

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92526 / July 30, 2021

INVESTMENT ADVISERS ACT OF 1940
Release No. 5810 / July 30, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20442

<p>In the Matter of</p> <p>COBURN & MEREDITH, INC.,</p> <p>Respondent.</p>

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 Coburn & Meredith, Inc. (“Coburn & Meredith” 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 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 out of breaches of fiduciary duty by Coburn & Meredith, a dually-registered investment adviser and broker-dealer, in connection with (1) fees received for advising clients to purchase and hold mutual fund share classes that paid fees pursuant to Rule 12b-1 under the Investment Company Act of 1940 ("12b-1 fees") instead of lower-cost available share classes that did not charge these fees; and (2) mark-ups on the rate of margin interest charged by Coburn & Meredith's unaffiliated clearing broker ("Clearing Broker") to its advisory clients as a result of advisory clients' use of margin.

2. First, from July 2014 through February 2021 (the "Relevant 12b-1 Period"), Coburn & Meredith purchased, recommended, or held for advisory clients mutual fund share classes that charged 12b-1 fees instead of lower-cost share classes of the same funds that were available to the clients. Coburn & Meredith received 12b-1 fees in connection with these investments, but at times did not adequately disclose this practice or the conflict of interest in its brochures on Forms ADV Part 2A or otherwise. Although it was eligible to do so, Coburn & Meredith did not self-report its receipt of 12b-1 fees to the Commission pursuant to the Division of Enforcement's (the "Division") Share Class Selection Disclosure Initiative ("SCSD Initiative").²

3. During the Relevant 12b-1 Period, Coburn & Meredith also, by causing certain advisory clients to invest in share classes of mutual funds that paid 12b-1 fees, when fund share classes were available to the clients that presented a more favorable value under the particular circumstances in place at the time of the transactions, breached its duty to seek best execution for those transactions.

4. Second, from July 2014 through May 2021 (the "Relevant Margin Interest Period"), Coburn & Meredith received mark-ups on the rate of margin interest from an unaffiliated clearing broker ("Clearing Broker") as a result of Coburn & Meredith advising certain advisory clients to use margin accounts to borrow money to purchase securities recommended by Coburn & Meredith. Coburn & Meredith did not disclose its receipt of this compensation or the resulting conflicts of interest in its brochures on Forms ADV Part 2A or otherwise.

5. During each of the Relevant Periods, Coburn & Meredith also failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund share class selection

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.

² See Div. of Enforcement, U.S. Sec. & Exch. Comm'n, *Share Class Selection Disclosure Initiative*, <https://www.sec.gov/enforce/announcement/scsd-initiative> (last modified Feb. 12, 2018).

practices and in connection with its disclosure regarding mark-up on margin interest from the rate charged by the Clearing Broker to Coburn & Meredith's advisory clients.

Respondent

6. Respondent Coburn & Meredith, Inc. is a Connecticut corporation headquartered in Simsbury, Connecticut. Coburn & Meredith has been registered with the Commission as an investment adviser since September 2008 and as a broker-dealer since January 1949. In its Form ADV dated March 29, 2021, Coburn & Meredith reported regulatory assets under management of approximately \$404.7 million.

Mutual Fund Share Class Selection And 12b-1 Fees

7. Mutual funds typically offer investors different types of shares or "share classes." Each share class represents an interest in the same portfolio of securities with the same investment objective. The primary difference among the share classes is the fee structure.

8. For example, some mutual fund share classes charge 12b-1 fees to cover certain costs of fund distribution and sometimes shareholder services. These recurring fees, which are included in a mutual fund's total annual fund operating expenses, vary by share class, but typically range from 25 to 100 basis points. They are deducted from the mutual fund's assets on an ongoing basis and paid to the fund's distributor or principal underwriter, which generally remits the 12b-1 fees to the broker-dealer that distributed or sold the shares.

9. Many mutual funds also offer share classes that do not charge 12b-1 fees (e.g., "Institutional Class" or "Class I" shares (collectively, "Class I shares")).³ An investor who holds Class I shares of a mutual fund will usually pay lower total annual fund operating expenses over time – and thus will generally earn higher returns – than one who holds a share class of the same fund that charges 12b-1 fees. Therefore, if a mutual fund offers a Class I share, and an investor is eligible to own it, it is often, though not always, better for the investor to purchase or hold the Class I share.

10. During the Relevant 12b-1 Period, Coburn & Meredith advised clients to purchase or hold⁴ mutual fund share classes that paid it 12b-1 fees when lower-cost share classes of those same funds were available to those clients. Coburn & Meredith received 12b-1 fees that it would not have collected had its advisory clients been invested in the available lower-cost share classes. These payments created an incentive for Coburn & Meredith to recommend its advisory clients buy or hold share classes that paid 12b-1 fees over other share classes of the same mutual funds that did not pay 12b-1 fees when rendering investment advice to advisory clients. As of February

³ Share classes that do not charge 12b-1 fees also go by a variety of other names in the mutual fund industry, such as "Class F2," "Class Y" and "Class Z" shares. As used in this Order, the term "Class I shares" refers generically to share classes that do not charge 12b-1 fees.

⁴ In many cases, mutual funds permit certain advisory clients who hold shares in classes charging 12b-1 fees to convert those shares to Class I shares without cost or tax consequences to the client.

2021, Coburn & Meredith instructed its Clearing Broker to rebate 12b-1 fees to advisory accounts going forward.

Margin Interest Payments

11. During the Relevant Margin Interest Period, Coburn & Meredith recommended to certain of its advisory clients that they enter into a margin brokerage account agreement with the Clearing Broker, and further recommended that the advisory clients use margin to purchase securities recommended by Coburn & Meredith. The advisory clients paid margin interest on the amount of margin in the account.

12. Coburn & Meredith entered into a Fully Disclosed Clearing Agreement (“Clearing Agreement”) with the Clearing Broker. The Clearing Agreement provided that the Clearing Broker would charge interest to Coburn & Meredith on its advisory clients’ margin accounts. The Clearing Agreement also provided that Coburn & Meredith would determine the rate of interest the Clearing Firm would charge to advisory clients on the balances in the advisory clients’ margin accounts, and that Coburn & Meredith would earn the difference between the interest paid by advisory clients and the interest paid by Coburn & Meredith to the Clearing Broker. During the Relevant Margin Interest Period, Coburn & Meredith received revenue that it would not have collected had it not marked up the margin interest rate the Clearing Firm charged to advisory clients. The payments Coburn & Meredith received from the Clearing Broker created an incentive for Coburn & Meredith to recommend its advisory clients use margin accounts when advising these clients to buy securities. Coburn stopped placing a mark-up on margin interest paid by its advisory clients as of May 2021.

Disclosure Failures

13. As an investment adviser, Coburn & Meredith was obligated to disclose all material facts to its advisory clients, including any conflicts of interest between itself and its clients, that could affect the advisory relationship and how those conflicts could affect the advice Coburn & Meredith provided its clients. To meet this fiduciary obligation, Coburn & Meredith was required to provide its advisory clients with full and fair disclosure that is sufficiently specific so that they could understand the conflicts of interest concerning Coburn & Meredith’s advice about investing in different classes of mutual funds and about authorizing the use of margin for their advisory accounts, and could have an informed basis on which advisory clients could consent to or reject the conflicts.

14. At times during the Relevant 12b-1 Period, Coburn & Meredith’s Form ADV Part 2A brochure disclosed that Coburn & Meredith may recommend mutual funds that paid 12b-1 fees, and that this created a conflict of interest. However, Coburn & Meredith failed to disclose the conflicts of interest that arose when it invested advisory clients in a mutual fund share class that would generate 12b-1 fee revenue for Coburn & Meredith while share classes of the same funds were available that did not pay 12b-1 fees. Coburn revised its disclosures in its Form ADV Part 2A brochure filed on December 18, 2020.

15. At times during the Relevant Margin Interest Period, Coburn & Meredith failed to disclose to its advisory clients in its Form ADV Part 2A or elsewhere that it marked up margin interest rates paid by clients above that charged by the Clearing Broker and received the difference as compensation, or the associated conflicts of interest.

Best Execution Failures

16. An investment adviser's fiduciary duty includes, among other things, an obligation to seek best execution for client transactions.⁵

17. During the Relevant 12b-1 Period, by causing certain advisory clients to invest in share classes of mutual funds that paid 12b-1 fees when share classes were available that presented a more favorable value under the particular circumstances in place at the time of the transactions, Coburn & Meredith violated its duty to seek best execution for those transactions.

Compliance Deficiencies

18. During each of the Relevant Periods, Coburn & Meredith failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund share class selection practices and in connection with disclosure of its mark-up on margin interest from the rate charged by the Clearing Broker to Coburn & Meredith's advisory clients.

Violations

19. As a result of the conduct described above, Respondent willfully⁶ violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to "engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client." Scierter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of 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, 194-95 (1963)).

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

⁵ See, e.g., Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Rel. No. 23170 (Apr. 28, 1986).

