

III.

The Commission finds the following:

A. Summary

Beginning in January 2007 and continuing through December 2012 (the “Relevant Period”), Bank of America, by and through certain of its traders, attempted to manipulate the U.S. Dollar International Swaps and Derivatives Association Fix (“USD ISDAFIX” or the “benchmark”), a leading global benchmark referenced in a range of interest rate products, to benefit the Bank’s derivatives positions.

ISDAFIX rates and spreads were published daily and were meant to indicate the prevailing mid-market rate, at a specific time of day, for the fixed leg of a standard fixed-for-floating interest rate swap.² They were issued in several currencies. USD ISDAFIX rates and spreads were published for various maturities of U.S. Dollar-denominated swaps, including 1-year to 10-years, 15-years, 20-years, and 30-years. The most widely used USD ISDAFIX rates and spreads, and the ones at issue in this Order, were those that were intended to indicate the prevailing market rate as of 11:00 a.m. Eastern Time. The 11:00 a.m. USD ISDAFIX rate was used for the cash settlement of options on interest rate swaps, or swaptions, and as a valuation tool for certain other interest rate products. For example, USD ISDAFIX was used during the Relevant Period in settlement of interest rate swap futures contracts traded on the Chicago Mercantile Exchange (“CME”).

During the Relevant Period, USD ISDAFIX was set each day in a process that began at 11:00 a.m. Eastern Time with the capture and recording of swap rates and spreads from a U.S.-based unit of a leading interest rate swaps broking firm (“Swaps Broker”). Swaps Broker disseminated rates and spreads captured in this 11:00 a.m. “snapshot,” “fix,” or “print”—as it was referred to by traders and brokers—as references to a panel of banks. (These reference rates and spreads were calculated using swap spread trade data from Swaps Broker, U.S. Treasuries electronic trade data from Swaps Broker, and Eurodollar futures at or around 11:00 a.m.) The panel banks then made submissions to Swaps Broker. Each bank’s submission was supposed to reflect the midpoint of where that bank would itself offer and bid a swap to a dealer of good credit as of 11:00 a.m. Eastern Time. Most banks on the panel, including Bank of America, usually submitted Swaps Broker’s reference rates and spreads as captured in the snapshot. As a result, after an averaging of the submissions, the reference rates and spreads became the published USD ISDAFIX almost every day.

However, on certain days on which Bank of America had a trading position settling against the USD ISDAFIX, the Bank attempted to manipulate USD ISDAFIX by making false submissions for the Bank as a panel bank to Swaps Broker, skewing the rates and spreads submitted in the direction that could have moved the USD ISDAFIX setting to benefit the Bank’s trading positions. A bank’s derivatives trading positions or profitability are not legitimate or permissible factors on which to base submissions in connection with a benchmark. Yet on occasion during the Relevant Period, certain Bank of America traders caused the Bank to

² In 2014, the administration of ISDAFIX changed, and a new version of the benchmark is published under a different name by a new administrator using a different methodology.

make USD ISDAFIX submissions higher or lower for the purpose of benefitting positions priced or valued against the benchmark, including swaption and interest rate swap futures positions. On these occasions, Bank of America's USD ISDAFIX submissions constituted false, misleading, or knowingly inaccurate reports because they purported to reflect the Bank's honest view of the true costs of entering into a standard fixed-for-floating interest rate swap in particular tenors, but in fact reflected traders' desire to move USD ISDAFIX higher or lower in order to benefit the Bank's positions. These submissions were false, misleading, or knowingly inaccurate because they did not report where the Bank would itself bid or offer interest rate swaps to a dealer of good credit absent a desire to manipulate USD ISDAFIX, but rather reflected prices that were more favorable to the Bank's specific positions.

In addition, on occasion, certain traders at Bank of America attempted to manipulate USD ISDAFIX by bidding, offering, and executing transactions in targeted interest rate products, including swap spreads and U.S. Treasuries, at or near the critical 11:00 a.m. fixing time, with the intent to affect the reference rates and spreads captured by Swaps Broker that Swaps Broker disseminated to panel banks, and thereby to affect the published USD ISDAFIX. On occasion, in conjunction with Bank of America's attempts to manipulate USD ISDAFIX by bidding, offering, and executing transactions in targeted interest rate products, Bank of America also attempted to manipulate USD ISDAFIX by making false USD ISDAFIX submissions.

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In accepting Bank of America's Offer, the Commission recognizes the Bank's cooperation during the investigation of this matter by the CFTC's Division of Enforcement ("Division"), which helped the Division undertake its investigation efficiently and effectively. The Commission also recognizes that Bank of America commenced significant remedial action to strengthen the internal controls and policies relating to all benchmarks, including USD ISDAFIX.

B. Respondent

Bank of America, N.A. is a national banking association with its main office in Charlotte, North Carolina, and offices in, among other places, New York City. It became provisionally registered with the Commission as a swap dealer on December 31, 2012.

C. Facts

1. USD ISDAFIX Setting

ISDAFIX rates and spreads were benchmarks that indicated prevailing market rates for "plain-vanilla" interest rate swaps.³ The 11:00 a.m. USD ISDAFIX was set during the Relevant

³ The term "swap" is defined in CEA Section 1a(47), 7 U.S.C. § 1a(47) (2012). Here, a "plain-vanilla" interest rate swap is generally an exchange of fixed payments for floating payments, wherein one party to a swap pays a fixed rate on a set notional amount (the party who "pays fixed" is said to have "bought" the swap, or is "long" the swap) and the other party pays a floating rate generally tied to three-month LIBOR (the party who "receives fixed" is said to have "sold" the swap, or is "short" the swap). The "maturity" or "tenor" of a swap refers to the number of years over which counterparties exchange payments.

