

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4836 / January 3, 2018

INVESTMENT COMPANY ACT OF 1940
Release No. 32958 / January 3, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18328

In the Matter of

**LKL INVESTMENT
COUNSEL LLC (a/k/a LKL
INVESTMENTS, LLC) and
MARK H. LOVE,**

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 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(e), 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 LKL Investment Counsel LLC and Mark H. Love (“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, and except as provided herein in Section V, 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 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 Respondents’ Offers, the Commission finds that:

Summary

These proceedings arise out of violations of the Investment Advisers Act of 1940 by formerly registered investment adviser, LKL Investment Counsel LLC (“LKL”), and its principal, Mark H. Love (“Love”), including various compliance-related deficiencies, misrepresentations in Forms ADV filed with the Commission, and failure to produce documents to Commission examination staff. Specifically, in 2009, Love began recommending that certain LKL clients invest in private funds without disclosing in LKL’s Forms ADV that he held managerial interests in those funds and that he stood to receive fees and a share of investment profits from those funds. LKL’s advisory clients who invested in the private funds, however, knew of Love’s involvement with the funds. Despite this, from at least 2010 to 2015, LKL’s Forms ADV Parts 1 and 2 falsely stated that Love had no outside financial industry activities or affiliations and did not have any ownership or proprietary interests in client transactions. During an early 2016 SEC examination of LKL, Love made these same misrepresentations to Commission examination staff and failed to produce requested documents to them regarding certain of his private funds. Subsequently, Love identified these private funds and provided documents to Commission enforcement staff.

Even when LKL partially corrected its Form ADV in March 2016, after the SEC examination, by disclosing Love’s connection to certain private funds, it did not include a complete list of the funds in its Form ADV Part 2A brochure or its Form ADV Part 2B brochure supplement. Additionally, in its March 2016 Form ADV annual updating amendment, LKL corrected its previously inflated assets under management (AUM) figure, reducing its stated AUM by nearly \$30 million, and expressly acknowledged that this was a material change. Because LKL made this material change to its Form ADV Part 2A brochure, it was required to deliver its revised brochure, or a summary of material changes to the brochure, to clients within 120 days of the end of LKL’s fiscal year. LKL failed to do this.

These violations were accompanied by compliance breakdowns—LKL did not conduct requisite annual reviews and failed to implement its policies requiring full disclosure of Love’s outside activities in LKL’s Forms ADV. Moreover, LKL failed to adopt policies related to advisory fees and made errors in charging and refunding advisory fees totaling approximately \$8,500. After Commission examination staff sent LKL a deficiency letter and Commission enforcement staff started an investigation, LKL undertook an account reconciliation and addressed this problem by reimbursing the affected clients with accrued interest. LKL also withdrew its registration with the Commission as an investment adviser in July 2017.

By virtue of this conduct, LKL willfully violated Sections 204(a), 206(4), and 207 of the Advisers Act and Rules 204-3 and 206(4)-7 thereunder. Love willfully violated Section 207 of the

Advisers Act and willfully aided and abetted and caused LKL's violations of Sections 204(a) and 206(4) of the Advisers Act and Rules 204-3 and 206(4)-7 thereunder.

Respondents

1. **LKL Investment Counsel LLC** (a/k/a LKL Investments, LLC) was an investment adviser registered with the Commission with its principal place of business in Phoenix, Arizona. LKL first registered with the Commission in 2005. According to its last Form ADV annual updating amendment filed in March 2016, LKL had 94 accounts and roughly \$101 million in assets under management. LKL withdrew its registration with the Commission as an investment adviser in July 2017.

2. **Mark H. Love**, age 61, is a resident of Phoenix, Arizona. Love was the sole member, president, and chief compliance officer of LKL, and he is also a managing member of various private funds. Love passed the Series 7 and Series 63 exams in 1984 and the Series 65 exam in 1995. Love is currently performing clerical tasks for a different investment adviser registered with a state.

Facts

A. False Forms ADV

Background

3. Beginning in 2009, Love formed and managed various private funds whose general purpose was to purchase equity in companies with strong growth potential. Around the same time, Love began recommending that certain LKL clients invest in these funds, and over the years these LKL clients invested millions of dollars by purchasing membership interests in some of these funds.¹

4. Not only did Love have ownership interests in the funds themselves, but in many cases, Love in his role as manager of the funds received a portion of the fund management fees charged to each investor, as well as a share of the funds' profits. Love coordinated the LKL client investments in the affiliated funds, and the money for the investments often came directly from the clients' accounts managed by LKL. LKL's advisory clients who invested in the private funds, however, knew of Love's involvement with the funds.

