UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10586 / December 17, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18933

In the Matter of

THE BANK OF NEW YORK MELLON

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against The Bank of New York Mellon ("Respondent" or "BNY Mellon").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of BNY Mellon's improper practices involving the pre-release of American Depositary Receipts ("ADRs").[2]

2. Sponsored ADR facilities, which provide for the issuance of ADRs, are established by a depositary bank (the "Depositary"), such as BNY Mellon, pursuant to a deposit agreement ("Deposit Agreement"). For unsponsored ADR facilities, ADRs are issued pursuant to the terms and conditions of the ADR.

3. As part of its role, a Depositary issues ADRs to a market participant that has delivered the corresponding number of foreign securities to the Depositary's foreign custodian ("Custodian"). However, in certain situations, Deposit Agreements may provide for "pre-release" transactions in which a market participant can obtain newly issued ADRs from the Depositary before delivering ordinary shares to the Custodian.[3] Only brokers (or other market participants) that have entered into pre-release agreements with a Depositary ("Pre-Release Agreements") can obtain pre-released ADRs from the Depositary. The Pre-Release Agreements, consistent with the Deposit Agreements, require the broker receiving the pre-released ADRs ("Pre-Release Broker"), or its customer on whose behalf the Pre-Release Broker is acting, to beneficially own the ordinary shares represented by the ADRs, and to assign all beneficial right, title, and interest in those ordinary shares to the Depositary while the pre-release transaction is outstanding. In effect, the broker or its customer becomes the temporary custodian of the ordinary shares that would otherwise have been delivered to the Custodian.

4. Contrary to how pre-release transactions were supposed to work, BNY Mellon at times pre-released ADRs to Pre-Release Brokers in circumstances where BNY Mellon was negligent with respect to whether the Pre-Release Brokers, or the parties on whose behalf the pre-released ADRs were being obtained, actually beneficially owned the corresponding number of ordinary shares, as they represented to BNY Mellon in their Pre-Release Agreements. The result of this conduct was the issuance of ADRs that in many instances were not backed by

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] ADRs allow U.S. investors to invest in foreign companies without having to purchase the shares in the foreign markets, and allow foreign companies to get increased exposure to U.S. markets.

[3] The securities deposited typically are equity securities, but debt securities may also underlie ADRs.

ordinary shares as required by the ADR facility.[4] This conduct violated Section 17(a)(3) of the Securities Act.[5]

Respondent

5. BNY Mellon is a New York State chartered bank headquartered in New York, NY. It is a subsidiary of The Bank of New York Mellon Corporation.

Background

ADRs and the Pre-Release of ADRs

6. ADRs are negotiable instruments that represent an interest in a specified number of foreign securities that have been deposited with a Depositary or with the Depositary's Custodian on the Depositary's behalf. ADRs may be traded on U.S. stock exchanges or over-the-counter. The owner of an ADR has the right to obtain the underlying foreign securities by withdrawing them from the ADR facility.[6]

7. An ADR is either "sponsored" or "unsponsored." If the ADR is sponsored, the Deposit Agreement is among the foreign issuer whose securities are represented by the ADRs (*i.e.*, the sponsor), the Depositary, and ADR holders. If the ADR is unsponsored, the agreement is between a Depositary and the ADR holders.[7] In either case, the Deposit Agreement or ADR terms and conditions describe fees applicable to the ADRs and the party responsible for paying those fees. In addition, the Depositary files a Securities Act registration statement on Form F-6 with the Commission to register the offer and sale of the ADRs, which includes the Deposit Agreement and the form ADR as exhibits.

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[4] *See* settled orders in *Matter of ITG Inc.*, Securities Act Rel. No. 10279 (Jan. 12, 2017); *Matter of Banca IMI Securities Corp.*, Securities Act Rel. No. 10401 (Aug. 18, 2017).

[5] A violation of Section 17(a)(3) (prohibiting engaging in any course of business that operates or would operate as a fraud or deceit upon the purchaser in the offer or sale of securities) may rest on a finding of simple negligence; scienter is not required. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997).

[6] In a more technical sense, ADRs evidence American Depositary Shares, or ADSs, which represent the specific number of underlying ordinary shares of the same company on deposit with the Custodian in the foreign issuer's home market. In addition, an ADR for a particular company may actually represent one ordinary share, more than one ordinary share, or a fraction of an ordinary share. The ADR-to-ordinary share ratio varies by ADR facility, based on pricing in the foreign and U.S. markets.

