

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3516 / December 18, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-15137

In the Matter of

**NEW ENGLAND
INVESTMENT AND
RETIREMENT GROUP,
INC., AND NICHOLAS
JOHN GIACOUMAKIS,**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTIONS 203(e) AND
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against New England Investment and Retirement Group, Inc. (“NEINV”) and Nicholas John Giacoumakis (“Giacoumakis”) (collectively, “the Respondents”).

II.

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

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. From approximately 2007 through 2011, NEINV and Giacoumakis, on several occasions, provided clients or prospective clients with reports generated using Morningstar® Principia® ("Principia") software. The Principia reports were used to assess various financial metrics. Among other things, the Principia reports purport to compare the historical performance and risk of NEINV's equity and fixed income models to either an equity or fixed income benchmark ("NEINV Principia reports"). However, these NEINV Principia reports did not represent past performance of NEINV's models. Instead, NEINV generated the information in these reports by inputting in the Principia software the current investments of one of NEINV's models and analyzing how the model would have performed had the model held its current investments throughout the entire time period in the NEINV Principia report. In reality, the models did not exist throughout the entire time period in the report and the models' holdings changed over time during the period when they did exist. The NEINV model performance reports did not disclose that the model results portrayed were hypothetical, not actual, results. Giacoumakis was responsible for distributing and presenting the NEINV Principia reports to several clients and prospective clients of NEINV.

2. In addition, throughout the relevant time period, NEINV failed to implement written compliance policies and procedures reasonably designed to prevent its employees from presenting performance information to clients or prospective clients that did not violate the Advisers Act and its rules.

Respondents

3. **NEINV** (SEC File No. 801-67679), is a Massachusetts corporation headquartered in North Andover, Massachusetts that has been registered with the Commission as an investment adviser since 2007. NEINV has approximately 1,395 discretionary accounts and, as of September 2012, approximately \$430 million in discretionary assets under management. Approximately 1,100 of NEINV's clients are individuals. NEINV also advises some corporate clients. Giacoumakis, the President of NEINV, formed NEINV in 1995 and owns the entire business. Giacoumakis was NEINV's Chief Compliance Officer ("CCO") from at least February 2007 until June 2011. NEINV has approximately 15 employees, and approximately five of these employees are investment adviser representatives.

4. **Nicholas John Giacoumakis**, age 45, resides in Windham, New Hampshire. Giacoumakis is the principal, President, and sole owner of NEINV. Giacoumakis formed NEINV in late 1995.

¹ The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

Background

5. At various times from approximately 2005 to the present, NEINV has used five equity-based models and three fixed income models to manage its clients' assets. Currently, the four equity models are called "Conservative," "Moderately Conservative," "Moderate," and "Moderately Aggressive." NEINV previously had an "Aggressive" equity model but no longer uses it with clients. NEINV has had investors invested in the "Moderate" model since approximately 2004 or 2005, the "Conservative" and "Moderately Conservative" models since approximately 2007 or 2008, and the "Moderately Aggressive model" since approximately 2006 or 2007. NEINV's three fixed income models are: (1) "Fixed Income 1," which holds municipal bonds; (2) "Fixed Income 2," which is roughly half municipal and half taxable bonds; and (3) "Fixed Income 3," which holds taxable bonds for investors with tax-deferred retirement accounts. NEINV has had investors in the "Fixed Income 1" and "Fixed Income 2" models since approximately 2007 or 2008, and NEINV has had investors in "Fixed Income 3" since approximately 2008 or 2009.

6. From at least 2007 to 2011, NEINV used Principia software to show how a hypothetical back-testing of the securities in one of its models measured against a benchmark or index such as the S&P 500®. The NEINV Principia reports showed a current portfolio value for an investment in the model for the preceding five to ten years and how such value grew over that period compared to a relevant benchmark. NEINV entered the current holdings of one of NEINV's models into Principia's software and the software did a hypothetical back-test to show how those holdings would have grown during the time period shown in the report.

