composite.[88]

Contrary to Respondents' argument, the GIPS Advertising Guidelines consider a document as a whole to determine if it is an advertisement.[89] As explained above, the newsletter was an advertisement under the Guidelines because, at a minimum, it was used to maintain clients.[90] Moreover, Respondents also used the "article" at issue to maintain clients by attempting to explain SCV's past performance and attribute it to an external factor (the uptick rule), thereby portraying ZPRIM in the best possible light.

December 2009 newsletter: Respondents argue that the December 2009 newsletter did not claim GIPS compliance because, in a section entitled "GIPS Compliance," they stated that the newsletter "remain[ed] not GIPS compliant." Respondents assert that because the GIPS Advertising Guidelines apply only when a firm claims compliance, they did not apply to the December 2009 newsletter.

We do not agree that Respondents' disclaimer of GIPS compliance with respect to the newsletter as a whole negated their earlier specific claim of GIPS compliance.[91] At best, Respondents' statements, taken together, convey that ZPRIM was claiming to be partially

---

(. . . *continued*)
ZPRIM complied with GIPS, although ZPRIM had not complied with the Advertising Guidelines.

[88] The uptick rule was a limitation on certain forms of short-selling that was eliminated in July 2007. Regulation SHO and Rule 10a-1, Exchange Act Release No. 55970 (June 28, 2007), 72 Fed. Reg. 36348 (July 3, 2007). Following notice and comment, we adopted Rule 201, the alternative uptick rule, in February 2010. *See* Amendments to Regulation SHO, Exchange Act Release No. 61595 (Feb. 26, 2010), 75 Fed. Reg. 11232 (Mar. 10, 2010).

[89] *See* 2005 GIPS at 33, Appendix C (providing Definition of Advertisement which discusses status of "newspapers, magazines, FIRM brochures, letters, media, or any other written or electronic material addressed to more than one prospective client").

[90] *See supra* note 83 and accompanying text.

[91] *Cf. Philip L. Spartis*, Exchange Act Release No. 64489, 2011 WL 1825026, at *10 n.42 (May 13, 2011) (finding that boilerplate disclaimers were ineffective where they did not adequately address the misleading aspects of the document); *Kenneth R. Ward*, Exchange Act Release No. 47535, 56 SEC 236, 2003 WL 1447865, at *10 n.42 (Mar. 19, 2003) (concluding that "'boilerplate' disclaimers in no way overrode Ward's unqualified recommendations regarding specific securities"), *aff'd*, 75 F. App'x 320 (5th Cir. 2003); *Brian Prendergast*, Exchange Act Release No. 44632, 55 SEC 289, 2001 WL 872693, at *6 n.15 (Aug. 1, 2001) (finding that "generic disclaimer" "failed to cure specific misleading aspects" of document at issue).

compliant with GIPS. But because GIPS prohibits claims of partial compliance,[92] Respondents' statements were misleading.[93]

b. Respondents' misrepresentations in ZPRIM's newsletters were material.

Respondents' claims of GIPS compliance in ZPRIM's April and December 2009 newsletters were also materially misleading. By failing to provide the returns required by the Guidelines, Respondents denied potential clients information necessary to make informed investment decisions, while representing that ZPRIM offered the benefits of GIPS compliance, including comparability of results.[94]

Respondents make three contrary arguments, each of which we find unconvincing. First, Respondents repeat their argument that their misstatements were immaterial because the information they failed to disclose was available through other sources. We reject this argument for the reasons stated above.[95]

Second, Respondents assert that their claims of GIPS compliance in the April 2009 newsletter were immaterial because they made them in connection with a discussion of the uptick rule, and the omitted information would not have changed investors' minds about that rule. But materiality focuses on the significance of omitted information to an investment decision, not a regulation.[96] Investors would have considered the performance results that Respondents failed to disclose important to their decision whether to invest their money with ZPRIM.[97]

Third, Respondents argue that their general disclaimer of GIPS compliance in their December 2009 newsletter renders their earlier specific claim of GIPS compliance in the same

---

[92] *See* 2005 GIPS at 8, Section II.0.A.8. ("If the FIRM does not meet all the REQUIREMENTS of the GIPS standards, the FIRM cannot represent that it is 'in compliance with the Global Investment Performance Standards except for . . .'"); 2005 GIPS at 8, Section II.0.A.9. ("Statements referring to the calculation methodology used in a COMPOSITE presentation as being 'in accordance [or compliance] with the Global Investment Performance Standards' are prohibited.").

[93] In addition, Feliz testified that "claiming all numbers are GIPS compliant," as Respondents did in the December 2009 newsletter, "is not a valid statement because firms are GIPS compliant, not numbers." Feliz also explained that "[t]ypically, Ashland's stance is that referencing GIPS in other ways [i.e., without a claim of compliance] is misleading because it's – it's speaking to somebody's compliance without meeting all the requirements of the standards."

[94] *See supra* section IV.A.1.b.

[95] *See supra* section IV.A.1.b. (availability of omitted information through other means).

[96] *See supra* note 56 and accompanying text.

[97] *See supra* note 94 and accompanying text.

newsletter immaterial. But as explained above,[98] when read together, these statements are still materially misleading.[99]

c. ZPRIM, through Zavanelli, acted with scienter with respect to the April and December 2009 newsletters.

We also find that ZPRIM, through Zavanelli, acted with scienter with respect to ZPRIM's April and December 2009 newsletters. At a minimum, Zavanelli was reckless in falsely claiming GIPS compliance in the newsletters. He was familiar with the GIPS Advertising Guidelines and devised the format of ZPRIM's initial advertisements. By November 2008, Ashland had informed ZPRIM that, because its newsletter claimed GIPS compliance and showed performance results, ZPRIM needed to attach a GIPS-compliant presentation or follow the GIPS Advertising Guidelines. But when Bauchle followed this advice on one occasion, Zavanelli instructed him not to so do again. And Zavanelli also did not follow the Guidelines with respect to either 2009 newsletter at issue. Under the circumstances, Respondents' false claims of GIPS compliance were reckless if not intentional.

