

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3702 / October 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15583

In the Matter of

Modern Portfolio Management, Inc.,
G. Thomas Damasco II,
and
Bryan F. Ohm

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 203(e), 203(f)
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 Modern Portfolio Management, Inc. (“MPM”) and Sections 203(f) and 203(k) of the Advisers Act against G. Thomas Damasco II (“Damasco”) and Bryan F. Ohm (“Ohm”) (MPM, Damasco and Ohm referred to collectively as “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers 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), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

These proceedings arise out of the failure of MPM, a registered investment adviser based in Ohio, and its principals, Damasco and Ohm, to correct ongoing violations at the advisory firm. At the time of an on-site examination of MPM in 2008 by the Office of Compliance Inspections and Examinations ("OCIE"), MPM had violated securities laws by failing to complete an annual compliance review in 2006, making misleading statements on MPM's website regarding MPM's exclusive access to Dimensional Fund Advisors ("DFA") funds, omitting disclosures in its performance information that were required by MPM's own policies and procedures, and making misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees. Following the examination, OCIE staff sent MPM a letter concerning these violations. Despite assurances that it would take corrective action to remedy these violations, MPM continued to violate securities laws at the time of OCIE's 2011 examination by failing to complete an annual compliance review in 2009 and by continuing to make misleading statements regarding its access to DFA funds in its marketing materials. MPM also misleadingly represented in one location on its website that it had over \$600 million in assets when it reported in its Form ADV that it had less than \$325 million in assets under management as of September 2011. Based on these actions, MPM willfully violated, and Damasco and Ohm willfully aided and abetted and caused MPM's violations of, Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-1(a)(5) thereunder.

Respondents

1. **Modern Portfolio Management, Inc. ("MPM")** is a SEC-registered investment adviser located in Holland, Ohio that was founded in 1995 by Damasco and Ohm. Damasco and Ohm are the principal shareholders of MPM, with Damasco serving as Chief Executive Officer ("CEO") and Ohm serving as President. MPM reported in its Form ADV that it provides customized non-discretionary portfolio management services to approximately 2200 clients with assets under management ("AUM") of approximately \$378 million.

2. **G. Thomas Damasco II**, age 55 and a resident of Swanton, Ohio, is MPM's co-owner and CEO and has been designated as its Chief Compliance Officer ("CCO") since November 2012. Damasco previously held Series 7, 24 and 31 licenses and currently has Series 63 and 65 licenses and a license for selling insurance in Ohio. Before founding MPM, Damasco

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

worked as a registered representative at various broker-dealers. Damasco has not been the subject of any Commission disciplinary action.

3. **Bryan F. Ohm**, age 57 and a resident of Maumee, Ohio, is the co-owner and President of MPM. Before founding MPM, Ohm worked as a registered representative at various broker-dealers. Ohm previously held a Series 7 license and currently has Series 63 and 65 licenses and a license for selling insurance in Ohio. Ohm has not been the subject of any Commission disciplinary action.

Facts

4. In 2001, Damasco and Ohm tasked an employee with less than three months of experience with overseeing compliance at MPM even though that employee had no Advisers Act compliance knowledge, experience or training. In 2006, MPM designated the employee as MPM's CCO without ensuring that the employee had adequate knowledge, training or resources to assess MPM's compliance with the Advisers Act.

5. MPM's policies and procedures required, among other things, that MPM's CCO complete annual compliance reviews each year, consistent with its obligations under the Advisers Act, and that Damasco and Ohm approve the annual compliance review.

6. MPM's policies and procedures also required that MPM's marketing materials be truthful and accurate and include all relevant disclosures and facts to ensure that the materials distributed to current and prospective clients were not misleading, fraudulent, deceptive or manipulative. Damasco and Ohm designated MPM's CCO to review and approve the marketing materials to ensure that they were consistent with MPM's policy and with regulatory requirements. Damasco and Ohm also had responsibility for, reviewed and approved MPM's marketing materials during the relevant period.

7. MPM's policies and procedures required that all performance information "be truthful and accurate, and prepared and presented in a manner consistent with applicable rules and regulatory guidelines," and that "all relevant disclosures and facts be made as necessary in marketing materials," including "making any and all disclosures required by the *Clover Capital Management* no-action letter." Damasco and Ohm were required to either review and approve the performance information or to designate another officer of the firm who was "familiar with the applicable rules and standards for performance advertising" to review and approve the performance information before it was disseminated to clients. Damasco and Ohm designated MPM's Chief Operating Officer ("COO") as the person responsible for "implementing and monitoring [MPM's] policy for the preparation, presentation, review and approval of any performance information to insure any materials are consistent with our policy and regulatory requirements." However, they were unaware, and took no steps to determine, whether the COO was familiar with the *Clover* guidelines or regulatory requirements for performance information before designating him to be responsible for MPM's performance information.

