**UNITED STATES OF AMERICA**
**Before the**
**COMMODITY FUTURES TRADING COMMISSION**

| | | |
|---|---|---|
| **In the Matter of:** | ) | |
| | ) | |
| **The Bank of Nova Scotia,** | ) | |
| | ) | **CFTC Docket No. 20-26** |
| **Respondent.** | ) | |
| | ) | |
| | ) | |

**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 at various times from at least December 31, 2012 to the present (the "Relevant Period"), Bank of Nova Scotia ("Respondent" or "BNS") violated Sections 4s(f)(1)(C), 4s(g)(1) and (3), 4s(h)(1), and 6(c)(2) of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1), 9(2) (2018), and Commission Regulations ("Regulations") 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), and 3.3(e), 17 C.F.R. §§ 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), 3.3(e) (2019). 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 Sections 6(c) and 6(d) of the

Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions ("Order") and acknowledges service of this Order.[1]

## II. FINDINGS

The Commission finds the following:

### A. SUMMARY

During the Relevant Period, BNS failed to supervise its swap dealer activities diligently, leading to numerous violations of Section 4s of the Act, 7 U.S.C. § 6s (2018), and to its base metals[2] desk regularly failing to comply with the swap dealer business conduct standards and recordkeeping requirements set forth in Part 23 of the Commission's Regulations, 17 C.F.R. pt. 23 (2019). BNS's counterparty onboarding process, recordkeeping, and Chief Compliance Officer reporting also failed to comply with the Act and Commission Regulations at times during the Relevant Period. Further, BNS was unable to respond to certain requests for required records made by the Commission's Division of Enforcement (the "Division" or "DOE") and made false or misleading statements to Division staff during the Division's investigation. BNS did not adequately remediate its non-compliant practices for many months after it became aware of the Division's investigation, and BNS has only recently begun to remediate certain of the issues.

Swap dealers such as BNS must comply with certain external business conduct standards, including providing pre-trade disclosure of the swap dealer's material incentives and conflicts of interest related to a swap. These include disclosing to potential counterparties the mid-market mark of a swap prior to consummating a swap transaction. The so-called pre-trade mid-market mark ("PTMMM") must exclude any amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. By making such disclosures, swap dealers inform their counterparties of an approximate measure of the objective value of a swap prior to markup being added by the swap dealer. Regularly from around May 2013 through the end of 2017, and then at times through at least the end of 2019, BNS's swap dealer desks provided counterparties with PTMMMs that were inaccurate, untimely, or both, or failed to provide a PTMMM entirely, affecting tens of thousands of swaps. This conduct had the effect of concealing BNS's full markup from its swaps counterparties and violated Section 4s(h)(1) of the Act, 7 U.S.C. § 6s(h)(1) (2018), and Regulation 23.431(a), 17 C.F.R. § 23.431(a) (2019).

---

[1] 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 be 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; a proceeding to enforce the terms of this Order; or a statutory disqualification proceeding pursuant to Section 8a(2), (3) and (4), 7 U.S.C. § 12a(2), (3), (4) (2018), and in accordance with Paragraph 3 of the undertakings in this Order. BNS 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.

[2] Base metals include aluminum, copper, lead, nickel, tin, and zinc.

From around May 2013 through at least late 2019, BNS also failed to comply with recordkeeping requirements for PTMMMs under the Act and Regulation. BNS had records of PTMMMs in the emails, chats messages, and audio recordings in which the PTMMMs had been communicated to counterparties. It did not, however, keep comprehensive records and did not keep its records in a manner searchable by transaction and counterparty. *See* Section 4s(g), 7 U.S.C. § 6s(g) (2018); Regulations 23.201(a)(1), 23.202(a)(1), 17 C.F.R. §§ 23.201(a)(1); 23.202(a)(1) (2019). Because of these recordkeeping failures, when Division staff sought BNS's PTMMM records, BNS could not produce them to the Division promptly upon request, in violation of Regulation 1.31(d)(3)(ii), 17 C.F.R. § 1.31(d)(3)(ii) (2019).

BNS's recordkeeping failures were not limited to PTMMMs. At the outset of its investigation, Division staff sent BNS a document preservation notice that required BNS to preserve, among other things, audio recordings of its base metals personnel telephone lines. After Division staff requested production of the audio recordings, BNS informed Division staff that it was unable to make a complete production because certain of the recordings had been deleted. Separately, BNS failed to provide a complete production of other audio recordings subject to a Division request for over eight months due to its inability to locate a full set of the recordings. These recordkeeping failures violated Sections 4s(f) and (g) of the Act, 7 U.S.C. § 6s(f), (g) (2018), and Regulations 23.201(a)(1), 23.202(a)(1), and 1.31(d)(3)(ii), 17 C.F.R. §§ 23.201(a)(1), 23.202(a)(1), 1.31(d)(3)(ii) (2019).

BNS also made statements to Division staff during the course of the Division's investigation that BNS knew or reasonably should have known were false or misleading concerning: (i) whether it had preserved all requested audio recordings; and (ii) who supervised its New York base metals desk in late 2017. Each of these false or misleading statements impeded the Division's ability to investigate BNS's compliance failures, and violated Section 6(c)(2) of the Act, 7 U.S.C. § 9(2) (2018).

Further, after being on notice of certain problems with its onboarding process, BNS failed to implement policies and procedures reasonably designed to obtain and record facts concerning whether its counterparties were U.S. persons. Among other things, these facts were needed to determine whether BNS was subject to PTMMM disclosure requirements. BNS therefore violated Regulation 23.402(b), 17 C.F.R. § 23.402(b) (2019).

BNS also failed to comply with chief compliance officer reporting requirements. Although BNS was aware of significant weaknesses in its trade surveillance program, BNS's disclosures in its 2017 Chief Compliance Officer Annual Report ("2017 CCO Report") failed to adequately describe those issues, in violation of Regulation 3.3(e), 17 C.F.R. § 3.3(e) (2019).

* * *

In accepting BNS's offer, the Commission notes that although BNS took some cooperative steps during the course of the Division's investigation, it also engaged in conduct that impeded the Division's investigation. BNS's conduct resulted in certain charges in this Order, including failing to preserve audio recordings and making false statements to Division staff. BNS also provided untimely, inaccurate, and incomplete responses to Division requests for documents and information, which required Division staff to expend resources to identify gaps

and errors and then pursue BNS to provide complete and accurate responses. Further, BNS has only recently begun to remediate certain of its non-compliant practices despite having been on notice of serious compliance failures and weaknesses and of the Division's investigation for some time.

## B. RESPONDENT

**The Bank of Nova Scotia** is a chartered schedule I bank on the Bank Act (Canada), headquartered in Toronto, Canada. BNS has been provisionally registered with the Commission as a Swap Dealer since December 31, 2012. BNS maintains offices in, among other places, New York, New York, and Houston, Texas.

