

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 103809 / August 29, 2025

INVESTMENT ADVISERS ACT OF 1940
Release No. 6911 / August 29, 2025

ADMINISTRATIVE PROCEEDING
File No. 3-22517

In the Matter of

**Empower Advisory Group,
LLC**

and

**Empower Financial Services,
Inc.**

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 15(b) AND 21C
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 Sections 15(b) and 21C 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 Empower Advisory Group, LLC (“Empower Advisory”) and Empower Financial Services, Inc. (“Empower Financial Services”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-And-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 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 Respondents’ Offers, the Commission finds¹ that:

Summary

1. This matter concerns inadequate disclosure of conflicts of interest and misleading statements by Respondents in connection with advising participants in Empower Retirement, LLC’s (“Empower”) Government Markets segment about whether to enroll in Empower Advisory’s Managed Account service, a fee-based advisory service that provides retirement plan participants with ongoing discretionary portfolio management of their in-plan retirement accounts. Participants enrolled in the service pay Empower Advisory a quarterly asset-based fee as negotiated by their retirement plan sponsor.

2. From July 1, 2019, through December 31, 2022 (the “Relevant Period”), Respondents employed Retirement Plan Advisors, all of whom were both registered representatives associated with Empower Financial Services and investment adviser representatives with Empower Advisory. Retirement Plan Advisors were responsible for providing retirement and financial education and advice to retirement plan participants in Empower Retirement, LLC’s Government Markets segment (“Plan Participants”).

3. During the Relevant Period, Respondents utilized a compensation system that incentivized certain Government Markets Retirement Plan Advisors—with bonuses and merit raises—to enroll Plan Participants in the Managed Account service.

4. Empower Financial Services did not provide full and fair written disclosure of the capacity in which Retirement Plan Advisors were acting when providing advice or a recommendation that a Plan Participant enroll in the Managed Account service. Rather than specifically disclosing to Plan Participants whether they were acting in the capacity of either a registered representative or an investment adviser representative, Retirement Plan Advisors disclosed to Plan Participants that they were dually licensed and placed the burden on Plan Participants to clarify the capacity. Additionally, Respondents did not adequately disclose the conflicts of interest that the incentive compensation system presented for certain Retirement Plan Advisors. This omission rendered misleading certain Retirement Plan Advisor statements to Plan Participants regarding the Retirement Plan Advisors’ role in discussing or recommending enrollment in the Managed Account service. This included statements made by certain Retirement Plan Advisors that they were salaried and/or noncommissioned. Some Retirement Plan Advisors also told Plan Participants that they were acting in a fiduciary capacity and that they were acting in the Plan Participant’s best interest. These statements, which were in

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

connection with the purchase or sales of securities, assured Plan Participants that Retirement Plan Advisors were providing disinterested advice when they enrolled their in-plan retirement accounts in the Managed Account service, but did not disclose their financial incentives to do so.

5. Empower Financial Services did not establish, maintain, and enforce written policies and procedures reasonably designed to identify and address conflicts of interest in connection with recommendations to enroll in the Managed Account service.

6. Based on the foregoing and as detailed below, Empower Advisory violated Section 206(2) of the Advisers Act and Empower Financial Services failed to comply with the Disclosure and Conflict of Interest Obligations of Regulation Best Interest (“Reg BI”), thereby violating Reg BI’s General Obligation (Exchange Act Rule 15c-1(a)(1)).

Respondents

7. **Empower Advisory** is a registered investment adviser (SEC# 801-58105) with its principal place of business in Greenwood Village, Colorado. Empower Advisory has been registered with the Commission as an investment adviser since November 2000 and, on its Form ADV dated May 14, 2025, reported more than \$159 billion in regulatory assets under management. Empower Advisory operated as Advised Assets Group, LLC until it changed its name to Empower Advisory Group, LLC on August 2, 2022.

8. **Empower Financial Services** is a registered broker-dealer (SEC# 8-33854) with its principal place of business in Greenwood Village, Colorado. Empower Financial Services has been registered with the Commission since April 1985. Empower Financial Services is an affiliate of Empower Advisory and all transactions that occur as a result of participation in the Managed Account service are executed by Empower Financial Services. Empower Financial Services operated as GWFS Equities, Inc. until it changed its name to Empower Financial Services, Inc. on August 2, 2022.

