UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 80039 / February 14, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17846

In the Matter of **CVR Energy, Inc.** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against CVR Energy Inc., ("CVR" or "Respondent").

II.

In anticipation of the institution of these proceedings, CVR 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 it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that[1]:

Summary

1. This matter concerns CVR Energy, Inc.'s ("CVR's") failure to adequately disclose the material terms of its fee arrangements with two investment banks (the "Banks") in connection

[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.

with financial advisory services they provided to CVR during a hostile tender offer by a well-known shareholder activist (the "Activist Investor"). Pursuant to the Banks' fee arrangements, the Banks collectively claimed approximately $36 million in "sale fees," also known as "success fees," even though the Activist Investor was able secure control of the company in the face of CVR's resistance, at a price that the CVR board of directors believed undervalued the company, and without raising its bid by any amount. Nor did the Banks obtain a competing bid from a "white knight" or third-party offeror before obtaining the success fees. Given the retainer agreements' expansive definition of success, the specific financial terms of the Banks' retention should have been disclosed to investors pursuant to Item 5 of CVR's Schedule 14D-9, which requires a target issuer to provide a summary of the material terms of the compensation arrangements for its advisors hired to assist with the issuer's response to a tender offer. Instead, CVR merely stated in its Schedule 14D-9, which was prepared by its outside legal counsel ("Outside Counsel"), that the terms of the Banks' retention were "customary." To the contrary, it was not customary for the Banks to receive a success fee in this situation and, accordingly, the fee arrangements should have been described in greater detail in order to comply with SEC disclosure rules.

2. Due to the inadequate disclosure of the Banks' fees, CVR shareholders were unaware of potential conflicts of interest that stemmed from the Banks' fee arrangements as they considered the Activist Investor's tender offer. This information was material to investors because the Banks' fees increased dramatically if the company was sold, regardless of (i) whether the sale price was deemed by the board to be adequate, (ii) whether the Banks succeeded in defending against the Activist Investor's bid, or (iii) whether the Banks were successful in causing the Activist Investor to raise his bid. More typically, sale fees are obtained by investment banks in tender offer situations only when the banks' services result in the shareholders retaining their shares or obtaining appropriate value for their shares through a tender offer or other sale of the company. Such fee arrangements customarily align the financial interests of the banks with those of the shareholders by increasing fees only when the services of the banks have fully protected the value of the shareholders' interest in the company. Because the fee arrangement with the Banks that ensured a so-called success fee regardless of whether shareholders obtained fair value for their shares, the interests of the Banks and CVR's shareholders diverged. The Banks' fees were not customary, and the material terms of the compensation arrangement with the Banks should have been disclosed.

3. By failing to fully and accurately disclose the material terms of the Banks' compensation in its initial and 10th Amended Schedule 14D-9, CVR violated Exchange Act Section 14(d)(4) and Rule 14d-9 thereunder.

Respondent

4. CVR is a Delaware corporation based in Sugar Land, Texas. At the time of the facts underlying this Order, it was an independent refiner and marketer of transportation fuels, and through its holdings in CVR Partners, LP, engaged in the nitrogen fertilizer business. Its equity securities are registered under Section 12(b) of the Exchange Act and are currently traded on the New York Stock Exchange.

Facts

5. On January 13, 2012, the Activist Investor filed a Schedule 13D disclosing a beneficial ownership interest in CVR amounting to approximately 14.54%. On the same day, CVR adopted a shareholder rights plan, or "poison pill," and prepared to defend itself from the Activist Investor's bid for corporate control.[2] On the same day, CVR issued a press release stating that the rights plan was designed to "protect against inadequate or coercive takeover attempts, or other tactics that might be used to gain control of the company without negotiating with the Board of Directors or paying all stockholders a fair price for their shares." CVR also retained Outside Counsel and later, the Banks, as its financial advisers.

6. CVR and the Banks memorialized the terms of their relationships in an initial set of engagement letters signed in January and February 2012. Significantly, the first set of engagement letters excluded work related to a tender offer, but stipulated that CVR would offer the Banks the opportunity to work for "customary" fees and other provisions in the event a tender offer occurred. Outside Counsel assisted CVR in negotiating and worked with the Banks in drafting the engagement letters.

7. On February 23, 2012, the Activist Investor announced a tender offer for CVR.

8. On March 1, 2012, CVR filed its initial Schedule 14D-9, prepared by Outside Counsel, advising shareholders not to tender their shares into the unsolicited tender offer. Notwithstanding the fact that CVR had yet to work out with the Banks the scope of services or payment terms with respect to the tender offer, the filing incorrectly stated that "[t]he Company has *retained* [Bank 1] and [Bank 2] as its financial advisors in connection with, among other things, the Company's analysis and consideration of, and response to the, [Activist Investor's tender] Offer. The Company *has agreed to pay customary compensation for such services*." (Emphasis added).

9. On March 21 and 23, 2012, CVR and the Banks, respectively, signed a second set of engagement letters, which were negotiated by the Banks and Outside Counsel, including advisory services by the Banks related to a tender offer. CVR's CEO did not review the engagement letters, but both CVR's Chief Financial Officer (to whom the engagement letters were addressed) and General Counsel understood, from discussions with Outside Counsel, that the Banks' services were part of a suite of legal and financial advisory services to CVR that involved a coordinated "raid defense" package that were designed to help CVR maintain its independence from the Activist Investor's hostile tender offer. In fact, documents associated with the financial advisory services used the term "raid defense engagement."

10. The second set of letters, which were signed by CVR's CFO, provided for possible fees to each bank, including a $9 million fee in the event CVR remained independent, a $4 million

[2] A shareholder rights plan, colloquially known as a "poison pill," is a defensive measure used by a corporation's board of directors against an unsolicited, non-negotiated takeover. Such a plan ordinarily gives shareholders the right to buy more shares at a discount if one shareholder buys a certain percentage or more of the company's shares at which point every shareholder (except the one who triggered activation of the plan) will have the right to buy a new issue of shares at a discount. If every other shareholder is able to buy more shares at a discount, such purchases would dilute the prospective bidder's interest, and the cost of the bid would rise substantially.

"discretionary fee" similar to a bonus payments that would be purely at the discretion of the board, a fee for the announcement of a transaction ($6 million), and a sales fee payable in the event of a sales transaction (.525% of the aggregate consideration).

11. Sales fees—sometimes referred to as "success fees"—are paid to investment banks for financial advisory services in connection with tender offers and have generally been accepted by clients because such fees align the interests of the banks with those of the shareholders. When banks assist in bringing a value-creating transaction to shareholders (such as, for example, causing a bidder to raise its offer price), success fees generally reward the banks for their role in bringing the transaction to fruition (*i.e.*, the higher the price in the value-enhancing deal, the larger the reward for the banks).

12. However, the Banks believed they would be entitled to receive a payout even under a scenario where the Activist Investor's tender offer bid prevailed at the original offer price and the Banks were unable to create a value-enhancing deal for CVR shareholders. Unlike a typical sales fee arrangement, the sales fee provision with the Banks could have been triggered, and, in fact, was triggered, regardless of whether the deal was in the best economic interests of shareholders (*i.e.*, company is "sold" at a discount to a valuation metric otherwise determined to be realistic).

13. In the weeks following its initial Schedule 14D-9, CVR filed nine amendments but, none of the filings disclosed the material terms of the Banks' fees, including provisions that could potentially motivate the Banks in ways that may not be aligned with the interests of CVR's investors (such as the payment of sale transaction fee even in the event of a sale to the Activist Investor or the lack of efforts by the Banks to solicit potential competing bids from other third parties). In each of these filings, CVR's board recommended that shareholders not tender their shares because the Activist Investor's offer, among other things, undervalued CVR.

14. On April 3, 2012, the Activist Investor announced that he had prevailed and that over 50% of CVR shareholders had indicated their desire to tender their shares. Shortly after, CVR and the Activist Investor began to negotiate the terms by which the Activist Investor could complete the tender offer. The poison pill, which provided CVR with a first line of defense, prompted the Activist Investor to negotiate with the board with a view towards having the rights plan rescinded or lifted so that he could purchase shares that had been tendered without activating the rights available under the poison pill.

15. During this time, Outside Counsel separately began to calculate its own legal fees as well as fees owed to the Banks. Through this exercise, Outside Counsel concluded that the Banks would be owed a "success fee" even though the Activist Investor had prevailed. On April 14, 2012, lawyers of Outside Counsel prepared a fee chart for their internal use and determined that in the event of a successful tender offer, each Bank would receive a sales transaction fee in the amount of $18 million. An email message between lawyers of Outside Counsel expressed surprise that "there's nothing carving out a hostile deal with [the Activist Investor] from the definition of a sale" and that this created a "weird perverse incentive for [Bank 1] and [Bank 2]."

