UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5477 / April 17, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-19752

In the Matter of **COZAD ASSET MANAGEMENT, 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 Cozad Asset Management, Inc. ("Cozad" 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 finds[1] that

Summary

1. These proceedings arise out of breaches of fiduciary duty and inadequate disclosures by Cozad, a registered investment adviser, in connection with its mutual fund share class selection practices and the fees certain of its associated persons received pursuant to Rule 12b-1 under the Investment Company Act of 1940 ("12b-1 fees"). During the period January 1, 2014 through October 31, 2018 (the "Relevant Period"), Respondent and its associated persons – each of whom also was a registered representative of an unaffiliated broker-dealer registered with the Commission, which is also a registered investment adviser (the "Unaffiliated BD/IA") – 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 those clients. Certain of Respondent's associated persons received, as registered representatives of the Unaffiliated BD/IA, 12b-1 fees in connection with clients' investments in the mutual fund share classes that paid those fees. Respondent also benefitted when clients were invested in these share classes. Respondent did not adequately disclose the conflicts of interest relating to selection of these share classes in its Forms ADV or otherwise.

2. Additionally, Respondent 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 its mutual fund share class selection practices.

3. As a result of the conduct described above, Respondent willfully[2] violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

Respondent

4. Respondent Cozad Asset Management, Inc., incorporated in Illinois and headquartered in Champaign, Illinois, has been registered with the Commission as an investment adviser since 1982. In its Form ADV filed May 6, 2019, Respondent reported regulatory assets under management of approximately $1,175,839,508.

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[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] "Willfully," for purposes of imposing relief under Section 203(f) of the Advisers Act and Section 9(b) of the Investment Company Act, "'means no more than that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

Mutual Fund Share Class Selection

5. 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.

6. For example, some mutual fund share classes charge 12b-1 fees to cover fund distribution and sometimes shareholder service expenses. 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.

7. 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 almost always 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.

8. During the Relevant Period, Respondent and its associated persons advised clients to purchase or hold[4] mutual fund share classes that charged 12b-1 fees when lower-cost share classes of those same funds were available to those clients. Certain of Respondent's associated persons, as registered representatives of the Unaffiliated BD/IA, received 12b-1 fees that they would not have collected had those clients been invested in the available lower-cost share classes, and, in turn, contributed additional revenue towards Respondent's operational expenses.

Disclosure Failures

9. During the Relevant Period, Respondent disclosed in its firm brochures that "[t]he purchase and sale of securities will normally incur transaction costs including sales charges, commissions, and/or markups," and that "[a] conflict of interest exists because some of our [associated persons] will be . . . receiving a portion of brokerage commissions, mark-ups, mutual fund sales charges and/or service fees on securities transactions." Respondent also disclosed in its Asset Management Agreement, which Cozad's advisory clients signed at the onset of their relationship, that its associated persons "may" receive 12b-1 fees from the sale of mutual funds and that the availability of such fees created a conflict of interest.

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[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.

10. As an investment adviser, Respondent was obligated to disclose all material facts to its advisory clients, including any conflicts of interest between itself and/or its associated persons and its clients that could affect the advisory relationship and how those conflicts could affect the advice Respondent provided its clients. To meet this fiduciary obligation, Respondent 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 Respondent's and its associated persons' 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. Respondent did not adequately disclose all material facts regarding the conflicts of interest that arose for it and its associated persons when they invested advisory clients in a share class that paid the associated persons 12b-1 fees while a share class of the same fund was available that would not provide that additional compensation.

Compliance Deficiencies

11. During the Relevant Period, Respondent failed to adopt and implement written policies and procedures reasonably designed to prevent violation 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.

Violations

12. As a result of the conduct described above, Respondent willfully 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 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)).

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

Cozad's Remedial Efforts

14. In determining to accept Respondent's offer, the Commission considered that Cozad: (i) self-reported to the Commission staff in the fall of 2018 after learning that the Unaffiliated BD/IA had participated in the Commission's Share Class Selection Disclosure Initiative[5]; (ii) undertook remedial acts promptly (including certifying to Commission staff that it had completed the undertakings identified in paragraphs 15.a, 15.b, and 15.c, below); and (iii) cooperated with Commission staff.

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

Undertakings

15. 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.

d. Within 30 days of the entry of this Order, notify affected investors (*i.e.*, those former and current 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) (hereinafter, "affected investors") of the settlement terms of the Order in a clear and conspicuous fashion 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) ordered pursuant to Section IV.D., below. 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 Paul A. Montoya, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 1450, Chicago, IL 60604, 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 shall 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 thereunder.

B. Respondent is censured.

C. Respondent shall pay disgorgement and prejudgment interest, totaling $416,870.10 as follows:

(i.) Respondent shall pay disgorgement of $369,423.75 and prejudgment interest of $37,446.35, consistent with the provisions of this Subsection C.

(ii.) Respondent shall pay a civil money penalty in the amount of $10,000, 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 investor accounts. 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 thirty (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.

(iv.) Within ten (10) days of the entry of this Order, Respondent shall deposit the full amount of the disgorgement, prejudgment interest, and civil monetary penalty (the "Fair Fund") 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].

(v.) Respondent shall be responsible for administering the Fair Fund and may hire a professional not unacceptable to the staff of the Commission, at its own cost, 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 an amount representing: (a) the 12b-1 fees attributable to each affected investor account 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 Fair Fund shall be paid to any affected investor account in which Respondent or its past or present officers or directors have a financial interest.

(vii.) Respondent shall, within ninety (90) days from the date of this Order, submit a proposed disbursement calculation (the "Calculation") to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the staff, Respondent, along with any third-parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the Distribution, shall make itself available for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculations 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 account. The Payment File should identify, at a minimum: (1) the name of each affected investor account; (2) the exact amount of the payment to be made from the Fair Fund to each affected investor account; (3) the amount of reasonable interest to be paid; and (4) the application of a *de minimis* threshold.

(ix.) Respondent shall complete the disbursement of all amounts payable to affected shareholder accounts 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.

(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 Securities Exchange Act of 1934 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 Respondent 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 Paul A. Montoya, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 1450, Chicago, IL 60604, 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 distribution of 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 by the Fair Fund.

(xii.) Within one hundred fifty (150) days after Respondent completes the distribution of all amounts payable to the affected investor accounts, Respondent shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection C. Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval. 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 (calculated at the short-term applicable federal rate plus 3%), 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 account; (4) the amount of any returned payment and the date received; (5) a description of any effort 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 for transfer to the United States Treasury; and (7) an affirmation that Respondent has made payments from the Fair Fund to affected investor accounts 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 Cozad Asset Management, Inc. as the Respondent in these proceedings and the file number of these proceedings to Paul A. Montoya, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Blvd., Suite 1450, Chicago, IL 60604, or such other address as the Commission staff may provide. Any and all supporting documentation for the accounting and certification shall be provided to the Commission staff upon request, and Respondent 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 Paragraphs (iii) through (xii) of 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, paragraphs 15.d through 15.e above.

By the Commission.

Vanessa A. Countryman
Secretary