

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 5627 / November 13, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20150

In the Matter of

**SECURITIES AMERICA
ADVISORS, INC.**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 203(e) AND
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Securities America Advisors, Inc. (“Respondent” or “SAA”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement of Securities America Advisors, Inc. (“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 finds¹ that

Summary

1. This matter concerns SAA's failure to adopt and implement policies and procedures reasonably designed to prevent investments in two volatility-linked exchange-traded products ("ETPs") that were not suitable for SAA clients. SAA, among other things, failed to implement its policies and procedures that required SAA investment adviser representatives ("IARs") to have an "adequate basis" to make recommendations to, and investments for, clients that were suitable in light of their investment profiles. SAA additionally failed to adopt reasonably designed policies and procedures directed specifically at volatility-linked ETPs. SAA clients suffered significant losses from investments in these products.

2. During the period from January 1, 2016, through February 28, 2018 ("Relevant Period"), SAA IARs invested clients in, or recommended for their clients, a volatility-linked security called the VelocityShares Daily Inverse VIX Short Term ETNs linked to the S&P 500 VIX Short-Term Futures Index ("XIV") and another volatility-linked security called the ProShares VIX Short-Term Futures ETF ("VIXY"). Like XIV, VIXY was tied to the performance of the S&P 500 VIX Short-Term Futures Index ER ("Index"). The Index offers exposure to futures contracts of specified maturities on the CBOE volatility index ("VIX"). The VIX attempts to track the expected volatility of the S&P 500, not the price level of the S&P 500 itself. XIV was an exchange-traded note ("ETN") that was designed to provide a return that was based on the inverse of the daily performance of the Index. VIXY is an exchange-traded fund that unlike XIV, was designed to provide "results (before fees and expenses) that, both for a single day and over time, match the performance of the Index." The offering materials for XIV provided that the product was for sophisticated investors to manage daily trading risks, and the offering materials for VIXY similarly provided that that product was for investors who understood the consequences of seeking exposure to VIX futures contracts and was for short-term investment horizons.

3. Throughout the Relevant Period, SAA failed to adopt and implement policies and procedures reasonably designed to prevent investments in, and recommendations of, volatility-linked ETPs such as XIV and VIXY that were not suitable for SAA clients. SAA had no policies and procedures directed specifically at volatility-linked ETPs, even though it knew that certain of its IARs were investing in XIV and VIXY on behalf of retail clients or were recommending that retail clients buy and hold the products for extended periods. The firm also failed to implement existing policies and procedures to determine whether IARs were fulfilling their fiduciary obligations when investing clients in, or recommending, XIV and VIXY. Among other things, it failed to implement policies and procedures requiring that IARs have the training necessary for them to have an

¹ The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

“adequate basis” to make recommendations to, and investments for, clients that were consistent with client investment objectives and risk profiles. SAA further failed to implement its policies and procedures that identified the products that could be traded in discretionary accounts, which did not include volatility-linked ETPs. SAA instead allowed discretionary trading in products such as XIV and VIXY. During the Relevant Period, SAA client accounts held XIV or VIXY for an average of 32 days, and the total losses to clients who suffered losses from investments in XIV and VIXY were significant.

4. Under the circumstances described above, SAA violated Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7.

Respondent

5. SAA is a Nebraska corporation with its headquarters in La Vista, Nebraska. It is and, during the Relevant Period, was an investment adviser registered with the Commission. SAA is owned by Securities America Financial Corporation. During the Relevant Period, Securities America Financial Corporation was a wholly owned subsidiary of Ladenburg Thalmann Financial Services Inc. (“Ladenburg Thalmann”), a financial services firm. On or about February 14, 2020, Advisor Group Holdings, Inc., which is owned by AG Parent Corporation, completed a merger with Ladenburg Thalmann, and Ladenburg Thalmann became a wholly owned subsidiary of Advisor Group Holdings, Inc.

Background

6. During the Relevant Period, IARs associated with SAA recommended, purchased, and sold two volatility-linked ETPs, XIV and VIXY, for SAA-client accounts. The offering materials for XIV provided that the product was “for sophisticated investors to manage daily trading risks.” The offering materials for VIXY provided that “[a]n investor should only consider an investment in a Fund [including VIXY] if he or she understands the consequences of seeking exposure to VIX futures contracts” and that the product generally was “intended to be used only for short-term investment horizons.”

7. XIV and VIXY were both tied to the performance of the Index. The Index offers exposure to futures contracts of specified maturities on the VIX. The VIX attempts to track the expected volatility of the S&P 500, not the price level of the S&P 500 itself. Futures contracts on the VIX allow investors to invest in forward volatility based on their view of the near-future direction of the VIX. The performance of XIV and VIXY are, therefore, not linked directly to the VIX. The performance of the Index is based on a rolling portfolio of one-month and two-month futures contracts to target a constant weighted average of one month maturity. Thus, the Index does not purport to track or measure implied volatility in the medium or long term, as its name—“Short-Term”—implies. Each day, the Index takes the prices of the two nearest-dated VIX futures contracts and uses them to calculate a hypothetical position that rolls the nearest month VIX futures contract to the next month.

The XIV Volatility-Linked ETP

8. XIV was an ETN issued by Credit Suisse AG (“Credit Suisse”). It was designed to provide a return that was based on the inverse of the daily performance of the Index. XIV, however, had a feature that, under specified circumstances, allowed Credit Suisse, in effect, to accelerate and redeem the notes early and pay investors an amount equal to the “Closing Indicative Value” as of a designated valuation date. On February 5, 2018, those circumstances occurred, and, on February 6, 2018, Credit Suisse announced that it was accelerating, i.e., redeeming, the notes. The redemption price was \$5.99 per note compared to the Closing Indicative Value of \$108.2681 on the prior trading day.

9. The pricing supplement for each issuance of XIV included the following warning on the cover page:

The ETNs . . . are intended to be trading tools for sophisticated investors to manage daily trading risks. They are designed to achieve their stated investment objectives on a daily basis, but their performance over longer periods of time can differ significantly from their stated daily objectives. The ETNs are riskier than securities that have intermediate or long-term investment objectives, and may not be suitable for investors who plan to hold them for longer than one day. Accordingly, the ETNs should be purchased only by knowledgeable investors who understand the potential consequences of investing in volatility indices and of seeking inverse or leveraged investment results, as applicable. Investors should actively and frequently monitor their investments in the ETNs, even intra-day.

The summary of the key terms further included a description of circumstances under which Credit Suisse could accelerate and redeem the notes early: “[A]n Acceleration Event includes . . . if the Intraday Indicative Value is equal to or less than 20% of the prior day’s Closing Indicative Value.”

The VIXY Volatility-Linked ETP

10. VIXY is an exchange-traded fund sponsored by ProShare Capital Management LLC. In contrast to XIV, VIXY was designed to provide “results (before fees and expenses) that, both for a single day and over time, match the performance of the Index.”

11. Similar to the pricing supplements for XIV, the prospectus for each issuance of VIXY included warnings about the product and the investors for whom it was intended, including a statement that

[a]s with all investments, an investor in any of the Funds could potentially lose the full principal value of his/her investment, even over periods as short as one day. However, investors holding Shares of the Ultra Fund and the Matching Fund [VIXY] beyond short-term periods have an increased risk of losing a substantial portion of their investment.

SAA Failed to Adopt and Implement Policies and Procedures Concerning the Suitability of Volatility-Linked ETPs for Advisory Clients

12. Throughout the Relevant Period, SAA’s policies and procedures manuals were not reasonably designed to prevent violations of the Advisers Act, and the firm failed to implement its existing policies and procedures.

13. SAA had no policies and procedures directed specifically at volatility-linked ETPs even though it knew that certain IARs were investing in XIV and VIXY on behalf of retail clients or were recommending that retail clients buy and hold the products for extended periods.

14. SAA also failed to implement existing policies and procedures detailing the IARs fiduciary obligations owed to clients. These policies and procedures provided that an investment adviser had an obligation “to make suitable recommendations to clients in light of their needs, financial circumstances and investment objectives” and “to have an adequate basis in fact for its recommendations.”

15. These policies and procedures, among other things, required IARs to consider a client’s risk tolerance, investment objective, age, net worth, and annual income. The policies and procedures included definitions and descriptions of various suitability criteria. Thus, for example, the policies and procedures set forth the criteria for clients with risk tolerances ranging from “conservative” to “speculative” and investment objectives ranging from “current income” to “maximum growth.” As reflected *infra* in paragraph 21, these policies and procedures were not reasonably implemented.

16. SAA further failed reasonably to implement the “adequate basis” element of its policies and procedures concerning its fiduciary obligations. The firm did not extend its structured products training requirement to IARs who only engaged in secondary market purchases of

products such as XIV and VIXY, i.e., structured products that were not 100% principal-protected. The trading in XIV and VIXY at issue in this Order took place in the secondary market. In addition, SAA lacked other policies and procedures, such as ones requiring appropriate documentation, certification, or monitoring, to require that IARs had an “adequate basis” for their investment decisions and recommendations in light of their clients’ investment criteria.

17. SAA’s policies and procedures also did not authorize discretionary trading in products such as XIV and VIXY. The policies and procedures provided that “[a]s long as the SAA IAR [investment adviser representative] is properly licensed, discretionary trading is allowed on no-load mutual funds, load funds at net asset value, variable annuity sub-accounts, stocks, bonds and covered equity options.” XIV and VIXY thus were not among the products that IARs were authorized to trade on a discretionary basis, but SAA nevertheless failed to implement these policies and procedures to prevent discretionary trading in XIV and VIXY.

