

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90740 / December 21, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20181

In the Matter of

CORMARK SECURITIES INC.,

Respondent.

**ORDER INSTITUTING CEASE-
AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 21C OF
THE SECURITIES EXCHANGE ACT
OF 1934, MAKING FINDINGS, AND
IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-
DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Cormark Securities Inc. (“Cormark” 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 Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, 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:

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.

Summary

1. These proceedings concern Cormark’s role in repeatedly causing a U.S. executing broker (the “Executing Broker”) to violate the order-marking and locate requirements of Regulation SHO of the Exchange Act.

2. From August 2016 to October 2017 (the “relevant period”), Cormark entered more than 200 sale orders for a hedge fund customer (the “Hedge Fund”) into an intermediary broker’s execution management system as “long” orders.² At the time these orders were entered, the Hedge Fund was not “deemed to own” the stock being sold and did not have a net long position in the stock. Thus, the orders should have been marked as “short” sales under Regulation SHO. The intermediary broker, ITG Canada Corp. (“ITG Canada”), routed the sale orders, with the incorrect order-marking information provided by Cormark, to the Executing Broker, which in turn executed the orders as “long” sales on U.S. exchanges. As a result, Cormark caused the Executing Broker to mismark sale orders as “long,” in violation of Rule 200(g) of Regulation SHO.

3. On more than 80 occasions, Cormark received information that the Hedge Fund had failed to deliver shares by the scheduled settlement date for “long” sales that Cormark had entered into ITG Canada’s execution management system on behalf of the Hedge Fund. After repeated failures to deliver, it was not reasonable for Cormark to continue to rely on the Hedge Fund’s representations about its net position without additional inquiry.

4. During the relevant period, the Hedge Fund sold more than \$660 million of common stock—which accounted for more than 90% of Cormark’s total sales for the Hedge Fund in the relevant securities—pursuant to sale orders mismarked as “long.”

5. As the Hedge Fund’s sale orders were, in fact, short sales, Cormark also caused the Executing Broker’s violations of Rule 203(b)(1) of Regulation SHO, because the Executing Broker neither borrowed nor located shares available for borrowing prior to effecting those short sales.

Respondent

6. Cormark Securities Inc. (“Cormark”), a Canadian corporation headquartered in Toronto, Canada, is a registered investment dealer in several Canadian provinces. During the relevant period, Cormark acted as the prime and introducing broker for the Hedge Fund.

Other Relevant Entity

7. ITG Canada Corp. *n/k/a* Virtu ITG Canada Corp. (“ITG Canada”), a Canadian corporation headquartered in Toronto, Canada, is a broker-dealer registered

² References to the “Hedge Fund” in this Order include the Hedge Fund, its subsidiary funds, and associated individuals and entities.

with several provincial securities regulators. Cormark was a customer of ITG Canada, which acted as an intermediary broker for the Hedge Fund's sale orders between Cormark and the Executing Broker. On March 1, 2019, ITG Canada was acquired by a financial firm and renamed Virtu ITG Canada Corp.

**Cormark Entered Sale Orders with Incorrect Order-Marking Information,
Despite Repeated Failures to Deliver**

8. In June 2015, Cormark entered into a Customer Agreement with ITG Canada to utilize ITG Canada's execution management system in order to access U.S. markets. Pursuant to the Customer Agreement, Cormark agreed to mark all orders "in compliance with the order marking requirements of Regulation SHO."

9. During the relevant period, Cormark received numerous orders from its customer, the Hedge Fund, to sell securities of Issuers A, B, and C (collectively, the "Issuers") on U.S. exchanges. On more than 200 occasions, Cormark entered "long" sale orders into ITG Canada's execution management system to sell the securities of the Issuers based on information from the Hedge Fund. At the time of order entry, the Hedge Fund was not "deemed to own" the stock under Regulation SHO and did not have a net long position in the stock to cover the sales.³ Based on the order-marking information from Cormark, ITG Canada routed these orders to the Executing Broker in the U.S. as "long" sales, which, in turn, marked the orders as such and executed them on a U.S. exchange.

