UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6734 / September 27, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22216

In the Matter of

First Allied Advisory Services, Inc., and Cetera Investment Advisers LLC,

Respondents.

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 Respondents First Allied Advisory Services, Inc. ("First Allied") and Cetera Investment Advisers LLC ("Cetera," collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") 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 them and the subject matter of these proceedings, which are admitted, Respondents consent 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 Respondents' Offers, the Commission finds[1] that:

Summary

These proceedings arise out of First Allied's and Cetera's (a) failure reasonably to supervise William D. Carlton ("Carlton") and Hans K. Hernandez ("Hernandez"), both of whom were investment adviser representatives associated with First Allied and later Cetera and engaged in separate fraudulent trade allocation or "cherry-picking" schemes; (b) failure to adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and its rules; and (c) false and misleading statements in First Allied's and Cetera's disclosure brochures concerning supposed safeguards in place to prevent their investment adviser representatives from placing their own interests ahead of those of advisory clients. Carlton and Hernandez were associated with First Allied, an investment adviser then registered with the Commission, until November 2020, when they became associated with Cetera, an investment adviser registered with the Commission. Carlton engaged in a cherry-picking scheme whereby he unfairly allocated purchases of securities to benefit his personal accounts at the expense of his clients' accounts from 2015 through approximately August 2022, and Hernandez engaged in a cherry-picking scheme whereby he unfairly allocated purchases of securities to benefit his personal account at the expense of his clients' accounts from July 2020 through approximately February 2022. Carlton and Hernandez both purchased stocks in their personal accounts and then, later in the day and after the opportunity to observe price movements, allocated shares among personal and clients' accounts. Hernandez also sometimes made the initial purchase in an account in the name of one or more of his largest clients before making a belated allocation of shares. Carlton and Hernandez disproportionately allocated profitable trades to personal accounts and disproportionately allocated unprofitable trades to their advisory clients.

Respondents

1. **First Allied Advisory Services, Inc**. is a Delaware corporation which was registered with the Commission as an investment adviser from June 2006 until November 2020 and was headquartered in San Diego, California. First Allied withdrew its registration with the Commission in November 2020 and its investment adviser representatives became associated with Cetera, which is part of the same corporate family.

2. **Cetera Investment Advisers LLC** is a Delaware limited liability company with headquarters in Schaumberg, Illinois. Cetera has been registered with the Commission as an investment adviser since January 1984 and on its annual updating amendment to Form ADV filed in March 2024, Cetera reported over $104 billion in regulatory assets under management.

[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Other Relevant Persons

3. **William D. Carlton,** age 64, is a resident of Kirkland, Washington. From November 2020 until December 2023, Carlton was an investment adviser representative associated with registered investment adviser Cetera Investment Advisers LLC and a registered representative associated with an affiliated registered broker-dealer (which was also a registered investment adviser until April 2024). Before that, Carlton was an investment adviser representative associated with then-registered investment adviser First Allied Advisory Services, Inc. and a registered representative associated with an affiliated then-dually registered investment adviser and broker-dealer. Prior to that, Carlton was associated with a series of registered broker-dealers and investment advisers since 1985.

4. **Hans K. Hernandez**, age 55, is a resident of Hillsborough, New Jersey. From November 2020 until May 2023, Hernandez was an investment adviser representative associated with registered investment adviser Cetera Investment Advisers LLC, and, from September 2022 to May 2023, a registered representative associated with an affiliated registered broker-dealer (which was also a registered investment adviser until April 2024). Before that, Hernandez was an investment adviser representative associated with then-registered investment adviser First Allied Advisory Services, Inc. from July 2012 to November 2020, and associated with an affiliated then-dually registered investment adviser and broker-dealer as an investment adviser representative from 2011 to 2012 and as a registered representative from 2011 to 2022. Prior to that, Hernandez was associated with a series of registered broker-dealers and investment advisers since 1991.

Background

The Cherry-Picking Schemes[2]

5. From 2015 to approximately August 2022, Carlton and his advisory clients had their accounts at the affiliated broker-dealer with which Carlton was associated, and Carlton had discretionary authority to place trades for these accounts. Carlton often executed trades in his personal accounts and then, later in the day, after the opportunity to observe price movements, determined how to allocate shares among his personal accounts and his clients' accounts. When Carlton determined to allocate shares to his clients' accounts, he generally called the broker-dealer's trade desk to provide his allocation instructions.

6. From July 2020 to approximately February 2022, Hernandez and his advisory clients had their accounts at the affiliated broker-dealer with which Hernandez was associated, and Hernandez had discretionary authority to place trades for these accounts. Hernandez often executed trades in his personal account and then, later in the day, after the opportunity to observe price movements, determined how to allocate shares among his personal account and his clients' accounts. Less frequently, Hernandez made the initial purchase in an account in the name of one or more of his largest clients and then made belated allocations. When Hernandez determined to

[2] The Commission has filed complaints in separate civil actions against Carlton and Hernandez in the United States District Courts for the Western District of Washington and the District of New Jersey, respectively.

allocate shares to his clients' accounts, he generally sent his allocation instructions to the broker-dealer's trade desk by email.

7. Both Carlton and Hernandez allocated a disproportionate amount of profitable trades—e.g., trades of securities that increased in price from the time of purchase to the time of allocation—to their personal accounts and a disproportionate amount of unprofitable trades—e.g., trades of securities that decreased in price from the time of purchase to the time of allocation—to their clients' accounts.

8. Carlton's personal accounts obtained average first-day returns of approximately 0.50% on equity trades, while Carlton's clients' accounts obtained average first-day returns of approximately –2.10% on equity trades. The difference between Carlton's allocations of profitable trades and unprofitable trades is statistically significant; the probability of these results occurring by chance is nearly zero.

9. Hernandez's personal account obtained average first-day returns of approximately 0.50% on equity trades, while Hernandez's clients' accounts obtained average first-day returns of approximately –0.40% on equity trades. The difference between Hernandez's allocations of profitable trades and unprofitable trades is statistically significant; the probability of these results occurring by chance is nearly zero.

First Allied's and Cetera's Failure to Adopt and Implement Policies and Procedures Reasonably Designed to Prevent Unfair Trade Allocations and Failure Reasonably to Supervise Carlton and Hernandez

10. First Allied had policies and procedures in place concerning "aggregation of client trades" that stated that "IARs [investment adviser representatives] are required to make a preliminary allocation before execution," and must transmit a "pre-trade allocation statement" to the trade desk "prior to the trade being entered." In addition, investment adviser representatives "are not permitted to modify the allocation for any reason" without "approval from the Compliance department," and "may include their personal accounts in an aggregated order as long as such inclusion does not materially diminish the benefits that clients would receive if the [adviser's] accounts were not included."

11. First Allied failed to implement its policies and procedures requiring pre-trade allocation statements to be submitted prior to executing aggregated orders and prohibiting allocations from being modified without approval from the Compliance department. Carlton and Hernandez were allowed to use their personal accounts to place aggregated trades without first submitting pre-trade allocation statements; they were also allowed to move trades from their personal accounts to client accounts without approval from the Compliance department. First Allied's compliance manual allowed inclusion of investment adviser representatives' personal accounts in aggregated orders, and First Allied allowed Carlton and Hernandez to place aggregated trades through their personal accounts—which they did for years. Yet First Allied's policies and procedures were not reasonably designed to monitor the fairness of allocations of these aggregated trades or to assess whether including personal trades in the aggregated order "materially diminished" the benefits of aggregation to clients.

12. Cetera had policies and procedures in place concerning "block trading" that stated "IARs [investment adviser representatives] are prohibited from engaging in any activity that may be deemed to advantage one client over another," and that required the firm to monitor the trading activity within clients' accounts "[i]n order to ensure that no client or group of clients is favored over another . . . ." The policies and procedures further required advisers to place aggregated orders through certain internal systems which "do not allow modifications to order allocations after a trade has been placed, which further limits unfair order allocations."

13. Cetera failed to implement its policies and procedures concerning block trading with respect to Carlton and Hernandez. Specifically, Cetera did not require Carlton and Hernandez to place aggregated orders through the aforementioned internal systems, and accordingly, the attendant safeguards preventing modifications to order allocations were not implemented.

First Allied's and Cetera's Materially Misleading Disclosures

14. In their firm brochures filed pursuant to Part 2A of Form ADV between July 2020 and March 2022, First Allied and then Cetera stated, "Our IARs [investment adviser representatives] are not permitted to disadvantage clients while trading their own accounts." However, Carlton's and Hernandez's cherry-picking schemes rendered this statement false and misleading.

15. In addition, First Allied and then Cetera stated in their brochures, "Our supervised persons are not permitted to recommend or use discretionary trading authority on behalf of clients at or about the same time that the IAR . . . buys or sells the same securities for their own account(s)." In reality, Carlton and Hernandez regularly bought and sold the same securities for their own accounts at or about the same time as for their clients' accounts, and First Allied had compliance policies and procedures specifically permitting investment adviser representatives to include their own trades in aggregated orders with clients' trades.

Supervisory Failures and Violations

16. As a result of the conduct described above, First Allied and Cetera failed reasonably to supervise Carlton and Hernandez within the meaning of Section 203(e)(6) of the Advisers Act, with a view to preventing their violations of Sections 17(a)(1) and (3) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a) and (c) thereunder, and Sections 206(1) and 206(2) of the Advisers Act, as described above.

17. As a result of the conduct described above, First Allied and Cetera willfully[3] violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging

[3] "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

in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.[4]

18. As a result of the conduct described above, First Allied and Cetera willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations, by the firm and its supervised persons, of the Advisers Act and the rules promulgated thereunder.

Cetera's Remedial Acts and Cooperation

19. In determining to accept Cetera's and First Allied's Offers, the Commission considered remedial acts promptly undertaken by Cetera and cooperation afforded 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 Respondents First Allied's and Cetera's Offers.

Accordingly, pursuant to pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents First Allied and Cetera 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. Respondents First Allied and Cetera are censured.

C. Respondents shall each, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $200,000 to the Securities and Exchange Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3),

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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).

[4] Proof of scienter is not required to establish violations of Sections 206(2) and 206(4) of the Advisers Act, or the rules thereunder; a violation may rest on a finding of negligence. *See, e.g., SEC v. Treadway*, 430 F. Supp. 2d 293, 338 (S.D.N.Y. 2006); *SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1105 (9th Cir. 1977).

transfer them to the general fund of the United States Treasury. 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 First Allied or Cetera 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 Joseph Sansone, Chief, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 100 Pearl St., Suite 20-100, New York, NY 10004-2616.

D. Regardless of whether the Commission in its discretion orders the creation of a Fair Fund for the penalties ordered in this proceeding, 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, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 Respondents 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.

E. Respondents acknowledge that the Commission is not imposing a civil penalty in excess of $200,000 for each Respondent based upon their cooperation in a Commission

investigation and related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that either Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Vanessa A. Countryman
Secretary