

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92809 / August 30, 2021

INVESTMENT ADVISERS ACT OF 1940
Release No. 5841 / August 30, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20497

In the Matter of

Cantella & Co., Inc.,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND 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 Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Cantella & Co., Inc., (“Cantella” 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 15(b) of the Securities Exchange Act of 1934 and 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 by Cantella, a dually-registered investment adviser and broker-dealer, in connection with its receipt of third-party compensation in connection with client investments without fully and fairly disclosing its conflicts of interest. Since at least 2016, Cantella invested clients in cash sweep products that resulted in Cantella receiving revenue sharing payments. In spite of this financial arrangement, Cantella provided no disclosure of the conflict of interest arising from the firm’s receipt of this compensation. At all relevant times, Cantella also 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 disclosures related to its cash sweep revenue sharing practices. As a result of the conduct described below, Cantella willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

Respondent

2. Respondent Cantella & Co., Inc., (“Cantella”), incorporated in Massachusetts and headquartered in Malden, Massachusetts, has been registered with the Commission as an investment adviser since 2002 and as a broker-dealer since 1979. As of June 30, 2021, Cantella reported managing approximately \$2.2 billion in regulatory assets under management for just over 6,800 clients in total. Of that approximately \$1.45 billion was reported as managed for 6,348 retail investor clients.

Background

3. Cantella provides investment advisory services to individuals and corporations. Cantella offers investment advisory services to clients on both a non-discretionary and discretionary basis. Cantella also provides financial planning, retirement planning, children’s education planning, and tax managing services.

4. As an investment adviser, Cantella was obligated to disclose all material facts to its advisory clients, including any conflicts of interest between itself and/or its associated persons and its clients, which could affect the advisory relationship. Cantella was also obligated to disclose all material facts relating to how those conflicts could affect the advice Cantella and/or its associated

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.

persons provided its clients. To meet this fiduciary obligation, Cantella was required to provide its advisory clients with full and fair disclosure that was sufficiently specific so that clients could understand the conflicts of interest concerning Cantella's investment advice and have an informed basis on which they could consent to or reject the conflicts.

Revenue Sharing from Cash Sweep Money Market Funds

5. Cantella recommends that clients choose certain money market funds to hold uninvested cash ("Sweep Account Options"). A sweep account is a money market mutual fund or bank account used by brokerages to hold uninvested cash (*e.g.*, incoming cash deposits, dividends, or certain investment returns) until the investor or its adviser decides how to invest the money ("Sweep Account"). A money market fund is a type of mutual fund registered under the Investment Company Act of 1940 and regulated pursuant to Rule 2a-7 under that Act. Money market funds generally invest in short term, highly liquid securities with limited credit risk, and are frequently used as cash sweep account options. The investment yields and expense ratio of a money market fund will differ from fund to fund.

6. Pursuant to its clearing agreement with an unaffiliated clearing broker ("Clearing Broker"), the Clearing Broker agreed to share with Cantella a portion of the revenue the Clearing Broker received in connection with certain money market funds held in clients' Sweep Accounts. Under this clearing agreement, the Clearing Broker provided Cantella with a list of many money market funds as Sweep Account Options for Cantella's advisory clients. The rate of revenue sharing Cantella received varied depending on the money market fund Cantella selected for advisory clients. Cantella's revenue sharing was based on the amount of Cantella's client assets in the Sweep Accounts.

7. Cantella had a conflict of interest when it recommended Sweep Account Options to its clients. In particular, the money market funds available on the Clearing Broker's platform wherein Cantella received the most revenue sharing generally charged higher fees and had at times returned lower investment yields to clients. Conversely, the money market funds available on Clearing Broker's platform that paid no or lower revenue sharing generally charged lower fees and had at times returned higher investment yields to clients.

8. Since at least January 2016 and until June 30, 2020 (the "Relevant Period"), Cantella predominantly recommended and selected for advisory clients' uninvested cash money market funds for which the Clearing Broker agreed to pay Cantella the highest revenue sharing even though the Clearing Broker made several similar money market funds available to Cantella's advisory clients that at times would pay Cantella's clients higher yields, but for which Cantella would have received less or no revenue sharing. When Cantella recommended Sweep Account Options to its clients, the firm's interests were in conflict with its advisory clients' interests because Cantella had an incentive to recommend cash sweep products that paid the greatest amount of revenue sharing to Cantella, even though they generally returned lower investment yields to clients.

9. During the Relevant Period, however, Cantella did not disclose its receipt of revenue sharing from cash sweep products that Cantella recommended for its clients' assets, or otherwise put clients on notice regarding the conflicts of interest inherent in this arrangement. Cantella's disclosures to its advisory clients did not advise them of this revenue sharing arrangement, or explain how the firm may be incentivized to recommend cash sweep products to advisory clients that paid Cantella revenue sharing, instead of other sweep options.

10. Beginning in April 2019, Cantella converted its clients from existing money market funds used in Sweep Accounts that generated revenue sharing for Cantella, to different money market funds that did not generate revenue sharing, which were also lower-cost and higher-yielding money market funds. Cantella substantially completed this conversion in August 2019. However, Cantella continued to receive some revenue sharing payments from its advisory clients' money market investments until June 2020.

Compliance Deficiencies

11. In the Relevant Period, Cantella 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 disclosure of conflicts of interest presented by its receipt of Sweep Account revenue sharing.