## C. FACTS

### 1. BNS Failed to Provide Accurate or Timely Pre-Trade Mid-Market Marks, or Failed to Provide Marks at All, and BNS's Records of Its Swaps Transactions Failed to Meet Commission Requirements

Section 4s(h) of the Act, 7 U.S.C. § 6s(h) (2018), sets forth certain business conduct standards for swap dealers. These standards include requirements that swap dealers disclose to counterparties: (1) information about the material characteristics of the swap to be traded; (2) the swap dealer's material incentives and conflicts of interest related to the swap; and (3) a daily mark of each uncleared swap transaction.

Regulation 23.431, 17 C.F.R. § 23.431 (2019), implements some of the disclosure requirements of Section 4s(h). Pursuant to Regulation 23.431(a), swap dealers must disclose to counterparties,[3] "[a]t a reasonably sufficient time prior to entering into a swap," among other things: (1) the material characteristics of the particular swap, "which shall include the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap"; and (2) the material incentives and conflicts of interest the swap dealer may have in connection with the swap, which shall include "[w]ith respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap."

Regulation 23.431(d)(2) instructs swap dealers that pre-trade mid-market marks "shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments."[4] The Commission has noted that the term mid-market "has been used by many

[3] Both Section 4s(h)(3)(B) and Regulation 23.431(a) limit the disclosure requirements discussed in this Order to counterparties who are not swap dealers, major swap participants, security-based swap dealers, or major security-based swap participants. The Commission has expressed the view that, for non-U.S.-based swap dealers such as BNS, Regulation 23.431(a) will generally apply under CEA Section 2(i), 7 U.S.C. § 2(i), to swaps trades made with counterparties located within the United States. *See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45,292, 45,351 (July 26, 2013). This Order will use the general term "counterparties" to refer to counterparties that fall within the scope of the Act and Regulations.

[4] The Commission considered, but ultimately did not require, swap dealers to disclose their profit separately. *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties* ("Proposed Rule Release"), 75 Fed. Reg. 80,638, 80,645 (Dec. 22, 2010).

industry participants since at least 1994,"[5] and characterized the mid-market mark as an "objective"[6] and "transparent"[7] value. Because the mid-market mark requirement was a "principles based" rule, the Commission declined to "endorse any particular methodology" of calculating the mark.[8]

### a. Failures to Comply with Business Conduct Standards for Pre-Trade Mid-Market Marks

Regularly from around May 2013 through the end of 2017, and at times through at least the end of 2019, BNS swap dealer desks provided counterparties PTMMMs that were inaccurate, untimely, or both, or failed to provide a PTMMM entirely. These failures had the effect of concealing BNS's full markup from counterparties for tens of thousands of swaps. Around late 2018, BNS began to improve its compliance with PTMMM requirements, but BNS still engaged in certain noncompliant practices through at least the end of 2019.

The BNS base metals desk's PTMMM compliance failures are representative of similar failures that occurred on other BNS trading desks. From around May 2013 through at least the end of 2017, BNS's base metals traders and salespeople provided counterparties PTMMMs that failed to inform the counterparties of the full trading and sales markups included in its prices. In a typical example of this conduct, a counterparty would approach a base metals salesperson to request BNS offer to sell it some number of three-month aluminum forward swaps. The salesperson would then relay the request to a trader, who would provide a price that included a trading markup. On top of that price, the salesperson would add additional dollars of sales markup before quoting the offer to the counterparty. When the counterparty accepted the price, the salesperson would then disclose a PTMMM that was only one dollar less than the agreed-upon price. In this instance and numerous others like it, BNS's PTMMM was inaccurate because it did not exclude all costs and adjustments—only one dollar of them—and it had the effect of understating the full markup added by both the salesperson and the trader.

BNS also provided inaccurate PTMMMs in instances where it did not sufficiently train its personnel to provide accurate marks. For example, one member of BNS's base metals desk ("Salesperson 1") had provided PTMMMs to counterparties for complex options transactions, including zero-cost collar transactions,[9] since approximately November 2016. Yet, in a December 2017 recorded telephone call with a supervisor, Salesperson 1 indicated that he did not understand how to calculate a PTMMM for a zero-cost collar transaction and that he "always" "just kind of stuck random stuff in" for the PTMMM.

---

[5] *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties* ("Final Rule Release"), 77 Fed. Reg. 9,734, 9,768 (Feb. 17, 2012).

[6] *Id.*

[7] Proposed Rule Release, 75 Fed. Reg. at 80,646.

[8] Final Rule Release, 77 Fed. Reg. at 9,768.

[9] A zero cost collar is an options strategy by which a trader purchases a call (put) option while simultaneously selling a put (call) option, with equal and offsetting premiums. The strategy is typically used to hedge against the price volatility of the underlying asset.

For at least one thousand base metals trades between April 2017 and December 2017 alone, BNS provided an inaccurate PTMMM. By providing inaccurate PTMMMs that understated its full mark up on swaps, BNS prevented counterparties from being able to assess swap valuations fully before making trading decisions.

With respect to timeliness, from 2013 through at least late 2018, and occasionally thereafter, BNS's base metals desk also failed to provide PTMMMs to counterparties at a reasonably sufficient time prior to entering into a swap. The common practice for BNS's base metals desk was to provide a PTMMM after it and its counterparty had agreed to transact. In numerous instances, BNS provided a PTMMM seconds, minutes, or hours after a transaction was consummated. As a result, for the vast majority of the 20,000 base metals swaps BNS executed from 2013 through late 2018 where BNS provided a PTMMM, it failed to provide a PTMMM sufficiently prior to entering into a swap. Thus, even if BNS provided a counterparty an accurate PTMMM, it still effectively concealed its full markup from counterparties until after a trade was done.

Finally, from 2013 through at least 2019, BNS failed to provide counterparties with PTMMMs at all for up to 4,300 base metals swaps.[10] In numerous instances, BNS's communications with a counterparty concerning a transaction do not contain a PTMMM disclosure.

**b. Failures to Keep Records of Pre-Trade Mid-Market Marks as Required by the Act and Commission Regulations**

During the Relevant Period, BNS also failed to keep records as required of the PTMMMs provided to counterparties by all of its trading desks. Under the Act and Regulations, swap dealers must keep daily trading records such as PTMMMs in a form and manner identifiable and searchable by transaction and counterparty. *See* Section 4s(g), 7 U.S.C. § 6s(g) (2018); Regulations 23.201(a)(1), 23.202(a)(1), 17 C.F.R. §§ 23.201(a)(1); 23.202(a)(1) (2019). Swap dealers must also be able to produce required records such as PTMMMs to the Commission "promptly" upon request. *See* Regulation 1.31(d)(3)(ii), 17 C.F.R. § 1.31(d)(3)(ii).