16. For the two weeks following the Activist Investor's announcement, the parties negotiated the terms by which the Activist Investor could complete the tender offer. During the

negotiations for what ultimately became the "Transaction Agreement," counsel for the Activist Investor specifically asked a senior partner of Outside Counsel for the amount of fees CVR would be obligated to pay to the Banks. The senior partner, however, did not disclose to the Activist Investor's counsel the details surrounding the fee arrangements, which he considered to be a leverage point in the negotiations. The senior partner, in recognizing the materiality of the fee arrangements, believed at the time, that had the fees been disclosed, the Activist Investor could have reduced the per share price of his offer in accounting for an impending liability to the Banks.

17. On April 19, the parties reached a negotiated Transaction Agreement whereby CVR agreed to remove the poison pill, an obstacle that made the tender offer practically impossible, in exchange for the Activist Investor agreeing to certain protections for minority shareholders.

18. On the same day, CVR issued a press release on its Form 8-K announcing a Transaction Agreement which provided CVR shareholders with "important protections," namely the "[r]educed conditionality to the offer" while increasing the "[p]otential upside from a future sale." The Transaction Agreement was included as an attachment to CVR's 10th Amended Schedule 14D-9 filed on April 23, 2012. In the press release, CVR reiterated that it continued to believe the Activist Investor's tender offer price undervalued CVR by as much as $12 a share, but recognized "many of the Company's stockholders may prefer to realize value in the near term and would consider the offer, as revised, an attractive near-term alternative." Moreover, in connection with the Transaction Agreement, CVR's board was not required to vote on whether to sell the company to the Activist Investor. To the contrary, as disclosed in its press release that CVR reserved the right under the Transaction Agreement to sell the company to a party other than the Activist Investor.

19. The negotiated Transaction Agreement between CVR and the Activist Investor was unique and unprecedented in that it had an offer on the table that the board believed was "woefully" inadequate and not in the best interest of shareholders to accept, but represented a compromise between the board and the Activist Investor given that the majority of CVR's shareholders had supported the tender offer.

20. On April 23, 2012, CVR filed Amendment No. 10 to its Schedule 14D-9, which was prepared by Outside Counsel. In the filing, the board continued to reject the tender offer while reiterating their initial recommendation that shareholders not tender their shares because the Activist Investor's bid undervalued the company. CVR's original Item 5 disclosure, however, continued to remain in effect and misleadingly described the Banks' fees as "customary."

21. The Schedule 14D-9 also failed to disclose any material terms of the Banks' compensation, including the sales fee provision. As a result, shareholders, who were deciding whether or not to tender, were unaware that the Banks would receive a sale fee payout regardless of whether the deal reached with the Activist Investor was ultimately in the best interests of shareholders or whether the Banks' interests were aligned with those of the shareholders. Notwithstanding the board's adverse recommendation and in the absence of the disclosure of the material terms of the fee agreements with the Banks, a majority of security holders tendered their shares.

Violations

22. Exchange Act Section 14(d)(4) requires any recommendation by a target to accept or reject a tender offer to be made in accordance with the rules prescribed by the Commission. Rule 14d-9(b) requires an issuer making a solicitation or recommendation in response to a tender offer to file a Schedule 14D-9. The disclosure in Schedule 14D-9 is intended to "assist security holders in making their investment decision and in evaluating the merits of a solicitation/recommendation." Exchange Act Release No. 16384 (Nov. 29, 1979). Rule 14d-9(d) specifies the information to be included in a Schedule 14D-9. The required disclosures include "a summary of all material terms of employment, retainer or other arrangement for compensation" for all persons who have been retained for the direct or indirect purpose of assisting the issuer in making a solicitation or recommendation in response to a tender offer. This disclosure is specifically required under Item 5 of Schedule 14D-9 and corresponding Item 1009(a) of Regulation M-A, both titled "Persons/assets, retained, employed, compensated or used."

23. As a result of the conduct described above, CVR violated Section 14(d)(4) and Rule 14d-9 thereunder which require an issuer making a solicitation or recommendation in response to a tender offer to file a Schedule 14D-9 which, among other things, must include "a summary of all material terms of employment, retainer or other arrangement for compensation" for all persons who have been retained for the direct or indirect purpose of assisting the issuer in making a solicitation or recommendation in response to a tender offer.

CVR's Cooperation

24. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and its extensive cooperation afforded the Commission staff.

Findings

25. Based on the foregoing, the Commission finds that Respondent, CVR, violated Exchange Act Section 14(d)(4) and Rule 14d-9 thereunder.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent CVR cease and desist from committing or causing any violations and any future violations of Section 14(d) of the Exchange Act and Rule 14d-9 thereunder.

B. Respondent acknowledges that the Commission is not imposing a civil penalty based upon its cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields
Secretary