

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6069 / July 21, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20933

In the Matter of

PRIVATE ADVISOR GROUP, LLC

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 Private Advisor Group, LLC (“PAG” 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 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. Private Advisor Group, LLC, a registered investment adviser, invested certain clients' assets in higher-cost mutual fund share classes than were otherwise available while failing to disclose the conflicts of interest associated with those investment recommendations. Among other services, PAG offers a wrap program option to its advisory clients. Under its arrangement with clients in wrap accounts, PAG was responsible for paying client trading costs – including transaction fees on mutual fund investments – as part of the overall management fee clients paid to PAG. However, PAG deducted any transaction fees incurred in wrap accounts directly from its investment adviser representatives' ("IARs") compensation. Since at least July 2014, PAG and its IARs avoided incurring transaction fees for wrap client transactions by investing certain clients' assets in mutual fund share classes from a no-transaction fee ("NTF") program offered by its clearing firm ("Clearing Firm"). Some of the mutual fund share classes charged fees pursuant to Rule 12b-1 of the Investment Company Act of 1940 ("12b-1 fees"). Often, lower-cost share classes of the same fund were available to clients through the Clearing Firm for a transaction fee. Although PAG and its IARs did not receive any of these 12b-1 fees, by investing clients in NTF share classes, PAG and its IARs avoided paying transaction fees on client trades of these mutual funds.

2. PAG did not provide full and fair disclosure to clients concerning its use of mutual fund share classes offered through the NTF program ("NTF Shares") in wrap accounts and its associated conflicts of interest. Similarly, PAG breached its duty of care, including its duty to seek best execution, by causing advisory clients with wrap accounts to invest in fund share classes that charged 12b-1 fees when share classes of the same funds that presented a more favorable value were available at that time and by failing to undertake an analysis to determine whether the particular mutual fund share classes it selected were in the best interests of its advisory clients. As a result of this conduct, PAG violated Section 206(2) of the Advisers Act.

3. PAG 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 its mutual fund selection practices in its wrap program and the related disclosures of its associated conflicts of interest. As a result of this conduct, PAG violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

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.

Respondent

4. Respondent Private Advisor Group, LLC, incorporated in New Jersey and headquartered in Morristown, New Jersey, has been registered with the Commission as an investment adviser since January 2011. In its Form ADV filed on April 1, 2022, PAG reported that it had approximately \$34 billion in regulatory assets under management.

Mutual Fund Share Classes

5. Mutual funds typically offer investors 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 the share classes is the fee structure.

6. For example, some mutual fund share classes charge 12b-1 fees to cover certain costs of fund distribution and sometimes shareholder services. These recurring fees, which are included in a mutual fund’s total annual fund operating expenses, vary by share class, but typically range from 25 to 100 basis points. They are deducted from the mutual fund’s assets on an ongoing basis and paid to the fund’s distributor or principal underwriter, which generally remits the 12b-1 fees to the broker-dealer that distributed or sold the shares.

7. Many mutual funds also offer share classes that do not charge 12b-1 fees (*e.g.*, “Institutional Class” or “Class I” shares (collectively, “Class I shares”).² An investor who holds Class I shares of a mutual fund will usually pay lower total annual fund operating expenses over time – and thus will generally earn higher returns – than one who holds a share class of the same fund that charges 12b-1 fees. Therefore, if a mutual fund offers a Class I share, and an investor is eligible to own it, it is often, though not always, better for the investor to purchase or hold the Class I share.

PAG’s Wrap Program and Participation in Clearing Firm’s NTF Program

8. PAG sponsors and serves as the manager and investment adviser to the PAG Wrap Program (the “Wrap Program”). PAG charges a single or “wrap” fee for investment advice, brokerage services, and administrative services. This fee is calculated as a percentage of the wrap client’s assets under management. The majority of PAG’s regulatory assets under management are held in wrap accounts, and PAG recommends – and the Wrap Program client portfolios typically invest in – mutual funds.

