

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10954 / July 13, 2021

SECURITIES EXCHANGE ACT OF 1934
Release No. 92376 / July 13, 2021

INVESTMENT ADVISERS ACT OF 1940
Release No. 5772 / July 13, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20392

In the Matter of

**TIAA-CREF INDIVIDUAL &
INSTITUTIONAL SERVICES,
LLC**

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
AND 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 Section 8A of the Securities Act of 1933 (“Securities Act”), Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”), and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against TIAA-CREF Individual & Institutional Services, LLC (“TC Services” 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 Section 8A of the Securities Act, Section 15(b) of the Exchange Act, and Sections 203(e) and 203(k) of the Advisers Act, 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 concerns Respondent’s failure adequately to disclose conflicts of interest and dissemination of inaccurate and misleading statements in connection with recommendations that clients invested in Teachers Insurance and Annuity Association of America (“TIAA”) record-kept employer-sponsored retirement plans (“ESPs”) roll over retirement assets into a managed account program called “Portfolio Advisor.” Respondent had a conflict of interest because Portfolio Advisor generated greater revenue than other available alternatives.

2. From January 1, 2013 through March 30, 2018 (the “Relevant Period”), Respondent created positive incentives and negative pressures for its Wealth Management Advisors (“WMAs”) to prioritize the rollover of ESP assets into Portfolio Advisor over lower cost alternatives for rollover-eligible ESP participants who were receiving advisory services as part of the financial planning process Respondent offered. Those incentives and pressures included: (i) an incentive compensation plan that paid WMAs more in variable compensation when they signed clients up for the Portfolio Advisor program than for some alternatives; and (ii) negative consequences for failure to meet related targets, including the placement of some WMAs on performance improvement plans (“PIPs”) and the threat of termination of employment. Respondent also trained WMAs to use the rollover process to discover areas of vulnerability for these clients, called “pain points,” to “create pain” by helping clients “self-realize” the financial vulnerability, and then to recommend Portfolio Advisor as the solution to their problem.

3. Respondent and WMAs made misleading statements to clients regarding the nature of the services provided by Respondent and the WMAs’ role with respect to the client in the rollover recommendation process. Respondent and the WMAs represented to some clients that the firm and WMAs were “fiduciaries” and that they provided “objective” and “non-commissioned” investment advice when recommending rollovers to Portfolio Advisor. These statements were misleading because Respondent compensated WMAs more for rolling over assets into Portfolio Advisor than some alternatives; WMAs commonly presented managed accounts as the only option for a rollover and frequently did not present alternative options as required by Respondent’s policies and procedures; WMAs were sometimes trained to avoid discussing fees associated with

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.

the rollover recommendation; and Respondent **did not treat** or review rollover recommendations to Portfolio Advisor **under a fiduciary standard**.

4. Respondent also **failed adequately to disclose related conflicts of interest**. While Respondent made some disclosures concerning conflicts resulting from its incentive compensation plan, it did not adequately disclose those conflicts in a number of regards. First, while the disclosures stated that the compensation differential for selling Portfolio Advisor was based on the “degree of effort” required to sell managed products and the “complexity” of those products, until 2017 Respondent **did not have an adequate basis** to support that statement. Second, starting in March 2017, the disclosures included “complex” products together with certain other TIAA products (defined as “core” products) when describing the incentive compensation, suggesting that complex and core products were similarly compensated when, in fact, WMAs **continued to be compensated more** for complex products, including managed account sales. Third, the **disclosures were misleading** regarding the role WMAs played; although WMAs **were acting as fiduciaries** when assisting clients with financial planning, the disclosures suggested that obligation attached to the entirety of the rollover recommendation process when the firm **did not treat or review rollover recommendations under a fiduciary standard**. Fourth, until March 2018, Respondent did not disclose that the incentive compensation plan incentivized WMAs to **recommend Portfolio Advisor for reasons other than a client’s particular investment needs**.

5. Respondent also **failed to adopt and implement written policies and procedures** reasonably designed to **prevent violations** of the Advisers Act in connection with rollover recommendations. While Respondent had a written policy requiring WMAs to discuss fees with clients in connection with rollover recommendations, Respondent did not take sufficient steps to ensure that WMAs conducted and memorialized those fee discussions. In fact, some Respondent training materials directed WMAs to avoid discussing fees in connection with rollover recommendations.

