

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4987 / August 17, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18648

In the Matter of

BKS Advisors LLC,

Respondent.

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

I.

The United States Securities and Exchange Commission (the “Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against BKS Advisors LLC (“Respondent” or “BKS”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

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

Summary

1. BKS is an investment adviser registered with the Commission. From at least January 2012 to November 2017 (the “relevant time period”), Roger T. Denha, an investment

¹The 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.

adviser and investment adviser representative of BKS, engaged in fraudulent trade allocation, or “cherry-picking.” Denha executed his cherry-picking scheme by unfairly allocating purchases of securities between his favored accounts (including his personal and family accounts) and his other BKS clients’ accounts. Denha disproportionately allocated profitable trades to the favored accounts, and disproportionately allocated unprofitable trades to the accounts of certain advisory clients. He executed his scheme by buying the securities in an omnibus account and then waiting to allocate until after he had an opportunity to see whether the securities had increased in price.

2. BKS failed reasonably to supervise Denha and failed to implement policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules. In addition, BKS stated in its Form ADV that it would put its own clients’ interests ahead of its employees’ interests with respect to its employees’ personal trading. Denha’s misconduct and BKS’s failure to supervise Denha rendered this statement false and misleading.

Respondent

3. BKS is a Michigan limited liability company with its principal place of business in Southfield, Michigan. BKS has been registered with the Commission as an investment adviser since 2001. According to its most recent Form ADV filed in March 2018, BKS had approximately 446 clients and \$365 million in assets under management. Of these clients and assets, Denha had approximately 197 clients and \$202 million in assets under management. BKS’s and Denha’s clients are primarily individual investors.

Other Relevant Person

4. **Roger T. Denha**, age 61, resides in Beverly Hills, Michigan. Denha has been an investment adviser representative of BKS since August 2003. From August 2003 to September 2017, Denha was a registered representative of a firm that was registered with the Commission as a broker-dealer throughout that time period and terminated its registration effective November 30, 2017. Denha has never been an owner or principal of BKS, but he is the only investment adviser representative for the BKS clients that he advises. Denha has no disciplinary history.

Facts

Denha’s Cherry-Picking Scheme.

5. During the relevant time period, all of BKS’s clients had their accounts in custody at a brokerage firm. To execute trades on behalf of himself and his clients, Denha sometimes made trades for himself and his clients in an omnibus account BKS set up for Denha’s block account trading at the brokerage firm. After placing a trade in the omnibus account, Denha instructed the brokerage firm to allocate the purchased securities among his and/or his clients’ accounts. By allocating shares sometime later in the day, after he placed a trade, Denha could watch the changes in price and then choose how to allocate the shares.

6. Although BKS had policies and procedures that stated “All block order allocations will be fair and equitable to all clients with no group being favored or disfavored over any other group” and that allocations shall be “based on an average price and common to all recipients of the allocation,” BKS did not implement any written policies and procedures reasonably designed to prevent unfair trade allocations.

7. Denha allocated a greater proportion of profitable trades, i.e., trades that increased in price from the time of purchase in the omnibus account to time of allocation later that day, to favored accounts and a greater proportion of unprofitable trades, i.e., trades that decreased in price from the time of purchase in the omnibus account to time of allocation later that day, to his other clients’ accounts (“disfavored accounts”). The favored accounts included accounts that belonged to Denha and his family members.

8. Denha made two types of profitable trades. The first type involved realized profits from day-trading, i.e., selling the security on the same day it was purchased for a profit. The second type involved unrealized profits from buy-and-hold trades, i.e., holding a security that increased in value on the day it was purchased. Denha allocated a greater proportion of profitable day trades and buy-and-hold trades to his favored accounts. Sometimes, Denha had a profitable day trade and an unprofitable buy-and-hold trade in the same security on the same day. When this occurred, he disproportionately allocated the profitable day trades to his favored accounts and the unprofitable buy-and-hold trades to his disfavored accounts. The difference between the allocations of profitable trades and unprofitable trades is statistically significant; the probability that such an uneven allocation of gains and losses occurred by chance is less than one-in-one-million.

9. Combining both day trades and buy-and-hold trades, the average combined, realized and unrealized return (measured from purchase to sale for day trades and from purchase to allocation for buy-and-hold trades) for the favored accounts during the relevant time period was approximately 1.01% while the average combined, realized and unrealized return for the disfavored accounts was negative 0.16%.

BKS Failed to Implement Policies And Procedures Reasonably Designed to Prevent Denha From Allocating Trades Unfairly And Failed Reasonably to Supervise Denha.

