UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6726 / September 25, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22174

In the Matter of **HARVEST VOLATILITY MANAGEMENT LLC,** **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 Harvest Volatility Management LLC ("Harvest" 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:

INTRODUCTION

1. From March 2016 to April 2018 (the "Relevant Period"), Harvest, a registered investment adviser, failed to follow the terms of the Investment Management Agreement ("IMA") in managing an options overlay strategy for certain clients referred by Merrill Lynch, Pierce, Fenner & Smith ("Merrill"). Specifically, in its Collateral Yield Enhancement Strategy, or "CYES," Harvest purchased and sold options contracts at levels materially above the levels clients authorized in the IMA. By failing to comply with the IMA, Harvest caused hundreds of clients to be over-exposed to the strategy, resulting in higher fees and, during certain periods, financial losses. As a result, Harvest willfully violated Section 206(2) of the Advisers Act.

2. Harvest 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 execution of CYES with respect to authorized notional amounts. As a result, Harvest willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

RESPONDENT

3. **Harvest** is a privately-owned investment adviser registered with the Commission since 2008, when it was founded. Harvest is a Delaware limited liability company with its principal place of business in Norwalk, Connecticut. Harvest provides advisory services to high-net worth individuals, registered investment companies, private funds, pension and profit-sharing plans, and corporations.

OTHER RELEVANT PARTY

4. **Merrill** is a Delaware company headquartered in New York, New York. Merrill has been registered with the Commission as an investment adviser since 1978 and as a broker-dealer since 1959. Since 2009, Merrill has been an indirect wholly-owned subsidiary of Bank of America Corporation.

FACTS

5. In 2008, Harvest developed CYES, an options overlay "Iron Condor" strategy. CYES sought to generate returns by collecting option premiums from a portfolio of short-dated option spreads on the S&P 500 index ("SPX"): selling options to generate premium while simultaneously purchasing further out-of-the-money options to manage risk. CYES was an "options overlay" strategy through which enrolled participants pledged existing cash or investment assets as

[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.

collateral. In general terms, Harvest used the collateral as the basis for an options trading strategy on the SPX. The stated objective of CYES was to generate incremental returns for enrolled investors from the "harvesting" of options premiums, without requiring the investors to commit new money to participate in the strategy. Typically, every six to eight weeks, Harvest created a structure of options contracts for CYES, and then adjusted the strategy during the ensuing weeks based on market conditions.

6. In or about August 2011, Merrill approved Harvest's CYES for investment by eligible ultra-high net worth investors. Merrill and Harvest entered into a Solicitation Agreement, under which Harvest paid Merrill 30% of CYES management and incentive fees for all clients introduced by Merrill. For such clients, Harvest created—and Merrill approved—an Investment Management Agreement ("IMA"). The IMA, which Merrill also signed, required Harvest to place all orders for the execution of CYES options trades through Merrill, for which Merrill charged associated trading commissions to the clients.

7. This matter generally pertains to CYES clients introduced to Harvest by Merrill prior to 2017. The investors introduced by Merrill enrolled in CYES through the IMA, in which investors instructed Harvest of their desired level of exposure to CYES by specifying, in writing, a "Notional Amount" in dollars in Schedule A of the IMA. Harvest used this Notional Amount to determine the initial number of index options to purchase for the investors' accounts. The IMA employed by Harvest before January 2017 ("pre-2017 IMA") provided that, "[o]n each successive initiating trade in the Account, the Notional Amount may temporarily exceed the Notional Capacity or initial Notional Amount as a result of changes in the index level." Investors could increase or decrease their designated Notional Amount by providing Harvest with an amended Schedule A to their IMAs. The IMA specified that Harvest was the "investment advisor," and Merrill Lynch the "custodian."

8. "Notional Amount" indicates the amount of money controlled by a position on a particular financial instrument, including options contracts. For Harvest, the Notional Amount of a client's account was based on the number of options contracts multiplied by the current market value of the SPX multiplied by 100 (number of contracts x SPX value x 100). Thus, if a client wanted a Notional Amount of $6 million and the SPX was at 2,000, Harvest would purchase 30 contracts (30 x 2,000 x 100 = 6,000,000), even though the market price of the underlying contracts might be a small fraction of the Notional Amount. If the SPX moved to 2,200, then the same 30 contracts would have a Notional Amount value of $6.6 million.

9. Because the SPX generally changes every trading day, the actual Notional Amount of clients' accounts generally also changed each trading day. Accordingly, to allow only temporary deviations to investors' Notional Amounts, Harvest needed to adjust the number of contracts it purchased after each six-to-eight-week period. However, during the Relevant Period, instead of adjusting the number of contracts it purchased for clients with pre-2017 IMAs every six to eight weeks, Harvest kept the number of contracts constant – that is, Harvest continued to purchase the same number of contracts in each successive period – despite increases or decreases in the SPX.

10. Pursuant to the pre-2017 IMA for investors introduced by Merrill, Harvest's management fees were based on clients' actual Notional Amounts, as estimated at the beginning of

a quarter and then trued-up at quarter-end, and not their authorized Notional Amounts. Thus, a client who directed a Notional Amount of $6 million, but whose account had an actual Notional Amount of $6.6 million, would pay 10% more in fees than if the actual Notional Amount were $6 million. Similarly, a client would pay proportionally less in fees if the actual Notional Amount were to decline because of a decline in the market value of the SPX.

11. In the Relevant Period, although the SPX fluctuated up and down, it trended upward. Consequently, clients' exposure to gains and losses on CYES rose, as did Harvest's fees, which were calculated as a percentage of Notional Amounts.

12. By March 2016, Harvest's management was aware that increasing Notional Amounts in CYES accounts had caused 102 accounts introduced by Merrill to exceed the client-directed amounts by 20% or more. Despite the accounts with elevated Notional Amounts being identified in a Harvest firm-wide email, Harvest failed to adjust the accounts to lower the Notional Amounts or to adopt a plan to notify all the clients and obtain their consent to trade at the higher levels.

13. Between early March 2016 and the end of April 2016, the SPX increased. On May 4, 2016, another Harvest firm-wide email showed that 115 CYES accounts of clients introduced by Merrill were now 20% or more over the client-directed Notional Amounts. One of the Harvest executives who received the email correctly suggested this was, in part, because "the number of contracts has remained constant but notional has crept higher as the [SPX] surged from 2012 to current." The executive wrote that "[i]t would be great to start shrinking this list" and suggested that another executive and a junior employee "come up with a plan."

14. Harvest did not enact a plan to address the elevated Notional Amounts in mid-2016. Instead, by September 14, 2016, Harvest had allowed 166 CYES accounts of clients introduced by Merrill to drift at least 20% over the client-directed Notional Amounts. The Harvest executive who had previously suggested developing a plan now proposed that "we should identify the biggest Notional versus Target gaps (from largest gap to smallest; only real care [sic] the difference is >30%) and start to address them (in batches 10 at a time)."

15. Throughout 2016, the SPX gained roughly 10%, causing the already-elevated Notional Amounts to increase further. Although Harvest could have adjusted the number of contracts it purchased for CYES clients to align the Notional Amounts with client directions, in many cases, Harvest did not make such adjustments.

16. By the end of 2016, Harvest had begun taking steps to address the elevated Notional Amounts. Executives decided to inform Merrill of accounts with Notional Amounts greater than the client had directed. Harvest planned to either to "rebalance" Notional Amounts – that is, to reduce the number of contracts in each account to place the account back in line with the client-specified Notional Amount – or to obtain client authorization to increase their Notional Amount to reflect the rise in the SPX. In numerous instances, Harvest informed Merrill of the notional overage and suggested the option of continuing to trade at that level by providing a client consent form. The alternative, as expressed by a Harvest representative, was that "we should probably bring the notional back down to their target, which would not require any paperwork."

17. Although Harvest had a plan at the start of 2017 to address CYES accounts at Merrill that had elevated Notional Amounts, Harvest failed to execute the plan, and relied on ad hoc communications from Harvest personnel to Merrill. Some Merrill personnel responded to Harvest, while others did not, and, for some CYES accounts, Harvest failed to contact Merrill entirely. Harvest did not consistently track their communications with Merrill and whether client consent had been obtained to trade at higher Notional Amounts. Additionally, for most of the accounts where Harvest did not obtain authorization from the client to increase a client's Notional Amount, Harvest continued to trade the same number of contracts.

18. During 2017, Harvest not only failed to adjust certain Merrill CYES accounts to conform with clients' existing instructions, but also failed to modify its internal processes and trading system. Harvest had originally designed its systems and options trading process to reduce the odds of making a trading or allocation error by holding the number of contracts constant in clients' accounts. To comply with the client-directed Notional Amounts, Harvest's trading system required Harvest to adjust the number of contracts before a new trade after the options contract expired or was sold. Harvest failed to do this.

19. As a result, and because the SPX increased by over 21% in 2017, hundreds of accounts continued climbing above the client-specified Notional Amounts without authorization. By the end of 2017, approximately 186 accounts for clients introduced by Merrill were 30% or more over client-specified Notional Amounts, and 74 accounts were 50% or more above client-specified Notional Amounts.

20. As a result of having greater exposure to the CYES strategy, some Harvest clients experienced elevated losses when the strategy had negative returns and elevated gains when the strategy had positive returns. Between the first quarter of 2016 and the first quarter of 2018, the CYES strategy experienced a net loss of approximately 1.05% on total notional exposure. Clients experienced investment losses greater than if Harvest had maintained the client-directed Notional Amounts in their pre-2017 IMAs.

21. In the second quarter of 2018, Harvest changed its trading process to regularly adjust the number of CYES options contracts to correspond with clients' designated Notional Amounts in pre-2017 IMAs. However, the consequences of the nine-quarter run up in Notional Amounts were significant. As a result of Harvest's failure to adjust contracts for certain clients introduced by Merrill during the Relevant Period, Harvest charged clients excessive management fees of approximately $4 million, which were shared with Merrill. Additionally, Merrill collected approximately $1 million in excessive commissions.

22. During the Relevant Period, the Notional Amounts in hundreds of CYES accounts at Merrill materially exceeded the client-directed amounts. When Harvest's returns were slightly positive in 2016 and much of 2017, many clients received incremental gains as a result of the increased exposure (to loss/gain) from higher-than-authorized Notional Amounts—though they also paid higher fees. However, when Notional Amounts in client accounts peaked in late 2017 and early 2018, CYES had poor returns, resulting in clients with excessive Notional Amounts losing more money than they had gained in the earlier part of the Relevant Period. In sum, clients whose accounts

were not adjusted cumulatively lost money during the Relevant Period due to trading in Notional Amounts greater than those authorized in their IMAs.

23. During the Relevant Period, Harvest rarely communicated directly with CYES clients who signed up for the Harvest strategy through Merrill. Harvest did not send account statements to the clients. Instead, Merrill generated and distributed account statements for the CYES accounts at Merrill. These monthly statements did not include the actual Notional Amount of the clients' accounts. Harvest offered clients and Merrill personnel access to an online portal that disclosed the Notional Amount of each client's account and tracked the level of the Notional Amount over the life of the account. In actuality, however, few clients requested or obtained credentials to the portal. As a result, many clients did not know that their instructions had not been followed and that they had greater exposure to the CYES strategy.

24. Harvest failed to adopt and implement policies and procedures to ensure that trading in clients' accounts was done consistently with the clients' instructions and that Harvest recorded or documented clients' instructions. In 2017, Harvest updated its IMA to authorize Harvest to trade the number of index option contracts initially selected by clients without the need to rebalance the number of contracts based on fluctuations in the value of the SPX. However, Harvest employed the new IMA only in establishing relationships with new clients and did not modify the IMAs of those clients introduced by Merrill before 2017. For many clients introduced before 2017, Harvest set the number of contracts when it began trading for those clients, and then did not adjust the number of contracts until early 2018. In 2018, after clients sustained losses as a result of excessive Notional Amounts in their accounts, Harvest modified its trading platform and adopted policies and procedures to trade consistent with clients' instructions.

VIOLATIONS

25. Section 206(2) of the Advisers Act makes it unlawful for an investment adviser, directly or indirectly, to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. As a result of the conduct described above, Harvest willfully violated Section 206(2).

26. Section 206(4) of the Advisers Act prohibits any investment adviser from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and authorizes the Commission to prescribe rules designed to prevent such conduct. Rule 206(4)-7 under the Advisers Act requires, among other things, 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. As a result of the conduct described above, Harvest willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.[2]

[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,

DISGORGEMENT AND CIVIL PENALTIES

27. The disgorgement and prejudgment interest ordered in Section IV 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. The Commission will hold funds paid pursuant to section IV in an account at the United States Treasury pending distribution. 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 Securities Exchange Act of 1934. In connection with such assistance, Respondents will produce, without service or notice of subpoena, all documents and other information reasonably requested by the Commission staff.

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 promulgated thereunder.

B. Respondent Harvest is censured.

C. Respondent Harvest shall, within 14 days of the entry of this Order, pay disgorgement of $2,500,000 and prejudgment interest of $1,000,000, to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Respondent Harvest shall also, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $2,000,000, to the Securities and Exchange Commission. 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

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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).

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 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 D. Mark Cave, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, prejudgment interest, and penalty referenced in Section IV.C. above. The Fair Fund may be added to or combined with any other fund established in any related action arising out of the same facts that are the subject of this Order. 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