

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95351 / July 22, 2022

INVESTMENT ADVISERS ACT OF 1940
Release No. 6070 / July 22, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20934

In the Matter of

**MESIROW FINANCIAL
INVESTMENT MANAGEMENT,
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 Mesirow Financial Investment Management, Inc. (“Mesirow” 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. Mesirow, a registered investment adviser, breached its fiduciary duty to its advisory clients by failing to provide full and fair disclosure regarding compensation paid to its affiliated broker-dealer, Mesirow Financial, Inc. ("MFI" or the "Affiliated Broker") and the related conflicts of interest. From at least February 2015 through May 2019, the Affiliated Broker received revenue sharing payments from an unaffiliated clearing broker ("Clearing Broker") as a result of Mesirow's advisory clients' investments in certain mutual funds. Certain of the mutual funds that paid revenue sharing were more expensive than lower-cost options available to clients, including instances when there were lower-cost share classes of the same mutual funds available to clients that did not result in any revenue sharing.

2. Mesirow also breached its duty to seek best execution by causing certain advisory clients to invest in share classes of mutual funds that paid revenue sharing when share classes of the same funds were available to the clients that presented a more favorable value for these clients under the particular circumstances in place at the time of the transactions.

3. Furthermore, Mesirow 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 mutual fund share class selection and best execution.

Respondent

4. Respondent Mesirow is an Illinois corporation headquartered in Chicago, Illinois. Mesirow has been registered with the Commission as an investment adviser since May 1986. In its most recent annual updating amendment on Form ADV, filed June 27, 2022, Mesirow reported regulatory assets under management of \$43,288,550,000.

Related Entity

5. MFI is a Delaware corporation headquartered in Chicago, Illinois, and an affiliate of Mesirow. MFI and Mesirow have the same parent company, Mesirow Financial Holdings Inc. MFI has been registered with the Commission as a broker-dealer since February 1983.

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.

Clearing Broker Revenue Sharing Payments

6. Mutual funds typically offer different types of shares or “share classes.” Each share class represents an interest in the same portfolio of securities with the same investment objective. The primary difference among share classes is the fee structure.

7. For example, some mutual fund share classes charge higher fees to cover costs of fund distribution and shareholder services. These fees negatively affect investor returns as the charges are deducted from the mutual fund’s assets. As a result, clients are often, though not always, better off investing in a mutual fund share class that does not include these additional fees versus a share class of the same fund that charges such a fee.

8. Many mutual funds pay the Clearing Broker a recurring fee to have some or all of their fund share classes offered as part of the Clearing Broker’s mutual fund programs. The Affiliated Broker had an agreement with its Clearing Broker referred to as the Fully Disclosed Clearing Agreement (“FDCA”). Since at least February 2015, pursuant to an amendment to the FDCA, the Clearing Broker would share this recurring fee (i.e., mutual fund revenue) with the Affiliated Broker based on the amount of the Affiliated Broker’s customer assets invested in certain mutual funds, including Mesirow client assets invested in those mutual funds.² The Clearing Broker did not pay the Affiliated Broker any form of revenue sharing for some mutual funds and for some share classes of mutual funds.

9. Since at least February 2015, the Clearing Broker had a “no transaction fee” (“NTF”) program (“NTF Program”) for which it did not charge a transaction fee for the purchase or sale of mutual funds in the NTF Program. The Clearing Broker charged certain fund families a higher recurring fee for a mutual fund to be part of the NTF Program as compared to being sold outside of that program. As a result, certain of the mutual fund share classes sold through the NTF Program had higher expense ratios than mutual fund share classes sold outside that program.

10. From at least February 2015 through May 2019, the Affiliated Broker had a revenue sharing arrangement with the Clearing Broker pursuant to which the Clearing Broker would share with the Affiliated Broker a portion of the recurring fee (i.e., mutual fund revenue) it received from mutual fund investments that were part of its NTF Program. The percentage that the Clearing Broker shared increased with the level of investment by the Affiliated Broker’s customers, including Mesirow client assets invested in those NTF mutual funds. Lower-cost share classes of those same funds were also generally available through other NFS programs, for which the Clearing Broker would have paid no or lower revenue sharing.

Disclosure Failures

11. As an investment adviser, Mesirow was obligated to disclose all material facts to its advisory clients, including any conflicts of interest between itself or its associated persons and its clients that could affect Mesirow’s advice to its clients. To meet this fiduciary obligation, Mesirow

² Mesirow clients indirectly paid these fees when they were included in the expense ratio of the mutual funds in which they invested.

was required to provide its advisory clients with full and fair disclosure that was sufficiently specific so that they could understand the conflicts of interest concerning Mesirow's advice and have an informed basis on which to consent to or reject the conflicts.

12. As a result of the revenue sharing agreements, Mesirow had an incentive to recommend mutual funds and mutual fund share classes that paid the Affiliated Broker revenue sharing as opposed to those that did not.

13. From at least February 2015 through May 2019, Mesirow failed to provide full and fair disclosure of all material facts regarding its conflicts of interest that arose when it invested advisory clients in mutual funds and mutual fund share classes that paid revenue sharing to the Affiliated Broker. Specifically, prior to June 2019, Mesirow made the following inadequate disclosure in its Forms ADV Part 2A ("Brochures"): MFI "may receive Rule 12b-1 fees from certain mutual funds. In those instances, the client's advisory fees will be reduced by the amount of the 12b-1 fees received by MFI. MFI may also receive and retain fees received in connection with mutual fund transactions for performing services related to shareholder accounting and related communications." This disclosure did not adequately disclose the receipt of NTF revenue sharing by MFI or the conflicts this created for MFIM, nor did it explain that NTF mutual fund shares were generally more expensive and that clients would be put into NTF mutual fund shares even when there were lower cost share classes of the same fund available to the clients.