During the Relevant Period, BNS had records of PTMMMs it provided to counterparties in one or more of the following places, depending on the transaction: (1) email mailboxes and archives for written electronic communications (such as emails and chat messages) for its personnel who provided PTMMMs in such form; (2) repositories of audio recordings for its personnel who provided PTMMMs over the telephone, and for some trades; and (3) a BNS email mailbox that collected PTMMM records for all BNS trading desks (the "Dodd-Frank Mailbox").

During the regular course of business, BNS traders and salespersons who provided counterparties PTMMMs in emails or chat messages often did not include unique transaction identifiers or full counterparty names in those same communications. Since 2013, BNS policy required that for any PTMMM provided orally over the telephone, an email must be sent to the Dodd-Frank Mailbox reflecting the PTMMM provided. BNS had internal guidance suggesting

[10] As discussed further below, in some instances, BNS may have failed to keep a record of a PTMMM that was provided due to its poor recordkeeping practices.

that emails to the Dodd-Frank Mailbox should include the trade's transaction number and counterparty name, but the guidance was not mandatory, and throughout the Relevant Period, BNS personnel often failed to include those details in their emails. In November 2017, BNS expanded its policy to require an email containing the PTMMM to be sent to the Dodd-Frank Mailbox for all transactions. Even after that point, however, BNS salespersons and traders frequently failed to send the requisite email for every trade.

BNS's recordkeeping system for PTMMMs did not permit it to produce PTMMM records to the Commission promptly upon request. BNS's Dodd-Frank Mailbox did not contain a comprehensive record of PTMMMs provided to counterparties and was not searchable by transaction number or counterparty name for all transactions for the reasons above. BNS's emails, chat messages, and audio recordings that contained PTMMMs likewise were not searchable by transaction number or counterparty name for all transactions. Moreover, BNS did not record, in transaction data or otherwise, the name of the base metals trader or salesperson that communicated with the counterparty for any particular trade.[11] As a result, when Division staff requested production of the PTMMMs provided to four counterparties over several years, BNS took almost five months to produce a response, which it represented was complete. BNS could not, however, represent that it had provided the PTMMM for every transaction with the four counterparties because it had not connected the communications containing PTMMMs to particular transactions. When BNS did finally attempt to connect its PTMMM communications with its transaction records, its shoddy recordkeeping resulted in BNS admitting that it was unable to "conclusively tie" all the PTMMMs it had identified to the specific transactions to which the marks pertained.

BNS's supervision of its PTMMM recordkeeping was insufficient. Since 2013, BNS conducted an annual test of its compliance with CFTC pre-trade execution requirements. Every year, the test concluded that BNS's process for collecting pre-trade records was "manually intensive" and "may not be scalable in the event the CFTC requests a much larger" number of records than had been tested. Yet BNS did not take any steps to improve its recordkeeping system until late 2017, and even then did not take adequate steps. BNS's recordkeeping oversight also failed to detect non-compliance with its recordkeeping policies. These supervision failures contributed to BNS being unable to produce, for base metals transactions alone, PTMMM records for nearly 15% of the over 25,000 swaps subject to Regulation 23.431 from May 2013 through December 2019. The percentage of PTMMMs it failed to record is over 19% if limited to the period prior to November 2017, when BNS expanded its use of the Dodd-Frank Mailbox.

**c. Failure to Supervise the Base Metals Desk and PTMMM Compliance**

BNS's supervision of its base metals desk generally, and of PTMMM compliance specifically, was lax. Although BNS provided supervisors general guidance, such as stating that

[11] BNS also failed to keep complete records of PTMMMs for swaps executed over Trading Platform 1, a trading platform that BNS base metals personnel used during the Relevant Period. For trades conducted over Trading Platform 1 where BNS provided its counterparty a PTMMM via the platform itself at the time of the trade, BNS did not retain a record of the PTMMM provided unless the BNS trader or salesperson took a screenshot at the time of the trade, which did not always happen.

they were responsible for "monitoring each trader" for compliance with business conduct standards, BNS did not have supervisory procedures for conducting such monitoring or attesting that it had occurred. Base metals supervisors also failed to recognize and stop noncompliant behavior. As noted above, after Salesperson 1 admitted to a supervisor that he "always" "just kind of stuck random stuff in" for PTMMMs, the supervisor provided a PTMMM for the specific trade but did not inquire any further or arrange for extra training, or report the issue to other supervisors or compliance.

Although BNS had some written policies, procedures, or guidance addressing PTMMMs, they lacked detail and were not consistently followed. BNS also failed to provide effective training on PTMMMs. For example, BNS training materials as far back as 2014 emphasized that PTMMMs should be given "prior to" entering into a swap, yet for years BNS personnel provided PTMMMs after a trade was done. BNS's PTMMM controls were also ineffective. As of May 2020, BNS had no controls at all to validate the accuracy of PTMMMs, and BNS only instituted a control for PTMMM timeliness in April 2019.[12] BNS compliance also failed to detect its PTMMM control weaknesses, despite conducting a review aimed specifically at doing so.[13] As a result, BNS failed to detect widespread noncompliance with PTMMM requirements for an extended period of time.

Moreover, BNS knew in May 2018 of concerns about PTMMMs from a former base metals supervisor. Yet even after BNS was aware of the Division's investigation, BNS continued to fail to remediate its PTMMM compliance deficiencies promptly. Through the end of 2018, BNS personnel consistently provided PTMMMs in an untimely manner, and through the end of 2019, BNS still had instances of PTMMMS that were either not given or not recorded.

BNS's systemic supervision failures, including inadequate supervisory oversight, ineffective policies, procedures, and training, and weak controls affected PTMMM compliance across the swap dealer and resulted in compliance failures by other desks. For example, in March 2020, BNS informed Division staff that its rates swap desk had misunderstood PTMMM requirements for an unknown number of cleared swaps and that its control for confirming that PTMMMs were provided for all in-scope transactions had failed to take into account cleared swaps.

### 2. BNS Swap Dealer Supervision Failures Extended to Its Audio Recordkeeping Obligations

BNS's lack of supervision was not limited to its PTMMM practices. In accordance with Commission Regulations, BNS's policies require the maintenance of required audio recordings for a period of one year. Regulation 1.31(b)(2), 17 C.F.R. § 1.31(b)(2) (2019) ("A records entity

[12] Although BNS had a control since at least November 2017 to confirm a PTMMM was provided for every in-scope trade, the control failed to do so for reasons BNS was unable to determine.

[13] In November 2017, BNS compliance began a review to test its PTMMM controls in light of the Commission's enforcement action, *In re Cargill*, CFTC No. 18-03, 2017 WL 5188245 (Nov. 6, 2017). That review did not identify any deficiencies with BNS's PTMMM controls. Another review referred to as the "Cargill assessment" took over nine months to conclude, in September 2018, that BNS had no control to validate whether its PTMMMs were accurate.

that is required to retain oral communications, shall keep regulatory records of oral communications for a period of not less than one year from the date of such communication."). BNS's procedures dictated that its technology infrastructure automatically deleted audio recordings made more than one year prior, unless such recordings are subject to, for example, a litigation hold.

