

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89481 / August 5, 2020

INVESTMENT ADVISERS ACT OF 1940
Release No. 5557 / August 5, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-19904

In the Matter of

**WBI Investments, Inc. and
Millington Securities, Inc.,**

Respondents.

**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 Sections 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 WBI Investments, Inc. (“WBI”) and Millington Securities, Inc. (“Millington”) (together, “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 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 Respondents’ Offers, the Commission finds¹ that:

Summary

1. This matter involves material misstatements by two affiliated investment advisers, WBI and Millington, concerning payments that Millington received for sending client orders to other brokerage firms for execution. WBI and Millington assured certain institutional clients that these “payment for order flow” arrangements did not affect the prices at which the clients’ orders were executed. These statements were misleading because the brokerage firms that executed the clients’ trades did in fact adjust execution prices to account for the payment for order flow arrangements.

2. From at least September 2014, WBI and Millington provided advisory services to, among other clients, a series of exchange traded funds (“ETFs”) and a series of mutual funds. Generally, WBI was responsible for making investment decisions on behalf of these shared clients.

3. From at least September 2014, Millington, a dually-registered broker-dealer and investment adviser, acted as the primary introducing broker-dealer for orders placed by WBI on behalf of its clients.

4. To execute WBI’s client order flow, Millington entered into arrangements with several unaffiliated broker-dealers (the “Executing Brokers”), which had two interrelated components. First, the Executing Brokers agreed to pay Millington, subject to certain exceptions, \$0.0125 per share for each executed stock trade and \$0.0150 per share for each executed ETF trade. These payments were referred to as “payment for order flow” and constituted Millington’s compensation for its role in effecting WBI’s client trades.

5. Second, Millington agreed that the Executing Brokers could execute WBI’s client orders on a “net” basis, which meant that, in the example of a buy order, an Executing Broker would buy a security in the market for one price (the “market price”) and then sell the security to Millington at a higher price (the “net price”). The difference between these two prices – an increase in the case of a buy order and a decrease in the case of a sell order – represented the Executing Broker’s compensation for effecting the trade. The net prices received by Millington were passed on directly to WBI’s clients as part of the transaction price.

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.

6. Millington and the Executing Brokers reached an understanding that, in general and over time, the Executing Brokers' compensation through the net trading arrangement would amount to \$0.02 to \$0.03 per share. As noted above, the Executing Brokers effectively paid a portion of this compensation back to Millington through the payment for order flow arrangement.

7. WBI and Millington, in their roles as investment advisers, disclosed to clients that Millington, in its role as a broker-dealer, received payments for order flow for routing WBI's client orders to the Executing Brokers and the amount of the payments received.

8. However, WBI and Millington also assured the boards of their ETF and mutual fund clients that the payment for order flow arrangements did not adversely affect execution prices, and that the costs of these arrangements were absorbed by the Executing Brokers. These assurances were materially misleading because, in fact, the payment for order flow arrangements did affect the amount of net trading compensation received by the Executing Brokers and, in turn, the execution prices received by clients – aspects of the payment for order flow arrangements that WBI and Millington did not share with the clients.

9. As a result of their conduct, WBI and Millington willfully violated Section 206(2) of the Advisers Act. WBI and Millington also failed to adopt and implement written policies and procedures reasonably designed to prevent such violations of the Advisers Act, in willful violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

Respondents

10. WBI is a privately-owned New Jersey corporation with its principal place of business in Red Bank, New Jersey. WBI has been registered with the Commission as an investment adviser since at least 1984. WBI acted as an adviser to the Absolute Shares Trust, the Advisors Series Trust, and their respective funds, among other clients.

11. Millington is an Illinois corporation with its principal place of business in Red Bank, New Jersey. Millington is dually registered with the Commission as an investment adviser and a broker-dealer. Millington became affiliated with WBI in approximately January 2014, when it was purchased by WBI Trading, Inc., a New Jersey corporation under common ownership with WBI. Millington acted as an adviser to the Absolute Shares Trust and its funds. Millington also provided brokerage services to WBI and certain of its clients.

Other Relevant Entities

12. Absolute Shares Trust, incorporated as a Delaware Statutory Trust, is an open-end investment company registered with the Commission since 2013. In approximately September 2014, WBI and Millington launched a series of actively-managed ETFs that are part of Absolute Shares Trust.

13. Advisors Series Trust, incorporated as a Delaware Statutory Trust, is an open-end investment company registered with the Commission since December 1996. During the period of approximately December 2010 through January 2018, WBI advised a series of mutual funds that were part of the Advisors Series Trust.

Facts

A. Millington's Payment for Order Flow Arrangements

14. In 2014, after becoming affiliated with Millington, WBI began using Millington as the primary introducing broker-dealer for orders that WBI placed on behalf of its advisory clients, including the Absolute Shares Trust ETFs and the Adviser Series Trust mutual funds (together, the "Funds").

15. Millington did not act as an executing broker for WBI's client orders and did not charge WBI or its clients explicit commissions for its brokerage services. Instead, Millington routed WBI's client orders to a group of Executing Brokers and collected compensation in the form of payment for order flow from those Executing Brokers, in the amount of \$0.0125 per share for stock trades and \$0.0150 per share for ETF trades. Millington retained these payments and did not pass them on to WBI's clients. Between 2014 and the second quarter of 2017, Millington received approximately \$7.6 million in payment for order flow in connection with orders placed on behalf of the Funds.