Respondents raise several arguments against a finding of scienter, each of which we reject. First, Respondents contend that Zavanelli believed in good faith that the newsletters were not advertisements and thus reasonably understood that the GIPS Advertising Guidelines did not apply. Even assuming that Zavanelli sincerely held this view, his conduct was still reckless because that view was so objectively unreasonable under the circumstances that Zavanelli must have been aware of the risk of misleading investors.[100] As explained above, the Guidelines, with which Zavanelli concedes he was familiar, define advertisements to include any written material (other than communications with a single person) "distributed to maintain existing clients or solicit new clients."[101] Zavanelli testified that he did not believe the newsletter was an advertisement because it was not used to solicit new clients. But ZPRIM posted the newsletter on its website and distributed it to persons other than clients, including industry participants who might be in a position to recommend ZPRIM to potential clients. And even assuming that the newsletter did not solicit new clients, Zavanelli conceded that it helped ZPRIM maintain its existing clients.[102]

---

[98] *See supra* notes 92 and 93 and accompanying text.

[99] *Cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097-98 (1991) ("The point of a proxy statement, after all, should be to inform, not to challenge the reader's critical wits. Only when the inconsistency would exhaust the misleading conclusion's capacity to influence the reasonable shareholder would a § 14(a) action fail on the element of materiality.").

[100] *See Sundstrand Corp.*, 553 F.2d at 1045; *accord SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010).

[101] 2005 GIPS at 33 (emphasis added).

[102] Zavanelli testified that he sent the investment reports to current clients "[t]o keep them informed of our performance, why we were winning, why we were losing, what w[ere] our future expectations." He also agreed that part of the reason for the investment reports was to

(*continued . . .*)

Second, Respondents contend that they did not act with scienter because they otherwise disclosed the information they omitted from the newsletters. But as explained above, the availability of the omitted information through other means does not establish that Respondents' claim of GIPS compliance was not knowingly or recklessly false.[103] And to the extent that Respondents contend that they deliberately excluded information required by the Guidelines from the newsletters based on its availability through alternative means, they confirm that they intentionally failed to follow the Guidelines, while simultaneously claiming GIPS compliance.[104]

Third, Respondents assert that Zavanelli did not learn that Ashland had sent ZPRIM a 2010 letter identifying GIPS-compliance options for its newsletter until after Ashland terminated its relationship with ZPRIM in July 2010. But Ashland's 2010 letter is not relevant to Respondents' scienter with respect to the 2009 newsletters.[105] Ashland told ZPRIM in writing in 2008 and 2009 that it needed to either attach a GIPS-compliant presentation to the newsletter or follow the GIPS Advertising Guidelines. Zavanelli was aware of this advice. Indeed, he dismissed it as alarmism in the December 2009 newsletter in which he expressed regret over Bauchle's prior distribution of the GIPS-compliant presentation and stated that he would not follow the Guidelines with respect to the newsletter.

3. ZPRIM violated Advisers Act Sections 206(2) and (4) with respect to its Morningstar report for the period ended September 30, 2010 and violated Sections 206(1), (2), and (4) with respect to the Morningstar report for the period ended March 31, 2011.

As explained below, ZPRIM made additional false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011; these statements were material; ZPRIM negligently made the false statements in the Morningstar report for the period ended September 30, 2010; and ZPRIM made the false statement in the Morningstar report for the period ended March 31, 2011 with scienter. Accordingly, we conclude that ZPRIM violated Advisers Act Sections 206(2) and (4) with respect to the 2010 Morningstar report and violated Sections 206(1), (2), and (4) with respect to the 2011 Morningstar report.

(. . . *continued*)
make sure that clients understood that they should stay with ZPR because it was following a long-term strategy.

103 *See supra* section IV.A.1.b. (availability of omitted information through other means).

104 *Id.*

105 In any event, it strains credulity to accept that Zavanelli had no knowledge of the 2010 letter until after Ashland terminated its relationship with ZPRIM. Respondents offer no reason why Bauchle (the letter's recipient) would not have forwarded the letter to Zavanelli given Zavanelli's personal engagement with Ashland regarding the newsletters' GIPS compliance.

a. ZPRIM made three false statements in the Morningstar reports.

ZPRIM made three false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011. First, in its September 30, 2010 Morningstar report, ZPRIM stated that Ashland had verified its "GIPS compliance for the period December 31, 2000 to the present." This statement was false because Ashland had resigned as ZPRIM's verification firm in July 2010 and its final report attesting to ZPRIM's GIPS compliance did not cover any period after December 31, 2009.[106] Second, in that same report ZPRIM asserted that it was not under a "Pending SEC investigation." This statement was also false because, as the Division of Enforcement had informed ZPRIM no later than August 16, 2010, Commission staff was "conducting an investigation" of ZPRIM. Third, ZPRIM repeated this false statement in the March 31, 2011 Morningstar report.

b. ZPRIM's Morningstar report misrepresentations were material.

GIPS verification claim: ZPRIM's false claim of GIPS verification in its Morningstar report for the period ended September 30, 2010 was material. It would have significantly altered the total mix of information for an investor to have learned that Ashland had not verified ZPRIM's GIPS compliance through "the present," i.e., approximately September 30, 2010, as ZPRIM had represented. Although optional, verification has become a de facto requirement for an adviser to be considered by institutional investors and also provides "marketing advantages."[107] ZPRIM's misstatement was material because it allowed ZPRIM to obtain these benefits without verification,[108] and it concealed that Ashland had resigned because it could not obtain sufficient comfort to continue to attest to the firm's claim of GIPS compliance.[109]

Respondents argue that their false claim of GIPS verification in 2010 was immaterial because another verifier, Alpha Performance Verification Services, issued a GIPS verification report for ZPRIM in 2011 covering 2010. But Alpha did not issue its verification report until February 4, 2011. A reasonable investor would have considered it significant that no verification report existed when ZPRIM falsely claimed that it had been verified "to the present," i.e., around

---

106 *See* 2005 GIPS at 21, Section III.A.4. ("Without . . . a report from the verifier, the FIRM cannot state that its claim of compliance with the GIPS standards has been verified.").

