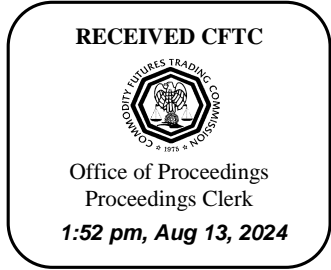


UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



_____))
In the Matter of:))
))
The Toronto Dominion Bank,))
))
Respondent.))
))
))
))
))
_____))

CFTC Docket No. 24-13

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I. INTRODUCTION

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from at least January 2018 to September 2023 (“Relevant Period”), The Toronto Dominion Bank (“TD Bank” or “Respondent”) violated, as set forth below, Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Respondent admits the facts set forth in Section II below, acknowledges that its conduct violated the Act and Regulations and consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”), and acknowledges service of this Order.¹

¹ Respondent agrees that the findings of fact and conclusions of law in this Order shall be taken as true and correct and be given preclusive effect without further proof in this proceeding and any other proceeding brought by the Commission or to which the Commission is a party or claimant, including but not limited to, a proceeding in bankruptcy or receivership. Respondent does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

To comply with its supervisory obligations as a swap dealer under Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023), TD Bank has had a system of supervision which includes, among other things, conducting surveillance on the business communications of its swap dealer personnel. Since at least 2013, TD Bank allowed its personnel to use, among other communications methods, a third-party electronic messaging platform (the “Messaging Platform”), and during the Relevant Period, TD Bank used a third-party automated surveillance tool to surveil communications made over the Messaging Platform. Although TD Bank had a process for ingesting Messaging Platform messages into its surveillance tool for surveillance, during the Relevant Period, TD Bank lacked effective oversight and internal monitoring over that process. As a result, TD Bank failed to surveil certain Messaging Platform messages for hundreds of its swap dealer associated persons (“APs”) over a five-year period. TD Bank therefore failed to diligently supervise activities related to its swap dealer business, specifically its electronic communications surveillance system, in violation Section 4s(h)(1)(B) of the Act and Regulation 23.602(a).

In accepting Respondent’s offer, the Commission recognizes the cooperation of TD Bank with the Division of Enforcement’s investigation of this matter. The Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter.

B. RESPONDENT

The Toronto Dominion Bank is an international banking and financial services corporation headquartered in Toronto, Ontario. TD Bank was provisionally registered with the Commission as a swap dealer since December 31, 2012 and is currently registered as a swap dealer.

C. FACTS

To comply with its supervisory obligations as a swap dealer under Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023), TD Bank has had a system of supervision which includes, among other things, conducting surveillance on the business communications of its swap dealer personnel. Since at least 2013, TD Bank allowed its personnel to use, among other communication methods, the Messaging Platform for business communications, and during the Relevant Period, TD Bank used a third-party automated surveillance tool to surveil communications made over the Messaging Platform. During the Relevant Period, TD Bank failed to supervise diligently its electronic communications surveillance system, resulting in TD Bank failing to surveil certain Messaging Platform messages for hundreds of its swap dealer APs over a five-year period.

1. TD Bank's Automated Electronic Communications Surveillance Process

In 2016, TD Bank had a process to ingest Messaging Platform messages into its surveillance tool for surveillance as follows. On a weekly basis, TD Bank received from its vendor an encrypted file identifying all Messaging Platform accounts for TD Bank personnel, including, as is relevant here, new accounts that had been recently created. Using an automated process, TD Bank took the encrypted file, decrypted it, and updated TD Bank's own internal record of Messaging Platform accounts. Once TD Bank's internal record of Messaging Platform accounts was updated, TD Bank's surveillance tool could ingest messages from the new accounts for surveillance.

2. The Encryption Change by TD Bank's Vendor and TD Bank's Failure to Surveil Messages

On July 1, 2016, TD Bank's vendor made a change to how it encrypted the weekly file identifying new TD Bank Messaging Platform accounts. When informed of this change, TD Bank recognized that it needed to update its automated process to address the encryption change. While TD Bank worked to update its automated process, as a temporary measure, TD Bank began updating its internal record of Messaging Platform accounts on a manual basis. This allowed TD Bank's surveillance tool to continue to ingest messages from new accounts for surveillance.