Other Financial Industry Activities and Affiliations

5. None of LKL's Forms ADV filed between March 2010 and March 2015 disclosed Love's affiliated private funds, and each affirmatively misrepresented that LKL and Love had no

¹ LKL was not an investment adviser to the funds.

outside business activities.² Form ADV Part 1A, Item 7.A, requests information concerning an investment adviser's related persons' financial industry affiliations and activities other than the advisory business.³ More specifically, an investment adviser is required to check a box if any of its related persons serve as a "sponsor, general partner, managing member (or equivalent) of pooled investment vehicles." LKL never checked this box despite Love's ongoing management of private funds.

6. Similarly, Form ADV Part 2A, Item 10 requires an investment adviser to provide information regarding "Other Financial Industry Activities and Affiliations." In response to Item 10, LKL's Part 2A brochure falsely stated that "[t]he firm and its management personnel do not engage in or maintain any financial industry activities or affiliations." The disclosure in LKL's Part 2A brochure also cross-referenced the Part 2B brochure supplement for "further information about personnel and their other business interests." Form ADV Part 2B, Item 4, requires information regarding the investment adviser representative's "Other Business Activity and Additional Compensation." LKL's Part 2B brochure supplement for Love stated that he maintained an insurance license, but then misleadingly stated that Love "may engage in other business activities that are unrelated to the investment industry." This response omitted to state that Love was actively managing private funds, which is an investment industry activity.

Undisclosed Interests in Private Funds

7. LKL's Forms ADV also provided false information about Love's financial interests in client transactions. Form ADV Part 1A, Item 8.A.(3) requires the investment adviser to identify whether it or any related person recommends securities to advisory clients in which it or any related person has a proprietary, or ownership, interest. Notwithstanding that Love managed and held an ownership interest in multiple private funds in which some LKL clients invested, LKL falsely checked "no" in response. Form ADV Part 2A, Item 11, similarly requires that an investment adviser disclose details concerning its or any related person's "Participation or Interest in Client Transactions." LKL's responses omitted information regarding Love's private funds and the accompanying financial interests that he had in LKL client transactions.

² Between March 2010 and March 2015, LKL filed six Forms ADV Part 1A annual updating amendments. Between March 2011 and March 2015, LKL filed five Forms ADV Part 2A brochures and five Form ADV Part 2B brochure supplements. LKL also filed amended, but still inaccurate, Forms ADV Parts 1A, 2A, and 2B in March 2016 that disclosed some, but not all, of the affiliated funds. Although Form ADV Part 2B brochure supplements are not required to be filed with the Commission, since at least 2011, LKL filed Love's annual Part 2B brochure supplements with the Commission.

³ Love is a "related person" to LKL because, as the sole member, president, and chief compliance officer of LKL, Love is both an "advisory affiliate" of LKL and under common "control" with LKL, as those terms are defined in the Form ADV Glossary of Terms.

Assets Under Management

8. For years, LKL provided incorrect assets under management in its Forms ADV. Forms ADV Part 1A, Item 5.F.(2), and Part 2A, Item 4, required that LKL provide information regarding its assets under management. Love admitted to Commission examination staff that LKL's AUM in its Forms ADV was incorrect and inflated. The degree to which LKL's AUM was erroneous varied across the different Forms ADV, but LKL admitted that in certain Forms ADV it overstated its AUM by more than \$30 million.

9. LKL further admitted in its March 2016 Part 2A brochure that "the firm had significantly overstated its previous AUM" and that its \$30 million downward adjustment of its AUM in March 2016 (from \$130 million to around \$101 million) was a "material change." This material change to the firm's brochure in LKL's annual updating amendment for the fiscal year ended December 31, 2015 required LKL to deliver the March 2016 amended Form ADV Part 2A brochure, or a summary of the material change, to LKL's clients within 120 days of the end of LKL's fiscal year. Such delivery never occurred despite LKL and Love being informed of the obligation by a compliance consultant.