8. OCIE staff conducted an examination of MPM in September 2008. As of September 2008, MPM had failed to complete an annual compliance review in 2006, made misleading statements on its website and in its investor brochure regarding the exclusivity of its access to DFA funds, omitted from its performance information the disclosures set forth in the *Clover* no-action letter, and included disclosures that the *Clover* no-action letter stated were prohibited, in spite of its policy requiring compliance with *Clover*, and made misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees.

9. Notwithstanding the requirements in MPM's policies and procedures, no annual compliance review was completed in 2006 and Damasco and Ohm did not approve an annual compliance review in 2006. They also did not designate an individual to review MPM's performance information who was knowledgeable about the guidelines for disclosures set forth in the *Clover* no-action letter despite an obligation to do so under MPM's policies and procedures. Damasco and Ohm also approved the misleading statements on MPM's website and investor brochure about MPM's purported exclusive access to DFA funds.

10. In February 2009, OCIE staff sent MPM a deficiency letter identifying all of these compliance failures. OCIE also cited its concern whether MPM's designated CCO was sufficiently knowledgeable regarding MPM's compliance operations relative to the Advisers Act to adequately administer MPM's compliance program as its CCO.

11. On April 30, 2009, Damasco and Ohm, on behalf of MPM, sent OCIE a response to the deficiency letter from its 2008 examination. In the response, Damasco and Ohm represented that MPM would take corrective action to remedy the deficiencies identified by OCIE staff. MPM specifically represented that it would complete annual compliance reviews, would add the *Clover* disclosures to its performance information, and would remove the statements about MPM's exclusive access to DFA funds.

12. MPM remedied a portion of the deficiencies and failed to address certain other deficiencies from the 2008 examination. Damasco and Ohm did not take any steps to ensure that all of the deficiencies identified by OCIE staff after the 2008 examination were corrected or to ensure that these compliance failures were not repeated going forward.

13. In 2009, MPM revised its website to indicate in one location that it had "over \$600 million in assets" without qualifying that this number included assets under management and consultative assets. Ohm and Damasco participated in calculating the "\$600 million in assets" and reviewed the website where the statement appeared. As of 2009 when this statement was added to MPM's website, MPM reported that its assets under management were less than \$267 million on its Form ADV.

14. OCIE staff began another on-site examination of MPM in September 2011. At the time of the September 2011 examination, MPM had failed to complete an annual compliance review in 2009 and continued to refer to MPM's exclusive access to DFA funds on its website and in its investor brochure. In addition, the unqualified "\$600 million in assets"

statement continued to appear on MPM's website even though MPM reported less than \$325 million in assets under management as of September 2011 on its Form ADV.

15. Despite MPM's policy requiring Damasco and Ohm to approve its annual compliance reviews and Damasco's and Ohm's representation to OCIE in April 2009 that MPM would complete annual compliance reviews, MPM did not complete an annual compliance review in 2009 and Damasco and Ohm did not approve an annual compliance review in 2009. In addition, Damasco and Ohm did not take any steps to make sure that the statements about MPM's exclusive access to DFA funds were not repeated when MPM revised its website in 2009 or updated its investor brochure in 2010.

16. In February 2012, OCIE staff sent MPM another deficiency letter which identified MPM's failure to complete an annual compliance review in 2009, its continued misleading statement regarding exclusive access to DFA funds in its marketing materials, and its representation that it had "over \$600 million in assets" on its website while it actually had less than \$325 million in assets under management on its Form ADV.

17. In March 2012, in response to OCIE's second deficiency letter, MPM began taking steps to rectify the unresolved issues from the 2008 and 2011 examinations. Also, in June 2012, MPM confirmed that it had changed the reference on its website from over \$600 million in assets to over \$300 million in assets under management.

18. Damasco and Ohm were aware of the deficiencies identified by OCIE during the 2011 examination and did not take adequate corrective action to prevent the failures from the 2008 examination from being repeated during the 2011 examination.

19. In November 2012, MPM's CCO departed. MPM designated Damasco as its CCO despite his lack of compliance experience and unfamiliarity with compliance requirements under the Advisers Act.

Violations

20. As a result of its misleading statements in its marketing materials regarding MPM's exclusive access to DFA funds as described in paragraphs 8 and 14 above, its misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees as described in paragraph 8 above, and its misleading representation on its website that it had over \$600 million in assets as described in paragraphs 13 and 14 above, MPM willfully violated Section 206(2) of the Advisers Act, which prohibits registered investment advisers from, directly or indirectly, engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.

21. As a result of its failure to perform annual compliance reviews as described in paragraphs 5, 8 and 14 above and its failure to implement the requirements of its policies and procedures related to model performance disclosures as described in paragraphs 7 and 8 above, MPM willfully violated Section 206(4) of the Advisers Act, which prohibits fraudulent conduct by

an investment adviser, and Rule 206(4)-7 thereunder, which requires, among other things, that a registered investment adviser: (1) implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules; (2) review at least annually its written policies and procedures and the effectiveness of their implementation; and (3) designate a CCO.