Months passed, and it took TD Bank longer than expected to update its automated process. Although TD Bank continued to update its internal list of Messaging Platform accounts manually for about eighteen months, on January 24, 2018, TD Bank stopped updating its internal list of accounts manually. This meant that messages from new Messaging Platform accounts for TD Bank personnel created after January 24, 2018 were generally not ingested into TD Bank's surveillance tool and were not surveilled.² Over time, as the number of new Messaging Platform accounts grew, the number of APs that had Messaging Platform messages that went unsurveilled also grew.

3. TD Bank's Update to Its Automated Process and Continued Failure to Surveil Messages

In October 2019, TD Bank finally updated its automated process to address the July 2016 encryption change by its vendor. TD Bank expected that this would restore its automated process for taking the weekly file identifying new accounts from TD Bank's vendor, decrypting it, and updating TD Bank's internal record of Messaging Platform accounts. TD Bank further expected that all messages for all new Messaging Platform accounts created after January 24, 2018 would be ingested into its surveillance tool for surveillance. After implementing the update, TD Bank verified that its updated process successfully decrypted the weekly file identifying new accounts. However, TD Bank did not verify that its internal record of Messaging Platform accounts was updated as expected, or that messages from new accounts

² In cases where TD Bank personnel communicated over the Messaging Platform with other TD Bank personnel that had a Messaging Platform account from prior to January 24, 2018, the message generally would have been ingested for surveillance and in fact surveilled by virtue of the pre-January 24, 2018 account already being included in TD Bank's internal record of Messaging Platform accounts.

created after January 24, 2018 were ingested for surveillance or were in fact surveilled. TD Bank therefore did not detect that there had been another technical change by its vendor that prevented TD Bank's automated process from functioning properly. Instead, TD Bank continued to fail to update its internal record of Messaging Platform accounts, to fail to ingest certain messages from new accounts into its surveillance tool, and to fail to surveil certain messages from those accounts.

TD Bank continued, until March 2023, to fail to surveil messages for all new Messaging Platform accounts created after January 24, 2018. In March 2023, TD Bank finished implementing an additional surveillance tool that did not rely on the same automated process as its existing surveillance tool. With the addition of the new surveillance tool, TD Bank began again surveilling all of the Messaging Platform messages for all of its APs. TD Bank discovered in June 2023 that its internal record of Messaging Platform accounts had not been updated for several years and that during that time, it failed to surveil messages for approximately 375 of its swap dealer APs.

4. TD Bank's Deficient Oversight and Monitoring

During the Relevant Period, TD Bank lacked effective oversight over its electronic communications surveillance system. Although TD Bank had some general monitoring of its surveillance system, it was insufficient to alert it to its surveillance gap. During most of the Relevant Period, TD Bank's internal monitoring aimed at identifying gaps in its surveillance primarily consisted of a single automated report that reflected the aggregate volume of data that its surveillance tool ingested each day. Although this report could be used to identify if the volume of data ingested for surveillance changed significantly, it was insufficient to alert TD Bank to a gap in its surveillance that grew over time or that a particular step in its surveillance process was not functioning as expected.

Further, in July 2016, when TD Bank switched to a manual process for updating its internal record of Messaging Platform accounts while it worked to update its automated process, it did not put in place any additional supervision or internal monitoring aimed at ensuring that the manual process was conducted or detecting if it was not. Moreover, after TD Bank updated its automated process in October 2019, it tested that some but not all of its process for ingesting messages for new accounts into its surveillance tool began functioning again as expected. Finally, despite the ongoing and long-term nature of the various issues affecting TD Bank's surveillance process, TD Bank did not escalate any of its surveillance technology issues to a more senior oversight body until after it discovered its years-long failure in June 2023.