Period using a combination of swap spread trade data from Swaps Broker,⁴ U.S. Treasuries electronic trade data from Swaps Broker, Eurodollar futures, and submissions from a panel of swap dealer banks, including Bank of America.⁵

Swaps Broker's medium-term USD swaps desk ("MTS Desk") functioned much like a traditional futures trading pit. Brokers on the desk sat (or stood) together and each serviced a number of major swap dealer banks, to whom they were connected throughout the trading day by direct phone lines and speaker boxes. The brokers communicated their clients' bids and offers by open outcry to the entire MTS Desk and all of the brokers simultaneously. Any client could accept a bid or offer. Once a broker confirmed that a client was "hitting" a bid, "lifting" an offer, or was otherwise "done" in a designated notional amount (either a minimum default amount or a greater amount), the trade between the counterparties was executed and the counterparties received a confirmation of the trade.

Swaps Broker published a live feed of transaction data for USD interest rate swap spreads, swap rates, and U.S. Treasury yields and prices to an electronic screen, known as the "19901 screen," accessible through a subscription-based market news service. The 19901 screen reflected the levels at which those products were trading through the MTS Desk (for swap spreads and swap rates) and Swaps Broker's proprietary electronic bond trading platform (for U.S. Treasuries). The levels displayed on the 19901 screen for swap spreads were manually controlled by an employee of Swaps Broker, known colloquially as the "screen guy" or "screen operator," who would toggle the levels up or down based on the swap spread trading activity that occurred before him on the MTS Desk. The 19901 screen is a reference used widely throughout the financial industry by swap dealer banks, hedge funds, asset managers, businesses, and other participants in interest rate markets. During the Relevant Period, levels displayed on the 19901 screen at precisely 11:00 a.m. were critical because they were used to set USD ISDAFIX.

To set USD ISDAFIX rates for the 2-year through 30-year maturities, Swaps Broker first generated reference rates and spreads from the snapshot of 11:00 a.m. screen prices, reflecting either the last traded spread or the mid-point between the most recent executable bid and offer. Swaps Broker's reference rates, for all maturities except the 1-year, were the sum of the reference spread and the 19901 screen's U.S. Treasury yield in the corresponding maturity. To generate the 1-year reference rate (for which there was no associated swap spread), Swaps Broker utilized a combination of Eurodollar futures yields (based on trading on CME's Globex platform) and broker "sentiment," which was intended to reflect prevailing rates for 1-year swaps based on trading through Swaps Broker's short-term swaps desk.

Minutes after the 11:00 a.m. snapshot of the 19901 was taken, Swaps Broker distributed its reference rates and spreads to a panel of fourteen or more contributing banks, which either

⁴ An interest rate swap spread trade consists of a fixed-for-floating interest rate swap and an offsetting trade in U.S. Treasuries of the same tenor, which allows a party to hedge part of the interest rate risk associated with the fixed-for-floating swap. The difference in basis points between the U.S. Treasury yield and the swap rate constitutes the "spread" quoted in a spread trade. The party who "receives fixed" in a swap and sells U.S. Treasuries to hedge is "short" spreads or has "sold" spreads, while a party who "pays fixed" in a swap and buys Treasuries to hedge is "long" spreads or has "bought" spreads.

⁵ Prior to its acquisition by Bank of America, Merrill Lynch was also on the panel of swap dealer banks that made ISDAFIX submissions.

accepted and submitted the reference rates and spreads as their own or submitted adjusted levels. Each bank, including Bank of America, was expected to submit “the mean of where that dealer would itself offer and bid a swap in the relevant maturity for a notional equivalent amount of US \$50 million or whatever amount is deemed market size in that currency for that tenor to an acknowledged dealer of good credit in the swap market.”⁶ In making their submissions, banks could change the prices for all rates and spreads across all maturities in their submissions; or change any subset, including any single rate or spread; or change none at all and simply submit the reference rates and spreads. Alternatively, a panel bank could make no submission at all. After a quorum of contributing banks made their submissions, a calculation agent eliminated the highest and lowest submissions (known as “topping and tailing”) and averaged the remaining submissions. The submission and calculation process was generally completed in the half hour following 11:00 a.m., after which the results were accessible to the public through a subscription-based news service.

In practice, most panel banks, often including Bank of America, accepted Swaps Broker’s reference rates and spreads as their default submissions. Thus, after “topping and tailing,” Swaps Broker’s reference rates and spreads usually became the final published USD ISDAFIX benchmarks. However, as noted below, on multiple occasions during the Relevant Period, Bank of America submitted a rate or spread higher or lower than Swaps Broker’s reference rates or spreads or traded at 11:00 a.m. on certain days that Bank of America had a derivatives position settling against USD ISDAFIX in an attempt to benefit that derivatives position.

2. Bank of America’s Role in USD ISDAFIX Setting

Throughout the Relevant Period, Bank of America was one of the panel banks that submitted rates and spreads for the determination of USD ISDAFIX. Bank of America’s Interest Rates Swaps Desk (“Swaps Desk”) employees made the Bank’s daily USD ISDAFIX submissions. The Swaps Desk was a market-making desk that traded, among other products, fixed-for-floating interest rate swaps. The Swaps Desk acted as counterparty to external clients as well as internal Bank of America desks in a variety of interest rate swap transactions.