22. As a result of its misleading statements in its marketing materials regarding MPM's exclusive access to DFA funds as described in paragraphs 8 and 14 above, its misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees as described in paragraph 8 above, and its misleading representation on its website that it had over \$600 million in assets as described in paragraphs 13 and 14 above, MPM willfully violated Section 206(4) of the Advisers Act, which prohibits fraudulent conduct by an investment adviser, and Rule 206(4)-1(a)(5) thereunder, which prohibits registered investment advisers from, directly or indirectly, publishing, circulating or distributing any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.

23. As a result of Damasco's and Ohm's conduct regarding MPM's statements in marketing materials about its exclusive access to DFA funds, its misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees, and its misleading representation that MPM had "over \$600 million in assets" as described in paragraphs 6-9, 11-15 and 18 above, Damasco and Ohm willfully aided and abetted and caused MPM's violation of Section 206(2) of the Advisers Act.

24. As a result of Damasco and Ohm's conduct related to the failure to complete annual compliance reviews and its failure to implement the requirements of its policies and procedures related to model performance disclosures as described in paragraphs 5, 7-9, 11, 12, 14, 15 and 18 above, Damasco and Ohm willfully aided and abetted and caused MPM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

25. As a result of Damasco's and Ohm's conduct regarding MPM's statements of its exclusive access to DFA funds, its misleading statements in its performance information by providing model results that did not deduct MPM's advisory fees, and its misleading representation that MPM had "over \$600 million in assets" as described in paragraphs 6-9, 11-15 and 18 above, Damasco and Ohm willfully aided and abetted and caused MPM's violations of Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

Respondents' Remedial Efforts

26. In deciding to accept the Offer, the Commission considered the remedial acts promptly undertaken by MPM, Damasco and Ohm and the cooperation afforded the Commission staff. During the Commission's staff investigation, MPM engaged a compliance consultant to advise MPM on compliance issues.

Undertakings

Respondents have undertaken to:

27. Compliance Training. By November 1, 2014, Damasco and Ohm shall each complete thirty (30) hours of compliance training relating to the Adviser's Act.

28. Designation of CCO. Within sixty (60) days of entry of this Order, MPM shall designate someone other than Damasco or Ohm to be its CCO.

29. Continued Retention of Compliance Consultant. MPM currently retains a compliance consultant to render compliance services. MPM shall continue to retain, at its expense, either its current compliance consultant or an independent compliance consultant, to render compliance services for a period of at least three (3) years from the entry of this Order. The scope of the engagement of MPM's current compliance consultant or the independent compliance consultant must include at least the same responsibilities detailed in MPM's March 2013 contract with its current compliance consultant, including comprehensive annual compliance reviews. To the extent MPM's current compliance consultant has already made recommendations for changes in or improvements to MPM's policies and procedures and/or disclosures to clients, MPM shall adopt and implement all such recommendations.

30. Recordkeeping. MPM shall preserve for a period of no less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of MPM's compliance with the undertakings set forth in this Order.

31. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

32. Certification of Compliance. MPM, Damasco and Ohm shall certify, in writing, compliance with the undertakings set forth above in paragraphs 27-29. 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 staff may make reasonable requests for further evidence of compliance, and MPM, Damasco and Ohm agree to provide such evidence. The certification and supporting material shall be submitted to James A. Davidson, Assistant Director, Securities and Exchange Commission, 175 West Jackson, Suite 900, Chicago, Illinois 60604, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of each of the undertakings in paragraphs 27-29.

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 against MPM, and Sections 203(f) and 203(k) of the Advisers Act against Damasco and Ohm, it is hereby ORDERED that:

A. Respondents MPM, Damasco and Ohm 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)-7 and 206(4)-1(a)(5) promulgated thereunder.

B. Respondents MPM, Damasco and Ohm are censured.

C. Respondent MPM shall pay a civil money penalty in the amount of \$75,000 to the United States Treasury. Respondent MPM shall pay \$37,500 within ten (10) days of entry of the order and the remaining \$37,500 within one-hundred eighty (180) days of entry of the order. Respondent Damasco shall pay a civil money penalty in the amount of \$50,000 to the United States Treasury. Respondent Damasco shall pay \$25,000 within ten (10) days of entry of the order and the remaining \$25,000 within one-hundred eighty (180) days of entry of the order. Respondent Ohm shall pay a civil money penalty in the amount of \$50,000 to the United States Treasury. Respondent Ohm shall pay \$25,000 within ten (10) days of entry of the order and the remaining \$25,000 within one-hundred eighty (180) days of entry of the order.

If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (2) 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 MPM, Damasco, and Ohm 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 James A. Davidson, Assistant Director, Chicago Regional Office, Securities and Exchange Commission, 175 West Jackson, Suite 900, Chicago, Illinois 60604.

D. Respondents shall comply with the undertakings enumerated in Section III, paragraphs 27-32 above.

By the Commission.

Elizabeth M. Murphy
Secretary