10. During the relevant time period, BKS had a compliance manual that included a policy for “Block Order Allocation.” This policy required that “All block order allocations will be fair and equitable to all clients with no group being favored or disfavored over any other group.” However, Denha allocated trades in a way that favored certain accounts and disfavored other accounts. This was possible because BKS permitted Denha to use the same omnibus account for Denha’s personal trades and his clients’ trades, and BKS did not require that Denha document his intended trade allocations before placing a block trade in the omnibus account.

11. BKS’s block order allocation policy required that allocations be “based on an average price and common to all recipients of the allocation.” Despite this policy, Denha allocated shares of the same stock, purchased on the same day, at different purchase prices. For example, if Denha bought two lots of a security on the same day, he disproportionately allocated

the lower-priced lot to the favored accounts while allocating the higher-priced lot to the disfavored accounts.

12. Although BKS conducted a daily review of Denha's trading, BKS focused on issues such as investment suitability and concentration, but the review did not address unfair trade allocation. Thus, BKS failed reasonably to implement its policies and procedures concerning block trade allocation and failed reasonably to supervise Denha.

Denha's Cherry-Picking Scheme Resulted in BKS Making Misleading Statements to Its Investment Advisory Clients and Prospective Clients.

13. As an investment adviser registered with the Commission, BKS is required to file with the Commission a "Form ADV." This form, which must be updated annually and made available as a public record, provides disclosures to advisory clients and includes information such as services provided and fees levied. The Form ADV includes parts 1 and 2.

14. During the relevant period, Item 11 of the Form ADV, Part 2A that BKS filed with Commission was called "Code of Ethics, Participation or Interest in Client Transactions and Personal Trading." In this Form ADV disclosure, BKS stated that "The interests of clients will be placed ahead of the firm's or any employee's own investment interests." However, Denha's cherry-picking scheme rendered this statement false and misleading.

15. In addition, BKS stated in Item 11 of the Form ADV, Part 2A that "[i]t is the express policy that no person employed by BKS advisors [sic] may purchase or sell any security prior to an initial transaction(s) being implemented for client account [sic], and therefore, preventing such employees from benefiting from transactions placed on behalf of client accounts." In fact, Denha benefited from transactions placed in the omnibus account by disproportionately allocating trades that were profitable at the time of allocation to his favored accounts. By this scheme, Denha benefited, while the clients who owned the disfavored accounts suffered.

Violations

16. As a result of the conduct described above, BKS willfully² violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

17. As a result of the conduct described above, BKS willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require registered investment advisers

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)).

to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules promulgated thereunder.

18. As a result of the conduct described above, BKS 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.

19. As a result of the conduct described above, BKS failed reasonably to supervise Denha within the meaning of Section 203(e)(6) of the Advisers Act.

BKS's Remedial Efforts And Cooperation

20. In determining to accept BKS's Offer, the Commission considered the voluntary remedial acts undertaken by BKS and BKS's voluntary cooperation with the Commission staff in its investigation of this matter. Among other things, upon being informed of potential issues regarding Denha's trade allocation practices, BKS conducted its own internal investigation, hired an outside law firm and new outside compliance consultant, amended its Form ADV, and implemented policies and procedures regarding trade allocation practices.

Undertakings

Respondent has undertaken to:

21. **Order Notification.** Within thirty days of the issuance of this Order, BKS undertakes to send to each of Denha's current or former BKS clients a copy of this Order. BKS shall certify, in writing, compliance with this undertaking. The certification shall provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission's staff may make reasonable requests for further evidence of compliance, and BKS agrees to provide such evidence. The certification and supporting material shall be submitted to Robert B. Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, no later than sixty days from the date of completion of the undertaking.

IV.

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

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

A. Respondent BKS 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 promulgated thereunder.

B. Respondent BKS is censured.

C. Respondent BKS shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$75,000.00 to the Securities and Exchange Commission. 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:

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 Respondent BKS as the Respondent in these proceedings, and the file number of these proceedings, with a copy of the cover letter and check or money order to be sent to Robert B. Baker, Assistant Regional Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties referenced in paragraph IV.C. above. The penalties paid by the Respondent in this proceeding shall be added to a Fair Fund to be established in the Commission's related proceeding, *In the Matter of Roger T. Denha*, Admin. Proc. File No. 3-18649 filed August 17, 2018). The combined Fair Fund will be distributed to harmed investors in accordance with a Commission-approved plan of distribution in that proceeding. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order

granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondent BKS shall comply with the undertakings in Section III, paragraph 21 above.

By the Commission.

Brent J. Fields
Secretary