6. Based on the foregoing and as detailed below, Respondent violated Sections 17(a)(2) and (3) of the Securities Act and Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

RESPONDENT

7. **TIAA-CREF Individual & Institutional Services, LLC (“TC Services”)** is a dually registered investment adviser (No. 801-63550) and broker dealer with its principal place of business in New York, New York. TC Services has been registered with the Commission as an investment adviser since September 2004 and reported, in its March 30, 2021 Form ADV filing, having nearly \$36.4 billion in regulatory assets under management. TC Services supports retirement plan participants and TIAA’s institutional (employer plan) relationships. TC Services also provides brokerage, advisory and retirement planning services, primarily to individuals who have a pre-existing relationship with TIAA, as defined below (*i.e.*, participation in a TIAA ESP).

OTHER RELEVANT ENTITIES

8. **Advice & Planning Services (“APS”)** is a division of TC Services and serves as the sponsor, manager and administrator of TIAA’s Portfolio Advisor program, a discretionary wrap fee advisory program that offers customized model-based portfolios of investments in registered funds, including mutual funds and exchange traded funds.

BACKGROUND

9. Teachers Insurance and Annuity Association of America (“TIAA”) is the parent company of TC Services and APS and is one of the country’s largest providers of ESPs, catering principally to non-profit institutions in the academic, research, medical, educational, cultural and governmental fields. As of March 2020, TIAA provided recordkeeping services to over 15,000 institutions and served approximately 5 million participants in institutional retirement plans.

10. In the 2000s, TIAA was experiencing an **increased outflow of its record-kept assets** that were being transitioned to other financial firms by ESP participants when they left their employers, retired, or otherwise became eligible to roll over those assets into new investment solutions. In 2004, TIAA created Advice & Planning Services (“APS”) – a division of its registered investment advisory firm, TC Services – to begin offering managed account and other products. Part of the impetus for the offerings was an **effort to retain record-kept assets** after ESP participants became eligible to roll those assets to other providers. For clients who rolled ESP assets into Respondent’s managed accounts, Respondent also sought to have clients bring over external assets (*i.e.*, assets in accounts at third-party firms) to their TIAA account.

11. Respondent’s managed account program, **Portfolio Advisor**, is a **wrap-fee** advisory program consisting of diversified, customized models utilizing mutual funds and exchange-traded funds. Portfolio Advisor’s model portfolios are selected based on the client’s risk tolerance, investment time horizon, preferences for certain investment strategies, investment options available through the program, and other information provided by the client. In recommending that clients roll assets over to the Portfolio Advisor program, Respondent offers specific securities based on the model portfolio. Clients are assessed a quarterly advisory fee, based on assets under management in the account.

12. Respondent employs WMAs who are both registered as broker-dealer representatives and licensed as investment adviser representatives of Respondent. During the Relevant Period, the WMAs purportedly engaged in **“hat switching”** between these dual roles during the course of interacting with ESP participants and depending on the activity. As discussed further below, WMAs were frequently confused about their various roles, including whether they were acting as an investment adviser representative or registered representative when recommending rollovers into Portfolio Advisor.

13. During the Relevant Period, Respondent’s practice was to contact participants in TIAA’s record-kept ESPs as they became eligible to roll assets out of their ESPs, due to retirement

or employment changes. Respondent provided WMAs with lists of ESP participants to contact to offer asset allocation advice and free, holistic financial planning as an advisory service.

14. Respondent's written policies required WMAs to **present clients with four options for rollovers** of ESP assets: (i) leaving the client's assets in the ESP; (ii) rolling over the assets into a self-directed individual retirement account ("IRA") or managed IRA such as a Portfolio Advisor account; (iii) rolling over the assets to a new employer's plan; and (iv) cashing out the account value/taking a lump sum distribution. Respondent also required WMAs to present an "Implementation Plan" to rollover clients as part of its financial planning, which included free asset allocation and rebalancing advice in the existing ESP and other accounts.

