

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 10832 / September 3, 2020**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 89756 / September 3, 2020**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 5569 / September 3, 2020**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-19958**

In the Matter of

NATIONAL FINANCIAL SERVICES  
LLC

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS,  
PURSUANT TO SECTION 8A OF THE  
SECURITIES ACT OF 1933, SECTION 15(b)  
OF THE SECURITIES EXCHANGE ACT OF  
1934, AND SECTION 203(e) 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 Section 8A of the Securities Act of 1933 (“Securities Act”), Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”), and Section 203(e) of the Investment Advisers Act of 1940 (“Advisers Act”), against National Financial Services LLC (“NFS” 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 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 Section 8A of the Securities Act of 1933, Section 15(b) of the Securities Exchange Act of 1934, and Section 203(e) 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 finds<sup>1</sup> that:

#### Summary

1. This proceeding concerns failures by NFS, a registered broker-dealer and investment adviser, to satisfy its prospectus delivery obligations to investors in connection with public offerings of common stock for FuelCell Energy, Inc. (“FuelCell”). NFS is a subsidiary of FMR LLC, which provides financial services through NFS and its other subsidiaries, primarily doing business under the name “Fidelity Investments.” From 2005 to 2017, NFS sold over 70 million shares of common stock for FuelCell in five public offerings that raised over \$148 million from investors without delivering final prospectuses.

2. Each of these public offerings was an at-the-market delayed shelf offering. Under the applicable rules for such offerings, an issuer is permitted to file, as FuelCell did in each offering, a registration statement that includes a “base prospectus” that omits certain important offering-specific information required of a final prospectus, such as the specific type of securities offered and the manner and timing of distribution. When the issuer decides to take the securities “off the shelf” and sell them into the market, it must file a final prospectus that discloses the required offering information that had been previously omitted.

3. The final prospectus is of particular significance in at-the-market shelf offerings. In such offerings, an issuer sells shares of its securities directly into the market at the prevailing market price, as opposed to selling a fixed number of shares at a fixed price all at once. Without a final prospectus, investors and the market may not know the type or quantity of securities offered or that a public offering has commenced. With respect to the five public offerings at issue, no final prospectuses were ever prepared, filed, or delivered.

4. As a statutory underwriter in these offerings, NFS had an obligation under Section 5(b)(2) of the Securities Act to ensure delivery of final prospectuses to the purchasers of these securities. Over a twelve-year period, NFS sold into the public market millions of shares of FuelCell stock without delivering final prospectuses. The trading desk that conducted these sales, the Institutional Cash Equities Desk (“Institutional Desk”), did not generally engage in underwriting activities, and NFS had no policies and procedures in place at this desk that might have prevented or detected the violations. From 2005 to 2015, NFS did not ensure that the newly-

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<sup>1</sup> 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.

issued shares of common stock it was selling on behalf of FuelCell, a public issuer, were being sold in compliance with Section 5 of the Securities Act. After certain underlying facts concerning these sales of securities came to the attention of compliance and legal personnel at NFS in 2016, NFS did not take timely and effective corrective action to prevent further violations.

5. NFS violated Section 5(b)(2) of the Securities Act by failing to deliver final prospectuses to purchasers of these securities. NFS also violated Rule 173 of the Securities Act by failing to provide purchasers with copies of the final prospectus or notice that the sales were pursuant to a registration statement. The traders on the Institutional Desk that handled the at-the-market offerings of FuelCell sales violated Section 5(b)(2) and Rule 173. NFS failed reasonably to supervise these traders within the meaning of Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(6) of the Advisers Act with a view to preventing and detecting their violations of Section 5(b)(2) and 173.

### **Respondent**

6. National Financial Services LLC (“NFS”), a Delaware limited liability company, is a registered broker-dealer and investment adviser. It is a wholly-owned, indirect subsidiary of FMR LLC, a privately held Delaware limited liability company that, along with NFS and its other subsidiaries, provides financial services, primarily doing business under the name “Fidelity Investments.”

### **Other Relevant Entity**

7. FuelCell Energy, Inc. (“FuelCell”), a Delaware corporation based in Danbury, Connecticut, designs, manufactures, and installs fuel cell power plants. FuelCell stock is registered under Section 12(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and trades on the Nasdaq Global Market.