107 2005 GIPS at 21; *see also* 2005 GIPS at 21, Section III.A.2. ("Third-party verification brings credibility to the claim of [GIPS] compliance and supports the overall guiding principles of full disclosure and fair representation of investment performance.").

108 *Cf. S.W. Hatfield, CPA*, 2014 WL 6850921, at *6 (finding that misrepresentation that audit report had been signed by a CPA was material because, among other things, "[a]n audit report signed by a CPA is important to investors because it provides an independent evaluation of the issuer's financial position by a qualified professional on whose expertise investors can rely").

109 *Cf.* Form 8-K, Instruction to Item 4.01 (specifying that "[t]he resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event"), *available at* https://www.sec.gov/about/forms/form8-k.pdf.

September 30, 2010. Moreover, ZPRIM specifically represented that its GIPS compliance had been verified "by Ashland Partners & Company LLP." But Ashland never reached a "necessary level of comfort" to allow it to do so for 2010. Alpha's belated verification report does not cure ZPRIM's failure to disclose Ashland's resignation.

Commission investigation: ZPRIM's false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011 that it was not under investigation by the Commission were also material. A reasonable investor would have found it significant to its decision whether to entrust money to ZPRIM for management that ZPRIM was under investigation by Commission staff.[110]

Respondents argue that these misrepresentations were not material because Morningstar did not require ZPRIM to disclose the existence of a Commission investigation unless and until the Commission filed particular charges against it. Respondents base their argument on language in the relevant Morningstar data entry form asking whether there was a "Pending SEC Investigation Charge." According to Respondents, no charge existed until the Commission issued the OIP.

Respondents' argument fails because ZPRIM's reports unambiguously stated that there were "No" "Pending SEC Investigations." The reports do not refer to "Investigation Charge[s]." A reasonable investor would have understood that there was no ongoing investigation of ZPRIM.

c. ZPRIM, through Bauchle, acted negligently with respect to its Morningstar report for the period ended September 30, 2010.

We find that ZPRIM, through Bauchle, acted at least negligently with respect to the Morningstar report for the period ended September 30, 2010. Because the Division did not appeal the law judge's dismissal of its scienter-based claims with respect to this report, the question of whether Bauchle acted with scienter is not before us.[111] Negligence requires a showing that the defendant failed to exercise reasonable care.[112] Because investment advisers and their associated persons are fiduciaries, they are charged with the affirmative duty of "utmost good faith, and full and fair disclosure of all material facts" and the obligation "to employ

---

[110] *See SEC v. Merkin*, No. 11–23585–CIV, 2012 WL 5245561, at *7 (S.D. Fla. Oct. 3, 2012) ("Clearly, there is a substantial likelihood that a reasonable investor would consider the fact that the SEC was investigating StratoComm for violation of securities laws and the details of the investigation important in deciding whether to buy or sell StratoComm stock."); *cf. In re Geniva Sec. Litig.*, 932 F. Supp. 2d 352, 387 (E.D.N.Y. 2013) (citing cases in which substantial stock price drop followed company's announcement of Commission investigation).

[111] *See supra* note 4.

[112] *Ira Weiss*, Exchange Act Release No. 52875, 58 SEC 977, 2005 WL 3273381, at *12 (Dec. 2, 2005) (citing *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997)), *petition denied*, *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006).

reasonable care to avoid misleading" their clients through half-truths or incompletely volunteered information.[113]

We find that ZPRIM breached its duty of reasonable care with respect to the Morningstar report for the period ended September 30, 2010. Although Ashland notified ZPRIM of its resignation as of June 9, 2010, neither Bauchle nor anyone else at ZPRIM corrected ZPRIM's statement that Ashland had verified ZPRIM's GIPS compliance "to the present." Bauchle testified that he originally included this language in the database so he would not have to update ZPRIM's disclosure each quarter to change the end date of the verification period. ZPRIM acted negligently by relying on this practice after Ashland had resigned.[114]

In addition, ZPRIM was informed of the existence of the Commission investigation no later than August 16, 2010, but neither Bauchle nor anyone else at ZPRIM disclosed it in connection with the September 30, 2010 Morningstar report. By failing to update the Morningstar database, ZPRIM (through Bauchle) was, at a minimum, negligent.

d. ZPRIM, through Bauchle, acted with scienter with respect to the Morningstar report for the period ended March 31, 2011.

We also find that ZPRIM, through Bauchle, acted with scienter with respect to ZPRIM's Morningstar report for the period ended March 31, 2011, in which ZPRIM falsely stated that there were "No" "Pending SEC Investigations." At the time of the report, Bauchle knew that ZPRIM was under investigation. ZPRIM had been informed of the investigation no later than August 16, 2010, and retained counsel in connection with the investigation by August 30, 2010. Bauchle gave investigative testimony on October 14, 2010, and Division counsel specifically informed him that he was testifying in connection with a Commission investigation. He nonetheless intentionally failed to disclose it in ZPRIM's Morningstar report for the period ended March 31, 2011.

Respondents rely on Bauchle's testimony that, although ZPRIM knew of the investigation, it "didn't feel that it was a real investigation" until the OIP was issued. As explained above, ZPRIM had been notified in writing that it was under investigation, and Bauchle specifically had been informed of the same during his investigative testimony. These statements were unequivocal and left no room for confusion; any contrary view is so objectively unreasonable that Bauchle must have known that claiming that ZPRIM was not the subject of a pending investigation would be misleading.

---

[113] *SEC v. Capital Gains Research Bureau*, 375 U.S. at 191, 194; *see, e.g.*, *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 & n.44 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

[114] Moreover, ZPRIM's use of "to the present" language was also negligent because, as Bauchle knew, Ashland typically did not issue its quarterly verification reports until sometime after the quarter had closed. Thus, even before Ashland resigned as ZPRIM's verifier it was not accurate for ZPRIM to claim that it had been verified "to the present."

Respondents also rely on the text of Morningstar's online input form. They assert that the form requires firms to disclose only "Pending SEC Investigation Charge[s]," and that these charges do not exist until an OIP is issued. But it was Zavanelli, not Bauchle, who advanced this theory at the hearing.[115] And because Zavanelli disclaimed any role in preparing the Morningstar reports, his testimony is irrelevant.[116] Bauchle explained that he was influenced by ZPRIM's internal attempts to minimize the importance of the investigation. He did not claim to have parsed the language of the Morningstar database input form.

Respondents also suggest that ZPRIM did not act with scienter with respect to the 2011 Morningstar report because those reports are available only to certain fee-paying Morningstar clients. But fee-paying clients and those persons to whom ZPRIM sent the reports were entitled to accurate information from ZPRIM.[117]

B. ZPRIM also violated Advisers Act Rule 206(4)-1(a)(5) through each of its misrepresentations.

ZPRIM violated Advisers Act Rule 206(4)-1(a)(5) through each of the misrepresentations discussed above. Rule 206(4)-1(a)(5) prohibits registered investment advisers from directly or indirectly publishing, circulating, or distributing any advertisement that "contains any untrue statement of a material fact, or which is otherwise false or misleading."[118]

Each of the requirements for liability is satisfied with respect to the misstatements at issue in this case. First, ZPRIM was a registered investment adviser at the time of the misstatements. Second, each of the magazine advertisements, newsletters, and Morningstar reports constituted advertisements under the broad definition set forth in Rule 206(4)-1(b).[119] Third, ZPRIM directly or indirectly published, circulated, and distributed these advertisements. Finally, as explained above, each advertisement contained a false or misleading statement of material fact.

---

[115] Zavanelli also testified that Morningstar agreed with his interpretation of the input form. As support, Zavanelli cited a conversation that his son, Mark Zavanelli, ostensibly had with Morningstar but did not recount in his own testimony at the hearing. We do not find this convincing.

[116] Zavanelli also testified that ZPRIM "didn't consider we had a formal investigation until the Wells notice of June 2012."

[117] *Cf. Dolphin & Bradbury*, 2006 WL 1976000, at *9 (explaining that "the protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated").

[118] 17 C.F.R. § 275.206(4)-1(a)(5). The Rule also applies to investment advisers required to be registered under Advisers Act Section 203. 15 U.S.C. § 80b-3.

[119] Rule 206(4)-1(b) broadly defines advertisement to include any "any notice or other announcement in any publication," which offers any "investment advisory service with regard to securities." 17 C.F.R. § 275.206(4)-1(b).

C. Zavanelli also violated the Advisers Act.

1. Zavanelli violated Advisers Act Sections 206(1) and (2) in connection with the charged magazine advertisements and newsletters.

We also find that Zavanelli is primarily liable under Advisers Act Sections 206(1) and (2) for ZPRIM's false and misleading magazine advertisements and newsletters.[120] Associated persons who fall under the statutory definition of investment adviser, which includes "any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities,"[121] may be subject to liability under Section 206.[122] It is undisputed that Zavanelli qualifies as an investment adviser under the statutory standard because he provided investment advisory services to others for money, which he concedes he continues to do. Because he approved, authored, or directly made, the false and misleading statements in ZPRIM's magazine advertisements and newsletters, acting with scienter, Zavanelli violated Sections 206(1) and (2) in connection with these misstatements.

2. Zavanelli also aided, abetted, and caused ZPRIM's violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) with respect to the magazine advertisements and newsletters.

We also find that Zavanelli is secondarily liable for the misrepresentations in ZPRIM's magazines and newsletters. To hold Zavanelli liable for aiding and abetting, we must find that ZPRIM committed primary violations of the securities laws; Zavanelli substantially assisted ZPRIM's conduct constituting the primary violations; and Zavanelli provided that assistance with the requisite scienter.[123] Zavanelli acted with scienter if he knew of, or recklessly disregarded, the wrongdoing and his role in furthering it.[124]

---

120 The OIP did not charge Zavanelli with primary violations of Advisers Act Section 206(4) or Rule 206(4)-1(a)(5), which rule applies only to registered investment advisers. In addition, the Division did not appeal the law judge's finding that Zavanelli was not primarily liable for ZPRIM's Morningstar reports.

121 Advisers Act Section 202(a)(11), 15 U.S.C. § 80b–2(a)(11).

122 *Warwick Capital*, 2008 WL 149127, at *9 n.37 ("We have held that an associated person may be charged as a primary violator under Section 206 where his activities cause him to meet the 'broad' definition of 'investment adviser.'" (quoting *Kenny*, 2003 WL 21078085, at *17 & n.54)); *see also* 15 U.S.C. § 80b–6 (making certain conduct "unlawful for any investment adviser").

123 *See Brendan E. Murray*, Advisers Act Release No. 28519, 2008 WL 4964110, at *5 (Nov. 21, 2008) (citing *Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 646 & n.17 (July 6, 2005) (citing additional cases)); *accord vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *13 (July 2, 2010) (citing *Graham v. SEC*, 222 F.3d at 1000).

124 *Murray*, 2008 WL 4964110, at *5 (citing *e.g.*, *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004); *Howard v. SEC*, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004); *Graham*

(*continued . . .*)

Under this standard, we find that Zavanelli aided and abetted ZPRIM's violations relating to its magazine advertisements and newsletters. First, ZPRIM violated Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) with respect to those advertisements, as explained above. Second, Zavanelli substantially assisted ZPRIM's violations in that he either drafted or approved the false or misleading documents. And third, for the reasons explained above, Zavanelli provided the assistance with the requisite scienter. We accordingly find that Zavanelli aided and abetted ZPRIM's violations in connection with its magazine advertisements and newsletters, and thus also caused them.[125]

In contrast, we cannot discern, on the record before us, the role that Zavanelli played with respect to the misstatements in ZPRIM's Morningstar reports. Accordingly, we dismiss the allegations that he caused those violations.