**a. BNS's Failure to Preserve and Produce Audio Recordings and False or Misleading Statements Concerning Audio Preservation**

In August 2018, Division staff issued BNS a document preservation request calling for it to preserve, among other things, audio recordings for a base metals supervisor with recorded lines in Houston, Texas and New York, New York ("Supervisor 1"). In October 2018, Division staff issued BNS a request under Section 4s of the Act (the "October 2018 4s Request") calling for the production of certain communications for Supervisor 1 from November and December 2017. Thereafter BNS proposed to Division staff that it would begin responding by producing written communications. Division staff then asked BNS to confirm that audio recordings had been preserved for certain BNS personnel, including Supervisor 1. BNS representatives initially informed Division staff on a December 7, 2018 telephone call that BNS only had one year's worth of audio recordings for the personnel, dating back to early December 2017. On December 13, 2018, however, BNS representatives spoke with Division staff to "correct the record" and conveyed that BNS did, in fact, have all of the audio recordings, including for Supervisor 1, dating back to at least August 2017. BNS confirmed this again orally on December 14, 2018, in writing on January 29, 2019, and orally on January 31, 2019. In March 2019, Division staff issued a 4s request for additional Supervisor 1 audio recordings from November 2017. In May 2019, BNS informed Division staff that some recordings from Supervisor 1's Houston line had been deleted through routine processes notwithstanding the Division's August 2018 preservation request, which should have halted those processes given BNS's assurances that the audio was being preserved.

At the time BNS's representatives made statements to Division staff about its preservation of audio recordings, its supervision of its legal hold process for audio was inadequate. BNS has represented the following. Prior to January 31, 2019, BNS did not have a written policy or procedure for how to initiate or implement the preservation of audio recordings, nor had it provided any formal training to its personnel on those topics. Some BNS staff responsible for matters requiring audio preservation had the erroneous belief that sending a notice calling for audio to be preserved to an internal group involved in preservation would be sufficient to accomplish the necessary preservation of audio. In reality, additional steps needed to be taken, including further communication specifying the need for audio to be preserved. The recordings also had to be "locked down" to ensure their preservation through a complex process that required different steps to be taken depending on the office location of the BNS personnel for whom audio recordings were to be preserved.

After BNS received the Division's August 2018 preservation request, BNS continued to delete Supervisor 1's Houston audio recordings pursuant to BNS's one-year audio retention policy until December 11, 2018. This was due in part to the erroneous belief that several legal hold notices that had been issued had ensured the requested preservation, and also in part to BNS's lack of expertise and understanding of its own complex process to "lock down" audio

recordings in different locations. As a result, BNS falsely represented to Division staff, multiple times, that Supervisor 1's audio recordings had been preserved dating back to at least August 2017, when in fact Supervisor 1's Houston recordings prior to December 11, 2017, had been deleted. BNS knew or reasonably should have known that those statements were false or misleading.

#### b. BNS's Additional Failure to Produce Audio Recordings Promptly

BNS's inadequate supervision of its audio recording operations extended beyond its failure to train personnel on audio preservation procedures. The Division's October 2018 4s Request also called for the production of certain audio recordings from November and December 2017 on the New York recorded lines of two base metals supervisors. In March and June 2019, Division staff issued additional 4s requests for audio recordings for various base metals personnel in New York and London from November and December 2017.

In or around September 2019, while responding to the Division's requests, BNS discovered gaps in its audio collection for its base metals personnel's New York and London recorded lines during the requested time period. BNS was previously unaware of the gaps, was unable to provide any explanation for them, could not identify their cause, and could not scope the full extent of the problem at that time. It was not until over eight months later that BNS represented to Division staff that it did in fact have a full set of the New York and London recordings, and BNS took several more weeks to complete its production. Thus, BNS failed to meet its obligation to respond promptly to the Division's 4s requests.

### 3. BNS's False or Misleading Statements Regarding Supervision of the Base Metals Desk

BNS initially represented to Division staff, in various ways, that both Supervisor 1 and a second supervisor located in New York ("Supervisor 2") were the relevant supervisors for BNS's New York base metals desk during the fall of 2017.[14] Division staff took the sworn testimony of Supervisor 1 on June 28, 2019, and Supervisor 2 on June 7, 2019, and inquired as to their supervision of the New York base metals desk during the fall of 2017. Later, BNS changed its position to support Supervisor 1 and Supervisor 2's disavowals of supervisory authority for the desk in testimony. BNS then made misleading statements to Division staff, such as affirming in an August 23, 2019 letter that Supervisor 1 and Supervisor 2 "were not the desk's designated supervisors" during the October through December 2017 time period and that they "did not assume full supervisory responsibility for the base metals business" until May 1, 2018.[15] Contemporaneous documentary evidence, including organization charts, human resources files,

[14] On March 18, 2019, in response to a 4s request for organizational charts for its base metals desk including traders, sales persons, and supervisors, BNS produced several organizational charts under cover of a letter that stated they had been prepared "for purposes of responding to the [4s request], based on the Bank's personnel records." Three separate organizational charts produced, for March through July 2017, August 2017, and September 2017 through April 2018, showed Supervisor 1 and Supervisor 2 as supervisors for BNS's base metals salespersons and traders in New York.

[15] May 1, 2018 was the date on which an email was sent announcing a formal reorganization of the BNS metals business globally.

compliance records, email communications, and audio recordings, as well as statements from other witnesses, contradict BNS's latter statements. BNS knew or reasonably should have known that its statements to the Division about the supervision of its New York base metals desk were false or misleading, and central to the staff's investigation of the misconduct at issue.

### 4. Failures to Implement Policies and Procedures Reasonably Designed to Obtain or Record Essential Facts About Counterparties

Throughout the Relevant Period, BNS also failed to implement, as required by Regulation 23.402(b), 17 C.F.R. § 23.402(b) (2019), policies and procedures reasonably designed to obtain and record facts about whether its counterparties were U.S. persons. These facts were needed to determine whether BNS's transactions with those counterparties were subject to Dodd-Frank disclosure requirements, including PTMMM disclosures.

BNS's counterparty onboarding process has had shortcomings for years. In 2017, BNS conducted an internal review of active counterparties that identified eight counterparties that had been inaccurately classified as non-U.S. persons. Then again, in 2018, BNS identified an additional fourteen counterparties that had been inaccurately classified as non-U.S. persons. Although BNS took steps to address the errors identified, despite knowing of these repeated errors, BNS did not conduct a full review of its onboarding policies and procedures to determine why they were ineffective, or reviewed its counterparty data to ensure it was complete and accurate for all of BNS's counterparties.