Related Entity

9. **Empower**, whose principal place of business is in Greenwood Village, Colorado, was organized in Colorado on May 17, 1993. Empower provides recordkeeping and administrative services to Plan Participants’ retirement plans under an agreement with the plan sponsor and keeps the records for those plans and their participant accounts. Empower Advisory and Empower Financial Services are affiliated companies of Empower.

Background

10. Empower describes itself as the nation’s second largest retirement plan recordkeeper. As of October 2024, Empower served more than 18 million individuals and over 82,000 different retirement plans. This matter focuses exclusively on Empower Advisory’s and Empower Financial Services’ activities with respect to Plan Participants in Empower’s Government Markets segment, for whom Empower provided recordkeeping services and who

were advised to enroll in Empower Advisory's Managed Account service during the Relevant Period. Empower describes its Government Markets segment as providing retirement plan services to individuals employed by a state government or political subdivision, or by agencies or instrumentalities thereof.

11. Certain of the personnel who service the Government Markets Plan Participants are known as Retirement Plan Advisors. Each Retirement Plan Advisor is an investment adviser representative with Empower Advisory and a registered representative associated with Empower Financial Services. Retirement Plan Advisors are responsible for, among other things, providing one-on-one education to all Plan Participants and personalized retirement advice on investing, savings strategies, and distributions. This also includes discussing and at times advising Plan Participants about enrolling their in-plan retirement accounts in Empower Advisory's Managed Account service.

12. The Managed Account service is only available to Plan Participants if their plan sponsor has specifically contracted with Empower Advisory to provide the Managed Account service. There are multiple ways in which Plan Participants may become enrolled in the Managed Account service. Using the online account service tools provided by Empower, a Plan Participant may elect to enroll in the Managed Account service without having contact with a Retirement Plan Advisor. Or, the Plan Participant may choose to enroll in the Managed Account service following an interaction with a Retirement Plan Advisor, which would typically be through a Retirement Readiness Review. A Retirement Readiness Review is a meeting between the Retirement Plan Advisor and Plan Participant during which the Retirement Plan Advisor collects detailed information about the Plan Participant's existing accounts, retirement income needs, and unique circumstances to provide retirement education and customized investment advice and recommendations.

Retirement Plan Advisors' Performance Goals and Compensation

13. Prior to the beginning of each year of the Relevant Period, Government Markets Retirement Plan Advisors received a document that outlined the yearly performance goals that would impact their annual compensation. For certain Retirement Plan Advisors, one of their yearly performance goals during the Relevant Period was the amount of assets that they were responsible for enrolling in Empower Advisory's Managed Account service ("Managed Account AUM Goal").

14. For those certain Retirement Plan Advisors who received an individual Managed Account AUM Goal, their respective goals differed based on the territories and/or plans they serviced. According to the annual goals documents, each of the Retirement Plan Advisors' performance goals was weighted, and during the Relevant Period, the weight of the Managed Account AUM Goal for the relevant Retirement Plan Advisors ranged from 25% to 35% of their total annual performance goal set.

15. A Retirement Plan Advisor's performance on their annual performance goals, which was tracked throughout the year, directly impacted their year-end rating, which in turn

impacted their bonus and merit increase, if any, for the year. At the end of each year, the manager for the Retirement Plan Advisor evaluated the Retirement Plan Advisor's performance on the annual performance goals along with other objective standards and subjective qualities and assigned a year-end performance rating. The manager then used that performance rating to recommend an appropriate bonus and merit raise, if any, for the Retirement Plan Advisor, with higher year-end ratings corresponding with higher bonuses and merit raises. The manager's recommendations for their Retirement Plan Advisors were then considered by Government Markets leadership as part of an overall annual calibration process for all Retirement Plan Advisors.

16. During the Relevant Period, the average Retirement Plan Advisor salary was approximately \$60,000 – \$90,000, and the total target bonus amount for Retirement Plan Advisors was generally set at \$11,500, with most Retirement Plan Advisors receiving the target bonus amount or slightly more or less than the target amount.

