

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92489 / July 26, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20436

In the Matter of

BIRKELBACH & CO.

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
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 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against Birkelbach & Co. (“Birkelbach” 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 Sections 15(b) and 21C of the Securities Exchange Act of 1934, 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 that:

Summary

1. This matter involves Birkelbach’s failure to file with the Commission and to deliver to retail investors its Form CRS. Birkelbach was required to file its initial Form CRS with the

Commission and to begin delivering its Form CRS to prospective and new retail investors, as applicable, by June 30, 2020. Birkelbach was further required to deliver its Form CRS to existing retail investor customers by July 30, 2020. The firm failed to file and deliver Form CRS by these deadlines, not becoming compliant until April 20, 2021. As a result, Birkelbach violated Exchange Act Section 17(a)(1) and Rule 17a-14 thereunder.

Respondent

2. Birkelbach is a Florida corporation with its principal place of business in Ponte Vedra Beach, Florida. Birkelbach is registered with the Commission as a broker-dealer pursuant to Section 15 of the Exchange Act. Birkelbach offers services to retail investors.

Facts

3. On June 5, 2019, the Commission adopted Form CRS and rules creating new requirements—the Form CRS Filing Requirement and the Form CRS Delivery Requirement (collectively, the “Requirements”)—for Commission-registered broker-dealers offering services to a retail investor.¹ See *Form CRS Relationship Summary; Amendments to Form ADV*, Release Nos. 34-86032 & IA-5247 (June 5, 2019) (effective September 10, 2019) (“*Form CRS Adopting Release*”).

4. *The Form CRS Filing Requirement.* First, Rule 17a-14 under the Exchange Act requires all Commission-registered broker-dealers offering services to a retail investor (“Retail BDs”) to electronically file on the Central Registration Depository (“Web CRD”) operated by the Financial Industry Regulatory Authority, Inc. (“FINRA”) an initial Form CRS satisfying the requirements of Rule 17a-14 no later than June 30, 2020.

5. *The Form CRS Delivery Requirement.* Second, Rule 17a-14 under the Exchange Act requires Retail BDs to deliver their current Form CRS to each retail investor. Specifically, under Rule 17a-14 under the Exchange Act, the Retail BD must deliver:

(1) to each retail investor its current Form CRS before or at the earliest of:

- a recommendation of an account type, a securities transaction, or an investment strategy involving securities;
- placing an order for the retail investor; or
- the opening of a brokerage account for the retail investor.

(2) to each retail investor who is an existing customer the Retail BD’s current Form CRS before or at the time the firm:

- opens a new account that is different from the retail investor customer’s existing account(s);

¹ For purposes of Form CRS, the term “retail investor” means “a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.” Rule 17a-14(e)(2) under the Exchange Act.

- recommends that the retail investor customer roll over assets from a retirement account into a new or existing account or investment; or
- recommends or provides a new brokerage service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

See Rule 17a-14(c)(1) & (c)(2). Rule 17a-14 also requires Retail BDs to post their current Form CRS prominently on their website, if they have one, in a location and format that is easily accessible to retail investors. The deadline for Retail BDs to begin complying with the Form CRS Delivery Requirement was June 30, 2020 for prospective and new retail investors and July 30, 2020 for the initial delivery to existing retail investor customers. See Rule 17a-14(f)(3); *Form CRS Adopting Release* at 239, 242, 406-407; Instructions to Form CRS, General Instruction 7.C (Sept. 2019).

6. Birkelbach failed to comply with the Requirements by its regulatory deadlines, and began complying only after FINRA contacted the firm regarding the failure to file its Form CRS. Specifically, FINRA contacted Birkelbach on September 17, 2020 to alert the firm that it had failed to file Form CRS. Birkelbach, however, still did not file its Form CRS. Birkelbach finally filed Form CRS with the Commission on April 16, 2021, and the firm did not deliver Form CRS to its existing retail investor customers until April 20, 2021.

Violations

7. As a result of the conduct described above, Birkelbach willfully² violated Exchange Act Section 17(a)(1) and Rule 17a-14 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 Birkelbach's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Exchange Act Section 17(a)(1) and Rule 17a-14 thereunder.

² “Willfully,” for purposes of imposing relief under Section 15(b) of the Exchange 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).

B. Respondent is censured.

C. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$10,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Securities Exchange Act of 1934 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 Birkelbach 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 Jennifer S. Leete, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F. St. NE, Washington, DC 20549, or such other person or address as the Commission staff may provide.

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