10. Although Cormark made efforts to settle the Hedge Fund's trades on time, the Hedge Fund repeatedly failed to deliver the securities it sold "long" by the scheduled settlement date during the relevant period. In just the first month that Cormark placed "long" sale orders of Issuer A's stock for the Hedge Fund, the Hedge Fund failed to deliver shares to settle its trades by settlement date nine times. In a little more than a year of trading, in more than 80 instances, the Hedge Fund claimed to have a net "long" position but failed to deliver sufficient shares of Issuers A, B, and C to settle the trades by the scheduled settlement date.

11. ITG Canada notified Cormark of these failures to deliver. Despite this, Cormark took no steps to confirm whether the Hedge Fund's subsequent sale orders should be marked "long," and simply continued to submit "long" sales on behalf of the Hedge Fund to ITG Canada. Given its knowledge of the repeated failures to deliver, it was unreasonable for Cormark to continue to enter the Hedge Fund's orders as "long" absent further inquiry.

12. In several instances, Cormark notified the Hedge Fund that its account at Cormark was short shares for settlement on the settlement date and asked when

³ Regulation SHO was designed, in part, to reduce failures to deliver—and to prevent "naked" short selling, i.e., selling short without having borrowed the securities to make delivery. See Short Sales, Exch. Act Rel. No. 34-50103 (July 28, 2004); Amendments to Regulation SHO, Exch. Act Rel. No. 34-60388 at 6, 9 (July 27, 2009).

additional shares would be received. The Hedge Fund repeatedly promised Cormark that the relevant shares would come in, but failed to deliver those shares by settlement. Under these circumstances, it was not reasonable for Cormark to continue to rely on representations from the Hedge Fund that it owned the shares and would deliver them prior to the scheduled settlement.

13. Cormark's policies required its traders to "make an affirmative determination" as to whether a customer's sale was "long" or "short," and to mark the ticket accordingly. Cormark failed to follow its own policy, relying instead exclusively on information from the Hedge Fund. Cormark did not obtain records to consider whether the order-marking information it provided to ITG Canada was correct.

14. Despite repeated failures to deliver, Cormark continued to enter the Hedge Fund's sale orders as "long" in ITG Canada's execution management system.

Legal Analysis

Cormark Caused the Executing Broker's Violations of Rule 200(g) of Regulation SHO

15. Rule 200(g) of Regulation SHO requires executing broker-dealers to mark all sell orders of any equity security as "long," "short," or "short exempt." 17 C.F.R. § 242.200(g).

16. An order to sell may be marked "long" only if two conditions are met. First, the seller must be "deemed to own" the security pursuant to Rule 200(a) through (f) of Regulation SHO. 17 C.F.R. §§ 242.200(a)-(f), 242.200(g)(1). A person is "deemed to own" a security only to the extent that he has a net long position in such security. 17 C.F.R. § 242.200(c). Second, an order may be marked "long" only if the broker-dealer either has possession or control of the security to be delivered or reasonably expects that the security will be in the broker-dealer's physical possession or control no later than the settlement of the transaction. 17 C.F.R. § 242.200(g)(1).

17. In determining whether it is reasonable to rely on a customer's representations that sale orders should be marked as "long," the broker-dealer has an affirmative obligation to obtain and consider information from its own records and other relevant sources helpful to making a reasonableness determination. Amendments to Regulation SHO, Exch. Act Rel. No. 34-60388 at n.33 (July 31, 2009). Such information includes "a customer's prior assurances . . . [of] its share ownership, or delivery of shares by settlement date." *Id.* As noted in the Regulation SHO Adopting Release, "[i]t may be unreasonable for a broker-dealer to treat a sale as long where orders marked 'long' from the same customer repeatedly required borrowed shares for delivery or result in 'failures to deliver.'" Short Sales, Exch. Act Rel. No. 34-50103 at n.111 (Sept. 7, 2004).