### **Shelf Registration, Section 5(b)(2), and Rule 173**

8. Delayed shelf registration provides eligible issuers with the flexibility to register securities offerings without issuing or offering the securities for sale immediately, while ensuring that investors and the market ultimately receive the fulsome disclosure required under the Securities Act. This is reflected in the Securities Act rules that authorize such registration. An issuer eligible to use Form S-3 for a primary offering may file a registration statement for a delayed shelf offering that includes a base prospectus that omits information “unknown or not reasonably available” at the time of filing. *See* Rule 430B. This can include information such as the specific type and quantity of securities being offered, the specific plan of distribution (e.g., whether the distribution will be at-the-market or otherwise), and the nature and terms of agreements with underwriters, dealers and agents.

9. The issuer is required to later file this previously-omitted information with the Commission. The information may be provided in a prospectus supplement or a post-effective amendment. If permitted by the applicable registration form, the information may also be included in an Exchange Act periodic or current report that is incorporated by reference into the registration

statement, provided that the issuer files a prospectus supplement that discloses the Exchange Act report or reports containing such information. *See* Rules 424 and 430B.

10. Section 5(b)(2) makes it unlawful to deliver a security “unless [it is] accompanied or preceded” by a final prospectus—i.e., one that meets the requirements of Section 10(a) by disclosing all the information required by the relevant registration form, including any information omitted previously. A base prospectus included in a shelf registration statement that omits required information in reliance on Rule 430B is not a final prospectus meeting the requirements of Section 10(a).

11. Pursuant to the “access equals delivery” rule (Securities Act Rule 172), an issuer, underwriter, or dealer participating in a distribution may satisfy its obligation to “deliver” a final prospectus under Section 5(b)(2) if, among other conditions, the issuer has filed with the Commission a final prospectus that satisfies the requirements of Section 10(a) of the Securities Act within the time specified by Rule 424 (or makes a good faith and reasonable effort to do so).

12. Delivering a final prospectus to investors pursuant to Section 5(b)(2) (or, in the alternative, satisfying the access equals delivery conditions of Rule 172) is a fundamental component of registering and selling shares under the Securities Act. A final prospectus serves to memorialize the terms and nature of the offering for those who purchase securities in an offering and for the market generally. *See* Securities Offering Reform, Release No. 33-8591, 70 Fed. Reg. 44722, 44782 (Aug. 3, 2005) (adopting Rule 172 and explaining that “the greatest utility of a final prospectus may be as a document that informs and memorializes the information for the aftermarket”). This disclosure is especially important in the context of an at-the-market shelf offering. Without this disclosure, purchasers of shares in an at-the-market shelf offering and the market remain unaware that an issuer has taken a specific type and number of securities off the shelf and begun selling them into the market.

13. In “a transaction that represents a sale by the issuer or an underwriter” in which the final prospectus delivery requirements apply, Rule 173 requires each underwriter or dealer participating in a registered offering to provide purchasers (with the exception of transactions solely between brokers or dealers) with a copy of the final prospectus or “a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172.” This notification can be included on trade confirmations sent under Exchange Act Rule 10b-10.

### **Background**

14. From 2005 to 2017, NFS, through a registered representative and on behalf of FuelCell, sold over 70 million shares of FuelCell’s common stock through at-the-market shelf offerings, helping the company raise over \$148 million from investors. NFS earned hundreds of thousands of dollars in commissions. The Institutional Desk treated these as ordinary course secondary market transactions. It did not enter into an underwriting agreement, engage in special selling efforts or receive compensation for its services in the form of an underwriting discount or “spread.”

15. The at-the-market offerings were made in connection with five shelf registration statements the issuer filed with the Commission. The following chart summarizes the at-the-market sales in connection with each of the shelf registration statements:

Shelf Registration	Dates of Sales	# of Shares Sold	FuelCell's Gross Proceeds
<b>Filed 6/17/05</b>	8/10/05 to 2/5/07	986,200	\$10,783,518
<b>Filed 1/23/07</b>	2/20/07 to 9/23/09	1,089,264	\$6,122,498
<b>Filed 1/20/10</b>	1/24/11 to 2/6/12	5,916,802	\$8,433,605
<b>Filed 6/7/13</b>	9/20/13 to 3/10/15	31,561,847	\$59,125,987
<b>Filed 1/9/15</b>	3/11/15 to 4/27/17	30,878,208	\$64,317,805
<b><u>Total</u></b>		70,432,321 <sup>2</sup>	\$148,783,413

16. As permitted by Rule 430B(a) of the Securities Act, FuelCell omitted from the base prospectuses contained in the Form S-3 registration statements certain information about the offerings, including the specific plan of distribution and the nature and terms of compensation or other agreements with any underwriters, dealers, or agents. The base prospectuses in the 2013 and 2015 shelf registration statements also omitted the specific type and quantity of securities offered.

