UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 35132 / February 16, 2024

INVESTMENT ADVISERS ACT OF 1940
Release No. 6560 / February 16, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-21857

In the Matter of **Van Eck Associates Corporation,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940 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 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Van Eck Associates Corporation ("VEAC" 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 9(f) of the Investment Company Act of 1940 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 ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. These proceedings arise out of registered investment adviser VEAC's disclosure failures concerning the launch of an exchange traded fund, the VanEck Social Sentiment ETF ("BUZZ ETF"), in March 2021. The BUZZ ETF markets itself as tracking an index that included stocks with "positive insights" based on social media and other data.

2. VEAC obtained an exclusive license to use the BUZZ NextGen AI US Sentiment Leaders Index ("BUZZ Index") in connection with the BUZZ ETF. The provider of the BUZZ Index ("Index Provider") informed VEAC that it planned to retain a well-known and controversial social media influencer (the "Influencer") to promote the BUZZ Index in connection with the launch of the BUZZ ETF. To incentivize the Influencer's marketing and promotion efforts, the Index Provider, among other things, requested a change to the proposed licensing fee structure that would provide the Index Provider with a larger percentage of the fee when assets under management of the BUZZ ETF met certain thresholds. VEAC agreed to these requests.

3. The Influencer's planned involvement and the details of the anticipated licensing arrangement were not disclosed to the independent trustees of the VanEck ETF Trust (the "Board") in connection with their approval to organize the BUZZ ETF and approval of the management fee. Although the Board later learned about the Influencer's involvement with the BUZZ Index days prior to the launch, at that time the Board had not been informed about many of the details of this arrangement. Nor did VEAC inform the Board of these details in connection with the Board's review and approval of the renewal of the VEAC advisory contract for the BUZZ ETF. Specifically, at various times from December 2020 until June 2021, VEAC misrepresented and omitted material information to the Board concerning: (a) the licensing arrangement with the Index Provider; and (b) the involvement of the Influencer, the compensation paid to the Influencer, and the controversies surrounding the Influencer. In addition, VEAC did not adopt and implement policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

[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.

Respondent

4. **Van Eck Associates Corporation** ("**VEAC**"), is an investment adviser registered with the Commission since May 17, 1984. VEAC is headquartered in New York, New York, and, among other things, advises ETFs. As of December 31, 2022, VEAC had $56.2 billion in regulatory assets under management.

Other Relevant Entities

5. **VanEck ETF Trust** ("**the Trust**"), is an open-end investment management company located in New York, New York. The Trust was organized as a statutory Delaware trust in 2001 and was formerly known as VanEck Vectors ETF Trust. The Trust has several series organized as ETFs.

6. **VanEck Social Sentiment ETF** ("**BUZZ ETF**"), is an ETF that is a series in the VanEck ETF Trust that was launched on March 4, 2021. VEAC is the investment adviser to BUZZ ETF. BUZZ ETF is a passively managed ETF that uses the BUZZ Index to buy and sell securities on a monthly basis. As of December 31, 2022, BUZZ ETF had total net assets of approximately $52 million.

Facts

Formation of BUZZ ETF

7. Beginning in 2019, VEAC began to explore the creation of a new passively managed ETF that would track the BUZZ Index. The BUZZ Index purports to identify "U.S. common stocks with the most 'positive insights' collected from online sources including social media, news articles, blog posts and other alternative datasets." VEAC began talks in earnest with the Index Provider in August 2020 to obtain a license to use the index for a new ETF.

8. In early October 2020, VEAC proposed economic terms for a license from the Index Provider. VEAC proposed to pay to the Index Provider a fee equal to 20% of the management fee it received from the ETF in exchange for an exclusive license to use the index in the United States. On October 9, 2020, the Index Provider responded to VEAC's proposal, affirming that it viewed the proposal as fair and was willing to move forward on that basis, though no agreement was finalized at that time.

9. Later that month and into November 2020, the Index Provider planned to partner with the Influencer, who was known for commenting on sports, investing, and other topics. As a result, the Index Provider proposed new economic terms to the licensing agreement. In particular, the Index Provider represented that, as the Influencer would receive a share of the licensing fee VEAC would pay to the Index Provider, a sliding scale licensing fee would incentivize the Influencer to raise awareness of the BUZZ Index and would offer the Influencer a significant monetary incentive if the BUZZ ETF reached sufficient scale.

10. Under the new economics of the proposed licensing agreement, the Index Provider would receive from VEAC at least 20% of the net management fee VEAC accrued (after netting out four basis points attributed to expenses) and as much as 60% of the

management fee if the new ETF had in excess of $1.25 billion in assets under management within eighteen months of launching the fund. The Influencer was offered an ownership interest in the Index Provider, which he accepted. The ownership agreement was executed on or about February 24, 2021.

11. Prior to the discussions concerning BUZZ ETF, VEAC had no experience working with a social media influencer in either promoting an ETF it advised or promoting an index used by a VEAC-advised ETF. Nevertheless, at least one VEAC executive expressed a belief that the involvement of the Influencer, who had a large following on social media, was essential to the success of the ETF.

12. By mid-November 2020, representatives of VEAC and the Index Provider agreed informally to the terms discussed in Paragraphs 9 and 10; they executed a final agreement on February 21, 2021.

VEAC Representations to the Board on the Proposed BUZZ ETF Launch

13. On November 24, 2020, VEAC assembled an agenda and materials for an upcoming December 3, 2020, virtual meeting of the Board. The agenda included a vote on the proposed organization and launch of the BUZZ ETF, and a vote to approve the advisory contract with VEAC, which included a 75 basis points unitary management fee. The materials included a VEAC-created memorandum that described the BUZZ ETF and provided other information to assist the Board in evaluating the proposed BUZZ ETF launch.

14. The memorandum included a discussion of certain of the economic terms of the licensing agreement for the proposed fund. A discussion of licensing terms for other proposed funds had been included in VEAC-created Board memoranda since at least February 2020, at the request of at least one member of the Board.

15. The memorandum to the Board misstated the anticipated terms of the licensing fee, which was to be paid by VEAC to the Index Provider, disclosing that it would equal 20% of the net management fee but failing to disclose the sliding scale, which would provide a larger share of compensation to the Index Provider if BUZZ ETF's assets reached certain thresholds. The memorandum stated that VEAC was "still in [the] process of finalizing and signing the index license agreement." For the December 3, 2020, Board meeting, neither the memorandum nor other Board materials disclosed the forecasted profitability to VEAC of the BUZZ ETF or the extent to which economies of scale would be realized as the BUZZ ETF grew.

16. The memorandum and other Board materials also did not disclose the Influencer's planned involvement in promoting the BUZZ Index and his related compensation through the licensing agreement. The memorandum and other Board materials further failed to discuss the controversies surrounding the Influencer, and the corresponding brand risk to VEAC and VEAC-advised ETFs.

17. On December 3, 2020, the Board convened a meeting and voted unanimously to approve the advisory contract and to organize and launch BUZZ ETF. However, the minutes do not show that the independent trustees were informed about: (a) the anticipated economic terms of the licensing agreement with the Index Provider; or (b) the planned involvement of the

Influencer in promoting the BUZZ Index, the compensation to be paid to the Influencer, and the controversies surrounding the Influencer.

The BUZZ ETF Launch

18. On March 4, 2021, BUZZ ETF launched and began trading on the New York Stock Exchange ("NYSE"). VEAC arranged for the Influencer to appear by video at the NYSE virtual bell ringing ceremony for BUZZ ETF.

19. Prior to the launch of the fund, on February 24, 2021, a public relations firm that VEAC retained informed VEAC executives that while the Influencer was a spokesperson for the BUZZ Index, the public would likely assume he was a spokesperson for BUZZ ETF. Nevertheless, VEAC did not inform the Board that the Influencer's controversial views might also be associated with the fund.