V.

The law judge permanently barred Zavanelli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (an "industry bar"); censured ZPRIM; imposed cease-and-desist orders with respect to Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5); and ordered ZPRIM to pay a civil money penalty of $250,000 and Zavanelli to pay a civil money penalty of $660,000. We impose essentially the same sanctions, with the exception of the civil money penalty against Zavanelli, which we reduce in light of our dismissal of the Morningstar allegations against him.[126]

A. Zavanelli is barred from the securities industry.

We find it appropriate to impose an industry bar against Zavanelli based on his misconduct between 2008 and 2011. Advisers Act Section 203(f) authorizes us to impose an industry bar on any person who, at the time of the misconduct, was associated with an investment adviser if we find that the person willfully violated or "aided, abetted, counseled,

---

(. . . *continued*)
v. SEC, 222 F.3d at 1000)); *accord Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *10 n.16 (Feb. 27, 2012) ("The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her role in furthering it."), *petition denied sub nom.*, *SEC v. Collins*, 736 F.3d 521 (D.C. Cir. 2013).

[125] *Warwick Capital*, 2008 WL 149127, at *7 n.21 (explaining that finding that respondent willfully aided and abetted primary violations "necessarily makes him a 'cause' of those violations" (citing *Sharon M. Graham*, Exchange Act Release No. 40727, 53 SEC 1072, 1998 WL 823072, at *7 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000))); *Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 WL 820658, at *6 n.20 (Nov. 30, 1998) (same).

[126] The law judge imposed civil money penalties on Zavanelli for the three Morningstar misrepresentations.

commanded, induced, or procured" a violation of the securities laws and the bar is in the public interest.[127] At the time of his misconduct, Zavanelli was associated with ZPRIM, an investment adviser. As explained below, we find that Zavanelli's misconduct was willful and that an industry bar is in the public interest.

1. Zavanelli willfully violated, and willfully aided and abetted violations of, the securities laws.

Zavanelli willfully violated, or aided and abetted violations of, Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) thereunder. To find willfulness, it is sufficient that the respondent "intentionally commit[ed] the act which constitutes the violation."[128] There is no requirement that the respondent "also be aware" that he "violat[ed] one of the Rules or Acts."[129] We find that the willfulness standard is satisfied because Zavanelli intentionally authored or approved the advertisements and investment reports containing the misrepresentations at issue.

2. Imposing an industry bar on Zavanelli is in the public interest.

We find that imposing an industry bar on Zavanelli would serve the public interest. In determining the public interest, we consider, among other things, "the egregiousness of a respondent's actions, the degree of scienter involved, the isolated or recurrent nature of the infraction, the recognition of the wrongful nature of the conduct, the sincerity of any assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future violations."[130] Our inquiry into the public interest "is flexible, and no single factor is dispositive."[131] We find that an industry bar is necessary to protect the public interest for the reasons set forth below.[132]

---

[127] 15 U.S.C. § 80b-3(f) (referencing, among other provisions, Advisers Act Section 203(e)(5), (6), 15 U.S.C. § 80b-3(e)(5), (6) (referencing willful violations of the securities laws, among other things)).

[128] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

[129] *Id.* (internal citation omitted).

[130] *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *8 (Aug. 5, 2011) (citing *Steadman v. SEC*, 603 F.2d at 1140).

[131] *Id.* (citing *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004)).

[132] Courts have rejected Zavanelli's argument that before we impose a bar we also must "explain why a less drastic remedy would not suffice." *See, e.g.*, *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (concluding that "the petitioners err in arguing the Commission must, in order to justify expulsion as remedial, state why a lesser sanction would be insufficient" and stating that, so long as a sanction is remedial and not punitive, the Court would "not require the Commission to choose the least onerous of the sanctions meeting those requirements"); *cf. Sheldon v. SEC*, 45 F.3d 1515, 1517 n.1 (11th Cir. 1995) (explaining that "the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact'" (quoting *Steadman*, 603 F.2d at 1140)).

Egregiousness and scienter: Zavanelli's conduct was egregious and he acted with a high degree of scienter. Despite his knowledge and familiarity with GIPS, Zavanelli flouted the requirements of the GIPS Advertising Guidelines and guidance that Ashland, ZPRIM's GIPS verification firm, provided. In 2008, during some of ZPRIM's worst performance, Zavanelli approved a dramatic change to its advertising format that concealed that ZPRIM's SCV composite had experienced substantial losses and was underperforming its benchmark in 2008. With respect to the 2009 newsletters, Zavanelli chose not to follow the GIPS Advertising Guidelines or distribute a GIPS-compliant presentation in defiance of Ashland's advice. Zavanelli's justification for doing so — a personal understanding of the meaning of advertisement — was inconsistent with the plain language of the definition provided in the Guidelines. And Zavanelli made additional false claims of GIPS compliance in 2011 after ZPRIM promised Commission staff it had taken corrective action with respect to such claims.