Refunding Advisory Fees

10. Form ADV Part 2A, Item 5 requires information regarding an investment adviser's "Fees and Compensation." LKL's Part 2A brochure falsely stated that when LKL's services are terminated prior to the end of a calendar quarter, pro-rated fees will be refunded to the client. This statement was false because, as discussed below, LKL failed to refund a pro rata share of pre-paid advisory fees for multiple client accounts that were closed mid-quarter until after Commission examination staff sent LKL a deficiency letter and Commission enforcement staff started an investigation.

Continuing Misrepresentations

11. LKL's Form ADV misrepresentations continued even after Commission examination staff confronted Love about certain affiliated private funds in early 2016. LKL then belatedly disclosed in its March 2016 Form ADV Part 2A, Item 10 ("Other Financial Industry Activities and Affiliations") that Love "served as Managing Member of . . . entities which meet the SEC's definition of pooled investment vehicles" but identified only two such funds (ones Commission examination staff had confronted Love about) and failed to disclose multiple other funds that Love managed and into which certain LKL client money was invested. Love provided similarly incomplete disclosure in Form ADV Part 2B, Item 4 ("Other Business Activity"). LKL's March 2016 Form ADV Part 1A, Item 8.A.(3), also continued to misrepresent that LKL did not recommend securities in which it or a related person held an ownership or proprietary interest, and Love omitted requested information concerning his participation and interest in client transactions in Form ADV Part 2A, Item 11.

12. The misrepresentations and omissions in LKL's Forms ADV were material, required disclosures in Form ADV.

13. Love approved, signed, and caused to be filed each Form ADV filed by LKL.

B. Failure to Provide Records to Commission Examination Staff

14. Love initially represented to Commission examination staff that he had not participated or had any interest in any other businesses or joint ventures in the past ten years.

15. When Commission examination staff asked Love about certain funds that Commission examination staff independently identified, Love provided only partial disclosure of the activities of those funds and failed to disclose the existence of other funds that he managed and into which LKL clients had invested money at his recommendation.

16. Consequently, documents for a number of Love's private funds that involved LKL client investments were never produced to Commission examination staff as required. Subsequently, Love identified these private funds and provided certain documents to Commission enforcement staff.

C. Advisory Fee Errors

17. LKL failed to adopt any written policies and procedures regarding (1) how advisory fees would be charged; or (2) ensuring that advisory fees were charged correctly. In LKL's firm brochure (Form ADV Part 2A, Item 5), the firm explained how LKL charged fees, but failed to adopt policies and procedures on this subject. LKL's failure resulted in the firm over-charging at least one former client. Between April 2012 and October 2012, LKL charged this former client's account an advisory fee of 2% instead of the 1.5% called for in the former client's advisory agreement with LKL. This resulted in the former client being over-charged by \$2,472.73 during this time period. After Commission enforcement staff had started its investigation, LKL refunded this amount to the former client plus interest.

18. LKL also failed to adopt any written policies and procedures regarding (1) how pre-paid advisory fees would be refunded when clients terminated their relationships with LKL mid-quarter; or (2) ensuring that these advisory fees would be refunded correctly. LKL's practice was to charge clients in advance of each quarter, generally by automatic deduction from the clients' accounts. In LKL's firm brochure (Form ADV Part 2A, Item 5), the firm explained that its practice was to reimburse a pro rata share of pre-paid fees when clients terminated their relationships with LKL mid-quarter but failed to adopt written policies and procedures on this subject.

19. As a result, LKL did not reimburse over \$6,000 in pre-paid fees that it owed to advisory clients who closed their accounts with LKL between December 2011 and August 2015. LKL undertook an account reconciliation after Commission examination staff sent LKL a deficiency letter and Commission enforcement staff served LKL and Love with subpoenas. On August 31, 2016, LKL sent letters to multiple former clients acknowledging that they were "entitled to a prorated portion of an account management fee that was inadvertently charged by LKL shortly after the date that you moved your money market account." The letters indicated that "though unintentional," the error was "due to the fault of LKL." The letters attached checks reimbursing the affected clients plus interest.

D. Other Compliance Failures

20. LKL failed to implement its written policy and procedure requiring that its policies and procedures be reviewed and tested at least annually. Love, who was tasked with responsibility for LKL's annual reviews, failed to conduct them and conceded to Commission examination staff in December 2015 that "[t]here has been no formal review of the compliance program since 2008."