During the Relevant Period, Bank of America did not have specific internal controls or procedures, written or otherwise, regarding how USD ISDAFIX submissions should be determined or monitored. ISDAFIX submitters received no formal training on making ISDAFIX submissions, and the Bank did not require submissions to be documented during the Relevant Period.

3. Bank of America’s Positions with Exposure to USD ISDAFIX

As described in more detail below, Bank of America traders engaged in attempts to manipulate USD ISDAFIX for two primary reasons: (a) to maximize profit (or minimize loss) for the Bank’s Option Desk by increasing their payments from counterparties, or decreasing payments to counterparties, in the cash settlement of swaptions; and (b) to maximize profit (or minimize loss) for the Bank’s Swaps Desk by increasing their payments from counterparties, or

⁶ See *ISDAFIX*, ISDA, <https://web.archive.org/web/20140209180148/http://www2.isda.org/asset-classes/interest-rates-derivatives/isdafix/> (last accessed July 16, 2018).

decreasing payments to counterparties, in the cash settlement of interest rate swap futures. A small movement of the benchmark higher or lower (e.g., one basis point or less) could result in meaningful gain for Bank of America on its cash settlements. Attempts to move USD ISDAFIX rates in Bank of America's favor, if successful, would hurt the Bank's counterparties to the cash settlements, as well as any other market participants who had positions referencing USD ISDAFIX on a given day that were directionally equivalent to Bank of America's counterparties' positions in the same maturity.

a. Swaption Cash Settlements

On occasion during the Relevant Period, traders on Bank of America's Options Desk, in coordination with the Swaps Desk, attempted to manipulate USD ISDAFIX in order to benefit the Options Desk's positions in so-called "European swaptions." A European swaption is an option to enter into a plain-vanilla fixed-for-floating interest rate swap, which must be exercised at 11:00 a.m. on a specified "expiry" date in the future at a pre-agreed fixed "strike" rate. A swaption can be exercised by "physical" delivery of the underlying swap or by cash settlement. A swaption that expired "in-the-money" would usually physically settle. Swaption cash settlements denominated in U.S. Dollars are typically calculated based on USD ISDAFIX rates according to a formula which measures the difference between the relevant USD ISDAFIX rate on the expiry date and the strike rate of the swaption. In any cash-settling swaption, the Options Desk's incentive to push the USD ISDAFIX higher or lower depended on (1) whether Bank of America was the owner (buyer) or seller of the swaption and (2) whether the swaption conferred the right to pay or receive the fixed rate in the underlying swap.

b. Swap Futures Cash Settlements

On occasion during the Relevant Period, the Swaps Desk also attempted to manipulate USD ISDAFIX to benefit its swap futures positions by increasing payments to Bank of America (or decreasing payments from Bank of America) during settlements.⁷ Bank of America regularly transacted in swap futures contracts and routinely maintained net exposure to the settlement of these contracts, which occurred on a quarterly basis. The final settlement price of each contract was determined based on USD ISDAFIX in the relevant maturity on the contract's last day of trading. Under swap futures contract specifications, the value of the contract had an inverse relationship to USD ISDAFIX: when Bank of America was long swap futures contracts, the Bank would benefit from a lower USD ISDAFIX rate in the relevant maturity on the contract's last day of trading. Bank of America's Swaps Desk typically held a net long or short position in multiple swap futures maturities on the contracts' settlement days, giving the Swaps Desk a corresponding incentive to attempt to push USD ISDAFIX up or down in a direction that would maximize the desk's profits and minimize its losses.

4. Means Employed in Attempts To Manipulate USD ISDAFIX

Certain Bank of America options and/or swaps traders understood and employed two primary means in their attempts to manipulate USD ISDAFIX rates:

⁷ During the Relevant Period, swap futures contracts were listed at and subject to the rules of the Chicago Board of Trade ("CBOT"). Swap futures were traded through both "open outcry" and through CME Globex.

- First, by directing the relevant Bank of America Swaps Desk middle office employee responsible for making USD ISDAFIX submissions (the “Submitter”) to submit rates and spreads higher or lower than the Submitter otherwise would submit, certain Bank of America traders attempted to affect the final published USD ISDAFIX rates and spreads to benefit the Bank’s positions.
- Second, certain Bank of America traders bid, offered, and/or executed swap spreads and/or U.S. Treasuries at or around 11:00 a.m. to affect rates on the 19901 screen and thereby increase or decrease Swaps Broker’s reference rates and spreads and influence the final published USD ISDAFIX.

Whichever the means employed, the traders’ goal was the same—to move USD ISDAFIX in the direction that favored Bank of America on specific trading positions at the expense of its counterparties.

a. Bank of America’s False, Misleading, or Knowingly Inaccurate Submissions

During the Relevant Period, Bank of America attempted to manipulate USD ISDAFIX by making false, misleading, or knowingly inaccurate submissions to Swaps Broker concerning swap rates and spreads.

On multiple occasions during the Relevant Period, Bank of America submitted a rate or spread higher or lower than Swaps Broker’s reference rates or spreads. On these occasions, certain traders directed the relevant Submitters to submit a rate or spread higher or lower than the reference rate or spread disseminated by Swaps Broker to panel banks. Certain traders made requests to change particular submissions by means including electronic communications requesting the Submitter to change the Bank’s submission for a particular tenor or tenors. The Submitters typically did not deviate from the reference rates and spreads provided by Swaps Broker unless they were specifically directed to do so for a particular tenor by a trader. The changes were not made to reflect the mean of where Bank of America would itself bid or offer the swap in the relevant maturity, but rather were made to benefit certain swaption or swap futures positions held by the Bank.