[7] An unsponsored ADR is created by the Depositary and does not involve the formal participation (or require the agreement) of the foreign company whose securities the ADRs represent.

8. Form F-6 may be used to register the offer and sale of ADRs if certain conditions are met, including that the ADR holder must be entitled to withdraw the deposited securities at any time, subject to certain limited exceptions inapplicable here. Typically, when ADRs are issued, a specified number of ordinary shares represented by the ADRs will have been delivered to the Custodian. In this way, those underlying ordinary shares are in effect removed from the market and the total value of securities in the markets — ADRs plus ordinary shares — is unaffected. This ensures that all ADR holders have the ability to withdraw the ordinary shares underlying their ADRs.

9. In some situations, a person may seek to obtain ADRs through a "pre-release" transaction pursuant to a Pre-Release Agreement with a Depositary, as provided for in the Deposit Agreements and in the ADR itself. In a pre-release transaction, a market participant obtains newly issued ADRs from the Depositary (as opposed to purchasing existing ADRs on the market) without having already delivered the corresponding ordinary shares to the Custodian.

10. The traditional rationale for pre-release transactions, which was memorialized in BNY Mellon's policies, was to address settlement timing disparities that could delay delivery to the Custodian of recently purchased ordinary shares. In theory, the pre-release transaction would be closed within a few days after the purchased ordinary shares were received by the Pre-Release Broker. Once issued, pre-released ADRs are indistinguishable from other ADRs of the same issuer and can be freely traded, even while the pre-release transaction remains open.

11. Deposit Agreements, the ADR itself, and Pre-Release Agreements govern the terms of pre-release transactions. Pre-Release Brokers may obtain pre-released ADRs directly from Depositaries with which they have entered into Pre-Release Agreements.

12. Deposit Agreements, the ADR itself, and Pre-Release Agreements typically require a representation that at the time of each pre-release and for the duration such pre-release remains outstanding, the Pre-Release Broker or its customer (i) beneficially owns corresponding ordinary shares, (ii) assigns all beneficial right, title, and interest in the shares to the Depositary, and (iii) will not take any action with respect to such shares that is inconsistent with the transfer of beneficial ownership (collectively, the "Pre-Release Obligations"). In effect, the Pre-Release Broker or its customer must maintain the ordinary shares for the benefit of ADR holders, similar to how the Depositary, through its Custodian, maintains the ordinary shares when it issues ADRs that are not pre-released.

13. Deposit Agreements, the ADR itself, and Pre-Release Agreements also include provisions addressing the situation where ADRs have been pre-released over a dividend record date. The provisions typically require the Pre-Release Broker or its customer to ensure that foreign withholding taxes, to the extent due in connection with the dividend on the corresponding ordinary shares, are paid to the foreign jurisdiction at the rate required for ADR holders, to forward to the Depositary all dividends received on the ordinary shares, net of any foreign withholding tax paid, and to pass through any tax credits or refunds from the dividends to the Depositary. In this way, the rights and obligations of all ADR holders (including those who hold pre-released ADRs) will be protected, and the flow of dividend and tax payments will not

be altered by the fact that the ordinary shares were not already deposited with the Custodian when the pre-released ADRs were issued.

14. Significantly, these agreements are intended to ensure that, at all times until the pre-release position is closed by delivery of ordinary shares to the Custodian (or delivery of an equivalent number of ADRs to the Depositary), the Depositary and the Pre-Release Broker or its customer are collectively maintaining, for the benefit of ADR holders, the required number of ordinary shares to correspond to the number of outstanding ADRs. This ensures that the total number of ordinary shares plus shares represented by ADRs available in the markets is unaffected by the fact that some ADRs were pre-released, and that any economic or tax impact related to holding the ordinary shares flows to the Depositary and the ADR holders for whose benefit the Depositary custodies ordinary shares.

BNY Mellon's Pre-Release Practices

15. From at least June 2011 through June 2016, BNY Mellon was a Depositary that pre-released ADRs to Pre-Release Brokers in thousands of transactions.