15. **Portfolio Advisor's lucrative management fees made Portfolio Advisor**, in aggregate, a **more expensive option for clients**. Portfolio Advisor charged asset-based advisory fees ranging from .75% to 1.15% annually for the majority of the Relevant Period and from .40% to 1.15% for new accounts opened after July 3, 2017, whereas clients paid no wrap fees for assets in their ESPs or self-directed accounts (though they did bear the cost of fund advisory fees).

16. In **June 2017**, Respondent adopted **enhanced procedures** in **response to the Department of Labor's Fiduciary Rule**. These procedures included enhanced supervisory review for rollover recommendations. Respondent continued to apply those procedures after the Rule was invalidated by the United States Court of Appeals for the Fifth Circuit in March 2018. In June 2020, Respondent adopted a fiduciary standard for all recommendations of managed accounts and decided to **eliminate differential compensation** for enrollments or sales of managed account and other retirement product sales in the WMA incentive compensation plan, starting in its 2021 incentive compensation plan.

RESPONDENT'S "CONSULTATIVE SALES PROCESS" AND INCENTIVE COMPENSATION PLAN

17. During the Relevant Period, as Respondent provided financial planning advisory services to rollover-eligible clients, it employed a methodology called the "Consultative Sales Process" ("CSP"). WMAs were **trained to identify a client's critical decision points**, sometimes referred to in TIAA's training materials as **"pain points,"** **diagnose a client's financial vulnerabilities** as part of the financial planning process, and **prescribe a managed account as the solution**. Respondent's training encouraged WMAs to **"create pain"** for clients by exposing the client's financial vulnerabilities and to **use those vulnerabilities to help the client to "self-realize" to find a solution, and that a managed solution was the right option.**

18. Respondent's **incentive compensation plan** incited WMAs to **recommend Portfolio Advisor** through **three components** of the **discretionary annual variable bonus**. For the typical WMA, this bonus constituted 60% of their base salary, significant portions of which could derive from their success in recommending Portfolio Advisor. Further, for **top-performing** WMAs, the annual variable bonus could constitute from **two times to nearly seven times their base salary**. First, a "cumulative growth award" rewarded WMAs who had at least \$100 million in cumulative

sales as much as 16 times more (4 basis points) for putting clients into some products, including managed accounts, versus certain other products (.25 basis points). Second, an “annual growth award” rewarded WMAs who produced more than \$8 million in annual sales up to 4 times more for external asset sales (25-40 basis points) than internal asset sales (10 basis points). Finally, one component of a “discretionary award” allocated 10% of the award based on “relationship complexity” – *i.e.*, the proportion of the WMAs assets that were “complex,” *e.g.*, managed accounts.

19. WMAs also **faced negative pressure to maintain and increase managed account assets**. Supervisors set aggressive and ever-increasing growth goals, and WMAs perceived that the incentive compensation plan **compensated staff less when they failed to move client assets into Portfolio Advisor**. WMAs were required, at least twice per month, to participate in internal strategy calls at which some supervisors discouraged WMAs from recommending rollover options other than managed accounts. Managers provided negative feedback during these widely-attended calls when a WMA deviated from the process. WMAs were praised in weekly emails for recommending and closing rollovers into managed accounts, creating competition among WMAs to move clients to managed account solutions. **Some WMAs who were not successful at meeting goals were placed on PIPs and faced the threat of termination** if their performance did not improve.

20. The incentive compensation plan and negative pressures also influenced behavior within Respondent’s WMA supervisory structure. For instance, some managers began to direct WMAs to **promote managed accounts as the appropriate solution for the client’s needs to 100% of clients** and to **avoid presenting alternatives** such as leaving assets in the ESP, self-directed investments, or rolling over to a new employer’s plan. Some managers also trained WMAs to not present clients with Implementation Plans, which would have provided asset allocation advice within the existing ESP, because it was viewed as inconsistent with the goal of selling a managed account solution. Training materials from multiple regions directed WMAs **not to mention “compensation” or “fees,”** and some WMAs followed that directive.

21. In **2014, an internal compliance report** raised concerns that the incentive compensation structure was significantly affecting WMAs’ behavior, causing them to focus on recommending managed solutions because they paid the most compensation. The report noted that as a result, **“it is not possible to claim that the agents are ‘product neutral.’”** Respondent **did not take any steps to address the findings** in this compliance report at the time.