For instance, on one quarterly expiration date for swap futures contracts in 2011, Bank of America had a long position in 5-year, 7-year, 10-year, and 30-year swap futures. A few minutes before 11:00 a.m., a trader on the Bank of America Swaps Desk advised the Submitter via Bloomberg message that he was “gonna need 5y7y10y and 30y rates and spreads at 11am,” noting that he “want[ed] them low.” The Submitter asked the trader if he had “any [levels] in mind.” The trader responded that he did “not yet” know what levels he wanted—reflecting that his desire for “low” USD ISDAFIX rates and spreads was not based on an honest view of the swap spreads market at a particular level but rather a desire to benefit the Bank’s positions. After the reference rates were published to Bank of America and the other panel banks, the trader instructed the Submitter to “put each of them lower by like 2/10,” stating that changing Bank of America’s submission in an attempt to affect where USD ISDAFIX was ultimately published was “worth a shot.” The Submitter complied with the trader’s request and submitted rates and spreads 0.25 lower for each of the four tenors.

b. Bank of America's Improper Trading Conduct

In addition to making false submissions in an effort to influence the final setting of USD ISDAFIX benchmarks, on multiple occasions certain traders at Bank of America attempted to manipulate USD ISDAFIX by bidding, offering, or trading swap spreads and U.S. Treasuries at and around Swaps Broker's 11:00 a.m. snapshot, in a manner designed to move USD ISDAFIX rates in a direction that would benefit the Bank.⁸

For instance, on one quarterly expiration date for swap futures contracts in 2009, Bank of America had a position in multiple swap futures tenors, including a short position in 5-year swap futures. Just prior to 11:00 a.m., multiple traders on the Bank's Swaps Desk traded on Swaps Broker's proprietary electronic bond trading platform, in each tenor trading Treasuries in the direction that would benefit the Bank's expiring swap futures positions, including selling 5-year Treasuries, while at the same time a Swaps Desk trader was buying 5-year swap spreads through Swaps Broker's MTS Desk.

After USD ISDAFIX was published that day, a Swaps Desk middle office employee—who later served as a Submitter for the Bank—asked a Swaps Desk trader to explain “how all those 5y spread [i.e., swap spread] trades we did affected the closing for the swap future . . . if that's what was going on around 11.” The trader responded, “yeah, that's the [Swaps Broker] 11am fixing,” confirming that “swap futures settle off that” and explaining that “the 11am rate is determined by [Swaps Broker] treasury price and [Swaps Broker] spread at 11am.” The middle office employee then asked: “so by paying [i.e., buying] all those 5y spreads **were we trying to push the price in a certain direction** or just for our position[?]” The trader responded that the answer was “both.” He explained: “at 11am we had to sell 3B in 5y notes [i.e., Treasuries] . . . so we got short spreads . . . we needed to buy spreads . . . so buying them before and **pushing the rate higher basically means we rev a higher rate at the fixing . . . we wanted the highest rate possible at 11am** . . . assuming we have all or most of it hedged before that.” After explaining this sequence of trading, the trader then asked the middle office employee if he had “any idea what you think that's worth to us?” and then estimated that the Swaps Desk had profited about \$4 million through this attempted manipulation. An email circulated to Swaps Desk employees later that day, discussing daily profit and loss, reported “DAYTRADES + \$4M” and referenced the “large swap future expiry at 11am.”

On at least one occasion, the Swaps Desk's attempted manipulation by trading was the result of collaboration with the Options Desk, in which options traders put pressure on the Swaps Desk to manipulate for the benefit of a swaptions position. In August 2011, prior to 11:00 a.m., an Options Desk trader learned that a swaption counterparty was asking for a cash settlement with Bank of America, and discussed with a Swaps Desk trader how that trader might attempt to

⁸ Bank of America traders referred to trades that they made around 11:00 a.m. for risk management purposes as hedging. When Bank of America's derivative products cash-settled, changes in Bank of America desks' risk positions could potentially cause traders to seek hedging trades, depending on a variety of factors, including the risk profile of other positions and whether the desk wanted to keep any resulting risk. Irrespective of whether the Bank of America traders had an interest in hedging, the traders engaged in attempted manipulation when they placed bids and offers or executed trades around 11:00 a.m. with the improper intent to move the USD ISDAFIX rate in Bank of America's favor.

manipulate USD ISDAFIX in the 1-year tenor to benefit the Bank's position in the cash settlement. The options trader told the swaps trader "I have no risk" and went on to discuss how the Bank might nonetheless bid and offer 1-year swaps in order to affect USD ISDAFIX in that maturity, telling the swaps trader, "**I just want isda fix to be set at 42.5.**" The swaps trader assured the options trader that "we are trying to get it to print 42.5 for you," and the Swaps Desk did in fact buy 1-year swap spreads at 42.5 very close to 11:00 a.m. with the objective of getting a 42.5 print on 1-year USD ISDAFIX. However, the Bank's attempted manipulation did not succeed, as Swaps Broker informed the Swaps Desk shortly after 11:00 a.m. that 1-year USD ISDAFIX would print at 42.4. The swaps trader who had promised to attempt to manipulate told the options trader that the Swaps Desk was "fighting" the 42.4 print. Another swaps trader told Swaps Broker that he was getting "all kinds of gr[ie]f here" because "our options boys were stan[d]ing there w[h]en we traded"; after the Bank's protests failed to change the outcome and USD ISDAFIX was published at the lower rate, the trader attempted to explain what happened to the "options boss."

