

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84115 / September 13, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 5006 / September 13, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18760

In the Matter of

Harbour Investments, Inc.,

Respondent.

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

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Harbour Investments, Inc. (“Harbour” 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

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

SUMMARY

1. These proceedings arise from certain failures by registered investment adviser Harbour. From at least 2012 through 2016 (the "Pertinent Period"), Harbour failed to fully and fairly disclose to its advisory clients compensation it received under a marketing services agreement with a third-party broker-dealer ("Custodian A") that provided custody and clearing services to Harbour and the conflicts of interest arising from that compensation. This arrangement created incentives for Harbour to favor Custodian A over other custodians when giving investment advice to its advisory clients about where to custody assets.

2. During the same period, Harbour invested some of its advisory clients in mutual fund share classes with 12b-1 fees when lower cost share classes of the same fund were available. In its capacity as a broker-dealer, Harbour received 12b-1 fees from some investments in these share classes, which created a conflict of interest that Harbour did not fully and fairly disclose to its advisory clients. Investing in a more expensive share class over a less expensive one in the same fund was also inconsistent with Harbour's duty to seek best execution for its advisory clients.

3. Finally, Harbour did not implement certain of its policies and procedures designed to manage the above conflicts. Based on the conduct above, Harbour violated Sections 206(2), 206(4) and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

RESPONDENT

4. **Harbour Investments, Inc.** ("Harbour") is a Wisconsin corporation with its principal place of business in Madison, Wisconsin. Since 1987, Harbour has been registered with the Commission as an investment adviser (File No. 801-29185) and as a broker-dealer (File No. 8-37373; CRD# 19258). Harbour's Form ADV reports approximately 167 affiliated independent investment adviser representatives ("IARs"), many of whom number among Harbour's 214 registered representatives, operating in more than 100 offices across the U.S. Harbour reports \$762 million in regulatory assets under management across more than 3,700 advisory accounts.

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.

FACTS

Background

5. Harbour has responsibility for the regulatory compliance and supervision of its representatives, which provide both brokerage and investment advisory services to predominately retail clients. In an attempt to provide various choices to its clients and representatives, Harbour recommends certain broker-dealers to execute and clear securities transactions and custody their assets. In 2012 and 2013, Harbour recommended four broker-dealers for its fee-based advisory services, including Custodian A, and in 2014 added an additional custodian.

Harbour's Marketing Services Agreement with Custodian A and Attendant Conflicts of Interest

6. In August 2008, Harbour entered into a marketing services agreement (the "Agreement") with Custodian A. Under this Agreement, among other things, Custodian A paid Harbour in its capacity as an investment adviser fees of two basis points (0.02%) of the value of assets Harbour advisory clients maintained at Custodian A. Harbour's advisory clients did not pay these fees or any additional charges as a result of the payment; Harbour did not share these payments with its registered representatives; and Harbour was not obligated to provide any services to Custodian A under the Agreement.

7. Harbour's Agreement with Custodian A created an incentive for Harbour to recommend Custodian A over its other custodians. This incentive was thus a conflict of interest between Harbour and its advisory clients.

8. During the Pertinent Period, Form ADV—a disclosure form filed with the Commission and provided to advisory clients—required advisers to disclose compensation received from third parties for providing investment advisory services to clients, as well as the resulting conflicts and how the adviser addresses them. Despite this requirement, it was not until April 2016 when Harbour first disclosed the existence of the Agreement or the attendant conflicts in its Forms ADV. Harbour also did not otherwise fully and fairly disclose the Agreement to its advisory clients who custodied assets at Custodian A, which resulted in a breach of fiduciary duty to its clients.²

² There was a reference to the Agreement on Harbour's website, but this did not fulfill its disclosure duties, because: (i) the description stated that Harbour "may" receive fees from Custodian A while Harbour was, in fact, receiving payments quarterly; (ii) the description did not disclose that the fees were based on client assets, much less that they were based on a percentage thereof or the percentage amount; and (iii) only certain clients were directed to the website and the website address to which they were directed was not the page that contained this reference. Moreover, website disclosure cannot substitute for disclosures an adviser is required to make on Form ADV.

