

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5450 / February 27, 2020

INVESTMENT COMPANY ACT OF 1940
Release No. 33806 / February 27, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-19713

In the Matter of

STEVEN E. FISHMAN

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY 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(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) and Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”), against Steven E. Fishman (“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 him 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(f) and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company 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 finds¹ that:

Summary

Respondent was the co-founder and a principal of Formation Capital, LLC ("Formation Capital"), an investment adviser registered with the Commission since September 11, 2014. Formation Capital's general investment strategy is to create single-purpose funds to acquire senior care properties and healthcare service providers. Since forming the company, Respondent was expected to personally invest in each of the funds sponsored by Formation Capital, which he did through single-purpose entities commonly referred to as "personal investment vehicles" ("PIVs"). Respondent was unable to meet his capital contribution obligations on his own, however, and therefore solicited other investors to assist him by contributing to his PIVs. Respondent knew that this conduct was prohibited by the firm, so Respondent concealed the existence of his additional PIV investors from his colleagues at Formation Capital. As a result of Respondent's conduct, annual audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP") were not distributed to some of the investors in its funds for fiscal years 2014 through 2017, in violation of Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder (the "Custody Rule").

Respondent

1. Fishman was a co-founder of Formation Capital and served as the company's President and Co-Chairman until August 31, 2018. He is licensed, but inactive, as a Certified Public Accountant. Fishman is 63 years old and is a resident of New York, New York.

Other Relevant Entity

2. Formation Capital is a Georgia limited liability company founded in 1999 and registered with the Commission since September 11, 2014. The company, headquartered in Atlanta, Georgia, employs approximately 50 people. Formation Capital is a private fund sponsor and asset management firm that focuses on investing in senior housing and health care services. As of December 31, 2017, Formation Capital managed 18 funds with approximately \$6.1 billion in assets under management.

Facts

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.

3. Since the founding of Formation Capital in 1999, Respondent and his co-founder agreed to invest their own capital into each Formation-sponsored fund in order to align their interests with those of the other investors. The amounts to be personally contributed were determined by Respondent's co-founder and were matched by Respondent.

4. Respondent made his contributions through PIVs, which were separate companies, individually owned and established solely for the purpose of funding an investment in a given project.

5. From the outset, Respondent suffered financial constraints and never possessed sufficient capital to match his co-founder's contributions to the funds. Respondent therefore solicited friends and other investors to make contributions to his PIVs, which he then passed along to Formation Capital under the pretense of being his own investments.

6. Since Formation Capital registered with the Commission in September 2014, Respondents' PIVs contributed more than \$28 million to approximately 18 different Formation-sponsored funds. Although he purported to fully fund these amounts, in reality less than \$2 million of the invested money came from Respondent himself.

7. Respondent knew that his use of other investors' money to fund his PIVs was prohibited by the firm. For example, when Respondent invested in funds advised by Formation Capital through a PIV, he signed subscription agreements and/or operating agreements stating that he was the sole owner of each PIV. In addition, Respondent stated in emails to his PIV investors that Formation Capital's compliance personnel should not be told that other individuals were investors in his PIVs. Respondent therefore concealed the existence of his PIV investors from his colleagues at Formation Capital for years, leaving the firm unaware of the existence of his PIV investors until March 2018.

8. Upon discovering Respondent's misconduct, Formation Capital terminated Respondent and took steps to ensure that the assets of his PIV investors were protected.

Violation

9. The Custody Rule is designed to protect investors from the misuse or misappropriation of their funds and securities. It requires that registered advisers who have custody of client funds or securities implement an enumerated set of requirements to prevent loss, misuse, or misappropriation of those assets.

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

11. Formation Capital had custody of its funds' assets as defined in Rule 206(4)-2. An investment adviser who has custody of client assets must, among other things: (i) ensure that a qualified custodian maintains the client assets; (ii) notify the client in writing of accounts opened

by the adviser at a qualified custodian on the client's behalf; (iii) have a reasonable basis for believing that the qualified custodian sends account statements at least quarterly to clients, except if the client is a limited partnership 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, member, or other beneficial owner; and (iv) ensure that client funds and securities are verified by actual examination each year by an independent public accountant at a time chosen by the accountant without prior notice or announcement to the adviser. *See* Rule 206(4)-2(a)(1)-(5).

12. The Custody Rule provides an alternative to complying with the requirements of Rule 206(4)-2(a)(2), (3) and (4) for investment advisers to limited partnerships or limited liability companies, or other types of pooled investment vehicles, such as Formation Capital's funds. 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 its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of [the fund's] fiscal year." *See* Rule 206(4)-2(b)(4). The accountant performing the audit must be an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board ("PCAOB"). *See* Rule 206(4)-2(b)(4)(ii). An investment adviser to a limited partnership, limited liability company, or other pooled investment vehicle that fails to meet the requirements to timely distribute audited financial statements prepared in accordance with GAAP would need to satisfy all of the requirements of Rule 206(4)-2(a) in order to avoid violating the Custody Rule.

13. Formation Capital attempted to satisfy the requirements of the Custody Rule by having its funds audited annually and by having the fund's audited financial statements distributed to investors within 120 days of the end of each fund's fiscal year.

14. Due to Respondent's concealment of the investors in his PIVs, Formation Capital failed to have audited financial statements distributed to these investors—who were beneficial owners of the funds—for fiscal years 2014 through 2017.

15. As a result of the conduct described above, Respondent willfully aided and abetted and caused Formation Capital's violations of Section 206(4) of the Advisers Act and Rule 206(4)-2 promulgated thereunder.

IV.

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

Accordingly, pursuant to Sections 203(f) and 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

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

B. Respondent be, and hereby is:

barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, compliance with the Commission's order and payment of any or all of the following: (a) any disgorgement or civil penalties ordered by a Court against the Respondent in any action brought by the Commission; (b) any disgorgement amounts ordered against the Respondent for which the Commission waived payment; (c) any arbitration award related to the conduct that served as the basis for the Commission order; (d) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (e) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall, within 21 days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

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

Payments by check or money order must be accompanied by a cover letter identifying Steven E. Fishman 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 Justin Jeffries, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia 30326.

E. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he 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 he 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary