

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6032 / May 23, 2022

INVESTMENT COMPANY ACT OF 1940
Release No. 34591 / May 23, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20867

In the Matter of

**BNY MELLON INVESTMENT
ADVISER, 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 AND SECTION 9(f) OF THE
INVESTMENT COMPANY 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”), and Section 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against BNY Mellon Investment Adviser, Inc. (“Respondent” or “BNYMIA”).

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 Respondent 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 and Section 9(f) of the Investment Company 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. This matter arises from material misstatements and omissions made by registered investment adviser BNYMIA concerning the consideration of Environmental, Social, and Governance ("ESG") principles to make investment decisions for certain mutual funds advised by BNYMIA (the "Overlay Funds").

2. During the period between July 2018 and September 2021 (the "Relevant Period"), BNYMIA represented to investors via mutual fund prospectuses and to those funds' boards that its affiliated sub-adviser to the Overlay Funds ("Sub-Adviser") implemented ESG principles by conducting proprietary ESG quality reviews as part of the Sub-Adviser's investment research process for all investments made by the Overlay Funds. Also during the Relevant Period, BNYMIA made other similar representations in certain written responses to requests for proposals ("RFP Responses") from other investment firms considering investments on behalf of their own clients that implied that all investments in the Overlay Funds had undergone an ESG quality review. The RFP Responses concerned the Overlay Funds as well as separately managed accounts that follow an Overlay Fund's investment strategy.

3. The Sub-Adviser's ESG principles called for identifying the ESG risks and opportunities presented by securities in which a fund might invest, and ensuring that ESG challenges were well-managed within the business strategy of any issuer in which a fund was considering an investment. As part of carrying out those principles, the Sub-Adviser maintained a Responsible Investment Team that researched ESG issues. The Responsible Investment Team prepared written ESG quality reviews for equity securities and corporate bonds. For certain mutual funds that the Sub-Adviser sub-advised, referred to as the "Sustainable Funds," the Sub-Adviser required the Responsible Investment Team's proprietary ESG quality review for all investments. For other mutual funds, including the Overlay Funds, individuals at the Sub-Adviser who selected investments were permitted to and did select investments that were not researched by the Responsible Investment Team and thus did not undergo a proprietary ESG quality review.

4. The Overlay Funds made investments that had not always received ESG quality reviews. Overlay Funds incorporate ESG considerations into investment decisions, but do not have a specific mandate to follow ESG principles for any investment. The Overlay Funds are distinct from the Sustainable Funds, also advised by BNYMIA and sub-advised by the same Sub-Adviser, which incorporate ESG investment principles as part their principal investment strategies. According to their prospectuses, the Sustainable Funds follow certain ESG-related criteria and

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.

requirements for investment in securities that “demonstrate attractive investment attributes and sustainable business practices, and have no material unresolvable environmental, social and governance (ESG) issues.” The Overlay Funds, in contrast, are not subject to that specific investment criteria and as a result their prospectuses do not contain language of this type in the “Principal Investment Strategies” or “Principal Risks” sections. Instead, for the Overlay Funds, BNYMIA represented to investors and intermediaries that ESG considerations were part of the funds’ investment process. In board minutes, and certain RFP Responses for both Overlay Funds and separately managed accounts that followed an Overlay Fund’s investment strategy, BNYMIA represented that ESG quality reviews were part of the Sub-Adviser’s investment research process. The Overlay Fund prospectuses, prepared and filed by BNYMIA, each made a similar statement. BNYMIA’s representations were incomplete because they did not also state that the Sub-Adviser could and did select portfolio investments that were not necessarily subject to that aspect of the research process.

Respondent

5. **BNY Mellon Investment Adviser, Inc.** (SEC File No. 801-8147) is an investment adviser that has been registered with the Commission since 1971. As of March 31, 2022, BNYMIA had over \$380 billion in regulatory assets under management, including over \$350 billion in mutual funds or other investment companies. BNYMIA is a wholly owned subsidiary of The Bank of New York Mellon Corporation. BNYMIA is the investment adviser to each of the Overlay Funds. References in this Order to BNYMIA include the period prior to June 3, 2019 when BNYMIA was known as the Dreyfus Corporation (“Dreyfus”). Dreyfus was the name for the primary mutual fund business of The Bank of New York Mellon Corporation and the name of the investment adviser to each of the Overlay Funds. On or about June 3, 2019, Dreyfus changed its name to “BNY Mellon Investment Adviser, Inc.” and “Dreyfus” was replaced with “BNY Mellon” in relevant fund names.

Other Relevant Entities

6. The Overlay Funds, each a registered investment company, are the **BNY Mellon Global Equity Income Fund** (a series of BNY Mellon Investment Funds III), **BNY Mellon International Equity Fund** (a series of BNY Mellon Investment Funds I); **BNY Mellon Variable Investment Fund - International Equity Portfolio** (liquidated effective April 30, 2020, a series of BNY Mellon Variable Investment Fund); **BNY Mellon Global Real Return Fund** (a series of BNY Mellon Advantage Funds, Inc.); **BNY Mellon Global Emerging Markets Fund** (a series of BNY Mellon Investment Funds II, Inc.); and **BNY Mellon Global Dynamic Bond Income Fund** (a series of BNY Mellon Advantage Funds, Inc.). As of March 31, 2021, the Overlay Funds had combined net assets of approximately \$5.3 billion.

Facts

BNYMIA Made Misleading Statements Suggesting that ESG Quality Reviews Were Prepared for All Overlay Fund Investments

7. In RFP Responses, BNYMIA described the Sub-Adviser as having an ESG focus since its inception in 1978. In 2004, the Sub-Adviser established a Responsible Investment Team with a focus on investment risks presented by ESG issues. The Responsible Investment Team prepared ESG quality reviews as part of its research process for investment recommendations. The ESG quality review focused on the issuer of a security – that is, the company that issued a security that a BNYMIA mutual fund might purchase. The Responsible Investment Team prepared an ESG quality review score on a range from 1 to 10, with 10 being for a company with ESG practices that the Sub-Adviser considered “world-leading.”

8. With respect to the Sustainable Funds, the Sub-Adviser required that there be an ESG quality review for all equity and most corporate bond investments either prior to, or in the case of corporate bonds, within 30 days after the investment was made. During the Relevant Period, however, the Sub-Adviser could and did select equity and corporate bond investments for the Overlay Funds that did not have an ESG quality review at the time of investment (or within 30 days after a corporate bond investment). In July 2020, the Sub-Adviser changed its policy to require that all equities selected for an Overlay Fund have an ESG quality review score prior to investment.

9. Numerous equity and/or corporate bond investments held by certain Overlay Funds did not have an ESG quality review score as of the time of investment. For example, out of 185 investments made by one Overlay Fund between January 1, 2019 and March 31, 2021, 67 did not have an ESG quality review score as of the time of investment (or, in the case of corporate bonds, within 30 days after purchase, consistent with the Sub-Adviser’s policy), amounting to nearly 25 percent of the fund’s net assets as of March 31, 2021.

BNYMIA Made Misleading Statements Regarding ESG Quality Review Practices in Overlay Fund Prospectuses and in Certain Overlay Funds Board Minutes

10. BNYMIA prepared and filed with the Commission Overlay Fund prospectuses that described the funds to investors and prospective investors. From September 21, 2018 to September 30, 2021, BNYMIA represented in the “Goal and Approach” section of Overlay Fund prospectuses that:

Integrated into the investment process, [the Sub-Adviser] has a well-established approach to responsible investment. This process includes identifying and considering the Environmental, Social and Governance (ESG) risks, opportunities and issues throughout the research process via [the Sub-Adviser’s] proprietary quality reviews, in an effort to ensure that any material ESG issues are considered.

11. This statement was made in the context of a description about the funds' portfolio managers' security selection process and was misleading because it failed to disclose that the Sub-Adviser neither required nor prepared quality reviews for all investments in the Overlay Funds. A reasonable investor reading an Overlay Fund prospectus could mistakenly conclude that all portfolio holdings selected by the Sub-Adviser were subject to an ESG quality review. Instead, the Sub-Adviser's personnel who chose investments for the Overlay Funds could, and did, select Overlay Fund investments that did not have an ESG quality review score at the time of investment.

12. Minutes from July and August 2018 meetings of the Overlay Funds' boards state that, during discussions relating to the above prospectus language, BNYMIA described the Sub-Adviser's "integration of environmental, social and governance ('ESG') factors into the investment process." The minutes state that BNYMIA represented to the board members that, "prior to making any investment, [the Sub-Adviser] assigns to each company a proprietary ESG quality review rating designed to ensure that any material ESG issues of the company are taken into consideration." That statement in the minutes was incorrect in the context of the Overlay Funds, because the Sub-Adviser could and did select investments for Overlay Funds that were not subject to a proprietary ESG quality review.

BNYMIA Made Misleading Statements in RFP Responses Suggesting that ESG Quality Reviews Were Conducted for all Investments

13. During the Relevant Period, BNYMIA prepared RFP Responses to other investment firms that were evaluating the Overlay Funds for their own clients. In response to numerous inquiries regarding ESG considerations, BNYMIA included language that described the Sub-Adviser's Responsible Investment Team's research process, including its preparation of ESG quality reviews. BNYMIA provided RFP Responses which stated that the Sub-Adviser's Responsible Investment Team prepared an ESG quality review for every security recommended by the Sub-Adviser's analysts. For example, BNYMIA stated in an RFP Response that "ESG considerations are taken into account at every stage of the investment process" and "ahead of investing, each security being considered for investment by our global industry analysts must have an ESG quality review conducted by a member of [the Responsible Investment Team]." BNYMIA's statements were incomplete because BNYMIA did not also state that the Sub-Adviser could and did select portfolio investments that did not necessarily receive an ESG quality review score.

14. BNYMIA similarly represented in an RFP Response for an investment firm concerning its clients' separately managed accounts, that as part of the Sub-Adviser's "due diligence process ahead of investing, each security being considered for investment by [the Sub-Adviser's] global industry analysts must have an ESG quality review conducted by a member of [the Sub-Adviser's Responsible Investment] team." That representation was incorrect, because the RFP Response concerned a strategy tracking an Overlay Fund that did not require ESG quality reviews to be performed before all investments.

BNYMIA Failed to Adopt and Implement Reasonably Designed Policies and Procedures

15. BNYMIA lacked written policies and procedures reasonably designed to prevent inaccurate or materially incomplete statements in prospectuses, in RFP Responses, or to the Overlay Funds' boards about the Sub-Adviser's use of ESG quality reviews when selecting investments for Overlay Funds. BNYMIA compliance personnel were unaware before mid-March 2020 that quality reviews were not prepared for all Overlay Fund investments, and thus lacked pertinent facts when determining whether BNYMIA's prospectuses and RFP Responses complied with federal securities laws.

16. Based on the foregoing, BNYMIA failed to adopt and implement policies and procedures reasonably designed to prevent the inclusion of untrue statements of fact in prospectuses or the inclusion of misleading statements in RFP Responses or to the Overlay Funds' boards.

Violations

17. As a result of the conduct described above, BNYMIA willfully² violated Section 206(2) of the Advisers Act, which prohibits an investment adviser, directly or indirectly, from engaging "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), which may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963)).

18. As a result of the conduct described above, BNYMIA willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which provides in relevant part that it is unlawful for an investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. A violation of Section 206(4) and the rules thereunder does not require scierter, and may rest on a finding of simple negligence. *Steadman*, 967 F.2d at 647.

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

² "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." *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).

registered or required to be registered with the Commission to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

20. As a result of the conduct described above, BNYMIA violated Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make any untrue statement of a material fact in any registration statement, or other document filed or transmitted pursuant to the Investment Company Act, or for any person so filing or transmitting to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading. Establishing a violation of 34(b) of the Investment Company Act does not require proof of scienter. *In the Matter of Fundamental Portfolio Advisors, Inc.*, Advisers Act Rel. No. 2146, 2003 WL 21658248, at *8 (July 15, 2003).

Remedial Efforts and Cooperation

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff. Throughout the staff's investigation, BNYMIA provided detailed factual summaries and made substantive presentations on key topics. The cooperation afforded by BNYMIA advanced the quality and efficiency of the staff's investigation and conserved Commission resources. BNYMIA also revised certain disclosure language. BNYMIA's remedial steps include, but are not limited to, modifying relevant processes, policies, and procedures.

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, and Section 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. BNYMIA 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 Rules 206(4)-7 and 206(4)-8 thereunder and Section 34(b) of the Investment Company Act.

B. BNYMIA is censured.

C. BNYMIA shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1,500,000.00 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 BNY Mellon Investment Adviser, 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 Robert Baker, Assistant Director, Asset Management Unit, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, 24th Floor, Boston, MA 02110.

D. 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