

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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 )  
**In the Matter of:** )

**The Bank of New York Mellon,** )

**Respondent.** )

\_\_\_\_\_ )

CFTC Docket No. 19-42

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Office of Proceedings  
Proceedings Clerk

7:47 pm, Sep 30, 2019

**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 December 31, 2012, until at least 2018 (the “Relevant Period”), The Bank of New York Mellon (“BNYM,” “Respondent,” or the “Bank”) violated Sections 2(a)(13)(G) and 4r(a)(3) of the Commodity Exchange Act (the “Act”), 7 U.S.C. §§ 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. §§ 43.3, 45.3 (2019), of the Commission’s Regulations (“Regulations”) promulgated thereunder. 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. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Act, Making Findings, and Imposing Remedial Sanctions (“Order”), and acknowledges service of this Order.<sup>1</sup>

<sup>1</sup> Respondent consents to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. 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

Over a period of more than five years, from December 31, 2012, through at least 2018, BNYM failed to correctly report hundreds of thousands of swap transactions to an SDR as required by the Act and the Regulations. This conduct violated Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. §§ 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. §§ 43.3, 45.3 (2019).

In accepting Respondent's Offer of Settlement, the Commission recognizes BNYM's substantial cooperation during the Division of Enforcement's ("Division") investigation of this matter. The Commission notes that BNYM's cooperation and remediation are recognized in the form of a substantially reduced civil monetary penalty.

### B. RESPONDENT

The Bank of New York Mellon ("BNYM") is the world's largest custody bank and asset servicing company. BNYM became a provisionally registered swap dealer on December 31, 2012. Its swap dealer activity is centered in its Markets Group which offers products including Spot Foreign Exchange ("FX"), Deliverable FX Swaps and Forwards, and Interest Rate Swaps.

### C. FACTS

#### 1. **FX Swap Reporting Violations**

From December 31, 2012, through July 2, 2018, BNYM failed to correctly report tens of thousands of FX swaps. FX swaps do not have a unique product identifier so each leg of the FX swap needs to be reported to the SDR along with an identifier linking the legs. During this period, BNYM did not correctly report approximately one-third of its FX swaps. For some of these incorrectly reported FX swaps, BNYM reported only one leg of the swap. For others, BNYM reported both legs of the swap transaction, but failed to include the identifier indicating that these two legs were in fact a single swap transaction. Both types of errors had the effect of making it impossible for a person contemporaneously reviewing BNYM's reports to determine that BNYM had, in fact, entered into these 184,000 FX swap transactions.

#### 2. **Interaffiliate Swap Reporting Violations**

From early 2013 through March 2016, nine BNYM affiliates were incorrectly classified as intrabank accounts rather than separate legal entities. As a result, tens of thousands of transactions with these nine affiliates that should have been reported to an SDR were not reported.

### 3. Swap Reporting Violations Involving Bunched Trades

Throughout the Relevant Period, BNYM has entered into FX transactions with investment managers acting as agents for one or more principals (“Bunched Trades”). After a Bunched Trade was executed, the investment manager provided BNYM with the names of the customers to which portions of the Bunched Trades were to be booked and the size of each such portion (“Allocated Trades”). Since December 31, 2012, through at least December 31, 2018, BNYM has been reporting these Allocated Trades but failing to report the underlying Bunched Trades. During the Relevant Period, thousands of Bunched Trades that should have been reported to an SDR were not reported.

### 4. BNYM’s Cooperation

Throughout the Division’s investigation, BNYM provided substantial cooperation. Among other things, BNYM conducted an internal investigation and provided specific and detailed information to the Division regarding the reporting deficiencies its internal investigation revealed. BNYM continued to substantially cooperate with the Division in its effort to confirm the results of the internal investigation. In addition, BNYM has taken substantial steps to remediate these deficiencies and improve its processes for swap reporting going forward.

## III. LEGAL DISCUSSION

### A. BNYM’s Conduct Violated Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. §§ 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. §§ 43.3, 45.3 (2019)

Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. §§ 2(a)(13)(G), 6r(a)(3) (2012), require that swaps be reported to an SDR and establishes requirements for such reporting. This section of the Act and the Commission’s implementing regulations in Parts 43 and 45 of the Regulations, 17 C.F.R. pts. 43, 45 (2019), were designed to enhance transparency, promote standardization, and reduce systemic risk. The accuracy and completeness of swap reporting are critical to the Commission’s mission to protect market participants and to ensure market integrity. *See, e.g., In re Ice Futures U.S.*, CFTC No. 15-17, 2015 WL 1276463 (Mar. 16, 2015) (consent order); *In re Deutsche Bank Sec. Inc.*, CFTC No. 15-11, 2015 WL 1508451 (Dec. 22, 2014) (consent order).