On at least one occasion, the Swaps Desk also sought to pressure one of its brokers at Swaps Broker to manipulate USD ISDAFIX to benefit its own positions in expiring swap futures. On one quarterly expiration date for swap futures contracts in 2010, Bank of America had a significant long position in 5-year swap futures, and attempted to benefit that position by selling down swaps spreads through Swaps Broker's MTS Desk in an attempt to push down USD ISDAFIX in the 5-year tenor. The head trader at Bank of America's Swaps Desk successfully sold 5-year swap spreads at 21 a few seconds before 11:00 a.m. in an attempt to get a 21 print, but the Swaps Desk broker trading on the head trader's behalf failed to "give a size or say sell on," and another bank was able to bid the price back up to 21.25 just before 11:00. After USD ISDAFIX printed at 21.25, the head trader was so angry at his broker for failing to get a lower print that the broker went back and listened to the audio recording of his trading activity around 11:00 a.m. in an effort to explain to the trader what had gone wrong. The broker told Bank of America's head trader that another bank "said mine at 21.25 . . . but that happened at 10.59 and 54 seconds . . . **immediately I knew what was up and had to get it down quickly at all costs.**" Significantly, on this same date the Swaps Desk also attempted to manipulate USD ISDAFIX in the same tenor through false submissions: shortly after 10:00 a.m., a junior Swaps Desk trader notified the Submitter that he would need to log in and make the Bank's USD ISDAFIX submission that morning because they "need it for today with the swap fut[ure] exp[iry]," and in fact the Bank submitted 5-year USD ISDAFIX rates at 20.75—even lower than the price at which the head trader had sought to sell in order get the print.

IV.

LEGAL DISCUSSION

A. Jurisdiction

As set forth below, Sections 6(c), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9, 13b, 13(a)(2) (2012), have long prohibited attempted manipulation of the prices of, or false reporting in regard to, *any* commodity in interstate commerce or for future delivery on or subject to the rules of any registered entity. An interest rate benchmark, such as USD ISDAFIX, is a

commodity, *see* CEA § 1a(9), (19), 7 U.S.C. § 1a(9), (19) (2012), and therefore may be subject to illegal attempted manipulation, whatever the manipulative means may be, or false reporting.

Here, Bank of America’s attempted manipulation is also proscribed by the Act for the separate reason that the conduct involved swaps executed or traded on a Swaps Broker desk that operated in practice as a “trading facility” under the Act. *See* CEA § 1a(51), 7 U.S.C. § 1a(51) (2012) (defining trading facility); *see also* former CEA § 2(d)(1)(B), 2(g)(3), 7 U.S.C. § 2(d)(1)(B), 2(g)(3) (2006; repealed 2011) (limiting jurisdictional exclusions to agreements, contracts, or transactions not executed or traded on a trading facility).

Lastly, as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), the Commission also has authority to initiate proceedings and impose sanctions for a broader range of manipulative conduct and false reporting, including in connection with any swap. *See* CEA §§ 6(c)(1), 6(c)(1)(A), 6(c)(3), 6(d), 9(a)(2); 17 C.F.R. §§ 180.1, 180.2 (2018). The Relevant Period encompasses conduct that occurred after the passage and effective date of the Dodd-Frank Act.

B. Respondent Attempted To Manipulate USD ISDAFIX

Section 9(a)(2) of the Act makes it unlawful for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.” With respect to conduct on or after July 16, 2011, amended Section 9(a)(2) of the Act also makes it unlawful to manipulate or attempt to manipulate the price of “any swap.”

For conduct prior to August 15, 2011, former Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), authorize the Commission to serve a complaint and impose, among other things, civil monetary penalties and cease and desist orders if the Commission “has reason to believe that any person . . . has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, . . . or otherwise is violating or has violated any of the provisions of [the] Act.”

For conduct occurring on or after August 15, 2011, the Commission is authorized to serve a complaint and impose penalties and orders with regard to attempted manipulation in violation of the broader amended provisions of Section 6(c)(1) and 6(c)(3) of the Act and the Regulations implementing those provisions. *See* CEA §§ 6(c)(4)(A), 6(d).

Section 6(c)(1) and 6(c)(1)(A) of the Act and Regulation 180.1 prohibit the use or attempted use of any manipulative device, including false reporting, in connection with any swap or contract of sale of any commodity in interstate commerce, or for future delivery, and Regulation 180.1(a) makes it:

unlawful . . . , directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to . . . (1) [u]se . . . or attempt to use . . . any manipulative device; (2) [m]ake, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a

material fact necessary in order to make the statements made not untrue or misleading; (3) [e]ngage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or, (4) [d]eliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, . . . a false or misleading or inaccurate report concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

Section 6(c)(3) of the Act prohibits the attempted manipulation of the price of any commodity in interstate commerce, and Regulation 180.2 makes it “unlawful . . . directly or indirectly, to . . . attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.”

To prove attempted manipulation under Sections 9(a)(2) and 6(c)(3) of the Act and Commission Regulation 180.2, the following two elements are required: (1) an intent to affect market price, and (2) an overt act in furtherance of that intent. See *In re Hohenberg Bros. Co.*, CFTC No. 75-4, 1977 WL 13562, at *7 (Feb. 18, 1977). To prove the intent element of attempted manipulation, the respondent must have “acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.” *In re Ind. Farm Bureau Coop. Ass’n*, CFTC No. 75-14, 1982 WL 30249, at *7 (Dec. 17, 1982). “[W]hile knowledge of relevant market conditions is probative of intent, it is not necessary to prove that the accused knew to any particular degree of certainty that his actions would create an artificial price. *It is enough to present evidence from which it may reasonably be inferred that the accused ‘consciously desire[d] that result, whatever the likelihood of that result happening from his conduct.’*” *Id.* (emphasis added) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 442, 445 (1978)). A profit motive may also be evidence of intent, although profit motive is not a necessary element of an attempted manipulation. See *In re DiPlacido*, CFTC No. 01-23, 2008 WL 4831204, at *29 (Nov. 5, 2008) (citing *In re Hohenberg Bros. Co.*, 1977 WL 13562, at *8), *aff’d sub. nom. DiPlacido v. CFTC*, 364 F. App’x 657 (2d Cir. 2009). It is also not necessary that there be an actual effect on price. See *CFTC v. Amaranth Advisors, L.L.C.*, 554 F. Supp. 2d 523, 533 (S.D.N.Y. 2008).

1. Respondent Attempted To Manipulate USD ISDAFIX Through False, Misleading, or Knowingly Inaccurate Submissions

As evidenced by communications among Bank of America employees and with others, as well as by the Bank’s USD ISDAFIX submissions themselves, certain Bank of America traders specifically intended to affect the rate at which USD ISDAFIX was set by making false, misleading, or knowingly inaccurate submissions to Swaps Broker for inclusion in the calculation of the daily rates. During the Relevant Period, Bank of America submitted to Swaps Broker market information—specifically, rates that were supposed to reflect the mean of where the Bank would itself offer and bid a USD denominated swap in the relevant maturity to an acknowledged dealer of good credit—that was used as part of the process for determining the daily USD ISDAFIX rate for the various maturities. However, rather than submitting rates and

spreads that reflected the Bank's honest view of the true costs of entering into a standard USD interest-rate swap in particular maturities, Bank of America knowingly made submissions with the intent to move USD ISDAFIX rates higher or lower in order to benefit the Bank's trading positions. Through its false, misleading, or knowingly inaccurate submissions, Bank of America attempted to manipulate USD ISDAFIX for numerous tenors.

The Bank of America traders' requests for certain rates to be submitted which would benefit their trading positions, and the submissions resulting from those requests, constituted overt acts in furtherance of the traders' intent to affect USD ISDAFIX. By doing so, the traders engaged in acts of attempted manipulation in violation of Section 9(a)(2) of the Act, 7 U.S.C. §13(a)(2) (2012); Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), for conduct occurring prior to August 15, 2011; and Section 6(c)(1), 6(c)(1)(A), 6(c)(3) and 6(d) of the Act, 7 U.S.C. §§ 9(1), 9(3), 13b (2012), and Regulations 180.1(a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018), for conduct occurring on or after August 15, 2011.

2. Respondent Attempted To Manipulate USD ISDAFIX Through Improper Trading Conduct

As evidenced by the communications among certain Bank of America employees and between certain Bank employees and their brokers, as well as certain trading conduct, certain Bank of America traders specifically intended to manipulate USD ISDAFIX by placing bids or offers or executing trades in the moments leading into 11:00 a.m. designed in a manner, including timing and pricing, to increase or decrease the price level of swap spreads and/or U.S. Treasuries at 11:00 a.m., with the intent to affect levels reported on the 19901 screen and USD ISDAFIX fixings. Moreover, the evidence reflects that certain traders intended such trading conduct to affect the fixings in order to benefit Bank of America's trading positions against its counterparties.

The Bank of America traders' bids, offers, and executed trades in the moments leading into 11:00 a.m., which were intended to manipulate USD ISDAFIX, as well as the traders' communications with each other and with their Swaps Broker brokers to plan and execute this trading conduct, constituted overt acts in furtherance of their intent to manipulate USD ISDAFIX. By doing so, the traders engaged in acts of attempted manipulation in violation of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012); Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), for conduct occurring prior to August 15, 2011; and Section 6(c)(1), 6(c)(1)(A), 6(c)(3) and 6(d) of the Act, 7 U.S.C. §§ 9(1), 9(3), 13b (2012), and Regulations 180.1(a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018), for conduct occurring on or after August 15, 2011.

C. Respondent Made False, Misleading, or Knowingly Inaccurate Reports Concerning USD ISDAFIX in Violation of Section 9(a)(2) of the Act

In addition to the prohibition on attempted manipulation contained in Section 9(a)(2) of the Act, that provision also makes it unlawful for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any

commodity in interstate commerce.” 7 U.S.C. § 13(a)(2) (2012); *see also United States v. Brooks*, 681 F.3d 678, 703-05 (5th Cir. 2012) (affirming the district court’s conviction of defendants for false reporting of natural gas trades in violation of the Act and finding that “it is ‘clear beyond a reasonable doubt that a rational jury’ would have found that the Defendants-Appellants had knowledge that their reports affected or tended to affect the price of natural gas”); *United States v. Valencia*, 394 F.3d 352, 354-57 (5th Cir. 2004) (reversing and remanding to the district court and holding that the knowledge requirement of the reporting prong of § 9(a)(2) applies to the false or misleading character of the reports, as well as to delivery and inaccuracy); *CFTC v. Johnson*, 408 F. Supp. 2d 259, 267 (S.D. Tex. 2005) (finding that the facts alleged in the CFTC’s complaint adequately stated a claim against the defendants for the delivery of knowingly inaccurate information).

