

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of:)

Bank of America, N.A., BofA)
Securities, Inc., and Merrill Lynch,)
Pierce, Fenner & Smith)
Incorporated,)

Respondents.)
_____)

CFTC Docket No. 22-38

**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 2015 to the present (“Relevant Period”), Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated (collectively, “BofA” or “Respondents”) violated, as set forth below, Sections 4g, 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6g, 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1)(B), and Commission Regulations (“Regulations”) 1.31, 1.35, 23.201(a), 23.202(a)(1) and (b)(1), 23.602(a), and 166.3, 17 C.F.R. §§ 1.31, 1.35, 23.201(a), 23.202(a)(1), (b)(1), 23.602(a), 166.3 (2021). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondents 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, Respondents have submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Respondents admit the facts set forth in Section II below, except for the facts set forth in Sections II.A.2 and II.C.2, which facts they neither admit nor deny, acknowledge that their conduct violated the Act and Regulations and consent 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 acknowledge service of this Order.¹

¹ Respondents agree 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

II. FINDINGS

The Commission finds the following:

A. SUMMARY

1. **BofA Employee Use of Unapproved Communication Methods**

The Act and Regulations impose recordkeeping and supervision requirements on Commission registrants to ensure that they responsibly discharge their crucial role in our markets. Compliance with these requirements is essential to the Commission's efforts to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.

In or about May 2021, Commission staff brought to BofA's attention the potential use of unapproved communication methods by at least one BofA trader, and head ("Desk Head") of one of BofA's trading desks ("Desk"). Notwithstanding Commission staff flagging this issue, traders on the Desk continued to use unapproved messaging methods to conduct firm business for several months. In October 2021, Commission staff again flagged to BofA that it had serious concerns regarding the use of unapproved methods by BofA employees.

Thereafter, BofA voluntarily undertook an investigation that included a review of the potential use of unapproved communication methods by members of the Desk. In addition, BofA completed a separate but related review of the potential use of unapproved communication methods by other BofA employees. BofA also disclosed to Commission staff that in 2018, it had undertaken a review of potential employee use of unapproved communication methods. These reviews by BofA demonstrated that there was widespread and longstanding use of unapproved methods to engage in business-related communications by BofA employees. BofA also identified a communication that took place on an unapproved communication method that should have been but was not promptly produced in response to a subpoena issued by Commission staff.

2. **BofA Employee's Deletion of Business-Related Communications and Request that Third-Party Brokers Delete Business-Related Communications**

The Commission's investigation also revealed that the Desk had a longstanding practice of using unapproved methods to communicate about business on their personal devices, including at the direction of the Desk Head. The Desk Head routinely directed traders on the Desk to delete messages with business contacts from their personal devices, and traders on the Desk had a practice of deleting messages, including business-related messages, from their personal devices. In March 2021, at a point in time when BofA was aware that Commission staff were investigating certain trading on the Desk, the Desk Head instructed three of his subordinates to delete messages from their personal devices and to communicate via the

Commission or to which the Commission is a party or claimant, including but not limited to, a proceeding in bankruptcy or receivership. Respondents do 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.

unapproved messaging application Signal when off the Desk, and to have such communications set to auto-delete. The Desk Head made similar requests to two third-party brokers. The Desk used their personal devices for business communications even though the traders had been issued company-owned devices that would have allowed them to exchange text messages consistent with BofA's policies and in a manner BofA could monitor. Despite BofA being alerted in May 2021 by the Commission staff of his use of off-channel communications, the Desk Head continued to supervise the desk until he resigned in 2022.

3. BofA Violated Commission Recordkeeping and Supervision Requirements

Overall, during the Relevant Period, BofA employees, including at senior levels, communicated both internally and externally using unapproved methods, including via personal text messages, WhatsApp, and Signal. These written communications were sent and received by BofA employees and included messages related to BofA's businesses as Commission registrants that were required to be maintained under Commission-mandated recordkeeping requirements. These written communications were generally not maintained and preserved by BofA, and BofA generally would not have been able to furnish the communications promptly to a Commission representative if and when requested. As a result, BofA violated, as set forth below, Sections 4g, 4s(f)(1)(C), and 4s(g)(1) and (3) of the Act, 7 U.S.C. §§ 6g, 6s(f)(1)(C), 6s(g)(1), (3), and Regulations 1.31, 1.35, 23.201(a), and 23.202(a)(1) and (b)(1), 17 C.F.R. §§ 1.31, 1.35, 23.201(a), 23.202(a)(1), (b)(1) (2021).