18. After being notified of repeated failures to deliver on the purported "long" sales, it was not reasonable for Cormark to continue to rely on the Hedge Fund's

representations that the sale orders should be marked as “long.” On more than 200 occasions, however, Cormark entered the Hedge Fund’s sale orders as “long” into ITG Canada’s execution management system, when, at the time of order entry, the Hedge Fund was not “deemed to own” the stock being sold and did not have a net long position in the stock. Consequently, all of these sale orders should have been marked as “short.” Relying on the incorrect order-marking information from Cormark, as relayed by ITG Canada, the Executing Broker mismarked all of these sales as “long” sales in violation of Rule 200(g).

19. The Commission may order any person that “is, was, or would be” a cause of another person’s violation of Regulation SHO, “due to an act or omission the person knew or should have known would contribute to such violation,” to cease and desist from committing or causing such violation and future violation of Regulation SHO. 15 U.S.C. § 78u-3(a).

20. As a result of the conduct described above, Cormark caused the Executing Broker’s violations of Rule 200(g) of Regulation SHO. Cormark entered inaccurate information concerning the order markings of the Hedge Fund’s sale orders into ITG Canada’s execution management system, and the Executing Broker relied on that information in mismarking the Hedge Fund’s sale orders as “long” sales. Furthermore, after being notified of repeated failures to deliver on purported “long” sales, Cormark should have known that continuing to enter incorrect order-marking information in ITG Canada’s execution management system would contribute to mismarkings by the Executing Broker.

Cormark Caused the Executing Broker’s Violations of Rule 203(b)(1) of Regulation SHO

21. Rule 203(b)(1) of Regulation SHO prohibits a broker-dealer from accepting a short sale order in an equity security from another person or effecting a short sale in an equity security for its own account, unless the broker-dealer has “(i) [b]orrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) [r]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) [d]ocumented compliance with this [requirement].” 17 C.F.R. § 242.203(b)(1). This is generally referred to as the “locate” requirement.

22. Since the Executing Broker incorrectly marked the Hedge Fund’s sale orders as “long” when the Hedge Fund was, in fact, selling short, the Executing Broker did not obtain a locate in connection with those sale orders. Consequently, the Executing Broker violated Rule 203(b)(1) of Regulation SHO.

23. As a result of the conduct described above, Cormark caused the Executing Broker’s violations of Rule 203(b)(1) of Regulation SHO. Cormark entered inaccurate information in ITG Canada’s execution management system, indicating that the Hedge

Fund's sale orders should be marked as "long," and the Executing Broker relied on that information in failing to obtain a locate, as required under Rule 203(b)(1) for short sales.

24. After being notified of repeated failures to deliver by the Hedge Fund on purported "long" sales, Cormark should have known that continuing to enter incorrect order-marking information in ITG Canada's execution management system would contribute to the Executing Broker's failure to obtain a locate in violation of Rule 203(b)(1).

Findings

25. Based on the foregoing, the Commission finds that Cormark caused the Executing Broker's violations of Rules 200(g) and 203(b)(1) of Regulation SHO.

Cormark's Cooperation and Remedial Efforts

26. In determining to accept Cormark's Offer, the Commission considered the cooperation afforded to the Commission staff and voluntary remedial acts taken by Cormark. Among other steps, Cormark discontinued trading in U.S. securities for the Hedge Fund upon receipt of the SEC's investigative requests, and cooperated fully in the SEC's investigation. Cormark has also implemented revised written policies and procedures, and conducted additional training, to enhance its compliance with Regulation SHO.

Undertaking

27. Respondent has undertaken to cooperate with any subsequent investigation by the Enforcement Division regarding the subject matter of this Order, and with any related enforcement action. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Cormark Securities Inc. cease and desist from committing or causing any violations and any future violations of Rules 200(g) and 203(b)(1) of Regulation SHO.

B. Respondent Cormark Securities Inc. shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$800,000 to the Securities and Exchange Commission. The Commission may distribute civil monetary penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of

2002. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

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, AMK-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Cormark Securities Inc. 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 Jennifer S. Leete, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

D. Regardless of whether the Commission in its discretion orders the creation of a Fair Fund for the penalties ordered in this 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.

By the Commission.

Vanessa A. Countryman
Secretary