7. Respondents on several occasions sent NEINV Principia reports to clients or prospective clients that purported to compare the performance of an NEINV model to a fixed income or equity benchmark. For example, NEINV sent a "NEINV RIA Models Moderately Aggressive" Principia report to a prospective client in May 2007. That report purported to portray the growth of an investment in the model from January 1, 2000 to March 31, 2007 compared to a custom benchmark. That report did not reflect the actual performance of the Moderately Aggressive model, but rather the back-tested performance of the group of securities held in the model in approximately May 2007. Moreover, NEINV's Moderately Aggressive model did not exist before 2006, so the reported performance presented model performance (including the three- and five-year returns of the model's "portfolio return" compared to the benchmark) for a time period in which the model did not exist. The report also compared the three- and five-year risk and return statistics of NEINV's model (as it existed in May 2007) to the benchmark without disclosing that the model's risk and return statistics were hypothetical.

8. In addition to other materials, Giacoumakis used the NEINV Principia reports in meetings with clients or prospective clients and also directed NEINV employees to send NEINV Principia reports to his clients or prospective clients. Giacoumakis and other NEINV employees distributed these NEINV Principia reports to clients and prospective clients both by email, and in hardcopy during in-person meetings.

9. NEINV's employees sometimes emailed the NEINV Principia reports to clients or prospective clients without disclosing that the model performance was hypothetical and not actual past performance.

10. In some instances, one former adviser of NEINV misrepresented to clients or prospective clients that the NEINV Principia reports reflected actual past performance of NEINV's models. In May 2010, this adviser emailed a prospective client comparing the historical performance and risk of her current portfolio to NEINV's models. In the email forwarding the report, the NEINV adviser stated: "Let me know if you have any questions, but as you can see we are taking less risk and getting better risk adjusted return on a 3 year and 5 year basis. Your one year number should be higher than ours for the risk you are taking." The prospective client ultimately became a client of NEINV. The same adviser sent other emails to prospective clients with no explanation that the results portrayed in the attached NEINV Principia report were hypothetical and not actual past performance. When this conduct was detected, this employee was terminated.

11. The NEINV Compliance and Procedures Manual contained a section on "Performance Advertising." That section described Rule 206(4)-1 promulgated under the Advisers Act and various staff statements regarding presentations of investment adviser performance but included no policies or procedures specifically addressing the presentation of performance information, especially performance of NEINV's models, in a manner designed to comply with the Advisers Act and rules thereunder. NEINV took no steps to implement that Manual or otherwise to prevent its employees from presenting performance to clients or prospective clients in a way that violated the Advisers Act and its rules.

Violations

12. As a result of the conduct described above, NEINV willfully violated² Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) promulgated thereunder. Section 206(2) of the Advisers Act prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Section 206(4) of the Advisers Act prohibits any investment adviser from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and authorizes the Commission to prescribe rules designed to prevent such conduct. Rule 206(4)-1(a)(5) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act for a registered investment adviser to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading. By negligently circulating or distributing misleading performance reports to clients and prospective clients, NEINV willfully violated Section 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

13. As a result of the conduct described above, NEINV also willfully violated Rule 206(4)-7 promulgated under the Advisers Act, which requires that registered advisers adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules that the Commission has adopted under the Act. By failing to adopt and implement such written policies or procedures reasonably designed to prevent violation of the

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

Advisers Act and the rules promulgated thereunder regarding performance presentations to clients and prospective clients and requiring that NEINV's Principia reports distributed to prospective or actual clients comply with the Advisers Act and the rules promulgated thereunder, NEINV willfully violated Rule 206(4)-7.

14. As a result of the conduct described above, Giacoumakis caused NEINV's violation of Section 206(4) of the Advisers Act and Rules 206(4)-1(a)(5) and 206(4)-7 promulgated thereunder. By negligently using misleading NEINV Principia reports with clients and prospective clients and negligently directing NEINV's employees to use misleading NEINV Principia reports with clients and prospective clients, Giacoumakis caused NEINV to violate Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) promulgated thereunder. Also, as NEINV's CCO, Giacoumakis caused NEINV to violate Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder by failing to adopt and implement written policies or procedures reasonably designed to prevent violation of the Advisers Act and the rules promulgated thereunder regarding performance presentations to clients and prospective clients, and by failing to require that NEINV's performance reports distributed to prospective or actual clients comply with the Advisers Act and the rules promulgated thereunder.