In June 2019, Division staff requested that BNS produce transaction data for its base metals transactions subject to Regulation 23.431 disclosure requirements. To respond, BNS needed to assess the historic U.S. person status of its counterparties. However, due to BNS's unreliable counterparty data, it took over seven months for BNS to produce an initial list of in-scope transactions, which it then had to correct after it found more errors in its counterparty data.[16] Further, BNS was unable to access counterparty data from prior to November 2014 and was therefore unable to provide a complete response to the Division's request.

### 5. BNS's Failure to Comply with CCO Reporting Requirements

As a swap dealer, BNS is required to submit an annual CCO report to the Commission discussing the state of its compliance with the Act and Regulations pursuant to Regulations 3.3(e) and (f), 17 C.F.R. § 3.3(e), (f) (2019). The Commission's Division of Swap Dealer and Intermediary Oversight ("DSIO") relies upon CCO reports when assessing a firm's compliance with the Act and Regulations. BNS submitted its 2017 CCO Report, for its fiscal year ended October 31, 2017, on or around January 29, 2018.

BNS has been aware of weaknesses in its trade surveillance program since at least 2015. By December 2017, BNS was aware, through an ongoing internal review of its trade surveillance for OTC derivative trading activity and a review conducted by an external consultant, that its trade surveillance program had significant weaknesses. In its 2017 CCO Report, BNS

[16] As of April 24, 2020, BNS identified that six of its thirty-six in-scope base metals counterparties had been misclassified as non-U.S. persons for various periods of time dating back to December 2014.

referenced its internal review of its trade surveillance program in the portion of its report dedicated to discussing the effectiveness of its policies and procedures. It disclosed that the review had identified two "moderate" risk issues and eight "low" risk issues, but it did not provide information sufficient to understand and evaluate the known issues with BNS's program. Nor did it identify BNS's trade surveillance program as a material noncompliance item, or even an area for improvement. BNS's disclosures in the 2017 CCO Report failed to sufficiently describe the facts and circumstances surrounding its trade surveillance program such that the Commission could understand and evaluate the issues and BNS's remedial efforts.

## III. LEGAL DISCUSSION

### A. Section 4s(h)(1)(B) and Regulations 23.602(a)—BNS's Failure to Supervise Diligently

Section 4s(h)(1)(B) of the Act, requires "diligent supervision of the business of the registered swap dealer." 7 U.S.C. § 6s(h)(1)(B) (2018). Regulation 23.602 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 (2019).

Under Regulation 23.602, 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 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) (same). 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." *In re Société Générale Int'l Ltd.*, CFTC No. 19-38, 2009 WL 4915485, at *7 (Sept. 30, 2019) (consent order) (quoting *In re INTL FCStone Markets*, 2015 WL 4980321, at *3).

BNS failed to supervise its swap dealer business activities diligently during the Relevant Period. As described above, BNS failed to maintain an adequate supervisory system and failed to perform its supervisory obligations diligently across the swap dealer, including failing to supervise its base metals desk, PTMMM disclosures, PTMMM recordkeeping, audio recordkeeping, and counterparty onboarding. BNS's failure to supervise is demonstrated by its failure to detect, prevent, and remediate repeated compliance failures over an extended period of time. BNS also failed to adequately supervise and train its personnel to ensure both the preservation and production of all audio recordings to comply with its legal obligations to produce records to the Commission. BNS therefore failed to supervise diligently its officers, employees, and agents, in violation of Section 4s(h)(1)(B) of the Act and Regulation 23.602(a).

## B. Section 4s(h)(1) and Regulation 23.431(a)—BNS's Failure to Provide Accurate and Timely Pre-Trade Mid-Market Marks, and Its Failure to Provide Pre-Trade Mid-Market Marks

As discussed above, Section 4s(h)(1) requires swap dealers to comply with business conduct standards prescribed by the Commission, which includes those of Regulation 23.431(a)(2), (3) requiring swap dealers to disclose to counterparties: (1) information about the material characteristics of the swap; and (2) the swap dealer's material incentives and conflicts of interest related to the swap. 7 U.S.C. § 6s(h)(1) (2018); 17 C.F.R. § 23.431(a)(2), (3) (2019). The Regulations require disclosure of a mid-market mark as part of the disclosure of material incentives and conflicts of interest. Regulation 23.431(a)(3)(i). The mid-market mark "shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments." Regulation 23.431(d)(2), 17 C.F.R. § 23.431(d)(2) (2019). These disclosures must be made "at a reasonably sufficient time prior to entering into a swap." Regulation 23.431(a).

As part of the comprehensive regulatory regime for swaps, Regulation 23.402(a)(1), 17 C.F.R. § 23.402(a)(1) (2019), requires that swap dealers maintain written policies and procedures reasonably designed to ensure compliance with swap dealer business conduct standards, including Regulation 23.431, 17 C.F.R. § 23.431 (2019). In adopting Regulation 23.431, the Commission noted that "the Commission will consider good faith compliance" with those policies and procedures as "a mitigating factor when exercising its prosecutorial discretion for violation of the rules."[17]

During the Relevant Period, desks across BNS's swap dealer provided PTMMMs to counterparties that were inaccurate, untimely, or both, or failed to provide a PTMMM entirely. These failures occurred for at least tens of thousands of swaps. BNS provided counterparties with inaccurate PTMMMs, including instances where it adjusted the PTMMM in whole or in part for BNS's trading and sales markups, and therefore did not exclude amounts attributable to "profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments." BNS also failed to provide PTMMMs to counterparties prior to entering into a swap; its personnel instead did not provide PTMMMs until after a transaction was consummated. In other instances, BNS failed to provide a PTMMM at all. Each of these failures had the effect of concealing BNS's full markup from counterparties. BNS therefore violated Section 4s(h)(1) and Regulation 23.431(a).

Moreover, in engaging in these violations, BNS did not act in good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules. BNS's widespread PTMMM compliance failures persisted for years. BNS knew in May

---

[17] Final Rule Release, 77 Fed. Reg. at 9,744; *see also id.* at 9,766, 9,768 (noting specifically that good faith compliance would be relevant to violations of the mid-market mark requirements). The Commission further stated:

> To be considered good faith compliance, the Commission will consider, among other things, whether the swap dealer . . . made reasonable inquiry and took appropriate action where the swap dealer . . . had information that would cause a reasonable person to believe that any person acting for or on behalf of the swap dealer . . . was violating the CEA or the Commission's Regulations in connection with the swaps related business of the swap dealer . . . .

*Id.* at 9,746.

2018 of concerns about PTMMMs from a former supervisor. Despite such knowledge, and despite knowledge of the Division's investigation, as of May 2020 BNS still had no procedures in place to check the accuracy of PTMMMs, provided untimely PTMMMs through at least late 2018, and occasionally failed to provide PTMMMs through the end of 2019. In light of these facts, BNS does not meet the requirements of the Commission's policy statement regarding mitigation.

