

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6681 / September 9, 2024**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-22092**

**In the Matter of**

**HOWARD BAILEY  
SECURITIES, 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 Howard Bailey Securities, LLC (“Howard Bailey” 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 that:

#### **Summary**

1. This matter involves failures by Howard Bailey, a registered investment adviser, to comply with Advisers Act Rule 206(4)-1 (the "Marketing Rule"). Specifically, after the compliance deadline for the Marketing Rule on November 4, 2022, and continuing through the date of this Order (the "Relevant Period"), Howard Bailey directly and indirectly disseminated numerous advertisements containing an endorsement that Howard Bailey is the "Official Wealth Management Partner of" a specific university athletic program ("the Athletic Program") without including disclosures required by the Marketing Rule, including that the endorsement was given by a person other than a current client, that cash compensation was provided for the endorsement, and any material conflicts of interest resulting from the compensation arrangement. Further, Howard Bailey disseminated an advertisement claiming to contain testimonials that did not come from current clients and therefore did not meet the definition of testimonials. As a result, Howard Bailey violated Section 206(4) of the Advisers Act and Rule 206(4)-1(b) thereunder.

#### **Respondent**

2. Respondent Howard Bailey is an Indiana limited liability company with its principal place of business in Fort Wayne, Indiana. Howard Bailey has been registered with the Commission as an investment adviser since January 30, 2019. In its Form ADV dated March 31, 2024, Howard Bailey reported that it had approximately \$463 million in regulatory assets under management.

#### **Facts**

3. On December 22, 2020, the Commission adopted significant amendments to Advisers Act Rule 206(4)-1, which governs marketing by Commission-registered investment advisers. *See Investment Adviser Marketing*, Release No. IA-5653 (Dec. 22, 2020) (effective May 4, 2021) ("Adopting Release"). The Commission set a deadline of November 4, 2022, eighteen months after the amendments' effective date of May 4, 2021, for registered investment advisers to come into compliance with the Marketing Rule. *See id.* at 252.

4. Under the Marketing Rule, registered investment advisers are prohibited from including any testimonial or endorsement in an advertisement unless the investment adviser clearly and prominently discloses, or reasonably believes that the person giving the testimonial or endorsement clearly and prominently discloses, as applicable:

- that the testimonial was given by a current client or investor in a private fund advised by the investment adviser ("private fund investor");<sup>1</sup>

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<sup>1</sup> During the Relevant Period, Howard Bailey reported on Form ADV that it is not an adviser to any private fund.

- the endorsement was given by a person other than a current client or private fund investor;
- that cash or non-cash compensation was provided for the testimonial or endorsement (as applicable); and
- a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person.

*See* Advisers Act Rule 206(4)-1(b)(1)(i). The adviser must also disclose the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement, although that disclosure need not be clear and prominent. *See* Advisers Act Rule 206(4)-1(b)(ii).

5. In adopting the requirement that an advertisement that includes a testimonial or endorsement clearly and prominently disclose that the testimonial was given by a current client or private fund investor, and that an endorsement was given by a person other than a current client or private fund investor, the Commission observed:

We believe that this disclosure will provide investors with important context for weighing the relevance of the testimonial or endorsement. For example, an investor might reasonably give more weight to a statement made about an adviser by a current investor rather than someone who was never an investor. Additionally, without clearly attributing an endorsement to someone other than an investor, the advertisement could mislead investors who may assume the endorsement reflects the endorser's experience as an investor.

Adopting Release at 92-93. The Commission provided a similar reason for requiring clear and prominent disclosure that cash or non-cash compensation was provided (as applicable). *See id.* at 94 (“Similar to the disclosure of a promoter's status as a current investor or person other than a current investor, we continue to believe that this disclosure [of compensation] will provide investors with important context for weighing the relevance of the testimonial or endorsement.”).

6. The Marketing Rule defines an “advertisement,” in pertinent part, to include “[a]ny direct or indirect communication an investment adviser makes to more than one person . . . that offers the investment adviser's investment advisory services with regard to securities to prospective clients . . . or offers new investment advisory services with regard to securities to current clients” or “[a]ny endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly.” Advisers Act Rule 206(4)-1(e)(1).

7. “Endorsement” is defined as “any statement by a person other than a current client or investor in a private fund advised by the investment adviser that: (i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons; (ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) Refers any current or prospective client or investor to be a client

of, or an investor in a private fund advised by, the investment adviser.” Advisers Act Rule 206(4)-1(e)(5).

8. “Testimonial” is defined as “any statement by a current client or investor in a private fund advised by the investment adviser: (i) About the client or investor’s experience with the investment adviser or its supervised persons; (ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.” Advisers Act Rule 206(4)-1(e)(17).

9. During the Relevant Period, Howard Bailey directly and indirectly disseminated communications via public websites of the Athletic Program and other third parties, the Athletic Program’s and Howard Bailey’s own social media platforms, online videos, physical objects such as bags and flags, and the Athletic Program’s arena jumbotron that identified Howard Bailey as the “Official Wealth Management Partner of [the Athletic Program,]” often with the Athletic Program logo. The Athletic Program is not a current client of Howard Bailey. This statement constitutes an endorsement because it is a statement by a person other than a current client that indicates approval, support, or recommendation of Howard Bailey. The endorsement constituted an advertisement because Howard Bailey provided compensation for the endorsement.

10. Howard Bailey directly and indirectly disseminated numerous advertisements containing this endorsement that did not include required disclosures, including that the endorsement was given by a person other than a current client, that cash compensation was provided for the endorsement, and any material conflicts of interest resulting from the compensation arrangement. In directly and indirectly disseminating these endorsements without the required disclosures, Howard Bailey violated Rule 206(4)-1(b)(1).

11. During the Relevant Period, Howard Bailey also published communications on its public website at <https://howardbailey.com> that constituted advertisements because they offered Howard Bailey’s investment advisory services with regard to securities to prospective clients and offered new investment advisory services with regard to securities to current clients. As the communications were published on Howard Bailey’s public website, they were made to more than one person.

12. These advertisements on Howard Bailey’s website included a page titled “Testimonials” in which Howard Bailey displayed select quotations from individuals expressing a positive view of the firm. Howard Bailey claimed that these statements were testimonials, but the quotations presented included one “testimonial” from a person who was no longer a client of the firm and another purported testimonial from a person who the firm was unable to verify had ever been a client. Because these statements were provided by persons other than current clients, they constituted endorsements, not testimonials. By failing to provide clear and prominent disclosure in advertisements that contained these endorsements that they were given by persons other than a current client, Howard Bailey again violated Rule 206(4)-1(b)(1).

### **Violations**

13. As a result of the conduct described above, Howard Bailey willfully<sup>2</sup> violated Section 206(4) of the Advisers Act and Rule 206(4)-1(b) thereunder.

### **Undertakings**

14. Respondent has undertaken to:

a. Within 10 days of the entry of this Order revise all advertisements identifying Howard Bailey as the “Official Wealth Management Partner of” the Athletic Program to meet the requirements of Rule 206(4)-1(b)(1) or, in the alternative, ensure that all such advertisements are no longer disseminated.

b. Within 10 days of the entry of this Order revise all advertisements containing testimonials and endorsements to meet the requirements of Rule 206(4)-1(b)(1) or, in the alternative, permanently stop disseminating all such advertisements.

c. Within 45 days of the entry of this Order, review all advertisements of Howard Bailey and confirm that the advertisements Howard Bailey is presently disseminating, or that third parties are disseminating on its behalf, comply with the requirements of the Marketing Rule.

d. Within 50 days of the entry of this Order, certify, in writing, compliance with the undertakings ordered pursuant to Section IV.C. below. The certification shall identify the undertaking(s), 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 Colin D. Forbes, Assistant Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission may provide, with a copy to the Office of Chief Counsel of the Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

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<sup>2</sup> “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).

e. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates 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 the last day.

#### IV.

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

Accordingly, pursuant to 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 Section 206(4) of the Advisers Act and Rule 206(4)-1 thereunder.

B. Respondent is censured.

C. Respondent shall comply with the undertakings enumerated in Section III, paragraphs 14.a through 14.d above.

D. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$90,000 to the Commission for transfer to the general fund of the United States Treasury, subject to the Securities Exchange Act of 1934 Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Howard Bailey as a Respondent in these proceedings, and the file number of the proceedings; a

copy of the cover letter and check or money order must be sent to Colin D. Forbes, Assistant Director, Asset Management Unit, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 24th Floor, Boston, MA 02110, or such other address as the Commission staff may provide.

E. 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