NEINV's Remedial Acts

15. In determining to accept the Offers, the Commission considered remedial acts undertaken by NEINV.

Undertakings

16. **Order Notification**

- a. Within thirty days of the issuance of this Order, NEINV undertakes to mail to each of its existing clients a copy of the Form ADV which incorporates the paragraphs contained in Section III of this Order, and which specifies that the entire Order will be posted on the homepage of NEINV's website.
- b. Within thirty days of the issuance of this Order, NEINV also undertakes to post a copy of this Order on the homepage of NEINV's website and to maintain this copy of the Order on the homepage of NEINV's website for a period of six months.

17. **Independent Compliance Consultant**

- a. NEINV shall retain, within 30 days of the date of the issuance of this Order, the services of an Independent Compliance Consultant not unacceptable to the staff of the Commission. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by NEINV. NEINV shall require the Independent Compliance Consultant to conduct one review of the NEINV compliance policies and procedures that the Independent Compliance Consultant deems relevant with respect to the publication, circulation, or distribution of performance reports;

- b. At the end of the review, which in no event shall be more than three months after the date of the issuance of this Order, NEINV shall require the Independent Compliance Consultant to submit an Initial Report to NEINV and to the Commission staff. The Initial Report shall describe the review performed, the conclusions reached, and shall include any recommendations deemed necessary to make the policies and procedures adequate. NEINV may suggest an alternative procedure designed to achieve the same objective or purpose as that of the recommendation of the Independent Compliance Consultant. The Independent Compliance Consultant shall evaluate any alternative procedure proposed by NEINV. However, NEINV shall abide by the Independent Compliance Consultant's final recommendation;
- c. Within six months after the date of issuance of this Order, NEINV shall, in writing, advise the Independent Compliance Consultant and the Commission staff of the recommendations it is adopting;
- d. Within nine months after the date of issuance of this Order, NEINV shall require the Independent Compliance Consultant to complete its review and submit a written final report to Commission staff. The Final Report shall describe the review made of NEINV's compliance policies and procedures relating to the publication, circulation, or distribution of performance reports; set forth the conclusions reached and the recommendations made by the Independent Compliance Consultant, as well as any proposals made by NEINV; and describe how NEINV is implementing the Independent Compliance Consultant's final recommendations;
- e. NEINV shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Independent Compliance Consultant's Final Report;
- f. For good cause shown and upon timely application by the Independent Compliance Consultant or NEINV, the Commission's staff may extend any of the deadlines set forth in these undertakings;
- g. NEINV shall require the Independent Compliance Consultant to enter into an agreement providing that for the period of the engagement and for a period of two years from completion of the engagement, the Independent Compliance Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with NEINV, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Independent Compliance Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Compliance Consultant in the performance of his or her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with NEINV, or any of its present or former affiliates, directors,

officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

18. NEINV shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission's staff may make reasonable requests for further evidence of compliance, and NEINV agrees to provide such evidence. The certification and supporting material shall be submitted to Kevin M. Kelcourse, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110, with a copy to the Office of the Chief Counsel of the Enforcement Division, no later than sixty days from the date of completion of the undertakings.

IV.

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

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

A. Respondent NEINV cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1 and 206(4)-7 promulgated thereunder.

B. Respondent Giacomakis cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-1 and 206(4)-7 promulgated thereunder.

C. Respondent NEINV is censured.

D. Respondents shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$200,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Respondents are jointly and severally liable for all payments required to be made by this paragraph. Payment must be made in one of the following ways:

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

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

Payments by check or money order must be accompanied by a cover letter identifying New England Investment and Retirement Group, Inc. and Nicholas John Giacomakis as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kevin M. Kelcourse, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110.

E. Respondent NEINV shall comply with the undertakings enumerated in Section III above.

By the Commission.

Elizabeth M. Murphy
Secretary