Disgorgement

12. The disgorgement and prejudgment interest ordered in Section IV.C (i) is consistent with equitable principles and does not exceed Cantella's net profits from its violations, and will be distributed to harmed investors to the extent feasible. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Violations

13. As a result of the conduct described above, Cantella willfully² violated Section 206(2) of the Advisers Act, which prohibits an investment adviser, directly or indirectly, from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit

² "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act and 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[ed]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

upon any client or prospective client.” Scierter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of 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, 195 (1963)).

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

Undertakings

15. Respondent Cantella has undertaken to:
- a. Within 30 days of the entry of this Order, review and correct as necessary all relevant disclosure documents concerning Sweep Account revenue sharing.
 - b. Within 30 days of the entry of this Order, evaluate whether existing clients should be moved to alternative cash sweep products, and move clients as necessary.
 - c. Within 30 days of the entry of this Order, evaluate, update (if necessary), and review for the effectiveness of their implementation, Cantella’s policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act in connection with disclosures regarding Sweep Account revenue sharing.
 - d. Within 30 days of the entry of this Order, notify affected investors (*i.e.*, those former and current clients who held Sweep Accounts during the Relevant Period that may have been impacted by the practices discussed above (hereinafter, “affected investors”)) of the settlement terms of this Order by sending a copy of this Order to each affected investor 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.
 - e. Within 45 days of the entry of this Order, 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 B. Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

f. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

IV.

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

Accordingly, pursuant to Section 15(b) of the Exchange Act and 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) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondent is censured.

C. Respondent shall pay disgorgement, prejudgment interest, and a civil penalty totaling \$701,630 as follows:

- (i.) Respondent shall pay disgorgement of \$536,953 and prejudgment interest of \$64,677, consistent with the provisions of this Subsection C.
- (ii.) Respondent shall pay a civil monetary penalty in the amount of \$100,000, consistent with the provisions of this Subsection C.
- (iii.) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to affected investors. 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 thirty (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.

- (iv.) Within ten (10) days of the entry of this Order, Respondent shall deposit \$701,630 (the “Fair Fund”) into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide evidence of such deposit in a form acceptable to the Commission staff. The account holding the assets of the Fair Fund shall bear the name and taxpayer identification number of the Fair Fund. If timely payment into the escrow is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] or pursuant to 31 U.S.C. § 3717.
- (v.) Respondent shall be responsible for administering the Fair Fund and may hire a professional at its own cost to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.
- (vi.) Respondent shall distribute from the Fair Fund to each affected investor an amount representing: (a) the financial harm during the Relevant Period by the practices discussed above, and (b) reasonable interest paid on such amounts, 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. The Calculation shall be subject to a *de minimis* threshold. No portion of the Fair Fund shall be paid to: (1) any affected investor account in which Respondent, or any of its current or former officers, directors, investment adviser representatives, or associated persons (or any of their spouses or children) have a financial interest; and (2) any affected investor account that was not charged advisory fees by Respondent.
- (vii.) Respondent shall, within thirty (30) days of the entry of this Order, submit a Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Distribution Calculation to the staff, Respondent shall make itself available, and shall require any third-parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the distribution to be available for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the staff with an opportunity to ask questions. Respondent also shall provide 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 ten (10) days of the date that the Commission staff notifies Respondent of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

- (viii.) Respondent shall, within thirty (30) days of the written approval of the Calculation by the Commission staff, submit a payment file (the "Payment File") for review and acceptance by the Commission staff demonstrating the application of the methodology to each affected investor. The Payment File should identify, at a minimum: (1) the name of each affected investor, (2) the net amount of the payment to be made, less any tax withholding, (3) the amount of any *de minimis* threshold to be applied, and (4) the amount of reasonable interest paid. The Respondent shall exclude from the payee file all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.
- (ix.) Respondent shall disburse all amounts payable to affected investors within ninety (90) days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in Paragraph (xiii.) of this Subsection C. Respondent shall notify the Commission staff of the date[s] and the amount paid for each distribution.
- (x.) If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an affected investor or a beneficial owner of an affected investor or any other factors beyond Respondent's control, 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 Exchange Act once the distribution of the funds is complete and before the final accounting provided for in Paragraph (xii.) of this Subsection is submitted to Commission staff. Payment must be made in one of the following ways:
 - (a) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
 - (b) 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

(c) 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 Cantella 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 B. Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110.

- (xi.) A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§1.468B.1-1.468B.5. Respondent agrees to be responsible for all tax compliance responsibilities associated with the Fair Fund's status as a QSF. These responsibilities involve reporting and paying requirements of the Fund, including but not limited to: (1) tax returns for the Fair Fund; (2) information return reporting regarding the payments to investors, as required by the applicable codes and regulations; and (3) obligations resulting from the Fair Fund's status as a QSF and the Foreign Account Tax Compliance Act ("FATCA"). Respondent may retain any professional services necessary. The costs and expenses of tax compliance, including any such professional services, shall be borne by Respondent and shall not be paid by the Fair Fund.
- (xii.) Within one hundred fifty (150) days after Respondent completes the disbursement of all amounts payable to affected investors, Respondent shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection C. The Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (1) the amount paid to each payee, with reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate an investor 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 Fair Fund to affected investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies Cantella & Co., Inc. as the Respondent in these proceedings and the file number of these proceedings to Robert B. Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request, and Respondent shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

- (xiii.) The Commission staff may extend any of the procedural dates set forth in Paragraphs (ii.) through (ix.) of this Subsection C for good cause shown. Deadlines for dates relating to the Fair 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 the last day.

D. Respondent shall comply with the undertakings enumerated in Section III, paragraph 15(a) through (e) above.

By the Commission.

Vanessa A. Countryman
Secretary