We are unpersuaded by Zavanelli's arguments that his conduct was not egregious for several reasons. First, Zavanelli argues that "so far as Zavanelli is concerned, more than 45% of the violations – five out of the 11 – involved either 'relatively low' or no scienter."[133] But as explained above, we find that Zavanelli acted with a high degree of scienter with respect to the six 2008 and 2011 magazine advertisements, and that he was, at a minimum, reckless with respect to the two 2009 newsletters. These recurrent fraudulent misrepresentations, regardless of the percentage they make up of the total violations, are egregious.[134]

Second, Zavanelli argues that he did not cause any direct financial harm to investors and made no money from the misrepresentations, and that ZPRIM's false claims of compliance with the GIPS Advertising Guidelines are less serious than false statements of performance that are inconsistent with the GIPS Performance Standards. But Zavanelli's conduct harmed the market generally because he disseminated false information regarding his firm's GIPS compliance and denied investors the ability to make direct comparisons between ZPRIM's performance and that of other investment advisers.[135] Moreover, we have imposed bars where misconduct did not

---

[133] The eleven violations that Zavanelli references are the three 2008 advertisements, the two 2009 newsletters, the three 2011 advertisements, and the three misrepresentations contained in the 2010 and 2011 Morningstar reports.

[134] Zavanelli's resort to a percentage-based approach to scienter is misguided. Depending on the circumstances, it may be appropriate to bar a respondent based on a single violation. If such a respondent also committed a negligence-based violation, at least 50% of his violations would not involve scienter. But that additional violation would not make the respondent any less culpable or a bar less appropriate than if the respondent committed only the single violation.

[135] *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013) ("Although the record does not contain evidence of direct investor harm, 'our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future.'" (*quoting Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 n.41 (Feb. 13, 2009))).

cause financial harm or lead to monetary gain for the respondent.[136] To the extent that the absence of pecuniary harm and benefit is mitigating, it is outweighed by the other factors we consider.

Third, Zavanelli asserts that there was no possibility that any investor would be misled by ZPRIM's false claims of GIPS compliance because ZPRIM otherwise disclosed the financial returns it failed to include in its advertisements. We disagree for the reasons set forth above.[137]

Fourth, Zavanelli asserts that his conduct was less serious than that in other cases in which we and the courts declined to impose permanent bars of various types. But "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."[138] In any event, the cases that Zavanelli cites are distinguishable.[139]

Recurrence: Zavanelli's conduct was recurrent. In 2008, 2009, and 2011, Zavanelli either authorized or authored multiple advertisements that claimed GIPS compliance but did not comply with the GIPS Advertising Guidelines. Zavanelli conceived of and approved the 2011 advertisements after ZPRIM promised the previous year to take corrective action. And although we do not consider it part of Zavanelli's current misconduct, we note that, in 1987, we accepted an offer of settlement from Zavanelli and Zavanelli Portfolio Research, censured them for violations of Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5), and prohibited them from

---

[136] *See, e.g.*, *Seghers v. SEC*, 548 F.3d 129, 136 (D.C. Cir. 2008) (noting that in imposing a permanent bar we "considered the fact that Seghers did not benefit financially from his conduct"); *Kornman*, 2009 WL 367635, at *9 (declining to give mitigating weight to fact that "no particular investor was directly harmed by [the] conduct"); *see also Korem*, 2013 WL 3864511, at *5 (rejecting respondent's argument that his conduct was not egregious because there was no harm or loss).

[137] *See supra* section IV.A.1.b. (availability of omitted information through other means).

[138] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973).

[139] In *SEC v. Benger*, the court declined to impose a penny stock bar where, unlike here, the defendant's misconduct (as an escrow agent) was non-fraudulent, he was "a cog in the machinery of the overall scheme," and his decades-long career had been "unblemished." 64 F. Supp. 3d 1136, 1140, 1143, 1144-45 (N.D. Ill. 2013). Similarly, in imposing a six-month suspension in *Leo Glassman*, we noted that the respondent had not violated the anti-fraud provisions of the securities laws, and we observed that he cooperated, told the full truth, and appeared genuinely contrite. Exchange Act Release No. 11929, 46 SEC 209, 1975 WL 160418, at *2 (Dec. 16, 1975). And in *SEC v. Metcalf*, the court relied on the defendant's lack of any other reported violations (unlike this case) to limit the length of penny stock and officer and director bars to five years. No. 11 Civ. 493 (CM), 2012 WL 5519358, at *7 (S.D.N.Y. Nov. 13, 2012).

soliciting or accepting new advisory clients for 180 days.[140] This disciplinary history further weighs in favor of a bar.

Zavanelli argues that ZPRIM's six false magazine advertisements arose from "just two distinct publishing decisions" in 2008 and 2011 and that it accordingly is a "distortion" to characterize them as recurrent. Yet Zavanelli concedes that "[t]he same sin was committed in each of the six ads – the inclusion of a footnote statement that ZPRIM was GIPS-compliant without setting forth all information called for by GIPS Advertising Guidelines." In other words, the same misstatement recurred at least six times.[141]

No recognition of wrongful conduct: Zavanelli does not genuinely recognize the wrongfulness of his conduct. Instead, he contends that he did nothing improper because, although ZPRIM's claims of compliance with the Advertising Guidelines were false, investors could have found the information omitted from the advertisements elsewhere. And Zavanelli blames others for the 2008 advertisements he concedes he approved.[142]

Zavanelli presents several contrary arguments, but we find each of them lacking. First, Zavanelli asserts that he recognized that his conduct was wrongful because he admitted that the 2008 and 2011 magazine advertisements did not follow the Guidelines. But conceding that the advertisements did not comply with the Guidelines is not the same thing as recognizing that, under the circumstances, Respondents' claims of GIPS compliance were wrongful. Zavanelli

---

[140] Order Instituting Public Proceedings Pursuant to Section 203(e) and 203(f) of the Investment Advisers Act of 1940, Making Findings and Imposing Remedial Sanctions, *Max Edward Zavanelli*, Advisers Act Release No. 1077, 1987 WL 755988, at *3 (Aug. 17, 1987). We found that Zavanelli and ZPRIM's predecessor had disclosed investment results that included three years during which no actual trading occurred and filed a Form ADV stating that Zavanelli had earned a doctorate from Columbia University, which he never completed. The respondents consented to the findings without admitting or denying them.