⁶ "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act and 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[ed]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

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

Disgorgement

21. The disgorgement and prejudgment interest ordered in Section IV.C. is consistent with equitable principles and does not exceed Respondent's net profits from its violations, and will be distributed to harmed investors to the extent feasible. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors, and any amounts returned to the Commission in the future that are infeasible to return to investors, may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

Undertakings

22. Respondent has undertaken to:
- a. Within 30 days of the entry of this Order, review and correct as necessary all relevant disclosure documents concerning mutual fund share class selection, 12b-1 fees, and margin interest.
 - b. Within 30 days of the entry of this Order, evaluate whether existing clients should be moved to a lower-cost mutual fund share class and move clients as necessary.
 - c. Within 30 days of the entry of this Order, evaluate, update (if necessary), and review for the effectiveness of their implementation, Respondent's policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act in connection with disclosures regarding mutual fund share class selection and receipt of margin interest mark-ups, and in connection with making recommendations of mutual fund share classes and use of margin interest that are in the best interests of Respondent's advisory clients.
 - d. Within 30 days of the entry of this Order, Respondent shall notify affected investors (*i.e.*, those former and current clients who were financially harmed by the practices discussed above) (hereinafter, "affected investors") of the settlement terms of this Order by sending a copy of this Order to each affected investor via mail, email, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff.
 - e. Within 40 days of the entry of this Order, certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), 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 Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Robert Baker, Assistant Director, Asset Management

Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

- f. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates 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 the last day.

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 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. Respondent is censured.

C. Respondent shall pay disgorgement, prejudgment interest, and a civil penalty, totaling \$299,340.92 as follows:

(i) Respondent shall pay disgorgement of \$201,778.55 and prejudgment interest of \$32,562.37, consistent with the provisions of this Subsection C.

(ii) Respondent shall pay a civil money penalty in the amount of \$65,000, consistent with the provisions of this Subsection C.

(iii) Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the penalties, disgorgement, and prejudgment interest described above for distribution to affected investors. 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 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.

(iv) Respondent shall pay the disgorgement, prejudgment interest and civil penalty ordered in this Subsection C in the following installments: within 10 days of the entry of this Order, Coburn shall pay \$234,340.92, representing the full amount of disgorgement and prejudgment interest, and shall pay \$21,666.67 of the civil penalty amount; within 40 days of the entry of this Order, Respondent shall pay \$21,666.67 of the civil penalty amount; and within 70 days of the entry of this Order, Respondent shall pay \$21,666.66 of the civil penalty amount, plus all accrued interest. Respondent shall deposit the payments of the disgorgement, prejudgment interest, and civil penalty (the “Fair Fund”), into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide the Commission staff with evidence of such deposits in a form acceptable to the Commission staff. Payments shall be applied first to post order interest accrued pursuant to SEC Rule of Practice 600 and/or 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

(v) 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.

(vi) Respondent shall pay from the Fair Fund to each affected investor an amount representing: (a) the 12b-1 fees attributable to the affected investor during the Relevant 12b-1 Period and the margin interest payments attributable to the affected investor during the Relevant Margin Interest Period; and (b) reasonable interest paid on such fees, pursuant to a disbursement calculation (the “Calculation”) that will be submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection C. 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 or directors, has a financial interest.

(vii) Respondent shall, within thirty (30) days of the entry of this Order, submit a Calculation to the Commission staff for review and approval. At or around the time

of submission of the proposed Calculation to the staff, Respondent shall make itself available, and shall require any third-parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the distribution to be 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 the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondent's 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 that the Commission staff notifies Respondent of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

(viii) Respondent shall, within ninety (90) days of the written approval of the Calculation by the Commission staff, 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; (2) the exact amount of the payment to be made; (3) the amount of any *de minimis* threshold to be applied; and (4) the amount of reasonable interest paid.

(ix) Respondent shall complete the disbursement of all amounts payable to affected investors within ninety (90) days of the date the Commission staff accepts the Payment File unless such time period is extended as provided in Paragraph (xiii) of this Subsection C. Respondent shall notify the Commission staff of the date and the amount paid in the initial distribution.

(x) If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an affected investor or a beneficial owner of an affected investor 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 Exchange Act when the distribution of funds is complete and before the final accounting provided for in Paragraph xii of this Subsection C is submitted to the Commission staff. Payment must be made in one of the following ways:

(a) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(b) 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

(c) 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 Coburn & Meredith, Inc. as the 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 Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide.

(xi) 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 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 any such professional services shall be borne by Respondent and shall not be paid out of the Fair Fund.

(xii) Within one hundred fifty (150) days after Respondent completes the disbursement of all amounts payable to affected investors, Respondent shall return all undisbursed funds to the Commission pursuant to the instructions set forth in 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 include, but not be limited to: (1) the amount paid to each payee, with the reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (7) an affirmation that Respondent has made payments from the Fair Fund to affected investors in accordance with the Calculation approved by the Commission staff. The final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to Commission staff, shall be sent to Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange

Commission, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as 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.

(xiii) 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 if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

D. Respondent shall comply with the undertakings enumerated in Section III, paragraph 22.a. – 22.e., above.

By the Commission.

Vanessa A. Countryman
Secretary