

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83934 / August 24, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 4995 / August 24, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18673

In the Matter of

FIRST WESTERN ADVISORS,

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTIONS 203(e) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against First Western Advisors (“FWA” 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 purposes of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(k) of the Investment Advisers Act, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise from a series of failures by FWA, a registered investment adviser and broker-dealer, in connection with compensation that FWA, in its capacity as a broker-dealer, received based on client investments in certain mutual fund share classes. From at least March 20, 2012, to December 31, 2016 (the "Relevant Period"), FWA disclosed to its advisory clients that it did not receive compensation in any form from the sale of mutual funds when, in fact, FWA, in its capacity as a broker-dealer, did. During the Relevant Period, FWA received \$139,698.50 in 12b-1 fees based on its clients' mutual fund investments. In addition, during the Relevant Period, FWA's investment adviser representatives ("IARs") invested certain advisory clients in mutual fund share classes that charged 12b-1 fees when those clients were eligible to invest in lower-cost share classes of the same funds. FWA failed to disclose that it had a conflict of interest as a result of the additional compensation it received for those share class selection practices. The practice of investing advisory clients in mutual fund share classes that charged 12b-1 fees rather than lower-cost share classes of the same funds was also inconsistent with FWA's duty to seek best execution for those transactions. Finally, during the Relevant Period, FWA failed to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund share class selection practices. As a result of the conduct described above, FWA willfully² violated Sections 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

Respondent

2. **First Western Advisors**, a Utah corporation based in Holladay, Utah, has been registered with the Commission as an investment adviser and broker-dealer since 2000 and 1983, respectively. FWA provides advisory services through its IARs, most of whom are also registered representatives of FWA's broker-dealer operations. In its Form ADV filed March 30, 2018, FWA reported regulatory assets under management of approximately \$284 million, all of which is associated with discretionary client accounts.

Background

3. During the Relevant Period, FWA offered various asset management services to its advisory clients ("Advisory Clients") through an advisory program called Private Client Accounts (the "PCA"). The PCA enabled FWA's IARs to invest client assets in various mutual

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.

² A willful violation of the securities laws means merely "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." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

funds across numerous fund complexes. FWA also acted as the introducing broker-dealer on all PCA securities transactions.

FWA's Untrue Disclosures Relating to Its Receipt of Compensation from Fund Companies

4. During the Relevant Period, FWA disclosed in its Forms ADV that FWA “does not receive compensation, in any form from fund companies” and that it “does not accept compensation for the sale of securities or other investment products . . . includ[ing] . . . from the sale of mutual funds.” These disclosures were untrue, however, because FWA, in its capacity as a broker-dealer, did receive compensation in the form of 12b-1 fees when FWA’s IARs invested Advisory Client assets in certain mutual fund share classes that charged 12b-1 fees.

5. Furthermore, as an investment adviser, FWA was obligated to fully disclose all material facts to its Advisory Clients, including any conflicts of interest between itself and its Advisory Clients that could affect the advisory relationship. To meet this disclosure obligation, FWA was required to provide its Advisory Clients with sufficient information so that they could understand the conflicts of interest that FWA had, enabling clients to give informed consent to such conflicts or practices or reject them.

6. During the Relevant Period, however, FWA failed to disclose in its Forms ADV or otherwise that it had a conflict of interest as a result of the additional compensation that it received for investing Advisory Clients in mutual funds that paid 12b-1 fees.

FWA's Mutual Fund Share Class Selection Practices and Related Disclosure Failures

7. 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 their fee structure.

8. For example, “Class A” shares³ generally are sold with sales charges or “loads” based on the dollar amount of the investment. The sales charges are generally waived for Class A shares purchased in wrap fee or fee-based advisory accounts. Class A shares, including “load-waived” Class A shares purchased in advisory accounts, charge 12b-1 fees to cover fund distribution and shareholder services. These recurring fees are deducted from the mutual fund assets on an ongoing basis and paid to the fund’s distributor or principal underwriter, which, in turn, generally remits the fees to the broker-dealer that distributed or sold the shares. The 12b-1 fee for this type of share class is typically 25 basis points per year.

9. Many mutual funds also offer other share classes that do not charge 12b-1 fees (e.g., “Institutional class” or “Class I” shares).⁴ Some of these share classes are available only to

³ Share classes sold with sales charges or “loads” go by a variety of names in the mutual fund industry. As used in this Order, the term “Class A shares” refers generically to share classes that charge 12b-1 fees.

⁴ Share classes that do not charge 12b-1 fees also go by a variety of names in the mutual fund industry. As used in this Order, the term “Class I shares” refers generically to share classes that do not charge 12b-1 fees.

investors who meet certain criteria (*e.g.*, minimum investment amount or eligible investment program), which vary from fund to fund. For many of the Class I shares that have higher initial investment minimums as compared to Class A shares, the funds waive or substantially reduce the thresholds for client purchases, particularly in advisory accounts such as those in the PCA offered by FWA. A client who holds Class I shares of a mutual fund will pay lower fees over time – and earn higher returns – than a client who holds Class A shares of the same fund. Therefore, if a mutual fund offers a Class I share, and a client is eligible to own it, it is almost invariably in the client’s best interest to purchase or hold the Class I share.

10. During the Relevant Period, FWA’s IARs purchased, recommended, or held, on behalf of some of its Advisory Clients, mutual fund share classes that charged 12b-1 fees (Class A shares) when those clients were also eligible to invest in cheaper share classes of those same funds (Class I shares). As a result, FWA received 12b-1 fees on those investments. In addition to its untrue statement regarding the receipt of 12b-1 fees generally discussed above, FWA failed to disclose in its Forms ADV or otherwise that it had a conflict of interest as a result of the additional compensation that it received for investing Advisory Clients in mutual funds that paid 12b-1 fees when those clients were eligible for cheaper share classes of the same funds.