[141] Zavanelli argues that, in *Benger*, the defendant's involvement in 1400 transactions was not deemed recurrent. But in that case, the court assessed the propriety of sanctions for a single count of failing to register as a broker-dealer, not repeated misrepresentations. 64 F. Supp. 3d at 1138. And Zavanelli's reliance on *In re Reserve Fund Securities and Derivative Litigation*, for the proposition that his conduct was not recurrent is also misplaced. There, the court concluded that the infractions were isolated occurrences where it found that the "wrongful conduct took place over a period of less than 36 hours," and the prior violations of one defendant did not involve the same or similar illegal conduct. No. 09 MD.2011(PCG), 2013 WL 5432334, at *20, *23 (S.D.N.Y. Sept. 30, 2013). In contrast, Zavanelli's misconduct here spanned years and he previously consented to Commission findings that he violated the same statutory and regulatory provisions at issue here by misleading investors.

[142] *See vFinance Invs., Inc.*, 2010 WL 2674858, at *15 ("As we have stated, 'attempts to shift blame are additional indicia of [a respondent's] failure to take responsibility for his actions.'" (quoting *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC 880, 1998 WL 730586, at *5 (Oct. 21, 1998), *petition denied*, 198 F.3d 253 (9th Cir. 1999))).

still attempts to minimize the gravity of his misconduct, and he continues to assert that the 2009 newsletters did not violate the Guidelines.

Second, Zavanelli asserts that "[h]is willingness to take on a lesser role and fewer responsibilities for·ZPRIM is a clear acceptance of responsibility." Again, we are not convinced. Zavanelli's transfer of ownership of ZPRIM to his son and his resignation from management positions were business decisions, not acceptance of responsibility for his misconduct. In any event, Zavanelli continues to manage ZPRIM's investments and retains substantial input into other decisions.

Third, Zavanelli argues that, in imposing sanctions, the law judge was improperly swayed by Zavanelli's "pugnacious personality," as reflected by his behavior at the hearing and his investigative testimony. Zavanelli has a right to vigorously contest liability. But his continued insistence that his newsletters did not need to comply with the Guidelines in the face of contrary advice from the expert GIPS verification firm he retained and his assertion that ZPRIM's false claims of GIPS compliance are not actionable because investors might have found the omitted information elsewhere show a lack of understanding of the antifraud provisions that endangers the investing public. Zavanelli's failure to recognize the wrongfulness of his conduct is relevant to our consideration of the public interest[143] and demonstrates a risk of future violations.[144]

Inadequacy of assurances against misconduct: We also are not convinced by Zavanelli's assurances against future misconduct. He asserts that there is no likelihood of future violations because he currently plays a limited role with ZPRIM, his son now owns and controls it, and ZPRIM has hired an outside compliance firm. But Zavanelli continues to provide investment advisory services,[145] and even after his son joined ZPRIM Zavanelli continued to give input into a great many areas, including GIPS compliance. Nor are we convinced that Zavenelli's son and outside consultants effectively could prevent Zavanelli from engaging in future misconduct.

---

[143] *Seghers v. SEC*, 548 F.3d at 136-37 (rejecting argument that the Commission violated respondent's due process rights by taking into account his failure to recognize the wrongfulness of his conduct); *see also SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002) ("[A]cceptance of responsibility for illegal conduct is a routine and unexceptionable feature even of criminal, let alone of civil, punishment.").

[144] *Wendy McNeeley, CPA*, Exchange Act Release No. 68431, 2012 WL 6457291, at *18 (Dec. 13, 2012) (finding that, while the respondent had the right to present a vigorous defense, her testimony and arguments on appeal reflected a continuing failure to grasp her role as a professional); *cf. SEC v. Lipson*, 278 F.3d at 664 ("The criminal who in the teeth of the evidence insists that he is innocent, that indeed not the victims of his crime but he himself is the injured party, demonstrates by his obduracy the likelihood that he will repeat his crime, and this justifies the imposition of a harsher penalty on him. . . . It makes no difference whether, as in this case, the government is seeking only a civil remedy.").

[145] Specifically, Zavanelli asserts that "[h]is only function for ZPRIM is to provide investment advice to clients and manage or co-manage ZPRIM's composites." In other words, Zavanelli concedes that he remains engaged in ZPRIM's core business.

Zavanelli's occupation will present opportunities for future violations: Zavanelli would remain involved in an occupation that would present opportunities for future violations. As noted, Zavanelli wishes to continue to work in ZPRIM's core investment advisory business.

The factors discussed above and Zavanelli's serious misconduct demonstrate his unfitness for the securities industry in general. The risks to customers from misrepresentations of the sort in which Zavanelli engaged exist throughout the industry. Indeed, each area covered by the industry bar "presents continual opportunities for [similar] dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[146] We find that an industry bar[147] will protect investors from future violations by Zavanelli.[148]

B. Cease-and-desist orders are appropriate with respect to each Respondent.

We also find it appropriate to issue cease-and-desist orders against Respondents. Advisers Act Section 203(k)(1) authorizes the Commission to impose a cease-and-desist order on any person we find has violated or a caused a violation of the Advisers Act or rules thereunder.[149] In determining whether a cease-and-desist order is appropriate, we consider, among other things, the same factors used in determining whether a bar is in the public interest. We also take into account "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[150] In addition, we consider the risk of future violations.[151] Although "'some' risk is necessary, it

---

[146] *Seghers*, 2007 WL 2790633, at *7; *see also Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *3 (Sept. 17, 1992) (noting that the industry "presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

[147] Although some of Zavanelli's misconduct occurred before the effective date of the Dodd-Frank Act (July 22, 2010), we find that Zavanelli's 2011 misconduct, which authorized ZPRIM's repeated false claims of GIPS compliance despite its representation to Commission staff that it would cease those misrepresentations, amply supports imposing an industry bar on him.

[148] Respondents do not challenge the law judge's censure of the firm, and we find it is in the public interest to censure ZPRIM for its willful violations of the Advisers Act. Advisers Act Section 203(e)(5), 15 U.S.C. § 80b-3(e)(5).