VEAC's Failures under Section 15(c) of the Investment Company Act

20. Section 15(c) of the Investment Company Act makes it unlawful for any registered investment company to enter into or renew any advisory contract unless the terms of the contract are approved by a majority of the independent directors of the investment company. As part of the approval process, Section 15(c) imposes a duty on an adviser to furnish, such information as may reasonably be necessary for the directors to evaluate the terms of the adviser's contract.

21. While Section 15(c) does not define what is "reasonably necessary" to evaluate a contract's terms, the Commission has promulgated various fund filing disclosure requirements to better inform shareholders about a board's evaluation process when approving or renewing an advisory contract. Specifically, in 2004, the Commission adopted form amendments, which require that when a fund board approves or renews any advisory contract, the fund's next shareholder report must discuss, in reasonable detail, the material factors and conclusions with respect thereto that formed the basis for the directors' approval or renewal of that contract. *See Disclosure Regarding the Approval of Investment Advisory Contracts by Directors of Investment Companies*, Investment Company Act Release No. 26486 (June 30, 2004).

22. As to the approval or renewal of an advisory contract, funds must include a discussion in their shareholder reports concerning, among other things, "the extent to which economies of scale would be realized as the [f]und grows," and "whether fee levels reflect these economies of scale for the benefit of [f]und investors." *See* Form N-1A, Item 27(d)(6)(i). In addition, funds must include a discussion concerning "the costs of the services to be provided and profits to be realized by the investment adviser and its affiliates from the relationship with the [f]und." *Id.* As noted by the Commission, "[i]t would be difficult for a board to reach a final conclusion as to whether to approve an advisory contract without reaching conclusions as to each material factor." Investment Company Act Release No. 26486.

23. After approving the advisory contract on December 3, 2020, by adding the BUZZ ETF to the investment management agreement with the Trust, VEAC provided materials as part of the advisory contract renewal process for all of the funds in the Trust, including BUZZ ETF, and made a presentation to the Board on May 7, 2021. The Board materials included an analysis

of economies of scale and VEAC's profitability. After the presentation and after obtaining additional information from VEAC, the trustees voted to approve the VEAC advisory contract on June 17, 2021.

24. With respect to economies of scale and profitability, VEAC had not shared with the Board the economic terms of the licensing arrangement VEAC had reached with the Index Provider. The sliding scale arrangement provided for the Index Provider to garner a larger proportion of the management fee if the asset levels of BUZZ ETF increased to meet certain thresholds. The Board did not have the ability to consider the economic impact of the sliding scale arrangement, which would have been a relevant factor in evaluating VEAC's profitability and the extent to which economies of scale would be realized as the BUZZ ETF grew.

Policies and Procedures

25. From at least February 2020 until March 2021, VEAC did not adopt or implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. In particular, VEAC did not have adequate written policies and procedures about furnishing the Board with accurate information reasonably necessary for the Board to evaluate the terms of the advisory contract, as well as material information related to a proposed fund launch.

26. VEAC had developed a template document with fields that were completed by VEAC personnel but the template used for the BUZZ ETF did not include VEAC's profitability or economies of scale as the fund's assets grew. In addition, there were no formal written policies and procedures.

Violations

27. As a result of the conduct described above, VEAC willfully[2] violated Section 15(c) of the Investment Company Act, which makes it the duty of an investment adviser to a registered investment company to furnish such information as may reasonably be necessary for the investment company's directors to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser to such company.

28. As a result of the conduct described above, VEAC 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." Scienter is not required to establish a violation of Section 206(2), which may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643

[2] "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act and Section 9(f) of the Investment Company 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).

n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963)).

29. As a result of the conduct described above, VEAC willfully 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 the rules thereunder.

VEAC's Remedial Efforts

30. In determining to accept the Offer, the Commission considered remedial acts undertaken by VEAC.

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 9(f) of the Investment Company 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 Section 15(c) of the Investment Company Act and Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondent is censured.

C. Within ten (10) days of the entry of this Order, Respondent shall pay a civil money penalty in the amount of $1,750,000. The proceeds shall be paid to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act 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 VEAC 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 Virginia M. Rosado Desilets, Assistant Director, Asset Management Unit, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549.

D. 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