### C. Section 4s(g) and Regulations 23.201(a)(1), 23.202(a)(1), and 1.31(d)(3)(ii)—BNS's Failure to Maintain Proper Records of Its Pre-Trade Mid-Market Marks

Swap dealers are required by statute to maintain records of their daily swaps trading, and must maintain those records for each counterparty in a form that is identifiable with each swap transaction. Section 4s(g)(1), (3), 7 U.S.C. § 6s(g)(1), (3) (2018). Commission Regulations specify that a swap dealer must "keep full, complete, and systematic records . . . of all its swaps activities," Regulation 23.201(a), 17 C.F.R. § 23.201(a) (2019), which includes keeping daily trading records, such as PTMMMs, in a form and manner identifiable and searchable by transaction and counterparty. Regulation 23.201(a)(1); Regulation 23.202(a)(1), 17 C.F.R. § 23.202(a)(1) (2019) (requiring swap dealers to keep daily trading records, including PTMMMs, of all swaps transactions they execute). Swap dealers must ensure that their records "include all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap." Regulation 23.202(a). Pre-execution trade information must be kept, including, "at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap." Regulation 23.202(a)(1). Regulation 23.203(b)(1), 17 C.F.R. § 23.203(b)(1) (2019), requires pre-execution trade information, like PTMMMs, to be kept in accordance with Regulation 1.31, 17 C.F.R. § 1.31 (2019), which in turn requires regulatory records to be produced "in the form and medium requested [by the Commission] promptly, upon request." Regulation 1.31(d)(3)(ii).

During the Relevant Period, BNS failed to keep records of the PTMMMs it disclosed to counterparties as required. BNS had some records of PTMMMs in emails, chat messages, and audio recordings, but it did not maintain the records in a form or manner identifiable and searchable by transaction and counterparty. BNS also failed to keep records of some of its PTMMM disclosures entirely. BNS was therefore unable to produce PTMMM records to the Commission promptly upon request and could not "conclusively tie" all of the PTMMMs it did produce to the specific transactions to which the marks pertained. BNS thus violated Section 4s(g) of the Act and Regulations 23.201(a)(1), 23.202(a)(1), and 1.31(d)(3)(ii).

### D. Regulation 23.402(b)—BNS's Failure to Obtain and Record Essential Facts About Counterparties During the Onboarding Process

Under Regulation 23.402(b), each swap dealer must implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty, including facts required to comply with applicable laws, regulations, and rules. 17 C.F.R. § 23.402(b) (2019).

As described above, BNS failed, for years, to implement policies and procedures reasonably designed to obtain and record facts concerning whether its counterparties were U.S. persons. These facts were essential to determining whether its transactions were subject to Regulation 23.431 disclosure requirements. BNS had repeated instances of finding errors in its counterparty data, but did not conduct a full review of its onboarding process or its counterparty data. BNS thereby violated Regulation 23.402(b).

## E. Section 4s(f) and (g) of the Act and Regulations 23.201(a)(1), 23.202(a)(1), and 1.31(d)(3)(ii)—BNS's Failure to Retain and Produce Promptly Required Audio Records

Section 4s(f)(1)(C) of the Act obligates swap dealers to keep books and records of all activities related to its business as a swap dealer "open to inspection and examination by any representative of the Commission." 7 U.S.C. § 6s(f)(1)(C) (2018); *see also* Section 4s(g)(1) and (3) of the Act, 7 U.S.C. § 6s(g)(1), (3) (2018) (requiring swap dealers to keep daily trading and counterparty records). These statutes are implemented, among other places, at Regulations 23.201(a)(1) and 23.202(a)(1), 17 C.F.R. § 23.201(a)(1), 23.202(a)(1) (2019), which obligate a swap dealer to "keep full, complete, and systematic records . . . of all its swaps activities," Regulation 23.201(a), which includes "daily trading records," Regulation 23.201(a)(1); 23.202(a)(1). Regulation 23.203(b)(1), 17 C.F.R. § 23.203(b)(1) (2019), requires audio recordings of pre-execution trade information to be kept in accordance with Regulation 1.31, 17 C.F.R. § 1.31 (2019), which in turn prescribes a one-year retention period, Regulation 1.31(b)(2) ("A records entity that is required to retain oral communications, shall keep regulatory records of oral communications for a period of not less than one year from the date of such communication."). A swap dealer must be able to produce such records to the Commission "promptly, upon request." Regulation 1.31(d)(3)(ii).

BNS deleted required audio records after Division staff issued a document preservation notice and the October 2018 4s Request calling for the recordings to be produced. BNS also failed to complete its production of other audio recordings subject to a Division 4s request in a timely manner. BNS therefore violated Sections 4s(f)(1)(C) and 4s(g) of the Act and Regulations 23.201(a)(1), 23.202(a)(1), and 1.31(d)(3)(ii).

## F. Section 6(c)(2)—BNS's False or Misleading Statements to the Commission

Section 6(c)(2) of the Act makes it unlawful for any person:

> [T]o make any false or misleading statement of a material fact to the Commission . . . or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

7 U.S.C. § 9(2) (2018).

As described above, BNS made statements to Division staff that it knew or reasonably should have known were false or misleading regarding: (i) whether it had preserved all requested audio recordings; and (ii) who supervised its New York base metals desk in late 2017.

These statements were central to the staff's investigation of the conduct at issue. By engaging in this conduct, BNS violated Section 6(c)(2) of the Act.

### G. Regulation 3.3(e)—BNS's Failure to Comply with CCO Reporting Requirements

Regulation 3.3(e), 17 C.F.R. § 3.3(e) (2019), requires a swap dealer's chief compliance officer to annually prepare a written report covering the most recently completed fiscal year. Regulation 3.3(e)(2), (3), and (5) provides in part that the report must include: (i) a review of each applicable requirement under the Act and Regulations, including identification of the policies and procedures reasonably designed to ensure compliance and an assessment of the effectiveness of those procedures; (ii) describe areas for improvement; and (iii) describe any material noncompliance issues identified, and the corresponding action taken.

BNS's 2017 CCO Report did not meet these reporting requirements. By December 2017, BNS was aware of significant weaknesses in its trade surveillance system but its 2017 CCO Report did not describe BNS's trade surveillance program as a material noncompliance item, or even an area for improvement. Therefore, BNS violated Regulation 3.3(e).

## IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that at various times during the Relevant Period Respondent violated Sections 4s(f)(1)(C), 4s(g)(1) and (3), 4s(h)(1), and 6(c)(2) of the Act, 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1), 9(2) (2018), and Regulations 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), and 3.3(e), 17 C.F.R. §§ 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), 3.3(e) (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 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;

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 (2018) and 28 U.S.C. § 2412 (2018), 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, Pub. L. No. 104-121, §§ 201–253, 110 Stat. 847, 857–68 (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 on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;

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;

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 4s(f)(1)(C), 4s(g)(1) and (3), 4s(h)(1), and 6(c)(2) of the Act, 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1), 9(2) (2018), and Regulations 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), and 3.3(e), 17 C.F.R. §§ 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), 3.3(e) (2019);

2. orders Respondent to cease and desist from violating Sections 4s(f)(1)(C), 4s(g)(1) and (3), 4s(h)(1), and 6(c)(2) of the Act and Regulations 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), and 3.3(e);

3. orders Respondent to pay a civil monetary penalty in the amount of fifty million dollars ($50,000,000), plus post-judgment interest; 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 VII of this Order.