[149] 15 U.S.C. § 80b-3(k)(1).

[150] *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also Herbert Moskowitz*, Exchange Act Release No. 45609, 55 SEC 658, 2002 WL 434524, at *8 (Mar. 21, 2002).

[151] *KPMG Peat Marwick*, 2001 WL 47245, at *26.

need not be very great to warrant issuing a cease-and-desist order."[152] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[153]

We find it is appropriate to order ZPRIM and Zavanelli to cease and desist from committing or causing violations or future violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5).[154] Our findings with respect to the imposition of an industry bar strongly support the need for a serious sanction against Zavanelli and ZPRIM. Respondents' violations occurred within the last four to seven years. Although the Division does not point to evidence of substantial harm to investors, Respondents provided false information to the marketplace regarding ZPRIM's GIPS compliance and verification. A cease-and-desist order will play a substantial remedial role with respect to ZPRIM considering that we have not revoked its registration as an investment adviser. Finally, we find that Respondents' recurrent misconduct, as well as Zavanelli's prior regulatory violations, establish the risk of future violations necessary to impose cease-and-desist orders.[155]

C. Second-tier civil money penalties are appropriate.

We also find it appropriate to order ZPRIM and Zavanelli to pay civil money penalties. Advisers Act Section 203(i)(1) authorizes the Commission to assess civil money penalties, among other things, where a respondent has willfully violated any provision of the federal securities laws or the rules or regulations thereunder or willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person.[156] We apply a three-tier system of civil penalties. Each tier is applicable to increasingly serious misconduct and subject to progressively higher maximum penalties,[157] which are periodically adjusted.[158]

In considering whether a penalty is in the public interest, we may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any

---

[152] *Id.* at *24.

[153] *Id.*

[154] The law judge also ordered Zavanelli to cease and desist from aiding and abetting such violations. But Advisers Act Section 203(k)(1) does not grant this authority; it authorizes cease-and-desist orders that prohibit "committing or causing" violations.

[155] *See supra* note 151 and accompanying text.

[156] 15 U.S.C. § 80b-3(i)(1).

[157] Advisers Act Section 203(i)(2)(A)-(C), 15 U.S.C. § 80b-3(i)(2)(A)-(C).

[158] 17 C.F.R. §§ 201.1003, 1004, and 1005 (effecting adjustment of civil monetary penalties for violations after, respectively, February 14, 2005, March 3, 2009, and March 5, 2013), Tables III, IV, and V to Subpart E of Part 201 (specifying such adjusted penalty amounts); *see also* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, ch. 10, sec. 31001 (providing for, among other things, periodic adjustment of penalty amounts).

person was unjustly enriched, taking into account any restitution made to injured persons; (4) any previous Commission, other regulatory agency, or SRO findings that the person violated federal or state securities laws or SRO rules, court orders enjoining the person from violations of such laws or rules, or specified felony or misdemeanor convictions; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require.[159] In addition, as relevant here, second-tier penalties require a showing that the act or omission giving rise to the penalty "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[160]

Respondents repeatedly violated the antifraud provisions with scienter. Respondents' misconduct was especially serious because it involved attempts to promote their firm through false claims of GIPS compliance or verification or by concealing the existence of a Commission investigation. The market was harmed by Respondents' misrepresentations, but the Division has not sought to quantify any unjust enrichment to Respondents. Zavanelli previously settled an enforcement proceeding with the Commission involving misrepresentations. There is a need to deter Respondents from committing future acts or omissions because, among other things, their conduct was egregious and recurrent, they ignored the advice of their verification firm, and they repeated their misconduct after ZPRIM represented to Commission staff that it would correct its noncompliance.

With respect to Zavanelli, we find it appropriate to impose a maximum second-tier penalty for each of his eight violations of the Advisers Act. We accordingly assess a $65,000 civil money penalty for each of the three 2008 advertisements ($195,000 total) and a $75,000 penalty for each of the three 2011 advertisements and two 2009 newsletters (an additional $375,000), for a total of $570,000.[161] Because we find that Zavanelli acted with scienter, we reject his argument that first-tier penalties are appropriate because his conduct was only negligent.

ZPRIM also violated the statute on eleven occasions. But below, the Division requested only a single second-tier penalty. We find that the law judge appropriately issued a penalty of two-thirds of the statutory maximum, i.e., $250,000. Such a penalty takes into account ZPRIM's efforts under Mark Zavanelli to comply with its disclosure obligations, as well as the impact that the industry bar on Max Zavanelli will have on ZPRIM.

---

[159] Advisers Act Section 203(i)(3), 15 U.S.C. § 80b-3(i)(3).

[160] Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B). Third-tier penalties may be imposed on an additional showing that the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain" to the violator. Advisers Act Section 203(i)(2)(C), 15 U.S.C. § 80b-3(i)(2)(C).

[161] As stated above, we reduce the civil money penalties ordered by the law judge in light of our finding that the record does not support causing liability for Zavanelli with respect to the Morningstar reports.

An appropriate order will issue.[162]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioner PIWOWAR concurring in part and dissenting with respect to the finding that ZPR Investment Management, Inc., violated Advisers Act Section 206(1) in connection with the Morningstar report for the period ended March 31, 2011).

Brent J. Fields
Secretary

---

[162] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4249 / October 30, 2015

Admin. Proc. File No. 3-15263

In the Matter of

ZPR INVESTMENT MANAGEMENT,INC.,
and MAX E. ZAVANELLI.

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Max E. Zavanelli be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that ZPR Investment Management, Inc., be censured for violations of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-1(a)(5) thereunder; and it is further

ORDERED that ZPR Investment Management, Inc., and Max E. Zavanelli cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) thereunder; and it is further

ORDERED that ZPR Investment Management, Inc., pay a civil money penalty of $250,000; and it is further

ORDERED that Max E. Zavanelli pay civil money penalties of $570,000.

Payment of the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary