

**MEMO# 35311**

May 11, 2023

# **SEC Charges Investment Adviser for Misstatements Regarding Tax Loss Harvesting Service**

[35311]

May 11, 2023

TO: Chief Compliance Officer Committee

Investment Advisers Committee

SEC Rules Committee SUBJECTS: Compliance

Disclosure

Investment Advisers

Litigation & Enforcement RE: SEC Charges Investment Adviser for Misstatements Regarding Tax Loss Harvesting Service

On April 18, 2023, the SEC's Division of Enforcement announced that it charged, a registered investment adviser offering robo-advisory services with violations of the Investment Advisers Act and rules under the Act.[\[1\]](#) These violations involved material misstatements and omissions related to the Respondent's automated tax loss harvesting (TLH) service, failing to provide clients with notice of changes to advisory agreements, and failing to meet recordkeeping requirements. Without admitting or denying the charges, the Respondent agreed to settle these violations with a cease-and-desist order, a censure, and payment of a \$9 million civil penalty that will be distributed to affected clients.

The SEC's findings against the Respondent are as follow:

- From March 2016 to April 2019 ("Relevant Period"), the Respondent, in communicating with clients (1) misstated or omitted several material facts concerning TLH (a service that scans clients' accounts for opportunities to reduce their tax burden on investment profits by offsetting them with losses from other investments); (2) failed to provide notice to clients regarding certain changes it made to their advisory contracts; (3) failed to maintain certain required books and records; and (4) failed to adopt and implement policies and procedures reasonably designed to prevent violations of the Investment Advisers Act of 1940, as amended ("Advisers Act") and the rules thereunder;.
- At different times during the Relevant Period, Betterment failed to disclose to clients: a change in the software related to its scanning frequency (the disclosures referred to

daily scanning despite a change to scan client accounts every other day); a programming limitation affecting certain clients with a negative tax consequence; and two computer coding errors that prevented TLH from harvesting losses for at least 150 clients. Together, these alleged failures negatively impacted more than 25,000 client accounts, causing those clients to lose approximately \$4 million in potential tax benefits;

- The Respondent failed to provide to clients advance notice of material changes to its advisory contract on several occasions, in violation of its fiduciary duty as an investment adviser;
- The Respondent failed, during certain times, to maintain accurate and current books and records reflecting certain clients' written agreements enabling TLH, and thus could not produce that information to the SEC staff upon request; and
- In connection with the failures related to TLH, the Respondent failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act.

As a result of the conduct described above, the SEC found that the Respondent willfully violated Section 206(2) of the Advisers Act, which prohibits an investment adviser, directly or indirectly, from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." The Respondent was also found to have violated Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act. And finally, the Respondent violated Section 204 of the Advisers Act, and Rule 204-2(a)(10) thereunder that require that investment advisers registered with the Commission to maintain and preserve certain books and records.

The Respondent resolved these violations by agreeing to the sanctions mentioned above.

Mitra Surrell  
Associate General Counsel, Markets, SMAs, & CITs

#### **Notes**

[1] See In the Matter of Betterment LLC, SEC Release No. 6288 (April 18, 2023) (the "Order"), which is available at <https://www.sec.gov/litigation/admin/2023/ia-6288.pdf>.