

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11019 / December 21, 2021

INVESTMENT ADVISERS ACT OF 1940
Release No. 5934 / December 21, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20688

In the Matter of

NICHOLAS ABBATE,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, 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 8A of the Securities Act of 1933 (“Securities Act”) and Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Nicholas Abbate (“Abbate” 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 proceeding 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 him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing 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 concern Nicholas Abbate and his role in assisting others in a course of business that operated as a fraud or deceit upon clients and investors. The fraudulent conduct involved a now-defunct U.S. mutual fund (Fund A) and its registered investment adviser (Adviser A), an offshore mutual fund (Fund B), and the founder and principal of both funds and the adviser, Person A.

Respondent

2. **Nicholas Abbate** resides in Staten Island, New York. From approximately 2016 to 2019, Abbate held the titles of Chief Operating Officer ("COO") and Portfolio Manager for Fund A and the titles of Chief Investment Officer ("CIO") and Portfolio Manager for Adviser A. From approximately 2020 to the present, Abbate held the title of Money Laundering Reporting Officer ("MLRO") for Fund B, one of only three officer positions at Fund B. Abbate held a Series 65 license while affiliated with Adviser A and previously held other securities licenses prior to 2010.

Other Relevant Entities and Individual

3. **Fund A** was an open-end mutual fund registered with the Commission as an investment company that was based in Nevada. Fund A filed a registration statement on Form N-1A that became effective in 2017 and filed an application for deregistration due to liquidation in 2019. Person A served as Trustee, President, Chief Executive Officer, Chief Financial Officer, and Chief Compliance Officer of Fund A.

4. **Adviser A** is a Nevada limited liability company that was registered with the Commission as an investment adviser from 2015 to 2019, when it terminated its registration. Adviser A was the investment adviser to Fund A. Person A is the owner, Chief Executive Officer, Chief Financial Officer, and Chief Compliance Officer of Adviser A.

5. **Fund B** is a mutual fund registered in the Cayman Islands that was founded by Person A in 2018. Fund B is not (and never has been) registered with the Commission, and has (or has had) directors and officers located in New York, Florida, California, the Cayman Islands, and the British Virgin Islands.

6. **Person A** resides in California. At all relevant times herein, Person A exercised full control over Fund A, Adviser A, and Fund B.

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.

Facts

A. Fund A

7. In 2016, Person A filed a registration statement with the Commission for Fund A. The Fund A prospectus, as prepared and amended by Person A, provided that the “investment objective” was to seek “current income consistent with preservation of capital and daily liquidity” by investing fund assets in U.S. Treasury securities and by entering into repurchase and reverse repurchase agreements collateralized by U.S. Treasury securities or cash.

8. The Fund A registration statement identified Adviser A as its investment adviser. Person A previously registered Adviser A with the Commission as an investment adviser in 2015.

9. Abbate agreed to assist Person A with Fund A’s operations and to hold the positions of COO and Portfolio Manager at Fund A and CIO and Portfolio Manager at Adviser A. Abbate also obtained a Series 65 license in connection with his work for Adviser A.

10. Abbate held these job titles in name only, however. At all relevant times, Person A controlled both Fund A and Adviser A. Acting on behalf of Fund A and Adviser A, Person A had exclusive authority over the fund’s operations, assets, and disclosures, and made all investment decisions. Despite serving as Fund A’s COO and Portfolio Manager and Adviser A’s CIO and Portfolio Manager, Abbate did not exercise the authority or have the responsibilities usually associated with those titles.

11. Fund A’s amended registration statement became effective in 2017, after which Person A and others at his direction began raising money from investors.

12. Once investors began purchasing shares of Fund A in 2017, Person A used a portion of fund assets to invest in U.S. Treasury securities. Fund A did not, however, invest the remaining fund assets in repurchase or reverse repurchase transactions as disclosed in public filings and other materials provided to investors. Rather than entering into repurchase agreements, Person A instead routed Fund A’s assets to shell companies under his control. Fund A did not receive U.S. Treasury securities or cash as collateral from these shell companies.

13. In 2019, Person A filed an application with the Commission to deregister Fund A and liquidated all shares in the fund. Thereafter, Person A terminated Adviser A’s registration.