17. Under this compensation structure, the Retirement Plan Advisors who performed well on their annual performance goals, including the Managed Account AUM Goal, where applicable, typically received higher year-end ratings and were therefore rewarded with larger bonuses and merit raises. This compensation structure incentivized Retirement Plan Advisors to enroll Plan Participants in the Managed Account service.

Retirement Readiness Reviews

18. One of the primary responsibilities of a Government Markets Retirement Plan Advisor was to conduct Retirement Readiness Reviews with Plan Participants. During the Relevant Period, each Retirement Plan Advisor had a performance goal for the number of Retirement Readiness Reviews they were expected to conduct each year. The weight assigned to the Retirement Readiness Review performance goal ranged from 25% to 30% of their total annual performance goal set.

19. Near the outset of the Retirement Readiness Review, Respondents required Retirement Plan Advisors to provide the following verbal disclosure to the Plan Participants:

During our call I may be acting in one or both of the following roles: I may act as a Registered Representative of [Empower Financial Services], a registered broker-dealer. I may also act in the capacity of an Investment Adviser Representative of [Empower Advisory], which is a registered investment adviser firm. If at any time you would like to know in which role I am acting, or if you would like an explanation of the different roles, please ask me.

20. The Retirement Plan Advisor then asked questions about the Plan Participant's investment profile and retirement goals and entered the answers into the Retirement Readiness Review tool. After entering the Plan Participant's information, the tool provided a customized output depicting the Plan Participant's current projected retirement income versus their projected retirement income if they were to make changes to their investment strategy/asset allocation.

21. At the conclusion of the Retirement Readiness Review, the Retirement Plan Advisor was responsible for advising and educating the Plan Participant about the various ways they could implement the recommended investment strategy/asset allocation generated during the Retirement Readiness Review, which included: (1) self-managing their retirement account, (2) investing in a target date fund or using the self-service online advice tool, or (3) enrolling in Empower Advisory's Managed Account service, which charges a quarterly advisory fee.

22. During Retirement Readiness Reviews, certain Retirement Plan Advisors routinely spent a significant amount of time discussing the benefits of the Managed Account service while only focusing on the drawbacks of self-managing or investing in a target date fund. In other instances, certain Retirement Plan Advisors discussed only the Managed Account service with Plan Participants and did not explain that alternative options existed. And in some instances, Retirement Plan Advisors explicitly recommended the Managed Account service as the best option for Plan Participants to achieve their desired retirement income goals. For those Retirement Plan Advisors who had a Managed Account AUM Goal, steering Plan Participants to enroll in the Managed Account service gave those Retirement Plan Advisors the opportunity to receive higher bonuses and merit awards.

Retirement Plan Advisors' Statements to Plan Participants

23. During the Relevant Period, Respondents required Retirement Plan Advisors to inform Plan Participants they were dually licensed and may be acting in either a brokerage or advisory capacity during Retirement Readiness Reviews. This dual disclosure, quoted above, placed the burden on Plan Participants to inquire of the Retirement Plan Advisor in which capacity they were acting when discussing, advising, or recommending Plan Participants enroll in the Managed Account service. The disclosure was also made verbally and not in writing as required under Reg BI. *See* Exchange Act Rule 15l-1(a)(2)(i).

24. Additionally, during Retirement Readiness Reviews, certain Retirement Plan Advisors made statements to Plan Participants concerning compensation that were rendered misleading because the Retirement Plan Advisors did not disclose that they had a financial incentive to enroll the Plan Participant in the Managed Account service. For example, throughout the Retirement Readiness Reviews, certain Retirement Plan Advisors routinely told Plan Participants they were salaried or noncommissioned, acting in a fiduciary capacity, and that they were acting in the Plan Participant's best interest. In more egregious cases, Retirement Plan Advisors even told Plan Participants that their enrollment in the Managed Account service would not affect the Retirement Plan Advisor's compensation and that no conflict of interest existed. These statements assured Plan Participants that Retirement Plan Advisors were providing disinterested advice that was in the Plan Participants' best interest when Retirement Plan Advisors advised Plan Participants to enroll in the Managed Account service. Plan Participants were not told that certain Retirement Plan Advisors were financially incentivized to enroll Plan Participants in the service, and neither Empower Advisory nor Empower Financial Services provided Plan Participants with full and fair disclosure of such conflicts of interest.