22. Respondent’s sales strategy, incentive compensation plan and negative pressures resulted in steadily increasing growth of its Portfolio Advisor assets under management. During the Relevant Period, Respondent opened in excess of **18,000 new Portfolio Advisor accounts** from rollovers, and annual revenues generated from assets rolled over to Portfolio Advisor increased from **\$2.6 million to \$54 million**.

RESPONDENT’S MATERIALLY MISLEADING STATEMENTS

23. During the Relevant Period, Respondent and WMAs made **materially misleading statements** to rollover clients concerning the nature of the services Respondent provided and the

role its WMAs played. These statements assured clients that WMAs were providing disinterested advice that was in the clients' best interest, and ultimately encouraged clients to roll over assets to Portfolio Advisor. However, clients did not receive adequate disclosure concerning the conflicts resulting from the incentive compensation program, and were not told that WMAs were incentivized to roll over assets to Portfolio Advisor regardless of whether a managed account was the best option to meet a client's particularized financial need.

24. First, Respondent trained its WMAs to say as part of their pitch to clients that they offered "objective" and "non-commissioned" advice to clients. This was misleading because Respondent's financial incentives for WMAs rendered their advice non-objective. Some WMAs did not view their advice as objective. Further, WMAs received differential levels of compensation directly tied to specific categories of investment programs and services. In 2013, Respondent recognized that, because of this compensation structure, calling WMAs "non-commissioned" was misleading, and attempted to train WMAs not to use the term. However, some of Respondent's training materials continued to use the description in marketing materials used regionally and in WMAs' communications with clients during the Relevant Period.

25. Second, many WMAs represented to clients that they "put the client first" and acted in the client's best interest. WMAs also held themselves out to clients as fiduciaries. These representations were misleading because Respondent did not ensure that WMAs' recommendations were in the best interest of the client, and did not review their recommendations under a fiduciary standard. While Respondent attempted to train WMAs in 2014 not to present themselves as fiduciaries in connection with product recommendations, WMAs remained confused as to their role and many continued to represent to clients that they were acting as fiduciaries. The financial incentives and negative pressures favoring the recommendation of managed accounts, as well as supervisors' directives emphasizing the sale of those products, applied pressure on WMAs to engage in conduct, described above, that was inconsistent with their representations to the clients.

26. Third, Respondent emphasized TIAA's non-profit heritage in marketing materials, including training WMAs to include this fact in promoting its free financial planning services to ESP participants approaching rollover eligibility. This statement misled clients into believing that the Respondent and WMAs operated without motivation, financial or otherwise, to promote particular products. Some current and former clients of Respondent have complained about the misimpression created by the citation of TIAA's nonprofit heritage.

RESPONDENT'S INADEQUATE AND MISLEADING DISCLOSURES

27. TC Services failed adequately to disclose conflicts of interest resulting from its incentive compensation program. Its disclosures did not apprise clients of the full nature and extent of those conflicts, or that advisors were incentivized to recommend products for reasons other than a client's particular investment needs. The disclosures also included misleading statements concerning WMAs' duties to clients in making rollover recommendations.

28. During the Relevant Period, TC Services provided clients with two sets of disclosures: (i) a Form ADV Part 2 Brochure for the Portfolio Advisor fee-based managed account services (the “PA Brochures”), and (ii) its brochures for its free investment advisory financial planning services (the “Free Advice Brochures”).

29. From March 2013 through March 2017, the PA Brochures addressed the conflict of interest resulting from the incentive compensation plan by disclosing that “[t]he annual variable bonus gives [WMAs] an incentive to enroll and retain client assets in Advice and Planning Services’ advisory programs such as Portfolio Advisor and compensates [WMAs] for doing so...” However, the PA Brochure minimized that conflict by stating that the incentive compensation was proportionally related to the degree of effort required to make a “complex needs” (*i.e.*, managed account) product recommendation. The March 2016 PA Brochure stated:

TIAA’s compensation philosophy aims to reward associates commensurate with *the degree of effort* generally required of the associate in gathering and retaining client assets in appropriate TIAA-CREF accounts, products and services. As a result, an associate has the potential to receive more compensation via the annual variable bonus for enrolling and retaining clients in TIAA-CREF solutions *designed to meet more complex needs* such as Portfolio Advisor, other TIAA-CREF managed account programs offered by TC Services’ affiliates, and after tax annuity and life insurance products offered through TC Life than the associate receives for enrolling and retaining client assets in other TIAA-CREF accounts, services and products. (Emphasis added.)

