

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5371 / September 26, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19530

In the Matter of

**Cetera Investment Advisers
LLC,**

Respondent.

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

I.

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

These proceedings arise out of Cetera's violation of Section 206(4) of the Advisers Act and Rule 206(4)-3 thereunder (the "Solicitor Rule"), which prohibit a registered investment adviser from paying a solicitor a cash fee for solicitation activities unless, among other things, the solicitor furnishes the client with a separate written disclosure document identifying the solicitor and the investment adviser, describing the nature of the relationship between the solicitor and the investment adviser, and specifying the terms of the compensation arrangement. Since at least January 2007, Cetera has paid cash fees to approximately 350 banks to, among other things, solicit investment advisory clients on behalf of Cetera. As part of this process, Cetera did not require the banks to give clients a separate written disclosure document or otherwise provide the information required under the Solicitor Rule. As a result, Cetera's clients were not informed of the extent of the banks' financial interest in the clients' choice of Cetera as an investment adviser and did not have all of the information that would enable them to evaluate the solicitor's recommendation. By paying cash fees for solicitation activities and not ensuring that advisory clients received the required disclosures, Cetera violated the Solicitor Rule.

Respondent

1. Cetera is an investment adviser based in Schaumburg, Illinois. Cetera provides investment advisory services to individuals, tax-qualified retirement plans, and other institutions. The firm has been registered with the Commission as an investment adviser since 1984. Cetera has approximately \$10.1 billion in assets under management. Cetera is wholly-owned by Cetera Financial Group, Inc.

Facts

2. As part of its business, Cetera has agreements with hundreds of banks and credit unions ("networking agreements") under which, among other things, each bank or credit union agrees to refer anyone seeking investment advisory services to Cetera. In return, Cetera pays the bank or credit union a substantial portion of any investment advisory fees it receives from the clients' advisory accounts.

3. In 2006, the staff of the Commission's Office of Compliance Inspections and Examinations ("examination staff") conducted an examination of a predecessor of Cetera called PrimeVest Financial Services, Inc. ("PrimeVest"), which was a dually-registered investment adviser and broker-dealer headquartered in St. Cloud, Minnesota until it was acquired by Cetera Financial Group in 2010. In August 2006, the examination staff issued a deficiency letter

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.

informing PrimeVest that it was violating the Solicitor Rule by failing to provide appropriate disclosures to advisory clients referred through its networking agreements with banks and credit unions regarding the compensation received by the banks and credit unions and the services they provided pursuant to the networking agreements.

4. Starting in approximately 2007, PrimeVest amended its networking agreements with credit unions and began requiring credit unions to give prospective advisory clients a separate written disclosure document (“solicitor disclosure”) identifying the credit union as a solicitor, describing the nature of the relationship, and specifying the percentage of the client’s advisory fee that PrimeVest would pay the credit union for the solicitation services.

5. PrimeVest also amended its networking agreements with banks, no longer requiring that prospective advisory clients receive a disclosure about PrimeVest’s payments to banks for solicitation activities. In a letter to the examination staff, PrimeVest stated that it was relying on a no-action letter issued to Kingland Capital Corporation in 1991. *See Kingland Capital Corp.*, SEC No-Action Letter, 1991 WL 178737 (Mar. 19, 1991). However, the *Kingland* letter did not reference the Solicitor Rule. It instead provided no-action relief with respect to whether banks in a particular bank networking arrangement with an investment adviser needed to register as investment advisers. In a response letter, the examination staff informed PrimeVest, among other things, that if it chose to rely on *Kingland*, it would do so at its own risk. PrimeVest had several subsequent conversations with the examination staff about its networking agreements and sent the examination staff a letter stating that the firm would revise the written disclosure document it provided to prospective clients to include disclosure about its fee sharing arrangements with banks. The firm later sent the examination staff a copy of its amended networking agreement. The examination staff did not further respond to PrimeVest’s letters and PrimeVest did not seek no-action relief for its proposed approach.

6. Starting in approximately December 2007, PrimeVest did not require the approximately 350 banks with which it had networking agreements to give prospective advisory clients the solicitor disclosure. Advisory clients referred to PrimeVest by a bank solicitor were informed in the standard advisory agreement that PrimeVest would share a portion of the client’s advisory fee with the bank. However, the clients did not receive a separate disclosure document explaining that the bank was being paid for its solicitation activities or the extent of the bank’s financial interest in the client’s choice of Cetera as an investment adviser.

7. Cetera Financial Group acquired PrimeVest in 2010 and, after PrimeVest withdrew its registration as an investment adviser in 2012, Cetera assumed responsibility for PrimeVest’s networking agreements with banks. Cetera continued PrimeVest’s practice of providing a solicitor disclosure only to advisory clients referred by credit unions and not to advisory clients referred by banks.

8. The examination staff conducted another examination of Cetera beginning in late 2014. After the examination staff again questioned Cetera about its failure to provide the solicitor disclosure to clients referred to Cetera by a bank solicitor, Cetera advised the staff that it would not provide the solicitor disclosure in reliance on the *Kingland* no-action letter.

9. The examination staff objected to Cetera’s interpretation of *Kingland* and requested that the firm begin providing the solicitor disclosure to clients referred through a bank networking agreement.

10. Following its correspondence with the examination staff, Cetera continued paying banks to solicit advisory clients without requiring banks to provide the solicitor disclosure until at least August 2017.

11. Between January 2013 and March 2017, Cetera generated more than \$56 million in advisory fees through its bank networking agreements and shared the vast majority of that compensation with the banks.

Violations

12. As a result of the conduct described above, Cetera willfully² violated Section 206(4) of the Advisers Act and Rule 206(4)-3 thereunder, which prohibit a registered investment adviser from paying a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless, among other things, the adviser enters into a written agreement with each solicitor and requires the solicitor to provide the client with a current copy of the adviser’s brochure and a separate written disclosure document containing, among other things: 1) the name of the solicitor; 2) the name of the investment adviser; 3) the nature of the relationship between the solicitor and the investment adviser; 4) a statement that the solicitor will be compensated for his or her solicitation services by the investment adviser; and 5) the terms of such compensation including a description of the compensation paid or to be paid to the solicitor.

Cetera’s Remedial Efforts

13. In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent. Starting in late 2017 Cetera began the process of amending its networking agreements with banks to include the requirement that advisory clients are provided with a separate solicitor disclosure. As of March 2018, Cetera amended its networking agreements with over 350 banks to ensure that new clients receive the solicitor disclosure and also notified existing clients of the solicitor relationship and provided them with the solicitor disclosure.

² “Willfully,” for purposes of imposing relief under Section 203(e) of the Advisers Act “means no more than that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory 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).

IV.

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

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

A. Respondent Cetera cease and desist from committing or causing any violations and any future violations Section 206(4) of the Advisers Act and Rule 206(4)-3 promulgated thereunder.

B. Respondent Cetera is censured.

C. Respondent Cetera shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$185,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

D. 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 Cetera as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Anne C. McKinley, Division of Enforcement, Securities and Exchange Commission, 175 W. Jackson Boulevard, Suite 1450, Chicago, IL 60604.

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.

Vanessa A. Countryman
Secretary