In addition, the widespread use of unauthorized communication methods by BofA's employees to conduct BofA business violated BofA's own policies and procedures, which prohibited such communications. BofA did not maintain adequate internal controls with respect to business-related communications on unapproved communication methods. Indeed, some of the very same supervisory personnel at BofA responsible for ensuring compliance with BofA's policies and procedures themselves utilized unapproved methods of communication to engage in business-related communications, in violation of company policy. Because BofA failed to implement a diligent supervisory system to ensure compliance with Commission recordkeeping requirements and the BofA's own policies and procedures, and because the widespread use of unauthorized communication methods resulted in BofA's failure to maintain Commission-required records, BofA failed to diligently supervise matters related to its business as a Commission registrant in violation of Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), and Regulations 166.3 and 23.602(a), 17 C.F.R. §§ 166.3, 23.602(a) (2021), as set forth below.

B. RESPONDENTS

Bank of America, N.A. is a national banking association with its main office in Charlotte, North Carolina. Bank of America, N.A. is provisionally registered with the Commission as a swap dealer.

BofA Securities, Inc. is a company with its principal place of business in New York, New York. BofA Securities, Inc. is registered with the Commission as a Futures Commission Merchant ("FCM").

Merrill Lynch, Pierce, Fenner & Smith Incorporated is a company with its principal place of business in New York, New York. Merrill Lynch, Pierce, Fenner & Smith Incorporated was registered with the Commission as an FCM until May 14, 2019 and is currently registered with the Commission as an introducing broker.

C. FACTS

1. **BofA's Supervision and Record-Keeping Failures**

During the course of a Commission investigation into certain of BofA's trading, Commission staff learned, based on information provided by a third party, of BofA employee use of non-company approved communication methods, like WhatsApp, on personal devices.

In May 2021, Commission staff first alerted BofA that Commission staff were aware of potential employee use of unapproved communications methods, and that Commission staff intended to interview a BofA supervisor regarding unapproved channel communications on the Desk. In October 2021, Commission staff again flagged to BofA that it had serious concerns regarding the use of unapproved methods by BofA employees on the Desk.

Thereafter, BofA conducted a review of certain of its employees' use of unapproved communication methods, including the use of unapproved communication methods on the Desk. Around the same time, BofA conducted a separate but related review of the use of unapproved communication methods by its employees. In addition, BofA disclosed that it had conducted a review of similar issues in 2018 as to eleven employees. These reviews by BofA demonstrated the widespread and longstanding use of unapproved communication methods by BofA employees—including senior-level employees—to engage in firm business, including relating to trading in CFTC regulated derivatives markets.

Overall, the reviews revealed that numerous traders and desk heads, participated in extensive internal and external discussions using unapproved communication methods. For example, BofA's 2018 review identified that one managing director, who is a co-head of global rates trading, had hundreds of messages using unapproved methods. Further, out of an analysis of the personal devices of thirty BofA employees, including three associated persons of BofA's Futures Commission Merchant business, the vast majority had violated BofA's communications policies and procedures by using personal text message and other unapproved methods to communicate with coworkers and other market participants. Moreover, the reviews conducted by BofA revealed that dozens more BofA employees (including numerous supervisors and managing directors) conducted firm business via unapproved methods. The communications included messages among BofA personnel, as well as with brokers and other market participants. Certain of these communications constituted records that were required to be kept pursuant to Commission recordkeeping requirements, and these communications were generally not preserved and maintained by BofA.

BofA also identified that in at least one instance, an unapproved-channel communication between BofA employees that was responsive to an earlier subpoena issued to BofA by Commission staff, but was not promptly produced in response to the subpoena because BofA did

not collect or review its traders' off-channel messages. BofA had not previously collected this message or produced it to the Commission because the message was sent or received through an unapproved communication method on an employee's personal device. Further, because business-related communications that occurred through an unapproved communication method on certain employees' personal devices were routinely deleted, BofA could not confirm that it had completely responded to all prior Commission subpoenas.