16. Several of the largest (by share volume) Pre-Release Brokers that obtained pre-released ADRs from BNY Mellon during that period failed in many instances to take reasonable steps to ensure that they or their counterparties complied with the Pre-Release Obligations. Indeed, those Pre-Release Brokers falsely certified to BNY Mellon that they were complying with the Pre-Release Agreements. Instead, these Pre-Release Brokers loaned the ADRs they received in the pre-release transactions to other parties pursuant to loan agreements that did not require compliance with the Pre-Release Obligations. As a result of these transactions, many of the ADRs that BNY Mellon provided to the Pre-Release Brokers were not actually backed by ordinary shares held for the benefit of BNY Mellon in accordance with the terms of the Deposit and Pre-Release Agreements.

17. The Depositary Receipts Division ("DR Division") of BNY Mellon handled the issuance (including pre-release) and cancellation of ADRs for the Depositary. Personnel in the DR Division did not act reasonably in pre-releasing ADRs in light of the circumstances of such transactions, which indicated that Pre-Release Brokers and their counterparties may not have been complying with the Pre-Release Obligations set forth in the Deposit and Pre-Release Agreements.

18. For example, certain personnel in the DR Division knew that Pre-Release Brokers routinely loaned pre-released ADRs they received to counterparties of the Pre-Release Brokers, including securities lending desks at other larger broker-dealers. The Pre-Release Brokers profited from the transactions by lending the ADRs to their counterparties at higher rates than those at which they obtained them from BNY Mellon, thus earning revenue on the difference between these rates. That pattern of conduit activity should have alerted DR Division personnel that the Pre-Release Brokers themselves were most likely not beneficial owners of the corresponding ordinary shares.

19. If Pre-Release Brokers did not themselves beneficially own the ordinary shares that were supposed to underlie the pre-released ADRs, that meant that, for there to be compliance with the Pre-Release Obligations, the Pre-Release Brokers' counterparties needed to beneficially own those shares. But DR Division personnel were also negligent with respect to whether the Pre-Release Brokers' counterparties owned the ordinary shares.

20. For example, in a 2011 meeting between DR Division personnel and personnel from Counterparty A, a broker-dealer with a large securities lending desk, Counterparty A personnel stated that even though Counterparty A had a Pre-Release Agreement with BNY Mellon, it did not seek ADRs directly from BNY Mellon because at some point previously BNY Mellon made changes to the Pre-Release Agreement. Instead of going directly to BNY Mellon for pre-released ADRs, Counterparty A personnel informed BNY Mellon personnel that it transacted through Pre-Release Brokers and that those brokers took a large percentage of the trade. BNY Mellon should have known that if, after BNY Mellon introduced a new certification of the Pre-Release Obligations, Counterparty A would not ordinarily seek pre-released ADRs directly from BNY Mellon, then there was a risk that Counterparty A was obtaining pre-released ADRs indirectly through a Pre-Release Broker where neither the Pre-Release Broker nor Counterparty A owned the ordinary shares. In these circumstances, BNY Mellon was negligent in continuing to pre-release ADRs to Pre-Release Brokers without taking reasonable steps to determine whether the Pre-Release Brokers, in violation of their Pre-Release Agreements, were on-lending the ADRs to counterparties who were not complying with the Pre-Release Obligations.

21. In addition, BNY Mellon's own policies and statements to foreign issuers reflected that BNY Mellon understood that the traditional reason for a pre-release — a reason that would appear consistent with the Pre-Release Obligations — was to address settlement timing disparities that prevented a party from delivering the ordinary shares to the custodian in time to obtain the ADRs. In these circumstances, the ordinary shares would have been expected to be delivered to the custodian shortly after the pre-release transaction was opened, as the timing disparity or fail would only have been of limited duration. In addition, a party in compliance with the Pre-Release Obligations would likely have wanted to make delivery as soon as possible in order to minimize its borrowing costs.

22. In practice, however, BNY Mellon conducted pre-release transactions that were often outstanding for lengths of time that typically would not result from such inter-jurisdictional settlement disparities. From June 2011 through June 2016, BNY Mellon had over 65,000 pre-release transactions; of those, over 20,000 were outstanding for more than 5 days; over 3000 were outstanding for more than 30 days; and over 500 were outstanding for more than 100 days. In addition, virtually all of the pre-release transactions were closed by the Pre-Release Broker delivering ADRs to the Depositary rather than delivering ordinary shares to the Custodian. Based on the durations of its pre-release transactions and the manner in which the transactions were closed, BNY Mellon should have recognized that pre-release was being used in connection with trading strategies that had nothing to do with settlement timing disparities, and in circumstances indicating potential non-compliance with the Pre-Release Obligations.