9. Pursuant to Wrap Program client agreements, PAG is responsible for paying transaction fees for trades in wrap accounts. Similarly, PAG’s agreement with the Clearing Firm makes PAG responsible for paying transaction fees in the Wrap Program. However, since at least 2014, PAG has deducted any transaction fees incurred in wrap accounts directly from the IARs’

² Share classes that do not charge 12b-1 fees also go by a variety of other names in the mutual fund industry, such as “Class F2,” “Class Y” and “Class Z” shares. As used in this Order, the term “Class I shares” refers generically to share classes that do not charge 12b-1 fees.

compensation. This created a conflict of interest as PAG and the IARs could avoid incurring transaction fees by selecting NTF Shares.

10. Since at least 2011, PAG has used the Clearing Firm to provide clearing, custody, and other brokerage services for clients in the Wrap Program. PAG also invested clients' assets in mutual funds offered through the Clearing Firm's NTF program, which provides access to numerous no-load and load-waived mutual funds for which it did not charge a transaction fee. However, the Clearing Firm did charge a fee for mutual fund share classes that were not part of the NTF program ("TF Shares"). In many cases, the Clearing Firm offered both NTF Shares and TF Shares of the same mutual fund. The NTF Shares typically had higher expense ratios – frequently due to the inclusion of 12b-1 fees – than TF Shares, and were, therefore, more expensive for Wrap Program clients than TF Shares.

PAG's Undisclosed Conflict of Interest Concerning NTF Shares

11. Although neither PAG nor its IARs received the 12b-1 fees paid to the Clearing Firm, PAG and its IARs had a conflict of interest when selecting NTF Shares for Wrap Program clients because NTF Shares avoided transaction fees that PAG was responsible for paying and that ultimately would have reduced the IARs' compensation. PAG, through its IARs, selected NTF Shares for Wrap Program clients, including when lower-cost share classes of the exact same fund were available as TF Shares, thereby avoiding incurring transaction fees when buying and selling those NTF Shares.

12. PAG failed to disclose this practice or the associated conflict of interest to clients in its Form ADV Part 2A Appendix 1 ("Wrap Brochure") or otherwise. PAG's disclosures failed to disclose the conflicts of interest that arose from the decision to invest Wrap Program client assets in NTF Shares – where PAG, and ultimately its IARs, avoided paying transaction fees – over lower-cost TF Shares of the same mutual funds.

13. During the fall of 2016, PAG announced to its IARs that: (i) beginning on January 1, 2017, PAG would no longer permit mutual fund share classes with 12b-1 fees to be purchased in wrap accounts, and (ii) IARs would have until December 31, 2017 to convert existing wrap assets in mutual fund share classes with 12b-1 fees to a lower fee-paying share class without 12b-1 fees. PAG continued to discuss these changes with its IARs, and began to review client accounts and convert client mutual fund holdings to lower fee paying share classes. While these changes, when implemented, began to mitigate the conflict of interest, they did not eliminate it and the conflict was never disclosed to clients.

PAG's Duty of Care Failures

14. An investment adviser's fiduciary duty includes a duty of care. To fulfill this obligation, an adviser, among other things, must provide investment advice in the best interest of its client based on the client's objectives and seek best execution for client transactions.³

15. Since at least July 2014, by causing Wrap Program clients to invest in NTF Shares when share classes of the same funds that presented a more favorable value were available at the time of the transactions, PAG violated its duty to seek best execution for those transactions.

16. PAG also did not fulfill its duty of care obligations when it advised Wrap Program clients to invest in NTF Shares without undertaking any analysis to determine whether the NTF Shares were in the best interests of those clients, when comparing the NTF Shares to lower-cost share classes of the same funds.

PAG's Policies and Procedures Deficiencies

17. PAG 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 its mutual fund selection practices in its Wrap Program and the related disclosures of its associated conflicts of interest.

PAG's Remedial Efforts

18. In determining to accept the Offer, the Commission considered certain remedial acts undertaken by Respondent, beginning in 2017 and prior to the commencement of the Commission's investigation in this matter.