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

## VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Respondent and its successors and assigns shall cease and desist from violating Sections 4s(f)(1)(C), 4s(g)(1) and (3), 4s(h)(1), and 6(c)(2) of the Act, 7 U.S.C. §§ 6s(f)(1)(C),

6s(g)(1), (3), 6s(h)(1), 9(2) (2018), and Regulations 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), and 3.3(e), 17 C.F.R. §§ 23.431(a)(3), 23.201(a)(1), 23.202(a)(1), 23.402(b), 23.602(a), 1.31(d)(3)(ii), 3.3(e) (2019).

B. Respondent shall pay a civil monetary penalty in the amount of fifty million dollars ($50,000,000) ("CMP Obligation"), within ten days of the date of entry of this Order. If the CMP Obligation is not paid in full within ten 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 (2018).

Respondent shall pay the CMP Obligation 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
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds 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 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. Remediation: Respondent undertakes the following:

a. Within 60 days of the issuance of this Order, Respondent will submit to the Commission a written plan ("Remediation Plan"), subject to review and approval by DOE and DSIO, that will describe the specific remediation steps that Respondent will take to fully address the following areas:

i. CCO Report preparation;

ii. Communication surveillance;

iii. Daily marks;

iv. Diligent supervision;

v. Disclosure of material information;

vi. Identification and classification of counterparties;

vii. Pre-trade mid-market marks;

viii. Recordkeeping—

1. Recordkeeping requirements under Commission Regulations 23.201 and 23.202, 17 C.F.R. § 23.201, 23.202 (2019), including those addressing the requirement to make and keep daily records of oral communications; and

2. Recordkeeping requirements under Commission Regulation 23.402(g), 17 C.F.R. § 23.402(g) (2019);

ix. Segregation requirements;

x. Swap dealer reporting requirements; and

xi. Trade surveillance.

b. Respondent shall submit the Remediation Plan to its CEO for signed, written approval prior to submitting it to the Commission. Such signed, written approval shall be provided to the Commission along with the Remediation Plan.

c. Respondent will implement the Remediation Plan.

d. Within 90 days of the submission of the Remediation Plan, Respondent shall submit a written report to the Commission, through DOE and DSIO, detailing its efforts to implement the Remediation Plan since the date of this Order.

e. Respondent shall submit additional written reports to the Commission, through DOE and DSIO, detailing the implementation status of the Remediation Plan, six months after submission of the report made pursuant to Paragraph 1(d), and then on an annual basis thereafter until the end of the term of the monitor defined in Paragraph 2 below.

f. All written reports shall contain a signed certification from each of Respondent's chief executive officer and chief compliance officer that

Respondent is continuing to comply with the terms of the Remediation Plan.

2. Monitor: Within 60 days of entry of this Order, Respondent shall retain, in consultation with and subject to the approval of DOE and DSIO, a monitor (the "Monitor") for a three-year term, at its own expense, to review and report on Respondent's implementation of the Remediation Plan and its compliance with the Act and Regulations, as set forth below.[18]

   a. The Monitor shall have sufficient knowledge of the provisions of the Act and Regulations applicable to swap dealers to understand, monitor, and assess the policies, procedures, and practices of Respondent. Furthermore, the Monitor must, in the view of the Division, be sufficiently impartial, distinct, and independent from Respondent and its directors, officers, employees, counsel, and other representatives.

   b. Although DOE and DSIO shall not be parties to any agreement(s) between the Monitor and Respondent, any agreement between the Monitor and Respondent must include language that the Monitor agrees to provide its services for the benefit of the Commission, that any and all reports and information provided by the Monitor to DOE and DSIO shall be deemed the property of the Commission, and that the Monitor shall abide by any specific request by DOE or DSIO for confidential treatment of any communication among the Monitor, DOE, and DSIO.

   c. The Monitor shall review Respondent's implementation of the Remediation Plan and all aspects of Respondent's swap dealer compliance program and identify areas of non-compliance with the Act and Regulations, including, but not limited to:

      i. Provision of all required client disclosures, including, but not limited to:

         1. daily marks;

         2. pre-trade mid-market marks

      ii. Onboarding of swap dealer counterparties;

      iii. Swap dealer trade reporting

      iv. Recordkeeping, including

[18] DOE and DSIO will not object to the appointment of a single Monitor, who will have responsibility for the tasks outlined in this Order as well as any tasks outlined for a monitor in the agreement BNS entered into with United States Department of Justice ("DOJ") in August 2020, provided that the Monitor must meet the requirements set forth in Paragraph 2(a) of these undertakings. If a single Monitor is appointed, DOE and DSIO may determine to adjust the timing and scope of the reports required by this Order.

1. General recordkeeping requirements pursuant to Commission Regulations 23.201 and 23.202

2. Recordkeeping requirements associated with disclosures of material information pursuant to Commission Regulation 23.402(g)

v. Policies and procedures meant to detect and prevent fraud, manipulative and other abusive practices, including but not limited to:

1. Electronic communication surveillance

2. Trade surveillance

d. Within 180 days of retention, and every six months thereafter, the Monitor shall prepare and submit to DOE, DSIO, and Respondent a written report. Such report shall include a description of the status of Respondent's implementation of the Remediation Plan and the Monitor's ongoing assessment of Respondent's swap dealer's compliance program.

The Monitor's report shall also include: (i) an analysis of Respondent's ability to comply with the Act and Regulations, (ii) a description of any areas of non-compliance with the Act or Regulations identified by the Monitor and not covered in the Remediation Plan, (iii) any recommendations made by the Monitor for bringing Respondent into compliance with the areas of non-compliance identified by the Monitor; and (iv) a description of Respondent's implementation of any such recommendations. If Respondent chooses not to adopt the Monitor's recommendations within a reasonable period of time, the Monitor shall report that fact to DOE and DSIO, along with Respondent's stated reason for not adopting the same.