23. For example, from June 2011 through June 2015, BNY Mellon engaged in hundreds of pre-release transactions involving the ADRs of foreign issuers that were scheduled to pay dividends. DR Division personnel understood that these pre-released ADRs were being used by Pre-Release Brokers' counterparties to maximize the after-tax yield on dividends. As described in more detail below, DR Division personnel should have known that the trading strategy entailed a substantial risk that the Pre-Release Brokers or their counterparties did not actually comply with the Pre-Release Obligations.

24. Pursuant to the Deposit and Pre-Release Agreements, the payment of dividends to ADR holders, and any resulting taxes due to foreign tax authorities, should not have been affected by the pre-release of ADRs if all relevant parties were fulfilling their obligations under those agreements. Under these agreements, the dividend payments on ordinary shares that would otherwise have been received by BNY Mellon's Custodian (*i.e.*, in those circumstances where there was no pre-release transaction) generally would have been forwarded by the Pre-Release Broker's counterparty to the Pre-Release Broker and on to BNY Mellon. In addition, the Pre-Release Agreements provide that the applicable foreign tax withholding on that dividend payment should have been calculated as though BNY Mellon owned and held the underlying ordinary shares for the benefit of a U.S. resident holder of ADRs, consistent with the transfer of beneficial ownership of the shares to BNY Mellon. In that situation, the Pre-Release Agreement would have required the Pre-Release Broker or its counterparty to pay any applicable withholding tax to the foreign jurisdiction. Thus, despite the existence of pre-released ADRs in the marketplace, all ADR holders on the record date would have been entitled to (a) receive the appropriate dividend amount, minus any withholding for foreign taxes, and (b) rely on the representations concerning transfer of beneficial ownership and, by extension, payment of any foreign taxes.

25. Here, the Pre-Release Brokers forwarded the correct dividend amounts (net of foreign withholding tax) to BNY Mellon. However, DR Division personnel should have recognized the risk that neither Pre-Release Brokers nor their counterparties had made the foreign tax payments required by the Pre-Release Agreements because it would not have been profitable for them to have entered into such pre-release transactions had they done so.

26. The profit from these dividend-driven pre-release transactions derived from a non-U.S. party with tax-favored status in a foreign jurisdiction securing pre-released ADRs in order to obtain dividends subject to little or no foreign withholding tax, while only having to pay a smaller net dividend (that is, the dividend subject to a higher withholding rate) back to the source of the pre-released ADRs.

27. When pre-releasing ADRs that were to be used by Pre-Release Brokers and their counterparties for such foreign withholding tax strategies, BNY Mellon charged Pre-Release Brokers a rebate rate for the duration of the pre-release transaction and also required them to pass along the dividend on the corresponding ordinary shares net of the standard foreign withholding tax rate applicable to an ordinary U.S. ADR holder. The potential profit in the transactions was the difference between the full untaxed dividend and the dividend net of foreign withholding tax. In effect, BNY Mellon, the Pre-Release Brokers, the Pre-Release Brokers' counterparties, and the non-U.S. parties with tax-favored status profited from the transactions by dividing up that

amount through the pricing of the pre-release and the pricing of the subsequent on-loans or transfers. In those circumstances, BNY Mellon should have recognized the unlikelihood that the Pre-Release Brokers or their counterparties were making the foreign tax payments required by the Pre-Release Agreement.

28. Given the economics of these transactions and the likelihood that the Pre-Release Brokers and their counterparties did not beneficially own corresponding ordinary shares, DR Division personnel did not act reasonably in conducting such transactions in reliance on the Pre-Release Brokers' representations. If the Pre-Release Broker had beneficially owned the required ordinary shares, it would have been more profitable for the Pre-Release Broker to lend those shares to its counterparty, rather than incurring the cost of a pre-release. And if the Pre-Release Broker's counterparty actually owned the ordinary shares on which the pre-release was supposed to have been based, it would have made economic sense for that counterparty to have used those ordinary shares to engage in its foreign tax strategy, rather than incurring the cost of a stock loan of additional ordinary shares and, by extension, a pre-release.

