UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6672 / September 3, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22046

In the Matter of **ClearPath Capital Partners, LLC** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against ClearPath Capital Partners, LLC ("ClearPath" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. ClearPath, a registered investment adviser, is an investment adviser to retail investors and private funds. This matter concerns ClearPath's violations of the federal securities laws in connection with the financial statement audits of private funds that ClearPath advised and its use of liability disclaimer language, commonly referred to as a hedge clause, in its advisory agreements and in private fund partnership and operating agreements. From at least 2018 through 2022, ClearPath failed to timely distribute annual audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP") to investors in certain private funds that it advised. This failure resulted in violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, commonly referred to as the "custody rule". In addition, from at least 2019, in its advisory agreements and certain private fund partnership and operating agreements, ClearPath used hedge clauses that contained misleading statements regarding the scope of its unwaivable fiduciary duty and could lead a client to believe incorrectly that the client had waived a non-waivable cause of action against the adviser provided by state or federal law. This violated Section 206(2) of the Advisers Act.

Respondent

2. ClearPath is a limited liability company with its principal place of business in Menlo Park, California. ClearPath has been registered with the Commission as an investment adviser since November 7, 2013. On its Form ADV, dated May 5, 2024, ClearPath reported that it had $146,573,794 regulatory assets under management, including $1,240,884 attributable to private funds.

Other Relevant Entities

3. ClearPath Strategic Opportunities Fund, L.P. ("Strategic Opportunities Fund") was a private fund formed as a limited partnership organized in Delaware that relied on the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act of 1940 ("Investment Company Act"). At all relevant times, ClearPath was the general partner of the Strategic Opportunities Fund. The fund invested in a rideshare technology company through another unaffiliated private investment vehicle. The fund was liquidated in 2019.

4. ClearPath Special Opportunities Fund 2017, LP ("Special Opportunities Fund") is a private fund formed as a limited partnership organized in Delaware that relied on the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Act. At all relevant times, ClearPath was the general partner of the Special Opportunities Fund. The fund invests in select technology companies through other unaffiliated private investment vehicles. The fund was launched in 2017 and is still active.

5. ClearPath Opportunities Fund, LLC ("Opportunities Fund") is a private fund formed as a limited liability company organized in Delaware that relied on the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act. At all relevant times, ClearPath was the manager of the Opportunities Fund. The fund invests in emerging companies through other unaffiliated private investment vehicles. The fund was launched in 2021 and is still active.

6. Strategic Opportunities Fund, Special Opportunities Fund, and Opportunities Fund are collectively referred to as the "Funds."

ClearPath Failed to Timely Distribute Required Audited Financial Statements

7. The custody rule requires that registered investment advisers that have custody of client funds or securities implement an enumerated set of requirements to prevent the loss, misuse, or misappropriation of those assets.

8. An investment adviser has custody of client assets if it holds, directly or indirectly, client funds or securities, or if it has the authority to obtain possession of those assets. *See* Advisers Act Rule 206(4)-2(d)(2). ClearPath has served as the manager or general partner of the Funds at all relevant times, and has had the authority to make decisions for, and act on behalf of, the Funds. ClearPath is therefore deemed to have custody of each Fund's assets as defined in Advisers Act Rule 206(4)-2.

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

10. The custody rule provides an alternative to complying with the requirements of Advisers Act Rule 206(4)-2(a)(2), (3) and (4) for investment advisers to limited partnerships, limited liability companies, or other types of pooled investment vehicles. The custody rule provides that an investment adviser "shall be deemed to have complied with" the independent verification requirement and is not required to satisfy the notification and account statements delivery requirements with respect to a fund if the fund is subject to audit at least annually and "distributes [the fund's] audited financial statements prepared in accordance with generally

accepted accounting principles to all limited partners . . . within 120 days of the end of [the fund's] fiscal year" ("Audited Financials Alternative"). *See* Advisers Act Rule 206(4)-2(b)(4). The accountant performing the audit must be an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB"). *See* Advisers Act Rule 206(4)-2(b)(4)(ii). An investment adviser to a limited partnership, limited liability company or other pooled investment vehicle that fails to meet the requirements of the Audited Financials Alternative to timely distribute audited financial statements prepared in accordance with GAAP would need to satisfy all of the requirements of Rule 206(4)-2(a)(2)-(4) in order to avoid violating the custody rule.

11. From at least 2018 through 2022, with respect to the Funds, ClearPath purported to rely on the Audited Financials Alternative in order to comply with the custody rule, but ClearPath failed in seven instances to timely deliver the audited financials to the Funds' investors. Specifically, ClearPath violated the custody rule two times with respect to the Strategic Opportunities Fund for fiscal years 2018 and 2019. In 2018, a year for which it received audited financial statements for the fund, ClearPath could not demonstrate that these financial statements were delivered to investors. In 2019, the Strategic Opportunities Fund was liquidated, but no audit was performed so audited financial statements for this year were not prepared or delivered to investors. ClearPath also violated the custody rule with respect to the the Special Opportunities Fund for fiscal years 2018 through 2021, and the Opportunities Fund for fiscal year 2021. The financial statements for the Funds that were ultimately delivered to investors were 333 to 1,064 days after the Funds' relevant fiscal year end. Accordingly, ClearPath did not satisfy the requirements of the Audited Financials Alternative in Rule 206(4)-2(b)(4) for the Funds. It was therefore obligated to comply with Advisers Act Rule 206(4)-2(a)(2), (3) and (4), which ClearPath also failed to do.

Improper Limitation of Liability in Advisory Agreements and Private Fund Agreements

12. The Advisers Act establishes a federal fiduciary duty for investment advisers. An adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. Moreover, advisory agreements may not misrepresent, or contain misleading statements regarding, the scope of an adviser's unwaivable fiduciary duty that could lead a client to believe incorrectly that the client has waived a non-waivable cause of action against the adviser provided by state or federal law. This is true even if there is a disclaimer (sometimes known as a "savings clause" or "non-waiver" disclosure) stating that compliance with the state or federal securities laws is not waivable.

13. Language purporting to limit an adviser's liability in an advisory agreement is also called a "hedge clause." Whether a particular hedge clause is misleading is a facts-and circumstances determination.

14. On June 5, 2019, the Commission published the Commission Interpretation Regarding Standard of Conduct for Investment Advisers, IA Rel. No. 5248 (June 5, 2019) ("Commission Statement"). The Commission Statement provided in relevant part that "there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be

consistent with [] antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights." *Id.* at p. 11, fn. 31. The Commission Statement also noted that a "contract provision purporting to waive the adviser's federal fiduciary duty generally … would be inconsistent with the Advisers Act, regardless of the sophistication of the client." *Id.* at p. 10-11.

15. From at least 2019, ClearPath used improper hedge clauses in advisory agreements. These agreements were still active as of mid-2024 and controlled ClearPath's relationships with its advisory clients other than the funds it advises. Most, if not all, of ClearPath's clients are retail investors.

16. In the relevant period, ClearPath used an advisory agreement with a hedge clause that stated, in relevant part:

> "Neither CCP nor any of its employees, officers, directors or any person acting on their behalf (each, and "Indemnitee") shall be liable to Client for any action or inaction that results in any cost, claim, liability, damage, loss or expense suffered in connection with the services covered herein, if the Indemnitee believed in good faith at the time of its action or inaction that its conduct was in the interests of Client, and such conduct did not constitute gross negligence, willful misconduct or a breach of applicable law. The indemnification provided for herein shall be available only as and to the extent that it is not prohibited by applicable law governing rights of indemnification."

17. In the relevant period, ClearPath used a second advisory agreement with a hedge clause that stated, in relevant part:

> "Except for gross negligence or willful malfeasance, or violation of applicable law, neither CCP, nor any of it's [sic] respective directors, employees, shareholders, officers or affiliates shall be liable hereunder for any action performed or omitted to be performed or for any errors of judgment in managing the Account. **Federal Securities Laws** and certain state securities laws impose liabilities under certain circumstances on persons who act on good faith, and therefore nothing herein shall in any way constitute a waiver or limitation of any rights which Client may have under any federal or state securities laws (or ERISA, if Client has a qualified plan there under)." (emphasis in original)

18. The language in these hedge clauses purports to broadly limit ClearPath's liability. The hedge clauses represent that ClearPath is not liable to its clients for "any action or inaction," with exceptions for "gross negligence" or "willful malfeasance" and violations of "applicable law." The language, when read in its entirety, is inconsistent with an adviser's fiduciary duty

because it may mislead ClearPath's retail clients into not exercising their non-waivable legal rights. Accordingly, these hedge clauses violated Section 206(2) of the Advisers Act.

19. From at least 2019, ClearPath also included improper hedge clauses in partnership and operating agreements for private funds that it advised and for which it served as general partner or manager. These agreements were still active and controlled ClearPath's relationships with its private funds as of mid-2024. Several of ClearPath's retail advisory clients also are investors in its private funds.