“Complex needs” products were defined in the document to include Portfolio Advisor, “core needs” products were defined to include ESP accounts, and “other solutions” was defined to include brokerage accounts.

30. The language in the March 2016 brochure was **misleading for two reasons**. First, until 2017, TC Services **did not have a reasonable, documented basis to represent that the incentive compensation associated with recommending Portfolio Advisor was commensurate with the degree of effort required to make that recommendation**. Respondent undertook efforts for the first time in 2016 and 2017 to measure the time and effort associated with the sale and servicing of various account types. In 2017, in connection with its implementation of the Department of Labor Fiduciary Rule, Respondent reduced the incentive compensation differential between managed account and core products to 3:1 from a ratio that had ranged, for managed account assets sold by cumulative growth award-eligible WMAs, from 8:1 up to 16:1.

31. Second, the **incentive compensation program incentivized WMAs to sell managed accounts whether or not a client had “complex needs.”** During the Relevant Period, while TC Services disclosed that WMAs had “the potential to receive more compensation” for enrolling and retaining clients in Portfolio Advisor than for other services and products, it did not disclose that the incentive compensation plan created conflicts of interest by incentivizing WMAs to recommend more expensive managed accounts for reasons other than a client’s particular

investment needs. This fact was disclosed for the first time in Respondent's March 2018 PA Brochure.

32. Subsequent PA Brochures after the 2016 brochure also failed adequately to disclose the compensation differential between managed account and other products. The March 2017 brochure stated:

TIAA's compensation philosophy aims to reward Advisors with appropriate compensation, recognizing the degree of effort generally required of the Advisor in gathering and retaining client assets in appropriate TIAA accounts, products and services.... Advisors earn more credit toward the annual variable bonus, and thus more potential compensation, *for enrolling clients in TIAA's complex needs and core needs solutions than they do for enrolling clients in or referring clients to other solutions*. In addition, Advisors can earn compensation when clients transfer funds into complex needs solutions from core needs solutions and other solutions at TIAA. (Emphasis added.)

33. This language created a misleading impression that WMAs were rewarded comparably for transferring assets into either the "complex" or "core" category of product, at a time when Respondent's incentive compensation was still three times as much, in some circumstances, for recommending complex products, including managed accounts. The extent of this disparity in compensation between products was never disclosed to clients, and the description of complex and core products was both confusing and misleading.

34. While Respondent disclosed during the Relevant Period that its financial planning services were "provided to clients on a one time or episodic basis," its disclosures implied that WMAs were acting as fiduciaries when making rollover recommendations to Portfolio Advisor. The March 31, 2017 Free Advice Brochure stated:

Advisors act as investment adviser representatives of APS in providing the Planning Services to clients.... Advisors also are broker-dealer registered representatives of TC Services.... In their capacity as registered representatives..., Advisors may suggest or recommend other accounts, services and products offered by TIAA to meet client investing and planning needs.

(Emphasis added.) The March 31, 2017 PA Brochure similarly stated:

In their capacity as registered representatives..., Advisors may suggest or recommend other accounts, services and products offered by TIAA to meet client investing and planning needs, *which are offered separate and apart from the [Portfolio Advisor] Program*.

(Emphasis added.)

35. These statements were misleading. It would have been reasonable for an investor to understand that a recommendation to invest in Portfolio Advisor was part of the financial planning process and, thus, that a WMA was acting as their fiduciary at the time of a recommendation and that WMAs were registered representatives with regard to recommending products other than Portfolio Advisor. Respondent, however, did not treat or review rollover recommendations under a fiduciary standard. Moreover, some WMAs engaged in conduct that was inconsistent with a fiduciary standard, such as avoiding discussing fees or compensation and not presenting clients with alternatives to a managed account rollover.