5. TD Bank's Remediation

TD Bank has represented the following. After TD Bank discovered in June 2023 that its existing surveillance tool had not been ingesting messages from new Messaging Platform accounts, it identified the technical issue preventing its automated process from functioning and resolved that issue by July 1, 2023. Following the identification of this issue, TD implemented several new controls over its process for ingesting messages into its surveillance tool, including, in September 2023: (1) creating an automated alert if the file from its vendor identifying new accounts is not delivered and/or not decrypted, and (2) implementing weekly manual reviews of

TD Bank’s internal record of Messaging Platform accounts to ensure it is being updated. Further, TD Bank enhanced its governance of surveillance technology issues, including by creating a written procedure for responding to and escalating technology failures and incidents. Finally, TD Bank has begun taking steps to surveil all Messaging Platform messages that went unmonitored during the Relevant Period.

III. LEGAL DISCUSSION

A. TD Bank’s Failure to Supervise Diligently in Violation of Section 4s(h)(1)(B) of the Act and Regulation 23.602(a)

Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), requires “diligent supervision of the business of the registered swap dealer[.]” Regulation 23.602(a) requires that each swap dealer “shall establish and maintain a system to supervise, and shall diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar status or performing a similar function).” 17 C.F.R. § 23.602(a) (2023). The operative language of Regulation 23.602 is similar to the language of the Commission’s longstanding supervision regulation for futures and options, Regulation 166.3, 17 C.F.R. § 166.3 (2023).

Under Regulation 23.602(a), a violation is demonstrated by showing either that: (1) the registrant’s supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *See In re Australia and New Zealand Banking Group Ltd*, CFTC No. 24-05, 2024 WL 1526678, at *3 (Apr. 2, 2024) (consent order) (hereinafter “*In re ANZ*”); *see also In re Commerzbank AG*, CFTC No. 19-03, 2018 WL 5921385, at *10-11 (Nov. 8, 2018) (consent order) (noting textual similarities between Regulation 23.602 and Regulation 166.3, applying case law concerning Regulation 166.3, and citing *In re Murlas Commodities, Inc.*, CFTC No. 85-29, 1995 WL 523563, at *9 (Sept. 1, 1995), and *In re Paragon Futures Assoc.*, CFTC No. 88-18, 1992 WL 74261, at *14 (Apr. 1, 1992)); *In re INTL FCStone Markets, LLC*, CFTC No. 15-27, 2015 WL 4980321, at *3 (Aug. 19, 2015) (consent order) (same). Either showing “alone is sufficient to establish a violation of the supervision requirement.” *Commerzbank*, 2018 WL 5921385, at *10 (interpreting Regulation 23.602 in light of Regulation 166.3 precedents). No evidence of an underlying violation is necessary. *In re Collins*, CFTC No. 94-13, 1997 WL 761927, at *10 (Dec. 10, 1997) (interpreting Regulation 166.3). Evidence of violations that “‘should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations have occurred repeatedly,’ is probative of a failure to supervise.” *See In re Bank of Nova Scotia*, CFTC No. 20-26, 2020 WL 4926053, at *10 (Aug. 19, 2020) (consent order) (quoting *In re Société Générale Int’l Ltd.*, CFTC No. 19-38, 2009 WL 4915485, at *7 (Sept. 30, 2019) (consent order)). A company’s “failing to ensure that [it] followed its procedures for surveillance” and “failing to ensure that its . . . data was processed for surveillance” constitutes a violation of the supervisory requirements. *In re Advantage Futures LLC*, CFTC No. 23-45, 2023 WL 6194819, at *4 (Sept. 20, 2023) (consent order) (interpreting Regulation 166.3); *see also In re ANZ*, 2024 WL 1526678, at *4 (finding violations of Regulation 23.602 where, “despite being on notice” of prior surveillance failures, respondent “failed to ensure that its spoofing surveillance tool with respect to futures activity was and would continue to be operating effectively.”).