B. Fund B

14. Person A formed and launched Fund B in 2018. The Fund B prospectus, prepared by Person A and at his direction, described a similar investment strategy as Fund A, focused on investing fund assets in U.S. Treasury securities and entering into repurchase and reverse repurchase agreements collateralized by U.S. Treasury securities or cash.

15. Using this prospectus and other offering materials, Person A began raising money from investors in mid-2018 by selling shares in various share classes of Fund B. At least some of the investors in Fund B were originally invested in Fund A.

16. Abbate agreed to assist Person A with the operations of Fund B. Under Person A's supervision and direction, Abbate handled Fund B's day-to-day operations, invested a portion of fund assets in U.S. Treasury securities, and processed subscriptions to and redemptions from the fund for investors. Abbate also arranged for a relative to serve as a nominal director of Fund B. At Person A's request, Abbate agreed to hold the position of MLRO beginning in 2020, with responsibility for handling AML compliance matters for Fund B.

17. Like with Fund A, Person A used a portion of Fund B assets to invest in U.S. Treasury securities but did not invest the remaining fund assets consistent with the prospectus and other materials provided to investors. Rather than entering into repurchase agreements, Person A instead routed Fund B's assets to shell companies under his control. Fund B did not receive U.S. Treasury securities or cash as collateral from these shell companies.

C. Abbate's Misconduct

18. Abbate took affirmative steps to support Person A's fraudulent course of business at Fund A and Fund B. While holding high-level positions at both funds and the adviser, Abbate transmitted statements to investors, potential investors, and others that misrepresented the fund's true investments and performance. In so doing, Abbate furthered Person A's fraudulent management of the funds and the investment of assets contrary to disclosures.

19. At Person A's direction, Abbate maintained and updated materials on websites for Fund A and Fund B that inaccurately stated that the funds were engaged in "Overnight Reverse Repo" transactions with counterparties that provided "securities lending collateral" in the form of "102% cash" or "102%-115% US Government Securities" that "is marked to market daily."

20. At Person A's direction, Abbate also provided information to actual and potential investors, to service providers including a fund administrator and a fund distributor, and to financial services firms that similarly misrepresented the investments, rate of return, and net asset value of Fund A and Fund B.

21. In assisting Person A through this conduct, Abbate failed to take reasonable steps to confirm that the materials he maintained and communicated to investors and others fairly reflected the funds' actual investments and performance. Despite his positions at Fund A, Adviser A, and Fund B, and his access to the funds' accounts, Abbate accepted the information provided by Person A about the funds' activities as true without taking reasonable steps to confirm its accuracy.

22. Furthermore, in 2021, Abbate assisted Person A in refusing to honor the request of the remaining investors in Fund B to redeem their full investment in the fund. Despite his position as an officer of Fund B and his role in handling previous subscriptions and redemptions, Abbate followed the instructions of Person A to move investor funds out of the account used to issue redemptions and into different accounts from which no redemptions could be made. Abbate also enforced new requirements for redemption that he knew had never been required previously.

Violations

23. Section 17(a)(3) of the Securities Act prohibits any person, in the offer or sale of securities, from engaging in any transaction, practice, or course of business that operates or would operate as a fraud or deceit upon the purchaser.

24. Section 206(2) of the Advisers Act 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. Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder prohibits an investment adviser from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in a pooled investment vehicle.

25. Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *In the Matter of KPMG Peat Marwick LLP*, Admin. Proc. No. 3-9500 (2001).

26. As a result of the conduct described above with respect to Fund A, Abbate caused Adviser A's and Person A's violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

27. As a result of the conduct described above with respect to Fund B, Abbate caused Person A's violations of Section 17(a)(3) of the Securities Act.

Undertakings

28. Abbate has undertaken to:

Refrain from participating, directly or indirectly, in the issuance, offer, or sale of any security; provided, however, that such undertaking shall not prevent Abbate from purchasing or selling securities listed on a national securities exchange for his own personal account.

IV.

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

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

A. Respondent Abbate cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act and Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

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

C. Respondent Abbate shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$30,000 to the Securities and Exchange Commission. 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 Nicholas Abbate 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 Virginia M. Rosado Desilets, Assistant Director, Asset Management Unit, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549.

D. Pursuant to Section 308(a) of the Sarbanes–Oxley Act of 2002, a Fair Fund is created for the penalty referenced in paragraph C 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, he shall not argue that he is entitled to, nor shall he 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 he 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty, or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree, or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary