

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

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 5555 / July 31, 2020**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-19898**

**In the Matter of**

**BIRINYI ASSOCIATES, 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 Birinyi Associates, Inc. (“Respondent” or “Birinyi Associates”).

**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 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 the Respondent's Offer, the Commission finds<sup>1</sup> that:

#### **Summary**

1. From at least June 2014 to June 2019 (the "Relevant Period"), Birinyi Associates, a SEC-registered investment adviser, sometimes allocated profitable day trades in a manner that was unfair to certain clients and inconsistent with the firm's disclosures and internal policies. Birinyi Associates had a small group of clients whose strategy was limited to day trading (the "Day Trade Clients"), for whom equity positions were to be sold by the end of each trading day per client directives, while for the vast majority of its clients (the "Buy and Hold Clients"), Birinyi Associates followed a buy-and-hold strategy and primarily purchased stock for longer-term investment. The Day Trade Client accounts were not affiliated in any way with Birinyi Associates or with its present or former principals, directors, officers, employees or agents.

2. Birinyi Associates made block trades in a master account and then allocated stock purchases and sales to individual client accounts. During the Relevant Period, Birinyi Associates occasionally executed a day trade in the master account and allocated the purchase and sale to a Day Trade Client, rather than allocating the purchase to a Buy and Hold Client's account as originally intended. The day trades allocated to the Day Trade Clients were almost always profitable but the profits were small, averaging 0.30% of the purchase price. As a result, the Day Trade Clients received risk-free day trades with small profits while the Buy and Hold Clients effectively bore all market risk for the Day Trade Clients.

3. Furthermore, Birinyi Associates failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its trade allocation practices.

#### **Respondent**

4. Birinyi Associates, Inc. ("Birinyi Associates") is a Connecticut corporation with its principal place of business in Westport, Connecticut. Birinyi Associates has been registered with the Commission as an investment adviser since 1990 (File No. 801-37267). According to its most recent Form ADV filed in March 2020, Birinyi Associates had 89 individual clients and approximately \$288.4 million in assets under management.

#### **Facts**

5. During the Relevant Period, Birinyi Associates provided investment advisory services to individual clients through separate client accounts, which were primarily in custody at a third-party brokerage firm. Birinyi Associates had a master account at this brokerage firm that it used to make block trades that Birinyi Associates subsequently allocated to its clients' accounts.

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<sup>1</sup> The findings herein are made pursuant to the Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

6. Birinyi Associates used the master account to execute trades primarily for two different investment strategies: (1) a day trade strategy, and (2) a buy-and-hold strategy. On a typical trading day, Birinyi Associates made a block purchase of a security through the master account for the Buy and Hold Clients, who followed a buy-and-hold investment strategy. After the block purchase, Birinyi Associates monitored the price of the security during the trading day. If the price increased, Birinyi Associates sometimes sold some or all of the security, thereby completing a profitable day trade in the master account. Sometimes, Birinyi Associates allocated the profitable day trade to Day Trade Clients, rather than hold the stock for investment by the Buy and Hold Clients, as originally intended. As a result, the Day Trade Clients sometimes received risk-free and profitable day trades while the Buy and Hold Clients effectively bore the market risk for the Day Trade Clients.

7. By sometimes allocating profitable day trades to the Day Trade Clients instead of the Buy and Hold Clients, Birinyi Associates advantaged Day Trade Clients at the expense of Buy and Hold Clients on the first day of trading. Overall, all of Birinyi Associates' trading (including both day trades and buy and hold trades) during the Relevant Period had an average first-day return of 0.004%. In other words, profitable day trading for the Day Trade Clients occurred against a background across all trading that was essentially flat on the first day of return. The trades that Birinyi Associates allocated to the Day Trade Clients during the Relevant Period earned an average first-day return of 0.26%. By comparison, the trades allocated to Buy and Hold Clients during the Relevant Period had an average first-day return of -0.02%.

8. Birinyi Associates asserts that it did not consider that its practice of capturing profitable day trades for Day Trade Clients unfairly benefited those clients at the expense of Buy and Hold Clients because the Buy and Hold Clients earned significantly higher average annual returns during the Relevant Period than the Day Trade Clients. By comparing only long-term returns, however, Birinyi Associates failed to consider that: (1) the Day Trade Clients received risk-free profits while the Buy and Hold Clients bore all the risk on the Day Trade Clients' behalf; (2) the Buy and Hold Clients' first-day returns were negatively affected by the allocation of profitable day trades to the Day Trade Clients; and (3) Birinyi Associates' allocation of day trades was not consistent with the disclosures in its Form ADV Part 2A.

9. During the Relevant Period, Birinyi Associates' Form ADV Part 2A brochure stated, in relevant part:

We owe a fiduciary duty to our clients not to favor the account of one client over that of another [and] have allocation policies and procedures in place to ensure that accounts are treated fairly. Generally allocations are made among clients with a similar strategy on a pro rata basis based on the size of the account. Explanations for variations from this approach are required to be documented and are subject to the periodic review of our Chief Compliance Officer to ensure that all accounts are being treated fairly. . . .

**Allocation Issues.** The existence of multiple clients that generally all invest in the same securities can create a material conflict of interest with respect to the allocation of investment opportunities among accounts. As a general rule, we only invest our clients' assets in securities the demand for which in our clients' accounts is greatly

exceeded by the supply available in the market. We allocate investment opportunities among the accounts by applying such considerations as we deem appropriate, including relative size of such accounts, amount of available capital, size of existing positions in the same or similar securities, impact of leverage, investment objective and strategy considerations, including, without limitation, concentration parameters and tax considerations and other factors. . . .

Although clients generally invest in the same securities, the net performance of one client's account may vary materially from that of other accounts as a result of the allocation policies described above, as well as differing expenses, tax considerations, the impact of leverage and other factors.

10. Likewise, Birinyi Associates' policies and procedures during the Relevant Period provided that the firm owed its clients "a duty of loyalty and a duty of care" and therefore could not "unfairly favor one client over another."

11. Despite these disclosures and policies, Birinyi Associates failed to take reasonable steps to determine that its allocation of day trades made through the master account treated all clients fairly. As a result, Birinyi Associates should have known, but did not, that the Day Trade Clients received risk-free, profitable day trades while other clients effectively bore the market risk of the block trades in the master account.

12. After the Commission's Enforcement Staff began its investigation, Birinyi Associates implemented new controls intended to create and retain documents to record that the firm's allocation of trades from the master account to all clients' accounts was consistent with its intended allocation at the time it placed the trade in the master account.

### **Compliance Deficiencies**

13. Birinyi Associates 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 the allocation of profitable day trades to client accounts.

14. During the Relevant Period, Birinyi Associates' compliance manual provided that the firm shall maintain sufficient records and "periodically review" client portfolios and objectives to "ensur[e] that . . . aggregated trades have been fairly allocated amongst our clients." But Birinyi Associates had no policies and procedures that summarized how to determine which client account should receive a profitable day trade, nor policies and procedures reasonably designed to achieve equitable allocation consistent with the firm's disclosures.

## Violations

15. As a result of the conduct described above, Respondent willfully<sup>2</sup> violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client.

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

## Undertakings

17. Notice to Advisory Clients. Within 30 days of the entry of this Order, Birinyi Associates shall notify all existing clients of the settlement terms of this Order by sending a copy of this Order to each client via mail, email, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.

18. Independent Compliance Consultant.

a. Within 90 days of the entry of this Order, Respondent shall retain the services of an independent compliance consultant (“Independent Consultant”) not unacceptable to the Commission staff. Respondent shall require that the Independent Consultant conduct a comprehensive compliance review and assist Respondent in developing and implementing written compliance policies and procedures reasonably designed to promote Respondent’s compliance with the Advisers Act with respect to trade allocation, monitoring, and recordkeeping.

b. Respondent shall require the Independent Consultant to submit a written report to the Respondent and to Commission staff within 180 days of the entry of this Order (the “Report”). The Report shall describe in detail (1) the Independent Consultant’s review, findings, conclusions, and recommendations; (2) any proposals made by Respondent; and (3) a procedure for Respondent to adopt and implement the recommended changes in or improvements to its policies and procedures.

c. Within ninety (90) days of receipt of the Report, Respondent shall adopt and implement all recommendations contained in the report; provided, however, that

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<sup>2</sup> “Willfully,” for purposes of imposing relief under Section 203(e) of the Advisers Act, “means no more than 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.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478–79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has “willfully omit[ted]” material information from a required disclosure in violation of Section 207 of the Advisers Act).

within thirty (30) days of Respondent's receipt of the Report, Respondent may, in writing, advise the Independent Consultant and the Commission staff of any recommendations that it considers unnecessary, unduly burdensome, impractical or inappropriate. With respect to any such recommendation, Respondent need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation on which Respondent and the Independent Consultant do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) days after Respondent provides the alternative procedures described above. In the event that Respondent and the Independent Consultant are unable to agree on an alternative proposal, Respondent and the Independent Consultant shall jointly confer with the Commission staff to resolve the matter. In the event that, after conferring with the Commission staff, Respondent and the Independent Consultant are unable to agree on an alternative proposal, Respondent will abide by the recommendations of the Independent Consultant.

d. Within thirty (30) days of Respondent's adoption of all of the recommendations in the Report, Respondent shall certify in writing to the Independent Consultant and the Commission staff that it has adopted and implemented all of the Independent Consultant's recommendations in the Report. Unless otherwise directed by the Commission staff, all Reports, certifications and other documents required to be provided to the Commission staff shall be sent to Robert Baker, Assistant Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission's staff may provide.

e. As part of its work with the Independent Consultant, Respondent shall cooperate fully and provide the Independent Consultant with access to files, books, records, and personnel as are reasonably requested by the Independent Consultant for review. The Respondent shall bear all of the Independent Consultant's compensation and expenses.

f. Respondent shall require the Independent Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing, or other professional relationship with Respondent, or any of its present or former affiliates, principals, directors, officers, employees, or agents. The agreement will also provide that the Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in performance of the Independent Consultant's duties under this Order, shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondent, or any of its present or former affiliates, principals, directors, officers, employees, or agents for the period of the engagement and for a period of two years after the engagement.

g. The reports by the Independent Consultant will likely include confidential financial, proprietary, competitive business or commercial information. Public disclosure of the reports could discourage cooperation, impede pending or potential government investigations or undermine the objectives of the reporting requirement. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except (1) pursuant to court order, (2) as agreed to by the parties in writing, (3) to the extent that the Commission determines in its sole discretion that disclosure would be in furtherance of the Commission's discharge of its duties and responsibilities, or (4) is otherwise required by law.

h. For good cause shown and upon timely application by Respondent, the Commission staff may extend any of the procedural dates set forth in this undertaking.

19. Respondent shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Robert Baker, Assistant Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than 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 Respondent's Offer.

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

A. Birinyi Associates cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder.

B. Birinyi Associates is censured.

C. Birinyi Associates shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$100,000.00 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 Birinyi Associates, Inc. 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 Robert Baker, Assistant Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110.

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.

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

By the Commission.

Vanessa A. Countryman  
Secretary