29. BNY Mellon often structured dividend-related pre-release transactions by using "all in" rates, an input used to calculate the daily rebate rate that a Pre-Release Broker would pay to BNY Mellon. For example, in September 2011, BNY Mellon pre-released 1,500,000 ADRs of a French issuer ("Issuer A") to a Pre-Release Broker ("Pre-Release Broker A"). At this time, BNY Mellon claimed 85% of the dividend from Pre-Release Brokers in connection with pre-release transactions involving ADRs of French issuers. As part of the transaction, Pre-Release Broker A agreed to an "all in" rate of 89.07%, which meant that Pre-Release Broker A would in effect pay 89.07% of the dividend to BNY Mellon and keep 10.93% of that dividend. Depending on tax elections of the ADR holders, BNY Mellon would generally pay up to 85% of the dividend to ADR holders, meaning that it would keep at least 4.07% of the dividend. In this particular transaction, BNY Mellon's revenue was at least $46,629.17, which did not include any revenue generated from the conversion of the pre-released ADRs to ordinary shares and back again at the Custodian (referred to as a "round trip"), for which, when it occurred, BNY Mellon would collect a separate fee.

30. Pre-Release Brokers and their counterparties also engaged in other transactions that were not consistent with the Pre-Release Obligations, such as transactions in which Pre-Release Brokers obtained pre-released ADRs in order to settle ordinary short-sale trades in the ADR market. The circumstances of these transactions should have indicated to BNY Mellon the likelihood that pre-released ADRs were being used to settle short sales without any corresponding ownership of ordinary shares. For example, certain DR Division personnel understood or should have understood that Pre-Release Brokers and their counterparties viewed BNY Mellon effectively as a lender of last resort for settlement needs when other traditional lending sources were exhausted. In those circumstances, Pre-Release Brokers and their counterparties contacted BNY Mellon seeking what the Pre-Release Brokers and their counterparties often referred to as "locates" for pre-released ADRs. Those requests represented a Pre-Release Broker's counterparty's need either to locate ADRs in connection with potential short-selling activity (pursuant to Rule 203 of Regulation SHO) or to find ADRs to settle trades that had already occurred.

31. In light of these circumstances, BNY Mellon did not take reasonable steps to determine that Pre-Release Brokers or their counterparties complied with the Pre-Release Obligations, and thus at times negligently facilitated short selling and enabled the settlement of trades with some ADRs that were not actually backed by ordinary shares held for the benefit of the Depositary in accordance with the requirements of the ADR facility.

32. In an effort to ensure compliance with the Pre-Release Obligations during the relevant period, BNY Mellon, among other things, relied on the Pre-Release Agreements and, starting in December 2013, required the Pre-Release Brokers to sign one-page annual certifications ("Certifications") stating that the Pre-Release Brokers or their counterparties were complying with the Pre-Release Obligations.

33. In light of the information that the DR Division had about the practices of Pre-Release Brokers, the Pre-Release Agreements and Certifications were insufficient to address the known risks of pre-released ADRs being issued without the Pre-Release Broker or its counterparty owning the corresponding ordinary shares.

34. From June 2011 through June 2016, BNY Mellon's net revenues from the negligently conducted pre-release transactions described above totaled approximately $29 million.

35. After the opening of the staff's ADR investigation, BNY Mellon implemented remedial measures. In November 2015, for example, BNY Mellon voluntarily ended its pre-release activity over dividend record date. By July 2016 BNY Mellon voluntarily ended the remainder of its pre-release activity.

36. Throughout the staff's investigation, BNY Mellon cooperated by meeting with the staff on multiple occasions, providing detailed factual summaries of relevant information and analyses, both on its own initiative and at the staff's request, including for periods beyond the staff's requests; assisted the staff in identifying individuals to provide testimony on topics relevant to the staff's investigation; and developed methods of targeted document collection and searching aimed at efficiently identifying the information the staff considered most relevant in its investigation.

37. Throughout the staff's investigation, BNY Mellon entered into tolling agreements with the Commission.

Violations

38. As result of the conduct described above, Respondent violated Section 17(a)(3) of the Securities Act, which prohibits, in the offer or sale of securities, engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

BNY Mellon's Cooperation

39. In determining to accept the Offer, the Commission considered BNY Mellon's voluntary remediation and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in BNY Mellon's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act.

B. BNY Mellon shall, within 30 days of the entry of this Order, pay disgorgement of $29,369,032.43 and prejudgment interest of $4,260,199.69 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

C. BNY Mellon shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $20,558,322.70 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying BNY Mellon as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sanjay Wadhwa, Senior Associate Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of $20,667,370.80 based upon its cooperation and agreement to cooperate in a Commission investigation and related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields
Secretary