Among the requirements of the Act and Regulations related to swap reporting, Part 43 establishes requirements for the real-time reporting and public availability of swap transaction data. *See* Regulations 43.2 and 43.3, 17 C.F.R. §§ 43.2, 43.3 (2019). Under Part 43, reporting parties must report a publicly-reportable swap transaction to an SDR as soon as technologically practicable after the swap transaction is executed. *See* Regulation 43.3.

Part 45 of the Regulations requires reporting parties to, among other things, report swap creation data to an SDR. Regulation 45.3, 17 C.F.R. § 45.3 (2019), sets forth the requirements for reporting creation data, including primary economic terms data and confirmation data. *See* Regulation 45.3(b) and 45.3(c).

From December 31, 2012, through 2018, on thousands of occasions, BNYM failed to report swap transactions to an SDR consistent with the requirements of Sections 2(a)(13)(G) and 4r(a)(3) of the Act and Regulations 43.3 and 45.3. Accordingly, BNYM violated these provisions of the Act and the Regulations.

**B. BNYM's Liability for the Acts of Its Employees**

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2019), provide that the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust. Pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, strict liability is imposed on principals for the actions of their agents. *See, e.g., Dohmen-Ramirez & Wellington Advisory, Inc. v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986).

The foregoing acts, omissions, and failures of BNYM's employees occurred within the scope of their employment, office, or agency with BNYM; therefore, pursuant to Section 2(a)(1)(B) of the Act, and Regulation 1.2, BNYM is liable for those acts, omissions, and failures in violation of the Act and Regulations.

**IV. FINDINGS OF VIOLATIONS**

Based on the foregoing, the Commission finds that Respondent violated Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. § 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. § 43.3, 45.3 (2019).

**V. OFFER OF SETTLEMENT**

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission to all the matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on a violation of or enforcement of this Order;
- C. Waives:
  - 1. The filing and service of a complaint and notice of hearing;
  - 2. A hearing;
  - 3. All post-hearing procedures;

4. Judicial review by any court;
  5. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
  6. Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2019), relating to, or arising from, this proceeding;
  7. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, ("SBREFA"), Pub. L. No. 104-121, tit. II, §§ 201-253, 110 Stat 847-74 (codified as amended in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
  8. Any claims of Double Jeopardy based upon 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;
- D. 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; and
- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Respondent violated Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. § 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. § 43.3, 45.3 (2019);
  2. Orders Respondent to cease and desist from violating Sections 2(a)(13) (G) and 4r(a)(3) of the Act and Regulations 43.3 and 45.3;
  3. Orders Respondent to pay a civil monetary penalty in the amount of seven-hundred and fifty thousand dollars (\$750,000), plus post-judgment interest within ten 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 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. Respondent shall cease and desist from violating Sections 2(a)(13)(G) and 4r(a)(3) of the Act, 7 U.S.C. §§ 2(a)(13)(G), 6r(a)(3) (2012), and Regulations 43.3 and 45.3, 17 C.F.R. §§ 43.3, 45.3 (2019).

- B. Respondent shall pay a civil monetary penalty in the amount of seven-hundred and fifty thousand dollars (\$750,000) (“CMP Obligation”). If the CMP Obligation is not paid in full within ten days of the date of entry of the Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of the Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of the Order pursuant to 28 U.S.C. § 1961 (2012).

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, Respondent shall make the payment payable to the Commodity Futures Trading Commission, and sent to the address below:

MMAC/ESC/AMK326  
Commodity Futures Trading Commission  
Division of Enforcement  
6500 S. MacArthur Blvd.  
HQ Room 181  
Oklahoma City, OK 73169  
(405) 954-6569 office  
(405) 954-1620 facsimile  
9-AMC-AR-CFTC@faa.gov

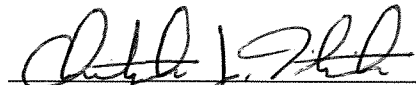
If payment is to be made by electronic transfer, Respondent shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies Respondent and the name and docket number of this proceeding. 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. Public Statements: Respondent agrees that neither it nor any of its successors, assigns, agents or employees under its 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 (i) testimonial obligations; or (ii) 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.

2. 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.

**The provisions of this Order shall be effective on this date.**

By the Commission.

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

Dated: September 30, 2019