18. SAA’s failure to adopt and implement reasonably designed policies and procedures subjected retail advisory clients to significant risk, and many of them sustained significant losses from investments in XIV and VIXY.

Purchases and Sales of XIV and VIXY

19. During the Relevant Period, 56 SAA IARs purchased and sold XIV and VIXY in approximately 283 SAA client accounts.

20. Notwithstanding that SAA’s policies and procedures did not allow for trading in XIV and VIXY in discretionary accounts, there were more than 1,400 purchase and sale, i.e., round-trip, transactions in XIV and VIXY in at least 130 discretionary accounts.

21. SAA IARs who traded XIV and VIXY frequently did so without regard to SAA’s suitability criteria. IARs, for example, invested in or recommended XIV, VIXY, or both for clients with low risk tolerances or who had high concentration levels of the products. IARs, moreover, could change a client’s risk tolerance in SAA’s books and records without prior notice to the client. Although sometime after such a change, SAA typically sent the client a letter with the client’s updated profile information, the letter did not identify the specific change that had been made to the client’s profile. As a result, the client was not on notice of the change to which his or her attention should be directed.

a. In one instance, for example, SAA’s trade monitoring system generated an alert as a result of a trade in XIV of more than \$118,000 that an investment adviser representative (“IAR”) had made for a client. The alert was issued because the trade meant that the standard deviation for the client’s portfolio exceeded SAA’s threshold for the client’s risk tolerance. The IAR, who had discretionary authority, was notified of the alert. Without prior notice to the client, the IAR then changed the client’s risk tolerance to “speculative,” and the trade was allowed with no further inquiry. Following the trade, SAA sent the client a letter that included the client’s updated profile information. The letter did

not identify the specific change to the client's profile, and the client otherwise was unaware of the change to a "speculative" risk tolerance. The client in whose account the IAR purchased XIV was a couple in their mid-seventies with a net worth (exclusive of their home) of approximately \$700,000. After changing the client's risk tolerance, the IAR continued to trade XIV and VIXY in the account. For the Relevant Period, the client lost approximately \$125,000 from the IAR's trading in XIV and VIXY.

b. In another example, SAA's trade monitor system generated multiple alerts for the size of trades in both XIV and VIXY for a client with an annual income of approximately \$125,000 and a net worth of approximately \$250,000. The IAR for the account had discretionary authority. The size of the IAR's trades in XIV and VIXY typically exceeded \$100,000. Throughout most of the Relevant Period, the holdings in XIV or VIXY represented approximately eighty-five percent of the value of the account. Notwithstanding the client's income, net worth, and account holdings, the trades were allowed. For the Relevant Period, the client lost approximately \$167,000 from the IAR's trading in XIV and VIXY.

22. SAA IARs further traded XIV and VIXY without regard to the risks of holding these products for periods longer than those identified in the offering materials for these products. The average holding period in SAA client accounts was 32 days, and in several instances, the holding period exceeded 100 days.

23. In total, approximately 156 retail advisory accounts suffered significant losses from the trading in XIV and VIXY during the Relevant Period.

SAA's Violations

24. Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7 require investment advisers to adopt and implement written compliance policies and procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and its rules.

25. SAA willfully² violated Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7.

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).

Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by SAA and cooperation afforded the Commission staff. In particular, SAA adopted policies and procedures that, with a few narrow exceptions, prohibited trading in volatility-linked ETPs.

IV.

In view of the foregoing, the Commission deems it appropriate, and in the public interest, to impose the sanctions agreed to in SAA's Offer.

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

- A. SAA cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7;
- B. SAA is censured for violation of Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-7;
- C. SAA shall pay disgorgement of \$3,399.42 and prejudgment interest of \$377.40, and a civil money penalty in the amount of \$600,000, totaling \$603,776.82 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

Payment must be made in one of the following ways:

- 1. SAA may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- 2. SAA may make direct payment from a bank account via Pay.gov through the SEC website at <https://www.sec.gov/paymentoptions>; or
- 3. SAA 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 SAA 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 Andrew B. Sporkin, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-6013, or such other address as Commission staff may provide.

D. 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, SAA 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 SAA's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, SAA agrees that it shall, within thirty (30) days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the 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 SAA by or on behalf of one or more clients based on substantially the same facts as alleged in the Order instituted by the Commission in these proceedings.

E. SAA shall cooperate fully with the Commission staff and shall provide the Commission staff with files, records, and/or supporting documentation as the Commission staff may request for the purpose of any distribution from the Fair Fund.

F. SAA shall pay all administrative costs and expenses of any distribution from the Fair Fund, including, but not limited to, the fees and expenses of a fund administrator and tax administrator, within thirty (30) days after receipt of an invoice for such services and amounts.

By the Commission.

Vanessa A. Countryman
Secretary