14. Mesirow engaged in a firm-wide conversion to move its advisory clients into lower-cost share classes in late 2018, during the course of an ongoing examination by the Commission's Division of Examinations, and revised its disclosures in June 2019.

Best Execution Failures

15. An investment adviser's fiduciary duty includes, among other things, an obligation to seek best execution for client transactions.³

16. By causing certain advisory clients to invest in share classes of mutual funds that were overall more expensive for the clients when share classes of the same funds were available to the clients that presented a more favorable value under the particular circumstances in place at the time of the transactions, Mesirow violated its duty to seek best execution for those transactions.

Compliance Deficiencies

17. From at least February 2015 through May 2019, while Mesirow's written policies and procedures explained that Mesirow "has an affirmative duty to act solely in the best interest of its clients" and to "make a complete and unbiased disclosure of all material facts," Mesirow did not

³ See, e.g., Interpretive Release Concerning the Scope of Section 28(e) of the Exchange Act and Related Matters, Exchange Act Rel. No. 23170 (Apr. 28, 1986).

adopt or implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder with respect to share class selection and best execution.

18. In addition, Mesirow had written policies and procedures requiring disclosure of all conflicts of interest between it and its clients. Mesirow also had written policies and procedures requiring it to seek best execution, including for mutual fund shares. However, Mesirow did not adopt and implement policies and procedures to disclose the conflicts of interest presented by its mutual fund share class selection practices or to seek best execution of the mutual fund share class that presents the more favorable value under the particular circumstances in place at the time of the transaction.

Violations

19. As a result of the conduct described above, Respondent Mesirow willfully⁴ violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to “engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.” Scienter 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, 194-95 (1963)).

20. As a result of the conduct described above, Respondent Mesirow 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.

Disgorgement

21. The disgorgement and prejudgment interest ordered in Section IV.C is consistent with equitable principles and does not exceed Respondent’s net profits from its violations, and will be distributed to harmed investors to the extent feasible pursuant to the respondent-administered distribution described in Section IV below. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors, and any amounts returned to the Commission in the future that are infeasible to return to

⁴ “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).

investors, may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Undertakings

Respondent Mesirow has undertaken to:

Steps Taken To Date

22. Respondent has certified that it has evaluated, updated, and reviewed for the effectiveness of their implementation, Respondent's policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with revenue sharing and best execution.

23. In determining whether to accept the Offer, the Commission has considered the undertaking set forth in paragraph 22 above.

Steps To Be Taken

24. Within 60 days of the entry of this Order, notify affected investors (i.e., those former and current clients who are financially harmed by the practices detailed 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.

25. Within 90 days of the entry of this Order, certify, in writing, compliance with the undertaking set forth in paragraph 24 above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Anne C. McKinley, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 1450, Chicago, Illinois 60604, 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.

26. For good cause shown, the Commission staff may extend any of the procedural dates relating to the 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 Respondent Mesirow's Offer.

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

A. Respondent Mesirow 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. Respondent Mesirow is censured.

C. Respondent Mesirow shall pay disgorgement, prejudgment interest, and a civil penalty, totaling \$752,834, as follows:

(i) Respondent shall pay disgorgement of \$487,862, prejudgment interest of \$94,972, and a civil penalty of \$170,000, consistent with the provisions of this Subsection C.

(ii) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, prejudgment interest, and penalties referenced in Paragraph (i) of this Subsection C. 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.

(iii) Within ten (10) days of the issuance of this Order, Respondent shall deposit the full amount of the disgorgement, prejudgment interest, and civil penalty (the "Fair Fund"), into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] and/or 31 U.S.C. § 3717.

(iv) Respondent shall be responsible for administering the Fair Fund and may hire a professional 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.

(v) Respondent shall distribute from the Fair Fund to each affected investor (i.e., those former and current advisory clients who invested in mutual fund share classes that were overall more expensive for the clients when share classes of the same funds were available to the clients that presented a more favorable value under the particular circumstances in place at the time of the transactions) an amount representing the financial harm incurred by the practices discussed above pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed, and approved by the Commission staff in accordance with Paragraph (vi) of this Subsection C. The Calculation shall be subject to a *de minimis* threshold. No portion of the Fair Fund shall be paid to any affected investor account in which Respondent, or any of its current or former officers or directors, has a financial interest.

(vi) Respondent shall, within sixty (60) 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 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 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.

(vii) 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: (a) the name of each affected investor; (b) the exact amount of the payment to be made; (c) the amount of any *de minimis* threshold to be applied; and (d) 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.

(viii) 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 (xii) of this Subsection C. Respondent shall notify the Commission staff of the date and the amount paid in the final distribution.

(ix) 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 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 funds is complete and before the final accounting provided for in Paragraph (xi) of this Subsection C is submitted to the 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 Mesirow Financial Investment Management, Inc. 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 Anne C. McKinley, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 1540, Chicago, Illinois 60604, or such other address as the Commission staff may provide.

(x) 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 shall be responsible for all tax compliance responsibilities associated with the Fair Fund, including but not limited to tax obligations resulting from the Fair Fund's status as a QSF and the Foreign Account Tax Compliance Act, and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent and shall not be paid out of the Fair Fund.

(xi) 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 instruction set forth in this Subsection C. 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 the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate any 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; 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, together with proof and supporting documentation of such payment in a form acceptable to the Commission staff, shall be sent to Anne C. McKinley, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 1540, Chicago, Illinois 60604, or such other address as the Commission staff may provide. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request, and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

(xii) The Commission staff may extend any of the procedural dates set forth in 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 Mesrirow shall comply with the undertaking enumerated in Section III, paragraph 24 above.

By the Commission.

Vanessa A. Countryman
Secretary