

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4876 / April 6, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18424

In the Matter of

**SECURITIES AMERICA
ADVISORS, 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 Securities America Advisors, Inc. (“SAA” 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 purposes 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 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. These proceedings arise out of breaches of fiduciary duty, inadequate disclosures, and deficiencies in compliance policies and procedures by registered investment adviser SAA in connection with its mutual fund share class selection practices. From at least February 1, 2012 to December 31, 2016 (the "Relevant Period"), SAA invested advisory clients in mutual fund share classes that charged 12b-1 fees instead of less expensive share classes of the same funds that were available without 12b-1 fees. SAA's affiliated broker-dealer, Securities America, Inc. ("SAI"), received 12b-1 fees based on these investments, of which SAI paid a portion to its registered representatives, who acted as investment adviser representatives ("IARs") of SAA for the relevant SAA advisory client accounts. However, SAA's disclosures failed to adequately inform its clients of the conflict of interest presented by its IARs' share class selection practices. In particular, SAA failed to disclose that its IARs had a conflict of interest as a result of the additional compensation an IAR received for investing advisory clients in a fund's 12b-1 fee paying share class when a less expensive share class was available for the same fund. Furthermore, the practice of investing advisory clients in mutual fund share classes that charged 12b-1 fees rather than lower-cost share classes of the same funds was inconsistent with SAA's duty to seek best execution for those transactions. Additionally, during the Relevant Period, SAA failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund share class selection practices.

2. As a result of the conduct described above, SAA willfully violated Sections 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

Respondent

3. **Securities America Advisors Inc. ("SAA")**, a Nebraska corporation based in La Vista, Nebraska, has been registered with the Commission as an investment adviser since 1994. SAA is a wholly-owned subsidiary of Securities America Financial Corporation ("SAFC"). SAA provides advisory services through over 1,700 IARs, most of whom are also registered representatives of SAI, SAA's affiliated broker-dealer. In its Form ADV filed September 29, 2017, SAA reported regulatory assets under management of approximately \$15.6 billion, most of which is associated with discretionary client accounts.

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.

Related Party

4. **Securities America, Inc. (“SAI”)**, a Delaware corporation based in La Vista, Nebraska, has been registered as a broker-dealer with the Commission since 1981. SAI is also a wholly-owned subsidiary of SAFC, and is therefore affiliated with SAA through common ownership. Throughout the Relevant Period, SAI acted as the introducing broker-dealer for SAA’s advisory clients.

Background

5. During the Relevant Period, SAA offered asset management services to its advisory clients (“Advisory Clients”) through certain wrap fee advisory programs, including the Financial Advisors, LifeGuide, Asset Based Brokerage Services, and Managed Opportunities Programs (collectively, the “Wrap Fee Programs”). Each Wrap Fee Program enabled SAA’s IARs to invest client assets in various mutual funds across numerous fund complexes. For each Wrap Fee Program, SAI acted as the introducing broker-dealer on all securities transactions. During the Relevant Period, virtually all of SAA’s IARs also acted in dual capacities as registered representatives of SAI.

Mutual Fund Share Class Selection

6. Mutual funds typically offer investors different types of shares or “share classes.” Each share class represents an interest in the same portfolio of securities with the same investment objective. The primary difference among the share classes is their fee structure.

7. For example, “Class A” shares² generally are sold with sales charges or “loads” based on the dollar amount of the investment. The sales charges are waived for Class A shares purchased in wrap fee or fee-based advisory accounts. Class A shares, including “load-waived” Class A shares purchased in advisory accounts, charge 12b-1 fees to cover fund distribution and shareholder services. These recurring fees are deducted from the mutual fund assets on an ongoing basis and paid to the fund’s distributor or principal underwriter, which, in turn, generally remits the fees to the broker-dealer that distributed or sold the shares. The 12b-1 fee for this type of share class is typically 25 basis points per year.

8. Many mutual funds also offer other share classes that do not charge 12b-1 fees (e.g., “Institutional class” or “Class I” shares).³ These share classes are generally available only to investors who meet certain criteria (e.g., minimum investment amount or eligible investment program), which vary from fund to fund. While many Class I shares have higher initial investment minimums as compared to Class A shares, many funds waive or substantially reduce

² Share classes sold with sales charges or “loads” go by a variety of names in the mutual fund industry. As used in this Order, the term “Class A shares” refers generically to share classes that charge 12b-1 fees.