Respondents' Written Disclosures

Empower Advisory's Disclosures

25. Empower Advisory's written disclosures did not adequately inform Plan Participants that certain Retirement Plan Advisors had a financial incentive to enroll them in the Managed Account service. Therefore, the disclosures did not apprise Plan Participants of the full nature and extent of the conflict of interest.

26. During the Relevant Period, Empower Advisory had two sets of disclosures related to conflict of interest: (1) a Form ADV Part 2A Brochure for the Managed Account service ("MA Service Brochure") and (2) a Form CRS Customer Relationship Summary ("Form CRS"), which was available beginning in June 2020.

27. In 2019, Empower Advisory's MA Service Brochure read: "Some [Empower Advisory] employees ***will have an opportunity to earn bonus compensation*** [emphasis added], in addition to their salary, for communication, education and/or assisting participants to enroll in [Empower Advisory's] Services."

28. This disclosure was inadequate because it did not fully disclose the conflict of interest to Plan Participants — that certain Retirement Plan Advisors were incentivized, with bonus compensation and merit raises, to enroll Plan Participants in the Managed Account service over alternative options that were less remunerative for the Retirement Plan Advisors and less expensive for Plan Participants.

29. In 2020, Empower Advisory slightly revised the MA Service Brochure to read: "[Empower Advisory] representatives ***may be indirectly compensated*** [emphasis added] through bonus compensation, in addition to their salary, for communication, education and/or assisting participants to enroll in [Empower Advisory's] Services." Additionally, in June 2020, Empower Advisory added a Form CRS, which included the same language as the 2019 MA Service Brochure.

30. Empower Advisory's 2020 disclosures remained inadequate and misleading for multiple reasons. First, Empower Advisory still did not disclose the full nature of the conflict of interest to its Plan Participants. Second, the addition of the "may be indirectly compensated" language minimized the connection between compensation and enrollment in Empower Advisory's Managed Account service. In reality, certain Retirement Plan Advisors' compensation was impacted by their enrollment of Plan Participants in the service. Finally, Empower Advisory used the term "may," rather than disclosing that in many instances certain Retirement Plan Advisors *did* receive incentive bonus compensation that resulted in the conflict of interest.

31. In 2021, Empower Advisory updated its MA Service Brochure to include additional disclosures regarding Retirement Plan Advisors' incentive compensation. The updated disclosures stated:

The incentive compensation an [Empower Advisory] representative receives depends on position type, but generally is calculated based on . . . the achievement of individual performance goals that consider factors unrelated to an account holder's adoption of investment products or services offered through Empower Retirement.

[Empower Advisory] representatives' individual performance goals and their related incentive compensation is based on a combination of factors including the number and quality of customer engagements during the measurement period and the amount of customer assets retained as result of the engagements. The rate of incentive compensation considers the total amount of retained or accumulated assets, compared with the monthly asset goal, as determined by [Empower Advisory] on a periodic basis. The asset goal is generally set on an annual basis and may differ by product or account type. Additional factors include certain qualitative factors, such as leadership, teamwork, client experience, quality and efficiency of client interactions, and adherence to corporate policies and regulatory standards.

32. After 2021, Empower Advisory did not make any additional substantive changes to the conflict of interest disclosure in its MA Service Brochure. Additionally, after 2021, the only substantive change to Empower Advisory's Form CRS was in March 2022 when it added a link to its "Empower Representative Compensation" page on its website.

33. From 2021 through the end of 2022, Empower Advisory's disclosures remained inadequate and misleading because although Empower Advisory provided further details about the incentive compensation, it still failed to inform Plan Participants of the full nature of the conflict of interest. At no time did Empower Advisory disclose to Plan Participants that Retirement Plan Advisors were incentivized to enroll them in the Managed Account service over alternative options that were less remunerative for Retirement Plan Advisors and less expensive for the Plan Participants.