Importantly, during the Relevant Period, BofA's policies and procedures broadly prohibited employees from using unapproved methods, such as personal text messages and WhatsApp, to engage in business-related communications. As part of its procedures, BofA also provided certain employees with company-issued personal devices in order for them to exchange messages in a way that the bank could monitor and supervise them. However, BofA did not take adequate steps to ensure that its employees were using those devices or to detect that certain employees were frequently failing to use those devices for all business-related communications.

Messages sent through BofA-approved communications methods were monitored, subject to review, and when appropriate, archived. By contrast, messages sent using unapproved communication methods, including over personal WhatsApp, email, and text messages, were generally not monitored, subject to review, or archived.

As a result of BofA's failure to ensure that employees—including supervisors and senior-level employees—complied with BofA's communications policies and procedures, BofA failed to maintain thousands of business-related communications, including communications in connection with its Futures Commission Merchant and Swap Dealer businesses, and thus failed diligently to supervise its businesses as Commission registrants. These supervision failures resulted in the widespread use of unapproved methods of communication by many BofA employees in violation of BofA's policies and procedures, as well as a widespread failure to maintain certain records required to be maintained pursuant to Commission recordkeeping requirements.

BofA's recordkeeping and supervision failures were company-wide and involved employees at all levels of authority. Moreover, employees' use of unapproved communication methods was not hidden within BofA. To the contrary, certain supervisors—the very people responsible for supervising employees to prevent this misconduct—routinely communicated using unapproved methods on their personal devices. In fact, managing directors and senior supervisors responsible for implementing BofA's policies and procedures, and for overseeing employees' compliance with those policies and procedures, themselves failed to comply with BofA policies by communicating using unapproved methods on their personal devices about BofA's Commission-regulated businesses.

2. BofA Employee's Deletion of Business-Related Communications and Request that Third-Party Brokers Delete Business-Related Communications

As a stark example of BofA's failure to enforce its communications policies, from at least fall 2015 until approximately August 2021, members of the Desk regularly used unapproved communication methods to communicate, including about BofA's Commission-regulated

business and, in fact, took steps to ensure that those messages were not retained or monitored. Further, certain traders on the Desk used their personal devices for these messages notwithstanding the fact that starting in 2020, BofA began issuing personal devices with company-approved communication methods that the traders could and should have been using instead.

Initially, starting at least around the fall of 2015, certain traders on the Desk used Short Message Service (“SMS”), the basic messaging service of cell phones, to engage in a group chat. In late 2020 or early 2021, the Desk Head, who was a managing director, instructed several subordinates on the desk to switch their SMS messages to WhatsApp. The Desk Head also orally reminded his subordinates that they—like he—should delete messages from their personal devices, which included business-related messages, on a routine basis. As one trader on the Desk wrote to another BofA employee in December 2020: “We [i.e., traders on the swaps desk] use WhatsApp all the time but / We delete convos [conversations] / Regularly.” Deletion instructions from the Desk Head became more frequent during the first quarter of 2021.

Additionally, on a Sunday morning at the end of February 2021, the Desk Head called a broker at a third-party swaps brokerage firm, to convey, in sum and substance, that the broker should delete the communications between them from his personal device, which included business-related communications. The Desk Head also asked the broker to contact the broker’s co-worker and request that the co-worker delete messages with a BofA trader. As a result of the Desk Head’s request, the broker deleted messages he had with the Desk Head.

In early March 2021, the Desk Head asked the broker to start using the messaging application Signal for their personal-device communications. The same week, the Desk Head messaged another broker at a separate swaps brokerage firm and asked him to stop using SMS, to delete the SMS messages between them (“no more sms” / “delete all”), and to use Signal for further personal-device communications.

Around the same time, the Desk Head began a Signal group chat with three subordinate traders on the Desk. Shortly thereafter, the Desk Head instructed one of those traders to set the desk group chat messages to delete (and thus become unrecoverable) after one day. As a result of the Desk Head’s instruction to set the messages to delete, messages within the group Signal chat were deleted from early March 2021 until the end of May 2021.

