UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6455 / October 10, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21780

In the Matter of **WILMINGTON TRUST INVESTMENT MANAGEMENT, 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 Wilmington Trust Investment Management, LLC ("Respondent" or "WTIM").

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 finds[1] that:

[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.

Summary

1. Wilmington Trust Investment Management, 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. Between at least February 2020 and August 2020 (the "Relevant Period"), among other services, WTIM offered a wrap program option to its advisory clients. Under its arrangement with clients in wrap accounts, WTIM was responsible for paying client trading costs – including transaction fees on mutual fund investments – as part of the overall management fee clients paid to WTIM. During the Relevant Period, WTIM avoided incurring transaction fees for wrap client transactions by investing certain clients' assets in higher-cost mutual fund share classes from a no-transaction fee ("NTF") program offered by its clearing firm ("Clearing Firm") instead of lower-cost share classes of the same funds that were available to clients for a transaction fee. WTIM also exchanged wrap clients' existing assets in certain mutual funds for other investments in the same sector that had higher expense ratios to avoid paying transaction fees.

2. WTIM 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, WTIM breached its duty of care, including its duty to seek best execution, by causing advisory clients with wrap accounts to invest in higher-cost mutual fund share classes when share classes of the same funds that presented a more favorable value for these clients under the particular circumstances in place at the time of the transactions were available to the clients, and by failing to undertake an analysis to determine whether particular investments it chose to exchange clients assets into were in the best interests of it advisory clients. As a result of this conduct, WTIM violated Section 206(2) of the Advisers Act.

3. WTIM also failed to 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, WTIM violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

Respondent

4. Respondent Wilmington Trust Investment Management, LLC, a Delaware limited liability company based in Wilmington, Delaware, has been registered with the Commission as an investment adviser since 1992. In its Form ADV dated March 30, 2022, WTIM reported that it had approximately $599 million in regulatory assets under management. As of June 2021, WTIM no longer sponsored or served as the manager and investment adviser to the Wrap Program, described below. Prior to that, WTIM reported regulatory assets under management in excess of $2 billion. WTIM is a wholly-owned subsidiary of M&T Bank Corporation, a financial holding company that trades on the New York Stock Exchange under the ticker symbol "MTB."

WTIM's Wrap Program and Participation in Clearing Firm's NTF Program

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. During the Relevant Period, WTIM sponsored and served as the manager and investment adviser to a wrap program (the "Wrap Program"). WTIM charged a single or "wrap" fee for investment advice, brokerage services, and administrative services. This fee was calculated as a percentage of the wrap client's assets under management. A significant portion of WTIM's regulatory assets under management were held in wrap accounts, and WTIM recommended – and the Wrap Program client portfolios typically invested in – mutual funds, among other investment products.

7. Pursuant to Wrap Program client agreements, WTIM was responsible for paying transaction fees for trades in wrap accounts. Similarly, WTIM ultimately was responsible for paying transaction fees in the Wrap Program as a result of WTIM's agreement with its affiliate and its affiliate's agreement with the Clearing Firm.

8. During the Relevant Period, WTIM used the Clearing Firm to provide clearing, custody, and other brokerage services for clients in the Wrap Program. WTIM invested clients' assets in mutual funds offered through the Clearing Firm's NTF program, which provides access to numerous 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 than TF Shares, and were, therefore, more expensive for Wrap Program clients than TF Shares.

WTIM's Disclosure Failures

9. WTIM had a conflict of interest when selecting NTF Shares for Wrap Program clients because selecting NTF Shares allowed WTIM to avoid transaction fees that it was responsible for paying. During the Relevant Period, WTIM 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. In addition, WTIM avoided paying transaction fees on client trades by exchanging Wrap Program clients' existing assets in certain mutual funds for other investments in the same sector that had higher expense ratios and were available in the NTF program.

10. WTIM failed to disclose this conflict of interest associated with share class selection to clients in its Form ADV Part 2A Appendix 1 or otherwise. WTIM's disclosures failed to disclose the conflicts of interest that arose from the decision to invest Wrap Program client assets in NTF Shares – where WTIM avoided paying transaction fees – over lower-cost TF Shares of the same mutual funds. Rather, WTIM's disclosures indicated that WTIM generally would select for advisory clients the most cost-effective mutual fund share class.

Duty of Care Failures

11. 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.[2]

12. During the Relevant Period, by causing Wrap Program clients to invest in NTF Shares 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, WTIM violated its duty to seek best execution for those transactions.

13. WTIM also did not fulfill its duty of care obligations when it exchanged Wrap Program clients' existing assets in certain mutual funds for other investments in the same sector without performing an analysis to determine whether those other investments were in the best interests of the clients.

Compliance Deficiencies

14. WTIM failed to implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with mutual fund selection practices in its Wrap Program and related disclosures of conflicts of interest.

15. During the Relevant Period, WTIM's written compliance policies and procedures generally required the selection of the most cost-effective mutual fund share class. WTIM's policies did not provide for any exceptions to allow for WTIM to avoid incurring transaction fees, and WTIM failed to implement a system reasonably designed to prevent such exceptions.

Client Reimbursement

16. After being contacted by the Commission staff, WTIM reimbursed, with interest, advisory clients financially harmed by the conduct described above.

Violations

17. As a result of the conduct described above, Respondent willfully[3] violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or

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[2] *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).

[3] "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

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)).

18. 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.

Disgorgement

19. The disgorgement and prejudgment interest ordered in paragraph IV.C is consistent with equitable principles, does not exceed Respondent's net profits from its violations, and returning the money to Respondent would be inconsistent with equitable principles. Therefore, in these circumstances, distributing disgorged funds to the U.S. Treasury is the most equitable alternative. The disgorgement and prejudgment interest ordered in paragraph IV.C shall be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Securities Exchange Act of 1934 ("Exchange Act").

WTIM's Remedial Efforts

20. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

Undertakings

21. Respondent has undertaken to:

a. 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.

b. Within forty (40) days of the entry of this Order, Respondent shall certify, in writing, compliance with the undertaking(s) set forth in paragraph 21(a) 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

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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).

make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Brendan P. McGlynn, Assistant Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103, 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.

c. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings set forth in paragraph 21(a) through (b) 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) and of the Advisers Act and Rule 206(4)-7 promulgated thereunder.

B. Respondent is censured.

C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $999,559, prejudgment interest of $77,588, and a civil money penalty in the amount of $250,000, for a total of $1,327,147 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment of disgorgement or prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment of the civil money penalty 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 Wilmington Trust Investment Management, 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 Brendan P. McGlynn, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103.

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.

E. Respondent shall comply with the undertakings enumerated in Section III, paragraphs 21(a) through (c) above.

By the Commission.

Vanessa A. Countryman
Secretary