Violations

19. As a result of the conduct described above, Respondent willfully⁴ violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or

³ See, e.g., Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Rel. No. 23170 (Apr. 28, 1986).

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

indirectly, to “engage in any transaction, practice or course of business which operates as a fraud or deceit 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, 194-95 (1963)).

20. 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 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

21. Respondent has undertaken to:
- a. Within thirty (30) days of the entry of this Order, Respondent shall review and update all relevant disclosure documents concerning mutual fund share class selection and the use of NTF Shares in wrap accounts.
 - b. Within thirty (30) days of the entry of this Order, Respondent shall evaluate whether existing clients should be moved to a lower-cost share class or fund and move clients as necessary.
 - c. Within thirty (30) days of the entry of this Order, Respondent shall review and update its policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act in connection with mutual fund selection.
 - d. Within thirty (30) days of the entry of this Order, Respondent shall notify affected investors (*i.e.*, those former and current clients who were financially harmed by the practices detailed above (hereinafter, “Affected Advisory Clients”)) of the settlement terms of this Order by sending a copy of this Order to each Affected Advisory 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.
 - e. Within forty (40) days of the entry of this Order, Respondent shall certify, in writing, compliance with the undertakings set forth in paragraphs 21(a) through 21(d) above. The certification shall identify the undertaking(s), 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

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).

to provide such evidence. The certification and supporting material shall be submitted to Virginia Rosado Desilets, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5012, 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 the undertakings set forth in paragraphs 21(a) through 21(e) above. 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's Offer.

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

A. Respondent 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 is censured.

C. Respondent shall pay a civil penalty of \$5,800,000, consistent with the provisions of this Subsection C:

(i) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalties described above for distribution to Affected Advisory Clients. 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.

(ii) Within ten (10) days of the entry of this Order, Respondent shall deposit \$5,800,000 (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 the taxpayer identification number of the Fair Fund. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

(iii) 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.

(iv) Respondent shall distribute from the Fair Fund an amount based on the financial harm since July 2014 by the practices described above, 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. If there are insufficient funds to fully compensate Affected Advisory Clients for these amounts, the Fair Fund will be distributed to Affected Advisory clients in a *pro rata* fashion. If sufficient funds are available, reasonable interest will be paid on such amounts. The Calculation shall be subject to a *de minimis* threshold that is approved by the Commission staff. No portion of the Fair Fund shall be paid to any Affected Advisory Client account in which Respondent, or any of its current or former officers, directors, or IARs, has a financial interest.

(v) Respondent shall, within ninety (90) 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 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.

(vi) 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 Advisory Client. The Payment File should identify, at a minimum: (1) the name of each Affected Advisory Client; (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, if applicable. Respondent shall exclude from the payee file all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.

(vii) Respondent shall disburse all amounts payable to Affected Advisory Clients within ninety (90) days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in paragraph (xi) of this Subsection C. Respondent shall notify the Commission staff of the date[s] and the amounts paid in the distribution.

(viii) If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an Affected Advisory Client or a beneficial owner of an Affected Advisory Client's account 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 subject to Section 21F(g)(3) of the Exchange Act once the distribution of funds is complete and before the final accounting provided for in paragraph (x) 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 Private Advisor Group, LLC 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 Virginia Rosado Desilets, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5012.

(ix) 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 payments to Affected Advisory Clients, as required by applicable codes and regulations; and (3) obligations resulting from compliance with the Foreign Account Tax Compliance Act. 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 out of the Fair Fund.

(x) Within one hundred fifty (150) days after Respondent completes the disbursement of all amounts payable to Affected Advisory Clients, 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 the reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of the money transferred or credited to each Affected Advisory Client; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate a 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 Advisory Clients in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies Respondent and the file number of these proceedings to Virginia Rosado Desilets, Assistant Director, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5012. 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.

(xi) 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 shall comply with the undertakings enumerated in Section III, paragraphs 21(a) through 21(e) above.

By the Commission.

Vanessa A. Countryman
Secretary