34. Additionally, Empower Advisory's representation that the incentive compensation was calculated based on performance goals that considered "factors unrelated to an account holder's adoption of . . . services offered through Empower" was misleading. Although Empower Advisory considered other factors in its determination of compensation, it failed to disclose to Plan Participants that for certain Retirement Plan Advisors, the amount of assets a Retirement Plan Advisor enrolled in the Managed Account service was a factor in calculating their compensation. Empower Advisory's references to an "asset goal" and "retained or accumulated assets" also did not fairly apprise Plan Participants of the existence of a Managed Account AUM Goal or the impact of that goal on Retirement Plan Advisor compensation.

Empower Financial Services' Disclosures

35. Empower Financial Services' written disclosures also did not provide full and fair disclosure of the material facts relating to the conflict of interest to Plan Participants because the

disclosures did not explain that certain Retirement Plan Advisors were financially incentivized to enroll Plan Participants in the Managed Account service.

36. During the Relevant Period, Empower Financial Services had two sets of disclosures related to conflicts of interest: (1) a Regulation Best Interest Disclosure (“Reg BI Disclosure”), which was available beginning in May 2020 and (2) a Form CRS, which was available beginning in June 2020.

37. Beginning in May 2020, Empower Financial Services’ Reg BI Disclosure included the following language:

Our Representatives are generally paid a salary and a variable bonus. The bonus is based on a combination of the performance of Empower Retirement and its affiliates and the Representative’s individual performance. In assessing individual performance, [Empower] may consider quantitative metrics such as the Representative’s success in gathering, retaining and consolidating client assets. Asset goals are generally set on an annual basis and may differ by product or account type. Additional factors include certain qualitative factors, such as leadership, teamwork, client experience, call quality, call efficiency, and adherence to Empower Retirement’s policies and regulatory standards.

38. Additionally, beginning in June 2020, in its Form CRS, Empower Financial Services disclosed:

Some of our representatives who interact with investors may receive incentive compensation [for] recommending products or services that earn us additional compensation, such as proprietary products, products that make third-party payments or products that pay revenue sharing.

39. Empower Financial Services’ Reg BI Disclosure and Form CRS did not satisfy Reg BI’s Disclosure Obligation because they did not provide full and fair disclosure of the conflict of interest presented by certain Retirement Plan Advisors who had a Managed Account AUM Goal and the impact that goal had on their compensation. Empower Financial Services’ disclosure that it “may consider” a Retirement Plan Advisor’s success in “gathering, retaining and consolidating client assets” when determining the Retirement Plan Advisor’s variable bonus was misleading for two reasons. First, the use of “may consider” was misleading because Empower Financial Services *did* take into consideration a Retirement Plan Advisor’s performance on the Managed Account AUM Goal when calculating a bonus and merit raise. Second, the references to gathering client assets and asset goals did not fully and fairly inform Plan Participants of the Managed Account AUM Goal or the conflict of interest resulting from the impact that goal had on Retirement Plan Advisors’ compensation.

Website Disclosures

40. In June 2020, as Reg BI's June 30, 2020 compliance date approached, Empower added a link to its website's homepage entitled "Empower Representative Compensation." The section entitled "General Compensation Practices" included the following language about compensation for Empower Advisory's and Empower Financial Services' personnel:

Empower employees who interact with individual investors receive a base salary . . . Most of these employees are also generally eligible for bonus compensation, usually paid annually. Bonus compensation depends on a number of factors including, but not limited to, Empower's profitability and attainment of the employee's performance goals. Goals vary by employee role and individual employee, and are set based on factors including number of engagements, engagement quality, investor satisfaction, leadership, teamwork, and adherence to Empower policies and regulatory standards. Goals do not consider the adoption of Empower or its affiliates' products or services by an individual investor, unless described below.

41. Below that, the section titled "Employee Categories" described "Advisers" (*i.e.*, Retirement Plan Advisors) as follows:

These employees meet in-person, online or over the phone with retirement plan investors and perform more extensive financial counseling and advisory services than the educational consulting provided from field Education Consultants. Advisers receive a salary and are eligible for additional compensation described in the "General Compensation Practices" section. Advisers are eligible to earn bonus compensation based on the actions that investors take after engagement, including an investor's acceptance of a recommendation from the Adviser, retirement plan enrollments, deferral increases, the diversification of an investor's investment strategy in a product neutral manner, and actions to address an investor's retirement readiness. Advisers generally have an annual goal for actions taken by the investors with whom they interact.