During the Relevant Period, Bank of America, through electronic and telephonic transmission of information to Swaps Broker, on multiple occasions knowingly delivered or caused to be delivered the Bank’s USD ISDAFIX submissions through the mails or interstate commerce. The Bank’s submissions were also delivered through the mails or interstate commerce through daily dissemination and publication globally, including throughout the United States, of the official published rates for USD ISDAFIX, as determined by averaging the submissions of Bank of America and other panel banks after “topping and tailing.” Data on submissions themselves was also disseminated. Bank of America’s daily USD ISDAFIX submissions contained market information concerning the mean of where the Bank would itself offer and bid a swap in the relevant maturity to an acknowledged dealer of good credit in the swap market absent intent to manipulate USD ISDAFIX. Such market information affected or tended to affect the prices of commodities in interstate commerce, including the daily fixing rates for USD ISDAFIX, as well as the on-exchange interest rate swap futures and other financial instruments which relied upon those rates.

During the Relevant Period, Bank of America’s USD ISDAFIX submissions on multiple occasions constituted false, misleading, or knowingly inaccurate reports because they purported to reflect the Bank’s honest view of the true costs of entering into a standard fixed-for-floating interest rate swap in particular tenors, but in fact on multiple occasions reflected traders’ desire to move USD ISDAFIX higher or lower in order to benefit their positions.

By using these impermissible factors in making the Bank’s USD ISDAFIX submissions and without disclosing that it based its submissions on these impermissible factors, Bank of America conveyed false, misleading, or knowingly inaccurate information that the rates it submitted were based on the prices at which the Bank would offer and bid swaps to an acknowledged dealer of good credit in the swaps market absent intent to manipulate USD ISDAFIX. Moreover, certain Bank of America employees knew that the Bank’s USD ISDAFIX submissions contained false, misleading, or knowingly inaccurate information. By such conduct, Respondent violated Section 9(a)(2) of the Act.

D. Respondent Is Liable for the Acts of Its Agents

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2018), provide that “[t]he act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope

of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust.” Pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, strict liability is imposed on principals for the actions of their agents. *See, e.g., Dohmen-Ramirez & Wellington Advisory, Inc. v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *CFTC v. Byrnes*, 58 F. Supp. 3d 319, 324 (S.D.N.Y. 2014).

Bank of America is liable for the acts, omissions, and failures of any traders, managers, and Submitters who acted as its employees and/or agents in the conduct described above. Accordingly, as set forth above, Respondent violated Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012); Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), for conduct occurring prior to August 15, 2011; and Section 6(c)(1), 6(c)(1)(A), 6(c)(3) and 6(d) of the Act, 7 U.S.C. §§ 9(1), 9(3), 13b (2012), and Regulations 180.1(a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018), for conduct occurring on or after August 15, 2011.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondent violated Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012); Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), for conduct occurring prior to August 15, 2011; and Section 6(c)(1), 6(c)(1)(A), 6(c)(3) and 6(d) of the Act, 7 U.S.C. §§ 9(1), 9(3), 13b (2012), and Regulations 180.1(a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018), for conduct occurring on or after August 15, 2011.

VI.

OFFER OF SETTLEMENT

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

- A. Acknowledges 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 (2012) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2018), 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, tit. II, §§ 201-53, 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;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer; and
- E. Requests, for the reasons set forth in Respondent's letter dated July 19, 2018 ("Request Letter"), that the Commission advise that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the Securities & Exchange Commission ("SEC"), 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order;
- F. 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 Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012); Section 6(c) and 6(d) of the Act, 7 U.S.C. §§ 9, 13b (2006), for conduct occurring prior to August 15, 2011; and Section 6(c)(1), 6(c)(1)(A), 6(c)(3) and 6(d) of the Act, 7 U.S.C. §§ 9(1), 9(3), 13b (2012), and Regulations 180.1 (a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018), for conduct occurring on or after August 15, 2011;
 2. orders Respondent to cease and desist from violating Sections 6(c)(1), 6(c)(1)(A), 6(c)(3), 6(d), and 9(a)(2) of the Act, and Regulations 180.1(a) and 180.2;
 3. orders Respondent to pay a civil monetary penalty in the amount of thirty million U.S. dollars (\$30,000,000) plus post-judgment interest;

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; and
 5. advises that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC should not arise as a consequence of this Order; and
- G. Represents that it has already undertaken certain steps intended to make reasonable efforts to ensure the integrity of interest-rate swap benchmarks, including, but not limited to, the following:
1. Respondent has conducted a global review of risks and best practices relating to its benchmark activities and the policies, procedures, and controls governing its benchmark activities, including USD ISDAFIX and its successor benchmark, and has reaffirmed its prohibition on manipulation and attempted manipulation of benchmark rates specifically (in addition to existing broad prohibitions on market manipulation); and
 2. Respondent has enhanced its policies, procedures, and controls relating to its benchmark activities, including in relation to USD ISDAFIX and its successor benchmark, as follows:
 - a. Enhanced policies and procedures providing additional guidance regarding activities that can affect a benchmark directly or indirectly, including benchmark submissions, and the identification and mitigation of potential conflicts of interest relating to Bank of America's trading in products affected by the relevant benchmark;
 - b. Implementation of recordkeeping requirements for benchmark activities, including the methodologies for establishing submissions, materials utilized in making submissions, and any requests to modify a pre-populated value;
 - c. Enhanced supervisory oversight of personnel that make benchmark submissions;
 - d. Enhanced routine training of all traders, supervisors, and other personnel who are involved in the fixing of any benchmark, and periodic audit of benchmark submissions;
 - e. Measures designed to enhance electronic communications surveillance, including measures designed to enhance the detection of improper communications concerning benchmarks;
 - f. Enhanced monitoring and surveillance systems designed to detect potential manipulation of benchmark rates, including interest-rate swap benchmarks, through trading;

- g. Periodic and annual review of benchmark inventories, including those categorized as submission benchmarks, as well as monthly attestations by trading supervisors regarding compliance with established policies; and
- h. Enhanced overall benchmark control framework and governance, including developing appropriate escalation procedures for both internal and external conduct relating to benchmarks, and mandating periodic review.