16. The Executing Brokers, for their part, were compensated through their net trading arrangement with Millington, which generally worked as follows.

17. Each trading day, Millington would send a set of large block orders entered by WBI on behalf of its clients to one or more of the Executing Brokers for execution. Typically, Millington's head trader would provide guidance to the Executing Brokers concerning these orders throughout the day, such as where to route the orders or when to execute the orders.

18. The Executing Brokers executed nearly all of the WBI client orders on a net basis, meaning, as described above, that the Executing Brokers bought or sold securities in the market for Millington at one price, and then sold those securities to Millington, or bought them from Millington, at a different price, with the difference representing the Executing Brokers' compensation. The net prices received by Millington were passed on directly to WBI's clients.

19. The difference between the market prices received by the Executing Brokers and the net prices charged to Millington varied from trade by trade. In a limited number of instances, such as when a mistake was made on a trade or Millington was unhappy with the execution quality, the Executing Brokers charged Millington net prices equal to or more favorable than the market prices.

20. But Millington and the Executing Brokers reached an understanding that, in general and over time, the Executing Brokers would charge Millington net prices that were approximately

\$0.02 to \$0.03 higher (or, in the case of sales, \$0.02 to \$0.03 lower) than the market prices received by the Executing Brokers, so as to offset the costs of the payment for order flow while also allowing the Executing Brokers to retain some profits for executing the trades.

B. WBI and Millington's Misstatements Concerning the Payment for Order Flow Arrangements

21. As investment advisers, WBI and Millington were obligated to exercise reasonable diligence regarding the accuracy of the information that they provided to clients about Millington's payment for order flow arrangements.

22. WBI and Millington made certain disclosures to clients concerning the payment for order flow arrangements. For example, from June 2014 forward, WBI's Form ADV Part 2A disclosed that Millington received payment for order flow in connection with orders placed by WBI on behalf of its clients and that "[c]lients should understand that WBI will trade through Millington even if the use of a different broker-dealer that is not affiliated with WBI may result in more favorable prices or transaction costs."

23. From June 2014 forward, WBI and Millington also informed the Funds on a quarterly basis of the payment for order flow rate paid by the Executing Brokers to Millington and the amount of payment for order flow received by Millington on a trade-by-trade basis.

24. Until approximately May 2017, however, WBI and Millington did not explain that, as part of the payment for order flow arrangements, the Executing Brokers would execute WBI's trades on a net basis and that, in general and over time, would add (or, in the case of sales, subtract) approximately \$0.02 to \$0.03 per share to the market prices received by the Executing Brokers. Nor did WBI and Millington explain that the payment for order flow arrangements affected the prices at which WBI's client orders were executed.

25. Instead, on three occasions between November 2014 and May 2016, WBI and Millington, in their roles as advisers, assured the Funds' boards that the payment for order flow arrangements did not affect the execution prices received by WBI and its clients.

26. For example, at a meeting of the Board of Trustees of the Absolute Shares Trust on November 11, 2014, a WBI and Millington executive, speaking on behalf of both firms, informed the Board that "performance or price execution is not compromised" by the payment for order flow arrangements.

27. Similarly, in a memo to the Board of Trustees of the Advisors Series Trust dated November 10, 2015, WBI represented that "the Affiliated BD [Millington] and the Adviser [WBI] believe that receiving PFOF [payment for order flow] does not have a negative impact on the Adviser Orders because the monies paid as PFOF would otherwise be retained in full by the market centers and would not inure to the benefit of brokerage customers or change the market price paid

by brokerage customers.” WBI and Millington made similar comments in a memo to the Absolute Shares Trust Board of Trustees dated May 19, 2016.

28. These statements were materially misleading. In reality, the payment for order flow arrangements affected the execution prices borne by WBI’s clients because, as set forth above, the Executing Brokers’ agreements to pay Millington for WBI’s order flow were premised on the mutual understanding that, in general and over time, the Executing Brokers would recoup these payments by adjusting execution prices by \$0.02 to \$0.03 per share to compensate themselves for executing the trades.

C. Compliance Deficiencies

29. WBI and Millington failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. In particular, WBI and Millington failed to adopt and implement written policies and procedures reasonably designed to ensure that the information concerning brokerage practices that they conveyed to clients was accurate and complete.

Violations

30. Section 206(2) of the Advisers Act prohibits investment advisers from directly or indirectly 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) of the Advisers Act 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.* As a result of the conduct described above, WBI and Millington willfully violated Section 206(2) of the Advisers Act.²

31. Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder require a registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. As a result of the conduct described above, WBI and Millington willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

² “Willfully,” for purposes of imposing relief under Sections 203(e) of the Advisers Act and Section 15(b) of the Exchange 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).

IV.

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

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

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

B. Respondents are censured.

C. Millington shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$250,000 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. WBI shall, within 365 days of the entry of this Order, pay a civil money penalty in the amount of \$750,000 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). Payment shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the payment, WBI shall contact the staff of the Commission for the amount due including post order interest.

E. Payment pursuant to paragraphs C and D above must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) 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
- (3) 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 WBI or Millington 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 Joseph G. Sansone, Chief, Market Abuse Unit, Securities & Exchange Commission, 200 Vesey Street, Suite 400, New York, New York 10281.

F. 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, 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 a civil penalty 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 penalty 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.

By the Commission.

Vanessa A. Countryman
Secretary