Mutual Fund Share Class Selection in Harbour’s Advisory Accounts and Attendant Conflicts of Interest

9. Harbour offered its advisory clients—through third-party custodians and clearing firms—the opportunity to invest in a wide selection of mutual funds across numerous mutual fund complexes. As with mutual funds generally, these funds typically offered investors different types of shares or “classes.” Each share class represents an interest in the same portfolio of securities with the same investment objective, but has a different fee structure.

10. Class A shares were a common mutual fund share class that Harbour purchased for advisory clients during the Pertinent Period. Class A shares typically pay a 12b-1 fee, which is paid by a mutual fund on an ongoing basis from its assets for shareholder services, and distribution and marketing expenses. The 12b-1 fee for Class A shares is typically 25 basis points. The fees are paid to the fund’s distributor or underwriter, which, in turn, generally remits the fees to broker-dealers that distribute or “sell” the fund’s shares. In its capacity as a broker-dealer, Harbour received 12b-1 fees from its clearing firms for mutual funds held in its advisory client accounts, and then paid a portion as compensation to the clients’ IARs in their capacity as registered representatives of Harbour’s broker-dealer.³

11. Many mutual funds offer share classes exclusively for fee-based advisory accounts that do not include 12b-1 fees. While these share classes generally have higher initial investment minimums than Class A shares (*e.g.*, \$1 million), some mutual funds waive or reduce these minimum investment requirements for fee-based advisory accounts like those offered by Harbour. The terms and eligibility requirements for any particular share class are described in a mutual fund’s prospectus. If a retail investor in a fee-based account is eligible for a lower-fee share class of the same mutual fund, it is often in the investor’s best interest to purchase the lower-fee class rather than the higher-fee one because the higher fees reduce investor’s returns.

12. During the Pertinent Period, Harbour invested some advisory clients in share classes with 12b-1 fees when lower-fee share classes of those same funds without 12b-1 fees were available.

13. During the Pertinent Period, Harbour disclosed in its Forms ADV Part 2A and 2B, and other written disclosures to clients, that it may receive 12b-1 fees from mutual fund investments by advisory clients, and that such fees created a conflict of interest. However, Harbour did not disclose in its Forms ADV or otherwise that it had a conflict of interest concerning mutual fund share classes and, in certain instances, selected share classes that carried 12b-1 fees

³ In contrast to its clearing firms, Harbour’s custodians did not share 12b-1 fees with Harbour.

even when its clients were eligible for lower-cost share classes of the same fund. Nor did Harbour disclose how it addressed the conflicts created by this incentive.⁴

Harbour's Duty to Seek Best Execution

14. 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 – *i.e.*, “to seek the most favorable terms reasonably available under the circumstances.” *In the Matter of Fidelity Management Research Company*, Investment Advisers Act Rel. No. 2713 (Mar. 5, 2008) (citing Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 23170, (Apr. 23, 1986)). The Commission has stated in settled enforcement actions that when an investment adviser causes a client to purchase a more expensive share class when a less expensive class is available, it has failed to seek best execution.⁵ Harbour recommended its clients invest in a mutual fund share class that paid a 12b-1 fee to Harbour. Some of these clients were eligible to purchase a share class in the same fund that did not pay 12b-1 fees, which would have lowered their costs. As a result, Harbour violated its duty to seek best execution for advisory client transactions.