RESPONDENT’S FAILURE TO IMPLEMENT ITS POLICIES AND PROCEDURES

36. During the Relevant Period, Respondent’s written policies required WMAs to discuss fees and expenses clients would incur in connection with rollover recommendations. In 2015, Respondent adopted a single set of internal written policies and procedures for its dually-registered WMAs to implement components of FINRA Regulatory Notice 13-45 (“RN 13-45”), a notice outlining considerations to incorporate into discussions with clients considering a rollover of assets from an employer-sponsored plan to an IRA.

37. To implement the considerations of RN 13-45, Respondent adopted a written policy that required its WMAs to discuss and document the four investment options available to clients considering – or being solicited to consider – an ESP rollover, and “other factors” including the “fees and or expenses” associated with these rollover options. In particular, the policy provided that WMAs were to be trained to document that all RN 13-45 considerations were reviewed with clients.

38. Respondent failed to take sufficient steps to implement and enforce this policy. In some cases, WMAs’ supervisors directed them not to follow those policies, and some of Respondent’s training materials encouraged WMAs to avoid discussing fees and expenses with clients. In addition, Respondent’s Centralized Principal Review (“CPR”) group, which provided oversight and supervision of all product recommendations, including recommendations of rollovers to the Portfolio Advisor program, did not have written procedures to ensure or confirm that WMAs engaged in the required fee and expense discussion with clients prior to 2015. This was particularly problematic because some of Respondent’s regional training materials directed WMAs to not mention fees in discussions with clients, notwithstanding written policies to the contrary.

39. Rollover recommendations regularly lacked any documentation confirming discussions of specific fees and expense relating to Portfolio Advisor, or how they compared to expenses in the employer sponsored plan.

VIOLATIONS

40. As a result of the conduct described above, Respondent willfully² violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from, directly or indirectly, engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

41. As a result of the conduct described above, Respondent willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which prohibit any person in the offer or sale of securities from obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make statements made not misleading, and from engaging in any practice or course of business which operates or would operate as a fraud or deceit in the offer or sale of securities, respectively.

42. A violation of Section 206(2) of the Advisers Act and Sections 17(a)(2) and 17(a)(3) of the Securities Act may rest on a finding of simple negligence; scienter is not required. *SEC v. Steadman*, 967 F.2d 636, 643 n. 5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 373 U.S. 180, 195 (1963)); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997).

43. 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 investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and its rules by the adviser and its supervised persons.

Respondent's Remedial Efforts

44. In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent before and since the commencement of the Commission's investigation, including changes to its compensation structure, WMA training, policies and procedures, and disclosures.

² "Willfully," for purposes of imposing relief under Section 203(e) and (k) of the Advisers Act, Section 15(b) of the Exchange Act and Section 8A of the Securities 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).

Disgorgement and Civil Penalties

45. The disgorgement and prejudgment interest ordered in Section IV. D. 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. Upon approval of the distribution final accounting by the Commission, any amounts remaining 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.

Undertakings

Respondent has undertaken to:

46. Notice to Advisory Clients. Within 30 days of the entry of this Order, Respondent shall notify affected clients (i.e., those former and current clients who were financially affected by the practices detailed above (hereinafter, "affected clients")) of the settlement terms of this Order by sending a copy of this Order to each affected client 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.

47. Disclosure Review. Within 90 days of the entry of this Order, Respondent shall review all disclosures relating to its recommendations of managed account solutions, identify areas for improvement, and ensure that they are written in plain English.

48. Training. Within 90 days of the entry of this Order, Respondent shall make and identify to the Commission staff any appropriate improvements to its training programs relating to its representations to clients and prospective clients regarding: (i) fiduciary duty; (ii) discussions of fees and expenses and documentation thereof; (iii) the existence and feasibility of other alternative investment options beyond managed accounts.

49. Certification of Compliance by Respondent. Respondent shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify each undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to David A. Becker, Asset Management Unit, Securities and Exchange Commission, 100 F Street, Washington, DC 20549, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549, no later than 60 days from the date of the completion of the undertaking.

In determining whether to accept the Offer, the Commission has considered these undertakings.