17. FuelCell did not file any prospectus supplements (or otherwise fulfill the requirements of Rule 172) in connection with any of the above at-the-market offerings of securities. Nor did it otherwise timely disclose the information that had been omitted from its shelf registration statements. FuelCell did subsequently disclose in its Form 10-Ks and 10-Qs the number of shares sold and proceeds earned over the prior reporting period, but these disclosures did not cure FuelCell's failure to file prospectus supplements or otherwise timely disclose the previously omitted information. NFS therefore could not and did not deliver final prospectuses to purchasers as required by Section 5(b)(2) of the Securities Act. Nor did NFS provide any purchaser

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<sup>2</sup> This share total reflects the number of shares sold in the at-the-market offerings at the time of each sale. The company engaged in 12-1 reverse stock splits on December 3, 2015, and May 8, 2019.

with notification that the sale had been made pursuant to a registration statement as required by Rule 173.

18. NFS began selling securities in FuelCell's at-the-market offerings in 2005. At the time, FuelCell was a client of Fidelity Stock Plan Services LLC ("Stock Plan Services"), an affiliate of NFS, that administered executive and employee stock compensation plans. At the request of FuelCell, representatives of Stock Plan Services agreed to assist FuelCell with at-the-market offerings of its common stock, set up a new account for the at-the-market offerings, and then connected FuelCell with a trader on the Institutional Desk who agreed to an initial sales plan for the company's stock. The Institutional Desk did not generally engage in underwriting activities and had no policies or procedures concerning shelf offerings. It typically traded on behalf of internal Fidelity clients, such as Stock Plan Services, as well as external clients, typically insurance companies, fund managers, pension funds, and the like. NFS did not conduct due diligence to determine whether these sales would comply with Section 5 of the Securities Act.

19. Over the next twelve years, NFS sold shares of stock on behalf of FuelCell in five at-the-market offerings. FuelCell communicated its sales orders directly to the Institutional Desk by phone and email. Typically, the company told the trader who was primarily responsible for executing the trades when it was transferring stock to its NFS account and when the offering would begin, provided instructions concerning the number of shares to sell at specified market price levels, and adjusted its instructions from time to time depending on market conditions and financing needs.

20. NFS had no policies or procedures specifically governing the Institutional Desk to ensure that the sales of securities complied with Section 5 of the Securities Act and its prospectus delivery requirements or to determine *if* securities traders on the desk were selling were part of a public offering. Other divisions and desks at Fidelity had policies concerning shelf offerings and prospectus delivery obligations under Section 5, but none were applicable to the Institutional Desk, and the trader who primarily sold FuelCell's stock, who did not normally participate in sales involving such offerings, was not familiar with those policies.

21. For more than a decade, no one at NFS conducted any inquiry to determine whether these sales of stock complied with the registration and prospectus delivery requirements of Section 5 of the Securities Act, notwithstanding that FuelCell was an issuer selling its own stock to the public.

22. In January 2016, FuelCell inquired with NFS about continuing its at-the-market offering during "blackout periods." This brought the at-the-market offerings to the attention of compliance and legal personnel at NFS. But NFS took no timely and effective corrective actions to prevent further violations.

23. On three occasions in 2016, on instructions from legal and compliance personnel, the trader primarily responsible for the sales asked FuelCell to identify the specific registration statement under which the shares in the at-the-market sales were registered. In written responses, FuelCell directed the trader to its 2015 shelf registration statement. The trader forwarded the

information to legal and compliance personnel. Like the earlier shelf registration statements used for at-the-market offerings, this registration statement omitted important offering information, including the specific type and quantity of securities to be offered, the specific plan of distribution (i.e., that the securities would be sold at-the-market), and NFS's participation in the offering. While NFS did make these inquiries with FuelCell, it did not inquire about the omitted information or the absence of a prospectus supplement. NFS continued to sell shares on behalf of FuelCell.