During the Relevant Period, TD Bank failed to perform its supervisory duties diligently in light of its electronic communications surveillance gap. As described above, TD Bank lacked effective oversight and internal monitoring over its electronic communications surveillance system. The inadequacy of TD Bank's supervisory system is evidenced by its failure to detect that it repeatedly failed to surveil certain Messaging Platform messages for approximately 375 of its swap dealer APs over a five-year period. By this conduct, TD Bank failed to supervise activities related to its swap dealer business diligently, in violation of Section 4s(h)(1)(B) of the Act and Regulation 23.602(a).

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, TD Bank violated Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it knowingly and voluntarily:

- A. Consents to the resolution of this matter in an administrative proceeding;
- B. Acknowledges service of this Order;
- C. Admits the facts described in Section II above and acknowledges that its conduct violated the Act and Regulations;
- D. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;
- E. Waives:
 1. The filing and service of a complaint and notice of hearing;
 2. A hearing;
 3. All post-hearing procedures;
 4. Any and all rights or defenses that Respondent has or might have for the matter to be adjudicated in a federal district court in the first instance, including any associated right to a jury trial;
 5. Judicial review by any court;
 6. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;

7. Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504, and 28 U.S.C. § 2412, and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2023), relating to, or arising from, this proceeding;
 8. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201–253, 110 Stat. 847, 857–74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
 9. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;
- F. Agrees for purposes of the waiver of any and all rights under the Equal Access to Justice Act specified in paragraph E.7 above, that the Commission is the prevailing party in this action;
- G. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer;
- H. Consents, solely on the basis of the Offer, to the Commission’s entry of this Order that:
1. Makes findings by the Commission that TD Bank violated Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023);
 2. Orders TD Bank to cease and desist from violating Section 4s(h)(1)(B) of the Act and Regulation 23.602(a);
 3. Orders Respondent to pay a civil monetary penalty in the amount of \$4 million US dollars (\$4,000,000), plus post-judgment interest within fourteen days of the date of entry of this Order; and
 4. Orders Respondent and its successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. TD Bank and its successors and assigns shall cease and desist from violating Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulation 23.602(a), 17 C.F.R. § 23.602(a) (2023).

- B. Respondent shall pay a civil monetary penalty in the amount of \$4 million US dollars (\$4,000,000) (“CMP Obligation”), within fourteen days of the date of the entry of this Order. If the CMP Obligation is not paid in full within fourteen days of the date of entry of this Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

Respondent shall pay the CMP Obligation and any post-judgment interest by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
6500 S. MacArthur Blvd.
HQ Room 266
Oklahoma City, OK 73169
9-AMC-AR-CFTC@faa.gov

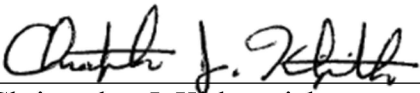
If payment is to be made by electronic funds transfer, TD Bank shall contact the Federal Aviation Administration at the above email address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

- C. Respondent and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:
1. Within 180 days of the entry of this Order, TD Bank shall submit a written report to Division of Enforcement (the “Division”) staff confirming that TD Bank has completed its review of all Messaging Platform messages sent or received by TD Bank personnel between September 13, 2016 and September 27, 2023 that previously went un surveilled (the “Report”). The Report shall: describe the review performed and the roles of the individuals who performed the review; categorize by type and volume all surveillance alerts generated, all surveillance alerts reviewed, and all surveillance alerts closed without further escalation; identify any surveillance alerts escalated for further investigation implicating compliance with the Act or Regulations, TD Bank policy, or other regulatory issues; describe how any such escalated alerts were further investigated and dispositioned; describe any conclusions reached; and describe the status of any ongoing investigation or disciplinary process resulting from any such escalated alerts.

2. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (1) testimonial obligations; or (2) right to take legal positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.
3. Cooperation, in General: Respondent shall cooperate fully and expeditiously with the Commission, including the Division, in this action, and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, the subject matter of this action.
4. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
5. Deadlines: For good cause shown, Division staff may extend any of the procedural dates relating to the undertakings. Unless otherwise specified, 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 to be the last day.
6. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone numbers and mailing addresses within ten calendar days of the change.

The provisions of this Order shall be effective as of this date.

By the Commission.



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: August 13, 2024