42. These additional website disclosures were also inadequate and misleading. The website's references that bonus compensation was based on "actions that investors take after engagement" and that Retirement Plan Advisors had "an annual goal for actions taken by the investors" did not fully and fairly disclose all material facts relating to the conflict of interest. The website disclosures did not adequately disclose that certain Retirement Plan Advisors had a Managed Account AUM Goal or that the goal incentivized them, with compensation, to enroll Plan Participants in the Managed Account service.

Empower Financial Services' Conflicts of Interest Policy

43. Empower Financial Services did not establish, maintain, and enforce written policies and procedures reasonably designed to identify and address the conflict of interest

related to the incentive compensation system, as required by Reg BI's Conflict of Interest Obligation. In particular, Empower Financial Services did not establish, maintain and enforce written policies and procedures reasonably designed to identify and mitigate (i.e., modify practices to reduce) any conflicts of interest associated with recommendations to retail customers that create an incentive for its registered representatives to place the interest of the broker-dealer or the registered representative ahead of the interest of the retail customer.

44. During the Relevant Period, Empower Financial Services' Conflicts of Interest Policy explained that "a conflict of interest may exist any time a person or a firm has an incentive to serve one interest at the expense of another interest or obligation." The policy further stated, "Financial compensation has the potential to be a major source for conflicts of interest. The rewards and incentives that firms offer associated persons may influence their behavior that, in turn, can be in conflict with a customer's best interests."

45. The Conflicts of Interest Policy further provided:

The Firm discloses its material [conflict of interest] to its retail customers via the [Reg. BI] Disclosures at the time any recommendation is made. The [Reg. BI] Disclosures includes material conflicts of interest associated with the Firm and its affiliates, including: investment advice and management services, increased fee income, proprietary investment funds and insurance products, third-party payments, and representative compensation.

46. Empower Financial Services' Conflicts of Interest Policy required conflicts of interest to be reviewed twice a year by a Conflicts Committee, which would then determine whether revised disclosures, mitigation, or elimination of such conflicts would be necessary. The policy further stated that both management and personnel were responsible for reporting potential conflicts of interest to the compliance department, and that supervisors were expected to conduct periodic training regarding identification and reporting of potential conflicts of interest.

47. Empower Financial Services' written policies and procedures were not reasonably designed because, despite the periodic review of conflicts of interest, Empower Financial Services did not take steps to mitigate the conflicts of interest related to certain Retirement Plan Advisors' receipt of incentive compensation in connection with their recommendations to Plan Participants to enroll their in-plan retirement accounts in the Managed Account service.

Violations

48. As a result of the conduct described above, Empower Advisory willfully² violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from, directly or

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." See *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)).

indirectly, engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

49. A violation of Section 206(2) of the Advisers Act may rest on a finding of simple negligence; scienter is not required. *SEC v. Steadman*, 967 F.2d 636, 643 n. 5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 373 U.S. 180, 195 (1963)); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453–54 (3d Cir. 1997).

50. As a result of the conduct described above, Empower Financial Services willfully violated Rule 15l-1(a)(1) under the Exchange Act.

Respondents' Remediation and Cooperation

51. In determining to accept the Offers, the Commission considered the cooperation provided by Respondents during the Commission's investigation. Respondents curated and provided key documents to the Staff, provided multiple voluntary presentations on topics of significant interest to the Staff, and performed extensive data collection, analysis, and review of Managed Account enrollment and related fee activity, which was provided to the Staff. The cooperation substantially advanced the quality and efficiency of the Staff's investigation and conserved Commission resources.

52. The Commission also considered the remedial acts undertaken by Empower and Respondents. These remedial acts include: removal of the Managed Account AUM Goal from all Retirement Plan Advisor goal sets; the hiring of new compliance professionals at senior levels with extensive broker-dealer and investment adviser experience; engagement of a third-party advisory services and consulting firm to assess the design of plan participant-facing activities and related supervisory and compliance controls and practices; an overhaul of the policies and procedures and compliance training relating to the Retirement Readiness Review process; the implementation of an algorithmic decision tool to assist Plan Participants in assessing the value of the Managed Account service offering; and requiring Retirement Plan Advisors to affirmatively disclose when they are acting as a representative of Empower Financial Services, of Empower Advisory, and when they may change roles during a Retirement Readiness Review.