In May 2021, Commission staff indicated to BofA their interest in speaking with the Desk Head about off-channel communications. Notwithstanding that Commission staff specifically raised this issue, traders on the Desk continued to use Signal for business-related communications. The Desk Head, at approximately the same time, disabled the one-day delete setting on the Desk’s group Signal chat (such that the messages were retained), and began to instruct the traders on the Desk to conduct business-related communications over bank-approved and monitored channels. However, between late May and early August 2021, approximately 250 messages were still sent through the Desk’s group Signal chat, including messages where the Desk Head and three traders at times communicated about specific trades and positions, and where on certain occasions the traders sought the Desk Head’s sign-off or advice before engaging in particular transactions. During this time, the participants to the group Signal chat

sent messages, if not daily, at least several times a week. It was not until August 2021 that the Desk Head and traders closed their Signal chat. Despite BofA being alerted in May 2021 by the Commission staff of his use of off-channel communications, the Desk Head continued to supervise the desk until he resigned in 2022.

Although BofA had policies in place that prohibited employees from communicating about business on unapproved channels, the bank's controls to ensure that those policies were being followed were inadequate. Despite issuing its traders mobile devices with company-approved communication methods, BofA did not take adequate steps to ensure employees were using those devices and BofA's controls were not adequate to detect that employees were frequently not using those devices for all business-related communications. Further, BofA's training of its staff on, and enforcement of, its communications and recordkeeping policies and procedures were inadequate to deter members of the Desk, including its supervisor, from violating those policies for several years. Indeed, Signal is designed with encryption that makes capturing and reviewing messages difficult. For that reason, BofA may not have been able to review and monitor such messages even were the bank aware of them, making such messages effectively unmonitorable.

III. LEGAL DISCUSSION

A. **Bank of America, N.A.'s Failure to Maintain Required Records in Violation of Sections 4s(f)(1)(C) and 4s(g)(1) and (3) of the Act and Regulations 23.201(a) and 23.202(a)(1) and (b)(1)**

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 . . . in such form and manner and for such period as may be prescribed by the Commission by rule or regulation" and those books and records must be kept "open to inspection and examination by any representative of the Commission." 7 U.S.C. § 6s(f)(1)(C); *see also* Section 4s(g)(1) and (3) of the Act, 7 U.S.C. § 6s(g)(1), (3) (requiring swap dealers to keep daily trading and counterparty records). These statutes are implemented, among other places, at Regulations 23.201(a) and 23.202(a)(1) and (b)(1), 17 C.F.R. §§ 23.201(a), 23.202(a)(1), (b)(1) (2021).

Regulation 23.201(a) obligates a swap dealer to "keep full, complete, and systematic records, together with all pertinent data and memoranda, of all its swaps activities," including "[r]ecords of each transaction, including all documents on which transaction information is originally recorded." Regulation 23.202(a)(1) and (b)(1) requires, in relevant part, every swap dealer to keep daily trading records of all swaps and related cash and forward transactions it executes including, specifically, a record of oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that led to the execution of a swap transaction or the conclusion of a related cash or forward transaction.

During the Relevant Period, as a result of the widespread employee use of unapproved communication methods, Bank of America, N.A. failed to maintain Commission-required transaction records and pre-execution communications. By this conduct, Bank of America, N.A.

violated Sections 4s(f)(1)(C) and 4s(g)(1) and (3) of the Act and Regulations 23.201(a) and 23.202(a)(1) and (b)(1).

B. BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated's Failure to Keep Required Records in Violation of Section 4g of the Act and Regulation 1.35

Section 4g of the Act requires FCMs and other registrants to create and keep books and records pertaining to transactions and positions in such form and manner and for such period as may be required by the Commission. 7 U.S.C. § 6g. Regulation 1.35(a)(1), 17 C.F.R. § 1.35(a)(1) (2021), sets forth some of the books and records that are required to be created and maintained by FCMs. Specifically, an FCM must:

(i) Keep full, complete, and systematic records . . . of all transactions relating to its business of dealing in commodity interests . . . which shall include all orders (filled, unfilled, or canceled), . . . and all other records, which have been prepared in the course of its business of dealing in commodity interests

(iii) Keep all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest . . . whether transmitted by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media

With the exception of pre-trade communications, all such records are required to be “kept in a form and manner that allows for the identification of a particular transaction.” Regulation 1.35(a)(5), 17 C.F.R. § 1.35(a)(5) (2021).