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 Section 8A of the Securities Act, Section 15(b) of the Exchange Act and 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 cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

C. Respondent is censured.

D. Respondent shall, within 10 days of the entry of this Order, pay disgorgement, prejudgment interest, and a civil monetary penalty totaling \$97 million, as follows:

1. Respondent shall pay disgorgement of \$73,985,572, and prejudgment interest of \$14,014,428 consistent with the provisions of this Subsection D.
2. Respondent shall pay a civil monetary penalty in the amount of \$9,000,000, consistent with the provisions of this Subsection D.
3. 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 client 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 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.

4. Within ten (10) days of the issuance of this Order, Respondent shall deposit the full amount of the disgorgement, prejudgment interest, and civil penalty (the "Fair Fund") into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. The account holding the assets of the Fair Fund shall bear the name and taxpayer identification number of the Fair Fund. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 -17 C.F.R. § 201.600 and/or 31 U.S.C. § 3717.
5. Respondent shall be responsible for administering the Fair Fund and may hire a professional at its own cost to assist 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.
6. Respondent shall distribute from the Fair Fund to each current or former affected client an amount representing the affected client's pro rata share of the Fair Fund for the management fees she or he paid for PA accounts opened with rollover assets from TIAA-record kept employer-sponsored programs to Portfolio Advisor during the time period January 1, 2012 through March 30, 2018 (including harm to current and former affected clients identified in the Office of the Attorney General of the State of New York's Assurance of Discontinuance, *In the Matter of TIAA-CREF Individual and Institutional Services*, Assurance No. 21-035). No portion of the Fair Fund shall be paid to any affected client account in which Respondent, or any of its officers or directors, has a financial interest.
7. 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 Distribution 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 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 Calculation shall be subject to a *de minimis* threshold. The revised Calculation shall be subject to all of the provisions of this Subsection D.

8. Respondent shall, within thirty (30) days of 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 client. The Payment File should identify, at a minimum, (i) the name of each affected client; and (ii) the net amount of the payment to be made, less any tax withholding; (iii) the amount of any *de minimis* threshold to be applied; and (iv) the amount of reasonable interest paid, if applicable.
9. Respondent shall disburse all amounts payable to affected client accounts within ninety (90) days of the date that the Commission staff accepts the Payment File, unless such time period is extended as provided in Paragraph 13 of this Subsection D. Respondent shall notify the Commission staff of the date(s) and the amount paid in the initial distribution.
10. If funds remain in the Fair Fund after the distribution is complete, the Respondent, if feasible and in consultation with the Commission staff, will make one redistribution to each current or former affected client who received a distribution payment electronically or negotiated a check (provided that the client would receive a minimum distribution of \$10). If Respondent is unable to distribute or return any further portions of the Fair Fund for any reason, including an inability to locate an affected client or a beneficial owner of an affected client 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 12 of this Subsection D 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 TIAA-CREF Individual & Institutional Services, LLC as 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 David A. Becker, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549, or such other address as the Commission staff may provide.

- 11. A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 1468B.1-1468B.5. Respondent shall be responsible for all tax compliance responsibilities associated with 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). Respondent may retain any professional services necessary. The costs and expenses of such professional services shall be borne by Respondent and shall not be paid out of the Fair Fund.
- 12. Within one hundred fifty (150) days after Respondent completes the disbursement of all amounts payable to affected clients, Respondent shall return all undisbursed funds to the Commission pursuant to the instructions set forth in this Subsection D. The Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (i) the amount paid to each payee, with the reasonable interest amount, if any, reported separately; (ii) the date of each payment; (iii) the check number or other identifier of the money transferred; (iv) the amount of any returned payment and the date received; (v) a description of the efforts to locate a prospective payee whose payment was returned or to whom payment was not made for any reason; (vi) the total amount, if any, to be forwarded to the Commission for transfer to the United States Treasury; and (vii) an affirmation that Respondent has

made payments from the Fair Fund to affected clients in accordance with the Calculation approved by the Commission staff. The final accounting and certification shall be submitted under a cover letter that identifies Respondent and the file number of these proceedings to David A. Becker, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549, 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 shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

13. The Commission staff may extend any of the procedural dates set forth in this Subsection D for good cause shown. Deadlines for dates relating to the Distribution Fund 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 to be the last day.

E. Respondent shall comply with the undertakings enumerated in Section III, Paragraphs 46-49 above.

By the Commission.

Vanessa A. Countryman
Secretary