21. LKL also failed to implement its written policy and procedure that in order to "provide full disclosure, our firm's Form ADV is kept current and accurate." LKL's compliance manual also stated that "[f]ull disclosure of outside business activities and affiliations is critical." Despite this, instead of the required "full disclosure," LKL made misrepresentations in its Forms ADV Parts 1A, 2A, and 2B regarding Love's outside activities.

22. As LKL's chief compliance officer, Love was responsible for LKL's written policies and procedures as well as the annual review of their adequacy and implementation.

Violations

23. As a result of the conduct described above, LKL and Love willfully⁴ violated Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

24. As a result of the conduct described above, LKL willfully violated, and Love willfully aided and abetted and caused LKL's violations of, Section 204(a) of the Advisers Act and Rule 204-3 thereunder, which require that, within 120 days of the end of their fiscal year, registered investment advisers deliver to their advisory clients either a current brochure (Form ADV, Part 2A), or a summary of material changes that offers to provide the current brochure, when material changes have been made to a brochure since the last annual updating amendment.

25. As a result of the conduct described above, LKL willfully violated, and Love willfully aided and abetted and caused LKL's violations of, Section 204(a) of the Advisers Act, which requires that investment advisers that use the mails or interstate commerce to maintain and make available to the Commission certain records as prescribed by the Commission.

26. As a result of the conduct described above, LKL willfully violated, and Love willfully aided and abetted and caused LKL's violations of, Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which requires an investment adviser registered with the Commission to adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder by the adviser and its supervised persons, and requires at least annual reviews of the adequacy of such policies and procedures and the effectiveness of their implementation.

⁴ 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)).

Undertakings

Respondents undertake to:

27. Notice to Advisory Clients: Within thirty (30) days of the entry of this Order, Respondents shall provide a copy of the Order to all persons who were LKL advisory clients as of January 1, 2017 via mail, e-mail, or such other method as may be acceptable to the Commission's staff, together with a cover letter in a form not unacceptable to the Commission's staff.

28. Notice to Investment Advisers: Love shall provide a copy of the Order to any investment adviser with which he associates, as defined in the Advisers Act, within ten (10) days of such association.

29. Certifications of Compliance by Respondents: Respondents shall certify, in writing, compliance with the undertakings set forth above as follows.

a. LKL and Love shall certify compliance with the "Notice to Advisory Clients" undertaking in paragraph 27, and Love shall certify compliance with the "Notice to Investment Advisers" undertaking in paragraph 28. The certifications shall identify the undertaking, 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 Respondents agree to provide such evidence.

b. The certifications and supporting materials shall be submitted to Assistant Regional Director Victoria A. Levin, 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 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 LKL and Love's Offers.

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

A. LKL cease and desist from committing or causing any violations and any future violations of Sections 204(a), 206(4), and 207 of the Advisers Act and Rules 204-3 and 206(4)-7 thereunder.

B. Love cease and desist from committing or causing any violations and any future violations of Sections 204(a), 206(4), and 207 of the Advisers Act and Rules 204-3 and 206(4)-7 thereunder.

C. LKL and Love are censured.

D. Love shall be, and hereby is, subject to the following limitations and prohibitions on his activities:

Love shall not act in a compliance capacity with

- (i) any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization; and
- (ii) 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.

Any application to act in such a compliance capacity will be subject to the applicable laws and regulations governing the reentry process, and permission to act in such a compliance capacity may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent Love, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) 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 (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

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

F. LKL shall pay civil penalties of \$100,000 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). Payment shall be made in the following installments: (1) \$25,000 within ten days of the entry of this Order; (2) \$37,500 within six months of entry of this Order; and (3) the remaining \$37,500 within twelve months of entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of the civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application.

Payments must be made in one of the following ways:

- (1) LKL may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) LKL 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) LKL 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 LKL 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 Victoria A. Levin, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower Street, Suite 900, Los Angeles, California 90071.

G. Love shall pay civil penalties 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). Payment shall be made in the following installments: (1) \$10,000 within ten days of the entry of this Order; (2) \$20,000 within six months of entry of this Order; and (3) the remaining \$20,000 within twelve months of entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of the civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application.

Payments must be made in one of the following ways:

- (1) Love may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Love 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) Love 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 Love 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 Victoria A. Levin, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower Street, Suite 900, Los Angeles, California 90071.

H. 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, Respondents agree that in any Related Investor

Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 Respondents 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 Love, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Love 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 Love 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.

Brent J. Fields
Secretary