Disgorgement and Civil Penalties

53. The disgorgement and prejudgment interest ordered in paragraph IV.D. is consistent with equitable principles and does not exceed Empower Advisory'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, and any amounts returned to the Commission in the future that

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).

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

IV.

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

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act and Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Empower Advisory cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

B. Empower Financial Services cease and desist from committing or causing any violations and any future violations of Rule 15c-1(a)(1) promulgated under the Exchange Act.

C. Respondents are censured.

D. Respondents shall pay disgorgement, prejudgment interest, and civil monetary penalties totaling \$5,989,969.94 as follows:

(i) Respondent Empower Advisory shall pay disgorgement of \$4,063,569.80, prejudgment interest of \$426,400.14, and a civil monetary penalty in the amount of \$750,000, consistent with the provisions of this Subsection D.

(ii) Respondent Empower Financial Services shall pay a civil monetary penalty in the amount of \$750,000, consistent with the provisions of this Subsection D.

(iii) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to affected Plan Participants. 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 penalties, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of civil penalties in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 penalties imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents 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 issuance of this Order, Respondents shall deposit \$5,989,969.94 (the “Fair Fund”) into an escrow account at a financial institution not unacceptable to the Commission staff and Respondents 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 SEC Rule of Practice 600 [17 C.F.R. § 201.600] and/or 31 U.S.C. §3717.

(v) Respondents shall be responsible for administering the Fair Fund and may hire a professional at their own cost to assist in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by Respondents and shall not be paid out of the Fair Fund.

(vi) Respondents shall distribute from the Fair Fund an amount representing a portion of the advisory fees paid to Empower Advisory by Government Markets Plan Participants, who enrolled in the Managed Account service during the Relevant Period without adequate disclosure of the conflict of interest presented by the incentive compensation system, plus reasonable interest from any remaining funds, pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection D. The Calculation shall be subject to a de minimis threshold. No portion of the Fair Fund shall be paid to any affected Plan Participant account in which Respondents, or any of their current or former officers or directors, has a financial interest.

(vii) Respondents shall, within ninety (90) days from the date 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, Respondents shall make themselves available, and shall require any third-parties or professionals retained by Respondents to assist in formulating the methodology for their 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. Respondents 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 Respondents’ proposed Calculation or any of their information or supporting documentation, Respondents 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 Respondents of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection D.

(viii) Respondents 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 Plan Participant; (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. Respondents shall exclude from the payee file all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.

(ix) Respondents shall disburse all amounts payable to affected Plan Participants 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 D. Respondents shall notify the Commission staff of the date[s] and the amount paid in the initial distribution.

(x) If Respondents are unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an affected Plan Participant or a beneficial owner of an affected Plan Participant or any other factors beyond Respondents' control, Respondents 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 xiii of this Subsection D is submitted to the Commission staff. Payment must be made in one of the following ways:

- a. Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- b. Respondents 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. Respondents 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 Empower Advisory and Empower Financial Services as Respondents 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 Natalie M. Brunson, Division of Enforcement, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E. Suite 900, Atlanta, GA 30326-1382.

(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. Respondents agree 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 applicable codes and regulations; and (3) obligations resulting from compliance with the Foreign Account Tax Compliance Act (FATCA). Respondents may retain any professional services necessary. The costs and expenses of tax compliance, including any such professional services, shall be borne by Respondents and shall not be paid out of the Fair Fund.

(xii) Within one hundred fifty (150) days after Respondents complete the disbursement of all amounts payable to affected investors, Respondents shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection D. Respondents 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; (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 Respondents have made payments from the Fair Fund to affected Plan Participants in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies Respondents and the file number of these proceedings to Natalie M. Brunson, Assistant Regional Director, Division of Enforcement, Atlanta Regional Office, Securities and Exchange Commission, 950 East Paces Ferry Road, N.E. Suite 900, Atlanta, GA 30326-1382. Respondents 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.

(xiii) The Commission staff may extend any of the procedural dates set forth in this Subsection D 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.

By the Commission.

Vanessa A. Countryman
Secretary