20. In the relevant period, ClearPath distributed a limited partnership agreement to its Special Opportunities Fund investors with a hedge clause, which stated, in relevant part:

> "None of the Indemnified Parties shall be liable to any Limited Partner or the Partnership for honest mistakes of judgment, or for action or inaction, taken in good faith in respect of the Partnership, or for losses due to such mistakes, action, or inaction, or to the negligence, dishonesty, or bad faith of any employee, broker, or other agent of the Partnership, provided that such employee, broker, or agent was supervised and selected, engaged, or retained with reasonable care. . . Notwithstanding any of the foregoing to the contrary, the provisions of this paragraph 15.3 and the immediately following paragraph 15.4(a) shall not be construed so as to relieve (or attempt to relieve) any person (except in the case of members of the Advisory Committee and their Constituent Limited Partners, who need only have acted in good faith in order to receive the benefit of exculpation under this paragraph 15.3) of any liability by reason of "gross negligence" or intentional wrongdoing (including fraud or other intentional criminal conduct) or to the extent (but only to the extent) that such liability may not be waived, modified, or limited under applicable law, but shall be construed so as to effectuate the provisions of such paragraphs to the fullest extent permitted by law. The Partners acknowledge and agree that certain provisions of this Agreement expressly or implicitly waive, reduce, redefine or otherwise modify fiduciary duties of the General Partner and the other Indemnified Parties (as defined below) arising under applicable law. It is the express intention of the Limited Partners that such waiver, reduction, redefinition or other modification be fully enforceable and binding upon the Partners. Accordingly, each Limited Partner hereby irrevocably: (i) waives any and all current and future claims (and right to assert such claims) against the General Partner and the other Indemnified Parties for any breach of fiduciary duty that would otherwise arise under applicable law but would be inconsistent with the terms of this Agreement; and (ii) agrees to fully reimburse the General Partner and any other applicable Indemnified Party for any and all losses, expenses, costs or other damages resulting from any waived claim brought by, through, or on behalf of such Limited Partner."

21. In the relevant period, ClearPath also distributed an operating agreement to its Opportunities Fund investors with a hedge clause, which stated, in relevant part:

"A Manager shall not be liable to the Company, a series, or to any Member for any loss or damage sustained by the Company, such series or Member, unless the loss or damage shall have been the result of fraud, deceit, gross negligence, willful misconduct or a wrongful taking by the Manager."

22. The language in these hedge clauses again purports to broadly limit ClearPath's liability. The hedge clause in the foregoing limited partnership agreement purports to waive ClearPath's non-waivable fiduciary duty and purports that ClearPath is not liable to its private fund client for "mistakes of judgment, or for action or inaction" and explicitly requires investors to "waive[] any and all current and future claims (and right to assert such claims) against [ClearPath] and the other Indemnified Parties for any breach of fiduciary duty." The hedge clause in the foregoing operating agreement represents that ClearPath is not liable for "any loss or damage" unless the result of "fraud, deceit, gross negligence, willful misconduct or a wrongful taking." The language, when read in its entirety, is inconsistent with an adviser's fiduciary duty because it may mislead ClearPath's client into not exercising its non-waivable legal rights.

23. Accordingly, these hedge clauses violated Section 206(2) of the Advisers Act.

Compliance Failures

24. Rule 206(4)-7 under the Advisers Act requires registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and rules thereunder and to review, no less frequently than annually, the adequacy of the policies and procedures established and the effectiveness of their implementation. ClearPath did not adopt policies and procedures reasonably designed to prevent violations of the custody rule with respect to the Funds. Among other things, ClearPath's written policies and procedures did not address how it would comply with the custody rule with respect to the Funds and never mentioned the Funds' fiscal year-end, the Audited Financials Alternative elected by it with respect to the Funds (including the requirement to distribute audited financial statements), or the person or persons responsible for ensuring that it complies with the custody rule.

25. In addition, ClearPath failed to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and rules thereunder with respect to its advisory agreements and private fund agreements. While ClearPath's written policies and procedures contain general fiduciary standards to protect clients, the firm failed to implement these policies and procedures with respect to the foregoing.

Violations

26. As a result of the conduct described above, ClearPath willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder, which require registered investment advisers that have custody of client funds or securities implement an enumerated set of requirements to prevent the loss, misuse, or misappropriation of those assets.

27. As a result of the conduct described above, ClearPath willfully violated Section 206(2) of the Advisers Act, which makes it unlawful "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Scienter is not required to establish a violation of Section 206(2), but rather may rest upon a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-195 (1963)).

28. As a result of the conduct described above, ClearPath willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder, which require, among other things, that an investment adviser: (a) adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules; and (b) review at least annually its written policies and procedures and the effectiveness of their implementation. A violation of Section 206(4) and the rules thereunder does not require scienter. *Steadman*, 967 F.2d at 647.

Remedial Steps

29. In determining to accept the Offer, the Commission considered the remedial acts undertaken by ClearPath, including its revision to its procedures for complying with the custody rule and demonstrated compliance with the rule, as well as the removal of the foregoing hedge clauses from its advisory and private fund agreements.

IV.

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

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

A. Respondent cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act, Section 206(4)(2) of the Advisers Act and Rule 206(4)-2 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondent is censured.

C. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $65,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

   a. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

b. Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

c. Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

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

C. Payments by check or money order must be accompanied by a cover letter identifying ClearPath as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Jeremy Pendrey, Assistant Regional Director, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104, or such other address as the Commission staff may provide.

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

By the Commission.

Vanessa A. Countryman
Secretary