24. In late January 2016, NFS stopped executing trades of FuelCell stock in CrossStream, an alternative trading system operated by NFS, to limit the number of FuelCell sale orders executing against purchase orders from other Fidelity customers. NFS also stopped manually crossing FuelCell sale orders with purchase orders from such customers. Neither action, however, affected NFS's ongoing obligation to deliver final prospectuses to purchasers of the security.

25. In May 2016, NFS compliance personnel recommended moving the FuelCell account to another trading desk to take advantage of that desk's "newly built execution protocols for issuer stock sales." However, the account was not moved and instead remained at the Institutional Desk.

26. At no time did NFS suspend its sale of FuelCell stock in the at-the-market offerings. NFS continued to sell stock for FuelCell until April 2017, when FuelCell ended its last at-the-market offering through NFS.

### **Violations**

27. As a result of the conduct described above, NFS violated Section 5(b)(2) of the Securities Act, which makes it unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or interstate commerce any security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Section 10(a) of the Securities Act.

28. As a result of the conduct described above, NFS violated Rule 173 of the Securities Act, which requires that, in a transaction that represents a sale by an issuer or an underwriter, each underwriter or dealer selling in such transaction shall provide to each purchaser from it, not later than two business days following the completion of such sale, a copy of the final prospectus or, in lieu of such prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172.

### **NFS Failed Reasonably to Supervise Its Personnel**

29. Broker-dealers perform a crucial gatekeeping function in the securities markets. "As professionals in the securities business and as persons dealing closely with the investing public, [broker-dealers] are expected to secure compliance with the requirements of the Securities Act to protect the public from illegal offerings." *In re Midas Securities, LLC*, Exch. Act Rel.

No. 66200, 2012 WL 169138, at \*10 (Jan. 20, 2012) (Commission opinion) (alterations and internal quotation marks omitted). As the Commission has emphasized:

With respect to the registration provisions of the Securities Act ... all registered broker-dealers should establish minimum standard procedures to prevent and detect violations of the federal securities laws and to ensure that the firm meets its continuing responsibility to know both its customers and the securities being sold. These procedures must be made known to firm personnel and [] be sufficient to reveal promptly to supervisory officials transactions which may, when examined individually or in the aggregate, indicate that sales in a security should be halted immediately for violating the Securities Act.

*Id.* at \*12 (internal quotations and citations omitted).

30. Section 15(b)(4)(E) of the Exchange Act provides that the Commission may sanction a broker-dealer for failing reasonably to supervise, with a view to preventing violations of the federal securities laws, another person subject to its supervision who commits such a violation. A broker-dealer fails reasonably to supervise its personnel when it fails either to establish reasonable policies to prevent or detect the particular violation at issue or to implement its policies and procedures. *See id.*; *In re Quest Capital Strategies, Inc.*, Exch. Act Rel. No. 44935, 2001 WL 1230619 at \*6 (Oct. 15, 2001) (Commission opinion).

31. As described above, traders on the Institutional Desk who handled FuelCell's at-the-market offerings violated Section 5(b)(2) of the Securities Act and Rule 173.

32. As described above, NFS had no policies or procedures for traders on its Institutional Desk to determine whether shares being sold in a public offering complied with the registration and prospectus delivery requirements of Section 5 of the Securities Act, including Section 5(b)(2) and Rule 173 thereunder.

33. As a result of the conduct described above, NFS failed reasonably to supervise within the meaning of Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(6) of the Advisers Act the traders on the Institutional Desk with a view to preventing and detecting their violations of Section 5(b)(2) of the Securities Act and Rule 173 thereunder.

#### IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 15(b) of the Exchange Act, and Section 203(e) of the Advisers Act it is hereby ORDERED that:

A. NFS cease and desist from committing or causing any violations and any future violations of Section 5(b)(2) of the Securities Act and Securities Act Rule 173.



B. NFS is censured.

C. NFS shall, within 14 days of the entry of this Order, pay a total of \$2,461,193, comprising disgorgement of \$797,905, prejudgment interest of \$163,288, and a civil money penalty in the amount of \$1,500,000, 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 of prejudgment interest and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment of the civil money penalty 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 National Financial Services LLC 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 Carolyn Welshhans, Division of Enforcement, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

D. 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.

Vanessa A. Countryman  
Secretary