The Monitor's report shall also include a description of the Monitor's methodology, information relied upon, and bases for the Monitor's findings.

e. The Monitor shall have the right to discuss the facts and circumstances of DOE's findings with DOE, and DOE may disclose to the Monitor those portions of its investigation that may assist the Monitor in reviewing and monitoring Respondent's policies and procedures in accordance with Paragraph 2(c) of these undertakings. The Monitor is also permitted to communicate at any time with DOE and DSIO concerning its monitorship, review, findings, assessments, and reports.

f. The Monitor shall immediately inform DOE and DSIO in writing if the Monitor determines that, during the course of its monitorship, Respondent has used or employed any fraud, manipulation, deception, concealment,

suppression, false pretense, or fictitious or pretended purchase or sale in connection with any bid, offer, or trade conducted by Respondent's swap dealer, and may also advise DOE and DSIO in writing, in advance of a scheduled report, if it believes Respondent is otherwise not complying with the provisions of this Order.

g. Subject to the express limitations set forth below, the Monitor's authority and duties are to be broadly construed. Respondent shall cooperate fully with the Monitor, including, but not limited to, providing the Monitor:

i. access to all files, documents, books, records, computer systems, personnel, and facilities that fall within the scope of the responsibilities of the Monitor, subject to a legitimate claim of any legally recognized privilege;

ii. the right to meet with and interview any director, officer, employee, agent, or consultant of Respondent and to participate in any meeting concerning any matter within or relating to the Monitor's duties, subject to a legitimate claim of any legally recognized privilege; and

iii. the right to observe Respondent's business operations that fall within the scope of the Monitor's responsibilities, subject to a legitimate claim of any legally recognized privilege.

If Respondent agrees, in its sole discretion, to provide the Monitor with access to privileged materials, the Monitor shall agree not to assert that this constitutes a waiver of any legally recognized privilege and shall further agree to maintain the confidentiality of the privileged materials (except to the extent that disclosure is required by law or may be necessary in furtherance of the Monitor's discharge of its official duties and responsibilities).[19] In the event Respondent seeks to withhold access to privileged materials from the Monitor, or where the Respondent reasonably believes production would otherwise be inconsistent with applicable law, Respondent shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor. If the matter cannot be resolved, then, at the request of the Monitor, Respondent shall provide written notice to the Monitor, DSIO, and DOE, including a general description of the nature of the information, documents, records, facilities, and/or employees that are being withheld, as well as the bases of the claim(s).

[19] If the Monitor believes that disclosure is necessary in furtherance of the Monitor's discharge of its official duties and responsibilities, the Monitor shall provide Respondent reasonable notice in advance of such disclosure, including the basis for such disclosure.

h. At any time during the Monitor's term, DSIO and DOE may recommend to the Commission that it terminate the term of the Monitor prior to three years elapsing. After two years of the Monitor's term, Respondent may also petition DSIO and DOE to make such a recommendation.

3. Swap Dealer Registration: Respondent acknowledges and accepts that sufficient grounds exist to commence proceedings to suspend or revoke Respondent's provisionally registered swap dealer registration status based on the findings set forth in this Order, pursuant to Section 8a(4), 7 U.S.C. § 12a(4) (2018). The Commission will defer commencing proceedings to suspend or revoke Respondent's registration status in accordance with the following conditions:

a. Upon each periodic report given by the Monitor to DOE and DSIO, and upon completion of the Monitor's term, DSIO will determine, in consultation with DOE, whether Respondent is likely to implement fully by the end of the Monitor's term the Remediation Plan and any recommendations of the Monitor relating to areas of non-compliance not covered by the Remediation Plan. Based on this determination, DOE, after consultation with DSIO, will decide whether to recommend to the Commission that it commence proceedings to suspend, revoke in full, condition, or restrict Respondent's provisional registration as a swap dealer, pursuant to Section 8a of the Act, 7 U.S.C. § 12a (2018), and Regulations 3.55 through 3.64, 17 C.F.R. §§ 3.55–3.64 (2019). DOE, after consultation with DSIO, may also decide to make such a recommendation to the Commission based upon the Monitor providing notice of misconduct to DSIO and DOE pursuant to Paragraphs 2(e) or 2(f) of these undertakings.

b. In the event that DSIO and DOE intend to recommend to the Commission that it commence proceedings to suspend, revoke in full, condition, or restrict Respondent's registration pursuant to Paragraph 3(a) of this undertaking, DOE will provide Respondent with written notice of the nature of the allegations against Respondent prior to making such a recommendation. Respondent shall have the opportunity to respond to the allegations within forty-five (45) days of receipt of such notice. In the event DSIO and DOE recommend the commencement of proceedings, any written statement by Respondent will be forwarded to the Commission if so requested. The Commission may in its discretion consider Respondent's statement when it determines whether to commence proceedings to suspend, revoke in full, condition or restrict Respondent's registration.

c. If pursuant to the procedures set forth in Paragraphs 3(a) and (b) of this undertaking the Commission determines to commence proceedings to suspend, revoke in full, condition, or restrict Respondent's provisionally registered swap dealer registration status, pursuant to Section 8a of the Act and Regulations 3.55 through 3.64, Respondent agrees that the factual

findings set forth in Section II.C. of this Order will be deemed admitted by Respondent in any such proceedings.

d. At any time during or after the Monitor's term, the Commission may choose to take any additional enforcement action and DOE may choose to commence any further investigation or action either in response to any findings made by the Monitor or for any other reason.

e. Respondent understands and agrees that the running of any statute of limitations applicable to any proceeding against Respondent arising out of findings made by the Monitor that is authorized, instituted, or brought by or on behalf of the Commission is tolled as of the date of this Order through the end of the term of the Monitor.

4. Public Statements: Respondent agrees that neither it nor any of its successors and 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 and/or its agents' and/or employees': (i) testimonial obligations; or (ii) right to take positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns 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[20].

5. Cooperation, in General: Respondent shall cooperate fully and expeditiously with the Commission, including with DOE, in this action, and in any current or future Commission investigation or action related thereto ("Commission Related Matters"). Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, the subject matter of this action ("Subject Related Matters"). Respondent's cooperation shall continue for a period of five years from the date of entry of this Order, or until any Commission Related Matters or Subject Related Matters are concluded, whichever is longest. As part of such cooperation, Respondent agrees to:

a. preserve and produce to the Commission in a responsive and prompt manner, as requested by the Division's staff, all non-privileged documents, information, and other materials wherever located, in the possession, custody, or control of Respondent;

b. utilize their knowledge and skill to explain transactions, interpret information and terminology, or identify new and productive lines of inquiry;

[20] To the extent that the Commission brings an enforcement action against any employee or agent of Respondent arising from the same nexus of facts as this Order, this provision shall not apply to actions or public statements by such employee made in connection with that enforcement action.

c. prepare and appear for interviews and testimony at such times and places as requested by the Division's staff;

d. respond completely and truthfully to all inquiries and interviews, when requested to do so by the Division's staff;

e. identify and authenticate relevant documents, execute affidavits or declarations, and testify completely and truthfully at depositions, trial, and other judicial proceedings, when requested to do so by the Division's staff;

f. accept service by mail, electronic mail, or facsimile transmission of notices or subpoenas for documents and/or testimony at depositions, hearings, or trials;

g. appoint Respondent's attorney as agent to receive service of such notices and subpoenas; and

h. waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules.

6. 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.

7. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Consent Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten (10) 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 19, 2020