Harbour's Policies and Procedures

15. Harbour's failure to fully and fairly disclose the conflict of interest attendant to its Agreement with Custodian A and its selection of mutual fund share classes with 12b-1 fees constituted a failure to implement its compliance policies and procedures. Harbour's Supervisory Procedures during the Pertinent Period required it to make “full and fair disclosure” on Form ADV and in client advisory agreements of “all material facts and in particular information as to any potential or actual conflicts of interest,” so its clients “may make an informed decision in each particular circumstance.” Harbour's policies and procedures also required that Harbour disclose any arrangement where the adviser “recommends or requires”

⁴ See, *e.g.*, Form ADV General Instructions (requiring a fiduciary to disclose “sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices you engage and can give informed consent to such conflicts or practices or reject them . . . you therefore may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require”); Item 5.E. of Part 2A of Form ADV (requiring disclosure of conflicts from compensation from the sale of securities or other investment products, including asset-based sales charges or service fees from the sale of mutual funds, and how the adviser addresses conflicts that arise); Item 4 of Part 2B of Form ADV (requiring disclosure of compensation, “including distribution or service (“trail”) fees from the sale of mutual funds”).

⁵ See *In the Matter of Securities America Advisors, Inc.*, Investment Advisers Act Rel. No. 4876 (April 6, 2018); *In the Geneos Wealth Management, Inc.*, Investment Advisers Act Rel. No. 4877 (April 6, 2018); *In the PNC Investments LLC*, Investment Advisers Act Rel. No. 4878 (April 6, 2018); *In the Matter of SunTrust Investment Services, Inc.*, Investment Advisers Act Rel. No. 4769 (Sept. 14, 2017); *In the Matter of Cadaret, Grant & Co., Inc.*, Investment Advisers Act Rel. No. 4736 (Aug. 1, 2017).

clients to direct brokerage to a “broker with whom the adviser has another economic relationship,” as well as the conflicts of interest attendant to such arrangement. Harbour also failed to implement its policy that clients and customers purchasing mutual funds “get the best deal possible, not only in the present but also over time,” including considering “the cost factor over time.”

VIOLATIONS OF LAW

16. As a result of the conduct described above, Harbour willfully⁶ violated Section 206(2) of the Advisers Act, which prohibits an investment adviser, directly or indirectly, from engaging “in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” A violation of Section 206(2) may rest on a finding of simple 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, 195 (1963)). Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. *Id.*

17. As a result of the conduct described above, Harbour 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.

18. As a result of the conduct described above, Harbour willfully violated Section 207 of the Advisers Act, which 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.”

RESPONDENT’S REMEDIAL EFFORTS

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

UNDERTAKING

Respondent has undertaken to:

⁶ 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)).

20. Notice to Advisory Clients. Within forty-five (45) days of the entry of this Order, Harbour shall provide an Internet link to this Order via mail, email, or other such method not unacceptable to the Commission staff,⁷ together with a cover letter in a form not unacceptable to the Commission staff, to each of Harbour's existing advisory clients as of the entry of this Order. For a period of one (1) year, Harbour shall post a link to a copy of the Order on its website www.harbourinv.com in a prominent place not unacceptable to the Staff.

21. Certifications of Compliance by Respondents. Harbour shall certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Harbour agrees to provide such evidence. The certification and supporting material shall be submitted to Anthony Kelly, Co-Chief, Asset Management Unit, Securities and Exchange Commission, 100 F Street, Washington, DC, 20549, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549, no later than sixty (60) days from the date of the completion of the undertakings.

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 Harbour 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 Harbour is censured.
- C. Respondent shall pay disgorgement, prejudgment interest, and a civil penalty as follows:
 1. Respondent shall pay disgorgement of \$157,327, prejudgment interest of \$9,152, and a civil penalty in the amount of \$75,000, for a total of \$241,479.
 2. Within ten (10) days of the issuance of this Order, Respondent shall deposit \$241,479 (the "Fair Fund") into an escrow account at a financial institution not unacceptable to the Commission staff and shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely

⁷ Harbour further agrees to provide a paper copy of the Order to any existing advisory client as of the date of the entry of this Order who requests it.

payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and/or 31 U.S.C. §3717.

3. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the distribution of the disgorgement, civil penalties, prejudgment interest, and other monies paid by Respondent pursuant to this Order to Affected Clients, as that term is defined below in Paragraph 5 of this Subsection C. This Fair Fund includes (i) Harbour's disgorgement of 12b-1 fees, (ii) disgorgement of payments to Harbour under the Agreement with PAS, which Harbour is gifting to the Fair Fund pursuant to Section 308(b), and (iii) Harbour's penalty and prejudgment interest. 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, 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 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 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 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.
4. Respondent shall be responsible for administering the Fair Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.
5. Respondent shall pay from the Fair Fund to its "Affected Clients"—defined as current or former advisory clients who paid 12b-1 fees on mutual funds held in advisory accounts that were shared with Harbour during the period 2012 through 2016—an amount representing the proportion of each Affected Client's payments of 12b-1 fees during the period compared to the 12b-1 fees paid by all other Affected Clients during the period. No portion of the Fair Fund shall be paid to any affected investor account in which Respondent or any of its current or former officers, directors, IARs, or registered representatives has a financial interest.
6. Respondent shall, within thirty (30) days of the entry of this Order, submit a proposed disbursement Calculation ("the "Calculation") to the Commission staff for review and approval. At or around the time of submission of the proposed

Calculation to the staff, Respondent, along with any third-parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the Distribution, shall make themselves 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 to the Commission staff such additional information and supporting documentation as the Commission staff may request for its review. In the event of one or more objections by the Commission staff to the 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 Respondent is notified of the objection, which revised calculation shall be subject to all of the provisions of Subsection C.

7. 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 affected investor. The Payment File should identify, at a minimum: (1) the name of each affected investor, and (2) the exact amount of the payment to be made from the Fair Fund to each affected investor. An amount of \$10 or less shall be considered *de minimis* and shall not be paid to such Affected Client, but rather shall be distributed pro rata to Affected Clients that are owed greater than \$10 as determined by the Calculation.
8. Respondent shall complete the disbursement of all amounts payable to Affected Clients within 90 days of the date that the Commission staff accepts the Payment File, unless such time period is extended as provided in Paragraph 11 of this Subsection C. If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an Affected Client or a beneficial owner of an Affected 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 Securities Exchange Act of 1934 when the distribution of funds is complete and before the final accounting provided for in Paragraph 10 of this Subsection C. 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 Harbour 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 Anthony Kelly, Co-Chief, Asset Management Unit, Securities and Exchange Commission, 100 F Street, Washington, DC, 20549-5010A.

9. A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 1.468B.1-1.468B.5. Respondent shall be responsible for any and all tax compliance responsibilities associated with the Fair Fund, including but not limited to tax obligations resulting from the Fair Fund's status as a QSF and the Foreign Account Tax Compliance Act ("FATCA"), and 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.
10. Within 150 days after Respondent completes the distribution of all amounts payable to Affected Clients, Respondent shall return all undisbursed funds to the Commission pursuant to the instruction set forth in Paragraph 8 of this Subsection C. The 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 be in a format to be provided by the Commission staff. The final accounting and certification shall include, but not be limited to: (i) the amount paid or credited to each payee; (ii) the date of each payment or credit; (iii) the check number or other identifier of money transferred or credited to the person or entity; (iv) the amount of any returned payment and the date received; (v) a description of any effort 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, forwarded to the Commission for transfer to the United States Treasury; and (vii) an affirmation that Respondent has made payments from the Fair Fund to Affected 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 in these proceedings and the file number of these proceedings, to Anthony Kelly, co-Chief, Asset Management Unit, Division

of Enforcement, Securities and Exchange Commission, 100 F Street, NW, Washington, DC, 20549-5010, or such other address the Commission staff may provide. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

11. 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 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 comply with the undertaking enumerated in Section III above.

By the Commission.

Brent J. Fields
Secretary