

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5065 / November 19, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18901

In the Matter of

**RETIREMENT CAPITAL
STRATEGIES, INC.**

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 Retirement Capital Strategies, Inc. (“RCS” 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 Respondent 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 finds¹ that:

SUMMARY

1. RCS, a registered investment adviser, failed to apply advisory fee discounts to certain client accounts contrary to its disclosures, representations to clients, and its advisory agreements. From January 2010 through February 2018 (the "Relevant Period"), RCS offered clients an advisory fee between 0.4% and 1.5% of their assets under management based on fee breakpoints described in a fee schedule that reduced the advisory fee as client assets under management increased. RCS's fee schedule was incorporated by reference in client advisory agreements, distributed to clients upon request, and, starting in 2011, disclosed in RCS's Form ADV Part 2A filed with the Commission. RCS's written policies and procedures manual stated that RCS was to conform its client fees and fee billing practices to those described in the Form ADV and in the advisory agreements provided to clients. In certain instances, however, RCS failed to apply the breakpoint discounts. As a result, RCS improperly calculated advisory fees and thereby overcharged certain clients.

RESPONDENT

2. **Retirement Capital Strategies, Inc.** is an investment adviser registered with the Commission since January 2010 (File No. 801-70918), and is headquartered in San Jose, California. RCS provides asset management services to separately managed accounts for retail clients on a discretionary basis, as well as financial planning services for certain clients. RCS's advisory business has approximately \$212 million in regulatory assets under management held in 649 client accounts according to its Form ADV filed in March 2018.

FACTS

3. During the Relevant Period, RCS offered clients discretionary investment advisory services for a fee on its Strategic Wealth Management ("SWM") platform. Each RCS client entered into a formal investment advisory agreement with RCS that set forth the terms and conditions according to which RCS would manage the client's investments, including the terms under which RCS would charge investment advisory fees.

4. During the Relevant Period, RCS assessed advisory fees for investment management services based upon a percentage of the market value of the assets under management held in a client's SWM account(s) in accordance with a fee schedule (the "Fee Schedule"). Although RCS told clients it would enclose the Fee Schedule as "Exhibit A" to the investment advisory agreements, it did not enclose the Fee Schedule.

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

5. RCS prorated each client’s annual fee and assessed it quarterly, in advance, based upon the market value of the assets under management on the last business day of the calendar month of the previous quarter. The custodian for the SWM accounts (“Custodian Broker”) calculated and deducted RCS’s investment advisory fees each quarter based on the advisory fee rate communicated by RCS.

6. RCS’s Fee Schedule applied a declining fee rate between 0.40% and 1.50% on all assets under management, starting with the first dollar invested, once a breakpoint was surpassed. The Fee Schedule, shown below, provided an incentive for clients to deposit more assets to reach the next breakpoint, and thereby receive a lower fee rate.

**Retirement Capital Strategies Fee Schedule for RIA
Strategic Wealth Management Accounts**

Account Value		Annual Fee	
\$ 15,000	To	\$ 249,999	1.50%
\$ 250,000	To	\$ 499,999	1.30%
\$ 500,000	To	\$ 749,999	1.10%
\$ 750,000	To	\$ 999,999	1.00%
\$ 1,000,000	To	\$1,999,999	0.85%
\$ 2,000,000	To	\$4,999,999	0.75%
\$ 5,000,000	To	\$9,999,999	0.60%
\$10,000,000	and	More	0.40%

**The fee is based on the value of the SWM account(s) only.*

7. The instructions to Form ADV Part 2A require advisers to, among other things, describe in their client brochure how they are compensated for advisory services, provide a fee schedule, and disclose whether fees are negotiable.

8. RCS included a fee schedule in its Form ADV Part 2A filed in March 2011 setting out thresholds or “breakpoints” at which clients invested with RCS would be entitled to discounted annual advisory fee rates. The fee schedule that RCS began publishing in its 2011 Form ADV Part 2A was the same Fee Schedule that RCS had used internally and distributed to clients upon request since at least 2010. In its disclosure, RCS stated that advisory fees would be based on the market value of the client’s assets under management “between negotiable and 1.50%” as shown in the Fee Schedule. RCS also continued to periodically share with its advisory clients a standalone copy of the Fee Schedule upon request throughout the Relevant Period, illustrating the breakpoints for RCS’s advisory fees, as well as fees for the Custodian Broker’s services.

9. RCS’s investment advisory representatives (“IARs”) repeatedly represented to clients during the Relevant Period that that they would be eligible for fee reductions on their

SWM accounts if they added sufficient funds to meet the thresholds depicted in the Fee Schedule.

10. During the Relevant Period, RCS also allowed related account balances of the same client and clients within the same household to be aggregated for the purposes of achieving the advisory fee breakpoint discounts.

11. Nevertheless, for the client billing quarters ending during the period January 2010 through February 2018, RCS charged certain clients higher advisory fees than disclosed in the Fee Schedule. Also throughout the Relevant Period, RCS failed consistently and timely to aggregate the assets under management in SWM accounts held by the same client or advisory clients in the same household, resulting in some clients paying higher fee rates on each of their accounts than they otherwise would be assessed under the Fee Schedule. As a result, during the Relevant Period, RCS overcharged 293 client accounts approximately \$304,000. Since the commencement of the Commission's investigation, RCS voluntarily refunded its clients all overcharged advisory fees, plus interest, for the period January 2010 through February 2018.

RCS FAILED TO ADOPT AND IMPLEMENT REASONABLY DESIGNED POLICIES AND PROCEDURES

12. During the Relevant Period, RCS's Form ADV Part 2A disclosed that RCS charged fees based on a client's assets under management, and, starting in March 2011, included the Fee Schedule as part of the Form ADV brochure. RCS failed to adopt and implement written policies and procedures reasonably designed to prevent RCS from charging advisory fees greater than those disclosed.

13. RCS's written policies and procedures manual stated that RCS was to conform its client fees and fee billing practices to those described in the Form ADV and in the advisory agreements with clients. However, RCS did not consistently implement this policy.

14. In addition, RCS's written compliance policies and procedures were not reasonably designed to prevent RCS from favoring certain clients by applying breakpoint discounts to the combined value of their aggregated accounts. The Fee Schedule RCS provided to its clients stated that the advisory fee would be based on the value of "SWM account(s)" managed by RCS. RCS IARs advised certain clients that RCS would aggregate SWM advisory accounts of the same client, or advisory accounts within the same household, to reach breakpoints in the Fee Schedule and thus apply a discounted advisory fee rate to all such aggregated accounts. RCS failed to include this in its written policies and procedures manual and failed to take reasonable steps so that it consistently aggregated household accounts for all clients, as applicable. As a consequence, certain of RCS's clients were treated more favorably than other clients, who did not receive the benefit of account aggregation and thus discounted advisory fees.

VIOLATIONS

15. As a result of the conduct described above, RCS willfully² violated Section 206(2) of the Advisers Act, which prohibits any 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. A violation of Section 206(2) may rest on a finding of simple 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, 195 (1963)).

16. As a result of the conduct described above, RCS willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

17. As a result of the conduct described above, RCS willfully 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 [pursuant to the Advisers Act]... or willfully to omit to state in any such application or report any material fact which is required to be stated therein.”

REMEDIAL EFFORTS

18. After both a Commission staff examination of RCS and the commencement of this enforcement investigation and prior to this action, RCS reviewed the records of current and former clients who may have paid excess fees and refunded those excess fees, with interest, to affected clients. RCS also retained a compliance consultant to, among other things, conduct a review of RCS’s written compliance policies and procedures regarding advisory fees and Form ADV disclosures. In addition, RCS updated its compliance policies and procedures and enhanced its billing automation.

19. In determining to accept the Offer, the Commission considered the remedial acts undertaken by RCS and the cooperation RCS afforded the Commission staff.

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

A. RCS shall cease and desist from committing or causing any violations and any

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)).

future violations of Sections 207, 206(2), and 206(4) of the Advisers Act, and Rule 206(4)-7 thereunder.

B. RCS is censured.

C. RCS shall, within 30 days of the entry of this Order, pay a civil 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 RCS as the 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, Asset Management Unit, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, CA 94104-4802.

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, 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.

Brent J. Fields
Secretary