³ Share classes that do not charge 12b-1 fees also go by a variety of names in the mutual fund industry. As used in this Order, the term “Class I shares” refers generically to share classes that do not charge 12b-1 fees.

these thresholds for client purchases, particularly in advisory accounts such as the Wrap Fee Programs offered by SAA during the Relevant Period. A client who holds Class I shares of a mutual fund will pay lower fees over time – and earn higher returns – than a client who holds Class A shares of the same fund. Therefore, if a mutual fund offers a Class I share, and a client is eligible to own it, it is almost invariably in the client’s best interest to purchase or hold the Class I share.

9. During the Relevant Period, SAA’s IARs purchased, recommended, or held, on behalf of certain Advisory Clients, mutual fund share classes that charged 12b-1 fees (primarily Class A shares) when those clients were otherwise eligible to invest in lower-cost share classes of those same funds (primarily Class I shares). As a result, SAI received 12b-1 fees that it would not have collected had SAA’s Advisory Clients been invested in lower-cost share classes. In turn, SAI passed on a portion of the 12b-1 fees to its registered representatives, who acted in their dual capacities as SAA’s IARs for the share class investments at issue. SAI also passed on a portion of the 12b-1 fees to SAA.

Inadequate Disclosures Concerning Mutual Fund Investments

10. As an investment adviser, SAA was obligated to fully disclose all material facts to its Advisory Clients, including any conflicts of interest between itself and its Advisory Clients that could affect the advisory relationship. To accomplish this disclosure obligation, SAA was required to provide its Advisory Clients with sufficient information so that they could understand the conflicts of interest that SAA had, enabling clients to give informed consent to such conflicts or practices or reject them.

11. During the Relevant Period, SAA generally disclosed in its Forms ADV that its IARs “may” receive 12b-1 fees from the sale of mutual funds and that the availability of such fees created a conflict of interest. However, SAA failed to disclose that SAA and its IARs had a conflict of interest as a result of the additional compensation they received for investing advisory clients in a fund’s 12b-1 fee paying share class when a less expensive share class was available for the same fund. Additionally, SAA failed to disclose that its IARs would and did select share classes paying 12b-1 fees when less expensive share classes were available to certain of SAA’s Advisory Clients for the same fund.

SAA’s Violation of Duty to Seek Best Execution

12. Section 206 of the Advisers Act imposes on investment advisers a fiduciary duty to act for the benefit of their clients. That duty includes, among other things, an obligation to seek best execution for client transactions. *See, e.g.*, Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Rel. No. 23170 (Apr. 28, 1986) (stating that money managers, as fiduciaries to their clients, have an obligation to “execute securities transactions for clients in such a manner that the client’s total cost or proceeds in each transaction is the most favorable under the circumstances”).

13. By causing certain Advisory Clients to invest in fund share classes that charged 12b-1 fees when such clients were otherwise eligible for lower-cost share classes, SAA violated its duty to seek best execution for those transactions.

Compliance Deficiencies

14. During the Relevant Period, SAA's written policies and procedures instructed its IARs that all mutual fund purchases in advisory accounts must be made in one of the share classes specified for mutual funds on an approved mutual fund products list created and updated by SAA ("Approved Funds List" or "List"). The List included mutual funds that Advisory Clients could purchase through the Wrap Fee Programs, along with available share classes for each fund and corresponding minimum investment requirements, if any. However, SAA's written policies and procedures failed to include any guidance or supervisory oversight concerning the selection of lowest-cost shares available for funds included on the List.

15. Throughout the Relevant Period, SAA failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, such as written policies and procedures to ensure that its IARs invested Advisory Clients in the lowest-cost share class available for mutual funds on the Approved Funds List when doing so was in an Advisory Client's best interest.

Violations

16. Section 206(2) of the Advisers Act makes it unlawful for an adviser, directly or indirectly, to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Scienter is not required to establish a violation of Section 206(2), but 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, 194-95 (1963)). As a result of the conduct described above, SAA willfully⁴ violated Section 206(2).

17. Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder require a registered investment adviser to, among other things, "[a]dopt and implement written policies and procedures reasonably designed to prevent violation" of the Advisers Act and its rules. As a result of the conduct described above, SAA willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

18. Section 207 of the Advisers Act 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." As a result of the conduct described above, SAA willfully violated Section 207 of the Advisers Act.

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)). 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)).