FWA’s Violation of Duty to Seek Best Execution

11. Section 206 of the Advisers Act imposes on investment advisers a fiduciary duty to act for the benefit of their clients. That duty includes, among other things, an obligation to seek best execution for client transactions. *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) (stating that money managers, as fiduciaries to their clients, have an obligation to “execute securities transactions for clients in such a manner that the client’s total cost or proceeds in each transaction is the most favorable under the circumstances”).

12. By causing certain Advisory Clients to invest in fund share classes that charged 12b-1 fees when such clients were also eligible for cheaper share classes, FWA violated its duty to seek best execution for those transactions.

FWA’s Compliance Deficiencies

13. During the Relevant Period, FWA’s written policies and procedures provided that its IARs must explain to Advisory Clients the costs applicable to different share classes of the same mutual fund and select, or advise the clients to select, the share class with the lowest sales charge based on how long the clients expected to hold the shares. However, on certain occasions, FWA failed to implement these policies and procedures.

Violations

14. Section 206(2) of the Advisers Act makes it unlawful for an adviser, directly or indirectly, to engage in any transaction, practice, or course of business that 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 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)). As a result of the conduct described above, FWA willfully violated Section 206(2).

15. Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder require a registered investment adviser to, among other things, “[a]dopt and implement written policies and procedures reasonably designed to prevent violation” of the Advisers Act and its rules. As a result of the conduct described above, FWA willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

16. Section 207 of the Advisers Act makes it “unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein.” As a result of the conduct described above, FWA willfully violated Section 207 of the Advisers Act.

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

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondent is censured.

C. Respondent shall pay disgorgement and prejudgment interest, totaling \$152,767.12 to compensate past and present advisory clients that were affected by the conduct detailed in this Order, as follows:

(i) Respondent shall pay disgorgement of \$139,698.50 and prejudgment interest of \$13,068.62, consistent with the provisions of this Subsection C.

(ii) Within 10 days of the issuance of this Order, Respondent shall deposit \$152,767.12 (the “Distribution Fund”) into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 -17 C.F.R. § 201.600.

(iii) Respondent shall pay from the Distribution Fund an amount representing the compensation in the form of 12b-1 fees received by FWA from fund companies to

the applicable past and present Advisory Clients who were charged such fees on their mutual fund investments for the period March 20, 2012, through December 31, 2016. No portion of the Distribution Fund shall be paid to any affected client account in which Respondent, or any of its officers or directors, has a financial interest.

- (iv) Respondent shall, within 90 days from the date of this Order, submit a proposed disbursement calculation (the “Calculation”) to the Commission staff for review and approval. 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 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 with 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. After the Calculation has been approved by the Commission staff, Respondent shall submit a payment file (the “Payment File”) for review and acceptance by the Commission staff demonstrating the application of the methodology to each harmed Advisory Client. The Payment File should identify, at a minimum, (i) the name of each affected harmed client; (ii) the exact amount of the payment to be made; and (iii) the amount of any *de minimis* threshold to be applied.
- (v) Respondent shall complete the disbursement of all amounts payable to affected client accounts with 90 days of the date that the Commission staff approves the Calculation, unless such time period is extended as provided in Paragraph ix of this Subsection C.
- (vi) If Respondent is unable to distribute or return any portion of the Distribution Fund for any reason, including an inability to locate an affected past or present Advisory Client or a beneficial owner of an affected past or present Advisory Client account or any factors beyond Respondent’s control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Exchange Act when the distribution of funds is complete and before the final accounting provided for in Paragraph viii of this Subsection C is submitted to the Commission staff. 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 FWA as 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 Jason J. Burt, Assistant Regional Director, Asset Management Unit, Denver Regional Office, Securities and Exchange Commission, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, CO 80294.

- (vii) Respondent shall be responsible for any and all tax compliance responsibilities associated with the Distribution Fund and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent and shall not be paid out of the Distribution Fund.
- (viii) Within 120 days after Respondent completes the disbursement of all amounts payable to affected past and present advisory clients, Respondent shall return all undisbursed funds to the Commission. The Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Distribution Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (i) the amount paid to each payee, with the reasonable interest amount, if any, reported separately; (ii) the date of each payment; (iii) the check number or other identifier of the money transferred; (iv) the amount of any returned payment and the date received; (v) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (vi) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (vii) an affirmation that Respondent has made payments from the Distribution Fund to affected past and present advisory clients in accordance with the Calculation approved by the Commission staff. Respondent shall submit proof and supporting documentation of such payment (whether in the form of electronic payments or cancelled checks) in a form acceptable to the Commission staff under a cover letter that identifies Respondent and the file number of these proceedings to Jason J. Burt, Assistant Regional Director, Asset Management Unit, Denver Regional Office, Securities and Exchange Commission, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, CO 80294. 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.

- (ix) 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 Distribution Fund 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 to be the last day.

D. Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. If timely payment 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:

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Payments by check or money order must be accompanied by a cover letter identifying FWA as Respondent in this proceeding, and the file number of this proceeding; a copy of the cover letter and check or money order must be sent to Jason J. Burt, Assistant Regional Director, Asset Management Unit, Denver Regional Office, Securities and Exchange Commission, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 1700, Denver, Colorado, 80294.

E. 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.

By the Commission.

Brent J. Fields
Secretary