

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5719 / April 15, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20261

In the Matter of

**MASON INVESTMENT
ADVISORY SERVICES,
INC.,**

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 Mason Investment Advisory Services, Inc. (“MIAS” 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

1. These proceedings arise out of breaches of fiduciary duty by MIAS, a registered investment adviser, in connection with its mutual fund share class selection practices and the receipt of fees by its affiliated broker-dealer, Mason Securities, Inc. ("MSI") pursuant to Rule 12b-1 under the Investment Company Act of 1940 ("12b-1 fees"). At times during the period from February 1, 2014, through September 30, 2016 (the "Relevant Period"), MIAS purchased, recommended, or held for certain 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. MIAS's affiliate, MSI, received 12b-1 fee revenue in connection with these investments, a small portion of which was then paid to certain of MIAS's investment adviser representatives ("IARs"), in their capacities as registered representatives of MSI. MIAS did not adequately disclose this conflict of interest in its Forms ADV or otherwise. MIAS also breached its duty to seek best execution, by causing certain advisory clients to purchase mutual fund share classes that charged 12b-1 fees when share classes of the same funds that presented a more favorable value for these clients under the particular circumstances in place at the time of the transactions were available to the clients.

2. Furthermore, MIAS 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.

3. MIAS, although eligible to do so, did not self-report to the Commission pursuant to the Division of Enforcement's Share Class Selection Disclosure Initiative ("SCSD Initiative").²

Respondent

4. Respondent Mason Investment Advisory Services, Inc. is a Delaware corporation based in Reston, Virginia, that has been registered with the Commission as an investment adviser since 1982. In its Form ADV dated June 29, 2020, MIAS reported that it had approximately \$8.33 billion in regulatory assets under management.

Related Party

5. Mason Securities, Inc. is a Delaware corporation based in Reston, Virginia, that has been registered with the Commission as a broker-dealer since 1982. MSI is an affiliate of MIAS

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).

with common ownership by Mason International, Inc. Throughout the Relevant Period, MSI acted as an introducing broker-dealer for certain of MIAS's advisory clients.

Mutual Fund Share Class Selection

6. 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.

7. 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 (equal to 0.25% to 1.00%). 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.

8. 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.

9. During the Relevant Period, MIAS advised certain clients to purchase or hold⁴ mutual fund share classes that charged 12b-1 fees when lower-cost share classes of those same funds were available to those clients. MIAS's affiliate, MSI, and certain IARs, in their capacities as registered representatives of MSI, received 12b-1 fees that they would not have collected had such advisory clients been invested in the available lower-cost share classes.

Disclosure Deficiencies

10. From February 2014 through September 2014, MIAS's firm brochure disclosed: "Certain employees of MIAS are also registered representatives with Mason Securities, Inc., and in such capacity the registered representatives may implement the decision of the client and execute the corresponding transactions. As MIAS is affiliated with (MSI), a potential conflict of interest may arise in executing transactions through (MSI). In connection with those transactions, (MSI) may collect commissions." The brochure further stated that: "MIAS and Mason Securities, Inc., its affiliate, may earn additional compensation in the form of continuing service fees ([including] 12b-

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.

1 fees) from mutual funds, as well as fees, commissions, and/or mark-ups on money market transactions. This additional compensation is not available to off-set fees. The registered representative (financial planner) may receive a portion of any service fees, processing charges, and/or mark-ups.”

11. From September 2014 through the end of the Relevant Period, MIAS omitted the disclosures outlined in Paragraph 10. As a result, MIAS did not make any disclosures relating to 12b-1 fees in the firm brochure.

12. Although disclosures were omitted from the firm brochure, certain MIAS advisory clients entered into service agreements that disclosed: “As Manager is associated with Mason Securities, Inc., (‘Broker’), a potential conflict of interest may arise in executing transactions through the Broker. In connection with those transactions, Broker may collect commissions. Broker does not have any discretion over the accounts and only acts at the direction of Manager... It is understood by and between the parties hereto that certain employees of Manager are also registered representatives with Mason Securities... Securities commissions, if any, earned by Mason Securities, Inc. are offset prospectively against the management fee and set-up fee. Continuing service fees ([including] 12b-1 fees) from mutual funds and money market sweep accounts, as well as fees, commissions, and/or mark-ups on money market transactions are not available to offset fees. Such registered representative(s) may receive a portion of any service fees, processing charges, and/or mark-ups.”

13. As an investment adviser, MIAS was obligated to disclose all material facts to its advisory clients, including any conflicts of interest between itself and/or its IARs and its clients that could affect the advisory relationship and how those conflicts could affect the advice MIAS provided its clients. To meet this fiduciary obligation, MIAS 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 MIAS’s and its IARs’ advice about investing in different classes of mutual funds and could have an informed basis on which they could consent to or reject the conflicts. MIAS did not adequately disclose all material facts regarding the conflict of interest that arose when it invested certain advisory clients in a share class that would generate 12b-1 fee revenue for MSI and its IARs, in their capacities as registered representatives of MSI, while a share class of the same fund was available that would not provide MSI and the IARs with additional compensation.

Best Execution Failures

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

15. By causing certain advisory clients to purchase mutual fund share classes that charged 12b-1 fees when share classes of the same funds were available to the clients that

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).

presented a more favorable value under the particular circumstances in place at the time of the transactions, MIAS violated its duty to seek best execution for those transactions.

Compliance Deficiencies

16. During the Relevant Period, MIAS failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with disclosure of conflicts of interest presented by its mutual fund share class selection practices, or in connection with making recommendations of mutual fund share classes that were in the best interests of its advisory clients.

Disgorgement

17. The disgorgement and prejudgment interest ordered in paragraph IV.C. is consistent with equitable principles, does not exceed Respondent's net profits from its violations, and is awarded for the benefit of 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.

Violations

18. 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." Scienter 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)).

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

⁶ "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." *Tagerv. 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).

MIAS's Remedial Efforts

20. Although MIAS did not self-report pursuant to the SCSD Initiative, in determining to accept the Offer, the Commission considered other remedial acts promptly undertaken by MIAS and cooperation afforded the Commission staff. These include: (i) a firm-wide initiative, begun in April 2016, in which the vast majority of MIAS's clients were transitioned from 12b-1 fee paying share classes to non-12b-1-fee-paying share classes; (ii) MIAS's diminishing use of 12b-1 fee paying share classes during the Relevant Period and the fact that MIAS ceased purchasing mutual fund share classes that charge 12b-1 fees by August 2016; and (iii) reimbursement of certain MIAS advisory clients prior to commencement of this action.

Undertakings

21. 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 and 12b-1 fees.

b. Within 30 days of the entry of this Order, evaluate whether existing clients should be moved to a lower-cost 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 in connection with making recommendations of mutual fund share classes that are in the best interests of Respondent's advisory clients.

d. Within 30 days of the entry of this Order, notify affected investors (*i.e.*, those former and current MIAS clients, who, during the Relevant Period, purchased or held 12b-1 fee paying share class mutual funds when a lower-cost share class of the same fund was available to the client, and for whom fees were collected by MSI and/or its IARs) (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 certification and supporting material shall be submitted to Brendan P. McGlynn, Assistant Regional Director, Asset Management Unit, Philadelphia Regional Office, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA

19103, 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 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 and prejudgment interest, totaling \$825,057.78 as follows:

(i) Respondent shall pay disgorgement of \$694,593.75 and prejudgment interest of \$130,464.03, consistent with the provisions of this Subsection C.

(ii) Within ten (10) days of the entry of this Order, Respondent shall deposit the full amount of the disgorgement and prejudgment interest (the "Distribution Fund"), less monies already distributed to affected investors, into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide evidence of such deposit in a form acceptable to the Commission staff. If timely deposit is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600].

(iii) Respondent shall be responsible for administering the Distribution Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Distribution Fund, including any such professional services, shall be borne by Respondent and shall not be paid out of the Distribution Fund.

(iv) Respondent shall distribute from the Distribution Fund to each affected investor an amount representing: (a) the 12b-1 fees attributable to the affected investor during the Relevant 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. The Calculation shall be subject to a *de minimis* threshold. No portion of the Distribution Fund shall be paid to any affected investor account in which Respondent, or any of its current or former officers or directors, have a financial interest.

(v) Respondent shall, within ninety (90) 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 shall also provide to 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 Respondent is notified of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

(vi) 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 from the Distribution Fund to each affected investor, (3) the application of a *de minimis* threshold; and (4) the amount of reasonable interest to be paid.

(vii) Respondent shall disburse 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 (xi) of this Subsection C. Respondent shall notify the Commission staff of the date and the amount paid in the initial distribution.

(viii) If Respondent is unable to distribute or return any portion of the Distribution Fund for any reason, including an inability to locate an affected investor or a beneficial owner of an affected investor account or any factors beyond Respondent’s control, Respondent shall transfer any such undistributed funds to the

Commission for further disposition as approved by the Commission. 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 Mason Investment Advisory Services, 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 Brendan P. McGlynn, Assistant Regional Director, Asset Management Unit, Philadelphia Regional Office, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103, or such other address as the Commission staff may provide.

(ix) A Distribution 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 any and all tax compliance responsibilities associated with the Distribution Fund, including but not limited to tax obligations resulting from the Distribution 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 tax compliance, including any such professional services, shall be borne by Respondent and shall not be paid out of the Distribution Fund.

(x) Within one hundred fifty (150) days after Respondent completes the distribution of all amounts payable to the affected investors, Respondent shall return all undisbursed funds to the Commission pursuant to the instruction set forth in this Subsection C. Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Distribution Fund for Commission approval. The final accounting shall be in a format to be provided by the Commission staff. The final accounting and certification shall include, but not be limited to: (1) the amount paid to each affected investor, with the reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the

check number or other identifier of money transferred or credited to each affected investor; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate an affected investor 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; and (7) an affirmation that Respondent has made payments from the Distribution Fund to affected investors in accordance with the Payment File approved by the Commission staff. Respondent shall submit the final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to Commission staff, under a cover letter that identifies Mason Investment Advisory Associates, Inc. as the Respondent in these proceedings and the file number of these proceedings to Brendan P. McGlynn, Assistant Regional Director, Asset Management Unit, Philadelphia Regional Office, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103, 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 Respondent shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

(xi) 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 Distribution 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, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$150,000 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. 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 MIAS 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 Brendan P. McGlynn, Assistant Regional Director, Asset Management Unit, Philadelphia Regional Office, Securities and Exchange Commission, 1617 JFK Blvd., Suite 520, Philadelphia, PA 19103, or such other address as the Commission staff may provide.

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.

F. Respondent shall comply with the undertakings enumerated in Section III, paragraphs 21.a through 21.e above.

By the Commission.

Vanessa A. Countryman
Secretary