Remedial Efforts

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

20. SAA has implemented several policies to address its mutual fund share class selection practices as described in this Order. As of January 1, 2017, SAA requires that its IARs complete all new purchases of mutual funds in advisory accounts at the lowest cost share class available, and has worked with its clearing platforms to ensure compliance with this policy. In addition, SAA has taken steps to convert mutual fund investments in all Class A shares (or comparable classes) to the lowest-cost share classes available for the same funds at no costs or tax consequences to its existing Advisory Clients. For those shares that cannot be or have not yet been converted, SAA has implemented a policy to credit back any newly-incurred 12b-1 fees to existing Advisory Clients.

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. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondent is censured.

C. Respondent shall pay disgorgement, prejudgment interest, and a civil monetary penalty of \$5,828,448.64 to compensate Advisory Clients that were affected by the conduct detailed in this Order, as follows:

- (i) Respondent shall pay disgorgement of \$4,473,025.50 and prejudgment interest of \$580,423.14, consistent with the provisions of this Subsection C.
- (ii) Respondent shall pay a civil money penalty in the amount of \$775,000 consistent with the provisions of this Subsection C.
- (iii) Within ten (10) days of the entry of this Order, Respondent shall deposit \$5,828,448.64 (the "Distribution Fund") into an escrow account acceptable to the Commission staff and shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] or 31 U.S.C. § 3717.

- (iv) Respondent shall be responsible for administering the Distribution Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Distribution Fund, including any such professional services, shall be borne by Respondent and shall not be paid out of the Distribution Fund. Respondent shall distribute the amount of the Distribution Fund to the applicable past and present Advisory Clients affected by the above conduct described herein, pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed and approved by the Commission staff in accordance with this Subsection C. Such calculation shall be subject to a *de minimis* threshold, as described in paragraph (v) below. No portion of the Distribution Fund shall be paid to Respondent or its past or present officers or directors.
- (v) Respondent shall, within 90 days of the entry of this Order, submit a proposed Calculation to the staff for its review and approval that identifies, at a minimum: (1) the name of each affected past or present Advisory Client account; (2) the exact amount of the payment to be made from the Distribution Fund to each affected past or present Advisory Client account; and (3) the amount of any *de minimis* threshold to be applied. Respondent shall also provide to the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondent’s proposed Calculation or any of its information or supporting documentation, Respondent shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within 10 days of the date that Respondent is notified of the objection, which revised Calculation shall be subject to all of the provisions of this Subsection C.
- (vi) The distribution of the Distribution Fund shall be made within 180 days of the staff’s approval of the Calculation. If Respondent does not distribute any portion of the Distribution Fund for any reason, including factors beyond Respondent’s control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury. Any such payment shall be made in accordance with Paragraph xi of this Subsection C, below.
- (vii) Respondent agrees to be responsible for all tax compliance responsibilities associated with distribution of the Distribution Fund and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent and shall not be paid by any of Respondent’s past or present clients.
- (viii) Within 120 days after Respondent completes the disbursement of all amounts payable to affected past and present Advisory Clients and has received notification of any returned payments, Respondent shall submit to the Commission staff a final accounting and certification of the disposition of the Distribution Fund not unacceptable to the staff, which shall be in a format to be

provided by the Commission staff. The final accounting and certification shall include: (1) the amount paid to each past or present Advisory Client account; (2) the date of each payment; (3) the check number or other identifier of money transferred to each account; (4) the amount of any returned payment and the date received; (5) a description of any effort to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that Respondent has made payments from the Distribution Fund to affected past and present Advisory Clients in accordance with the distribution plan approved by the Commission staff. Respondent shall submit the final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to Commission staff, under a cover letter that identifies SAA as the Respondent in these proceedings and the file number of these proceedings to Jason J. Burt, Assistant Regional Director, Asset Management Unit, Denver Regional Office, Securities and Exchange Commission, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, Colorado, 80294, or such other address the Commission staff may provide. Any and all supporting documentation for the accounting and certification shall be provided to the Commission staff upon request, and Respondent shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

- (ix) After Respondent has submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission for approval and shall request Commission approval to send any undistributed amount to the United States Treasury.
- (x) The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Distribution Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.
- (xi) If Respondent is unable to distribute or return any portion of the Distribution Fund for any reason, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury, in accordance with Section 21F(g)(3) of the Securities Exchange Act of 1934, after the final accounting provided for in Paragraph viii of this Subsection C is submitted to the Commission staff. 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 SAA as Respondent in this proceeding, and the file number of this proceeding; a copy of the cover letter and check or money order must be sent to Jason Burt, Assistant Regional Director, Asset Management Unit, Denver Regional Office, Securities and Exchange Commission, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, Colorado, 80294.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalty, disgorgement, and prejudgment interest described above. 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