As a result of the widespread use of unapproved methods of communication by their employees, which communications were not preserved and maintained, BofA Securities Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated failed to keep full, complete, and systematic records of all transactions relating to its business of dealing in commodity interests, in violation of Section 4g of the Act and Regulation 1.35.

C. Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated's Failure to Keep Records in Required Manner in Violation of Regulation 1.31

Regulation 1.31(b)(4), 17 C.F.R. § 1.31(b)(4) (2021), requires that registrants keep all books and records that are required to be maintained under the Act and Regulations in such manner as to make them “readily accessible” for a period of two years for paper records and for the duration of the retention period for electronic records. Upon request of the Commission, all of these documents are required to be “promptly” produced. Regulation 1.31(d), 17 C.F.R. § 1.31(d) (2021). Regulation 23.203(b)(1), 17 C.F.R. § 23.203(b)(1) (2021), requires that

records required to be kept pursuant to Part 23 of the Regulations, be kept in accordance with Regulation 1.31, 17 C.F.R. § 1.31 (2021).

By failing to keep all Commission-required records in such a manner as to make them “readily accessible,” Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated violated Regulation 1.31. In addition, Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated violated Regulation 1.31 by not promptly producing such communications upon request in connection with the Commission’s investigation, as described above.

D. Bank of America, N.A.’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) (2021). The operative language of Regulation 23.602(a) 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 (2021).

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 JPMorgan Chase Bank, N.A.*, CFTC No. 22-07, 2021 WL 6098347, at *6 (Dec. 17, 2021) (consent order); *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)).

Bank of America, N.A. failed to supervise its swap dealer business activities diligently during the Relevant Period. Bank of America, N.A. failed to maintain an adequate supervisory system to ensure that employees did not utilize unapproved methods to engage in communications relating to its business, including the swap dealer business. Bank of America,

N.A.'s failure to supervise is demonstrated by its failure to detect, prevent, and remediate repeated violations of the Commission's recordkeeping requirements and company policies and procedures. Supervisory personnel failed to ensure that employees complied with Bank of America, N.A.'s Commission recordkeeping requirements and firm communications policies and in some instances themselves violated the policies. These supervision failures also resulted in the failure to keep and maintain Commission-required records, the failure to maintain the records in such a manner as to make them readily available, and the failure to produce the records promptly upon request. By this conduct, Bank of America, N.A. 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).

E. BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated's Failure to Diligently Supervise in Violation of Regulation 166.3

Regulation 166.3 states:

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

17 C.F.R. § 166.3 (2021).

A violation under Regulation 166.3 is an independent violation for which no underlying violation is necessary. *See Collins*, 1997 WL 761927, at *10. A violation of Regulation 166.3 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. *Murlas Commodities, Inc.*, 1995 WL 523563, at *9; *Sansom Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1990 WL 282783, at *11 (Feb. 16, 1990) (noting that, under Regulation 166.3, registrants have "duty to develop procedures for the detection and deterrence of possible wrongdoing by [their] agents" (internal quotation omitted)); *In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158, at *17-19 (Aug. 11, 1992) (providing that, even if an adequate supervisory system is in place, Regulation 166.3 can still be violated if the supervisory system is not diligently administered); *see also In re Rosenthal Collins Grp., LLC*, CFTC No. 12-18, 2012 WL 1242406, at *6 (Apr. 12, 2012) (consent order) (respondent failed to perform supervisory duties diligently by not following its compliance procedures that were in place). 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 diligently supervise. *In re Paragon Futures Assoc.*, CFTC No. 88-18, 1992 WL 74261, at *14 (Apr. 1, 1992) ("The focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether [a] review [has] occurred and, if it did, whether it was 'diligent.'").

BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated failed to supervise their business as a Commission registrant by failing to maintain adequate supervisory systems to ensure that employees complied with Commission recordkeeping requirements and company policies and procedures that prohibited business-related communications on unapproved methods of communication. The inadequacy of BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated's supervisory systems is demonstrated by the longstanding and repeated violations of BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated's Commission recordkeeping regulations and company policies and procedures, including by supervisory personnel, and the fact that the supervisory failures resulted in the repeated failure to maintain Commission-required records, to ensure that the required records were readily accessible, and that the records could be promptly produced upon request. By this conduct, BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated failed to supervise diligently its officers, employees, and agents in violation of Regulation 166.3.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, Bank of America, N.A. violated Sections 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the Act, 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1)(B), and Regulations 1.31, 23.201(a), 23.202(a)(1) and (b)(1), and 23.602(a), 17 C.F.R. §§ 1.31, 23.201(a), 23.202(a)(1), (b)(1), 23.602(a) (2021); and BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated violated Section 4g of the Act, 7 U.S.C. § 6g, and Regulations 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2021).

V. OFFER OF SETTLEMENT

Respondents have submitted the Offer in which they:

- A. Acknowledge service of this Order;
- B. Admit the facts described in Sections II above, except for the facts set forth in Sections II.A.2 and II.C.2, which facts they neither admit nor deny, and acknowledge that their conduct violated the Act and Regulations;
- C. Admit 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;
- D. Waive:
 - 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 they 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 (2021), relating to, or arising from, this proceeding;
 7. Any and all claims that they 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
 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, including this Order;
- E. Stipulate that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondents have consented in the Offer; and
- F. Consent, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Bank of America, N.A. violated Sections 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the Act, 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1)(B), and Regulations 1.31, 23.201(a), 23.202(a)(1) and (b)(1), and 23.602(a), 17 C.F.R. §§ 1.31, 23.201(a), 23.202(a)(1), (b)(1), 23.602(a) (2021); and BofA Securities Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated violated Section 4g of the Act, 7 U.S.C. § 6g, and Regulations 1.31, 1.35 and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2021);
 2. Orders Bank of America, N.A. to cease and desist from violating Sections 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the Act, and Regulations 1.31, 23.201(a), 23.202(a)(1) and (b)(1), and 23.602(a); and BofA Securities Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated to cease and desist from violating Section 4g of the Act and Regulations 1.31, 1.35, and 166.3;
 3. Orders Respondents to pay, jointly and severally, a civil monetary penalty in the amount of one hundred million US dollars (\$100,000,000), plus post-judgment interest within fourteen days of the date of entry of this Order; and
 4. Orders Respondents and their 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; and
- G. Represent that they have engaged in a review of certain recordkeeping failures and begun a program of remediation.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Bank of America, N.A. and its successors and assigns shall cease and desist from violating Sections 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the Act, 7 U.S.C. §§ 6s(f)(1)(C), 6s(g)(1), (3), 6s(h)(1)(B), and Regulations 1.31, 23.201(a), 23.202(a)(1) and (b)(1), and 23.602(a), 17 C.F.R. §§ 1.31, 23.201(a), 23.202(a)(1), (b)(1), 23.602(a) (2021); and BofA Securities Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated and their successors and assigns shall cease and desist from violating Section 4g of the Act, 7 U.S.C. § 6g, and Regulations 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2021).
- B. Respondents shall pay, jointly and severally, a civil monetary penalty in the amount of one hundred million US dollars (\$100,000,000) (“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.

Respondents 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, Respondents shall contact Tonia King or her successor at the above email address to receive payment instructions and shall fully comply with those instructions. Respondents shall accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent(s) and the name and docket number of this proceeding. The paying Respondent(s) 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. Respondents and their successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:

1. BofA shall conduct:

- a. A comprehensive review of BofA's supervisory, compliance, and other policies and procedures designed to ensure that BofA's electronic communications, including those found on personal electronic devices, including without limitation, cellular phones ("Personal Devices"), are preserved in accordance with the requirements of the Act, the Regulations, and BofA's policies and procedures.
- b. A comprehensive review of training conducted by BofA to ensure personnel are complying with the requirements regarding the preservation of electronic communications, including those found on Personal Devices, in accordance with the requirements of the Act and the Regulations, and BofA's policies and procedures, including by ensuring that BofA personnel certify in writing on a quarterly basis that they are complying with preservation requirements.
- c. An assessment of the surveillance program measures implemented by BofA to ensure compliance, on an ongoing basis, with the requirements found in the Act, the Regulations, and BofA's policies and procedures to preserve electronic communications, including those found on Personal Devices.
- d. An assessment of the technological solutions that BofA has begun implementing to meet the record retention requirements of the Act, the Regulations, and BofA's policies and procedures, including an assessment of the likelihood that BofA personnel will use the technological solutions going forward and a review of the measures employed by BofA to track employee usage of new technological solutions.
- e. An assessment of the measures used by BofA to prevent the use of unauthorized communications methods for business communications by employees. This assessment should include, but not be limited to, a review of BofA's policies and procedures to ascertain if they provide for any significant technology and/or behavioral restrictions that help prevent the risk of the use of unapproved communications methods on Personal Devices (e.g., trading floor restrictions).
- f. A review of BofA's electronic communications surveillance routines to ensure that electronic communications through approved communications methods found on Personal Devices are incorporated into BofA's overall communications surveillance program.
- g. A comprehensive review of the framework adopted by BofA to address instances of non-compliance by BofA employees with BofA's policies and procedures concerning the use of Personal Devices to communicate about BofA business in the past. This review shall include a survey of how BofA determined which employees failed to comply with BofA policies and procedures, the corrective action carried out, an evaluation of who violated

policies and why, what penalties were imposed, and whether penalties were handed out consistently across business lines and seniority levels.

2. Written Report of Findings:

- a. Within forty-five (45) days after completion of the review set forth in subparagraphs 1.a. through 1.g. above, BofA shall submit a detailed written report of its findings to the Commission staff (the “Report”). The Report shall include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, and a summary of the plan for implementing the recommended changes in or improvements to BofA’s policies and procedures.
- b. BofA shall adopt all recommendations contained in the Report within one hundred and thirty-five (135) days of the date of the Report.
- c. The Report will likely include confidential financial, proprietary, competitive business or commercial information. Public disclosure of the reports could discourage cooperation, impede pending or potential government investigations or undermine the objectives of the reporting requirement. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except: (1) pursuant to court order; (2) as agreed to by the parties in writing; (3) to the extent that the Commission determines in its sole discretion that disclosure would be in furtherance of the Commission’s discharge of its duties and responsibilities; or (4) is otherwise required by law.

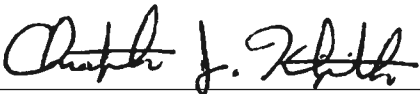
3. One-Year Evaluation: BofA shall assess its program for the preservation, as required under the Act, Regulations, and BofA’s policies and procedures, of electronic communications, including those found on Personal Devices, commencing one year after submitting the Report required by Paragraph 2.a. above. BofA shall require this review to evaluate BofA’s progress in the areas described in Paragraph 1.a. through 1.g. above. After this review, BofA shall submit a report (the “One Year Report”) to the Commission staff and shall ensure that the One Year Report includes an updated assessment of BofA’s policies and procedures with regard to the preservation of electronic communications (including those found on Personal Devices), training, surveillance programs, and technological solutions implemented in the prior year period.

4. Reporting Discipline Imposed: For two years following the entry of this Order, BofA shall notify the Commission staff as follows upon the imposition of any discipline imposed by BofA, including, but not limited to, written warnings, loss of any pay, bonus, or incentive compensation, or the termination of employment, with respect to any employee found to have violated BofA’s policies and procedures concerning the preservation of electronic communications, including those found on Personal Devices: (1) at least 48 hours before the filing of a Form 8-T; or (2) within ten (10) days of the imposition of other discipline.

5. Recordkeeping: BofA shall preserve, for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of compliance with these undertakings.
6. Public Statements: Respondents agree that neither they nor any of their 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 Respondents': (1) testimonial obligations; or (2) right to take legal positions in other proceedings to which the Commission is not a party. Respondents and their successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of their agents and/or employees under their authority or control understand and comply with this agreement.
7. Cooperation, in General: Respondents shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this action, and in any current or future Commission investigation or action related thereto. Respondents shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, the subject matter of this action.
8. Partial Satisfaction: Respondents understand and agree that any acceptance by the Commission of any partial payment of Respondents' CMP Obligation shall not be deemed a waiver of their 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.
9. 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.
10. Change of Address/Phone: Until such time as Respondents satisfy in full their CMP Obligation as set forth in this Order, Respondents shall provide written notice to the Commission by certified mail of any change to their 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: September 27, 2022