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

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 6(c)(1), 6(c)(1)(A), 6(c)(3), 6(d), and 9(a)(2) of the Act, 7 U.S.C. §§ 9(1), 9(1)(A), 9(3), 13b, 13(a)(2) (2012), and Regulations 180.1(a) and 180.2, 17 C.F.R. §§ 180.1(a), 180.2 (2018).
- B. Respondent shall pay a civil monetary penalty of thirty million U.S. dollars (\$30,000,000), within ten (10) days of the date of entry of this Order (the “CMP Obligation”). If the CMP Obligation is not paid in full within ten (10) 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 (2012).

Respondent shall pay the CMP Obligation and any post-judgment interest by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, 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.
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 Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

- C. Respondent and its successors and assigns shall comply with the following undertakings set forth in the Offer:

1. REMEDIATION

As set forth above in Section VI, paragraph G, Respondent represents that it has already undertaken and continues to undertake extensive remedial measures to implement and strengthen its internal controls and procedures relating to the fixing of interest-rate swaps benchmarks and related supervision of its swaps and options desks. With respect to its remediation efforts to the extent not already undertaken, Respondent undertakes that:

- a. The Bank will implement and improve its internal controls and procedures in a manner reasonably designed to ensure the integrity of the fixing of any interest-rate swap benchmark, including measures to identify and address internal or external conflicts of interest;
- b. The Bank's remediation improvements will include internal controls and procedures relating to:
 1. measures designed to enhance the detection and deterrence of improper communications concerning interest-rate swap benchmarks, including the form and manner in which communications may occur;
 2. monitoring systems designed to enhance the detection and deterrence of trading or other conduct potentially intended to manipulate directly or indirectly swap rates, including benchmarks based on interest-rate swaps;
 3. periodic audits, at least annually, of the Bank's participation in the fixing of any benchmark based on interest-rate swaps;
 4. supervision of trading desks that participate in the fixing of any benchmark based on interest-rate swaps;
 5. supervision of trading desk conduct that relates to any interest-rate swap benchmark;

6. routine and on-going training of all traders, supervisors and others who are involved in the fixing of any benchmark based on interest-rate swaps;
 7. routine and on-going training of all trading desk personnel relating to the trading of any product that references a benchmark based on interest-rate swaps;
 8. processes for the periodic but routine review of written and oral communications of any traders, supervisors and others who are involved in the fixing of any benchmark based on interest-rate swaps with the review being documented and documentation being maintained for a period of three years; and
 9. continuing to implement a system for reporting, handling and investigating any suspected misconduct or questionable, unusual or unlawful activity relating to the fixing of any benchmark based on interest-rate swaps with escalation to compliance and legal, and with reporting of material matters to the executive management of the Bank and the Commission, as appropriate; the Bank shall maintain the record basis of the handling of each such matter for a period of three years.
- c. Within 120 days of the entry of this Order, the Bank shall make a report to the Commission, through the Division, concerning its remediation efforts prior to and since the entry of this Order. Within 365 days of the entry of this Order, the Bank shall submit a report to the Commission, through the Division, explaining how it has complied with the undertakings set forth herein. The report shall contain a certification from a representative of the Bank's Executive Management, after consultation with the Bank's chief compliance officer(s), that the Bank has complied with the undertakings set forth above, and that it has established policies, procedures, and controls to satisfy the undertakings set forth in the Order.

2. COOPERATION WITH THE COMMISSION

In this action, and in any investigation or other action instituted by the Commission related to the subject matter of this action, Respondent shall cooperate fully and expeditiously with the Commission, including the Division. As part of such cooperation, Respondent agrees to do the following, for a period of three (3) years from the date of the entry of this Order, or until all related investigations and litigations in which the Commission, including the Division, is

a party, are concluded, including through the appellate review process, whichever period is longer:

- a. Preserve all records relating to the subject matter of this proceeding, including, but not limited to, audio files, electronic mail, other documented communications, and trading records;
- b. Comply fully, promptly, completely, and truthfully with all inquiries and requests for non-privileged information or documents;
- c. Provide authentication of documents and other evidentiary material;
- d. Provide copies of non-privileged documents within the Bank's possession, custody, or control;
- e. Subject to applicable laws and regulations, make best efforts to produce any current (as of the time of the request) officer, director, employee, or agent of the Bank, regardless of the individual's location, and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including, but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and
- f. Subject to applicable laws and regulations, make its best efforts to assist in locating and contacting any prior (as of the time of the request) officer, director, employee, or agent of the Bank.

Respondent also agrees that it will not undertake any act that would limit its ability to cooperate fully with the Commission. The Bank will designate an agent located in the United States of America to receive all requests for information pursuant to these Undertakings, and shall provide notice regarding the identity of such Agent to the Division upon entry of this Order. Should the Bank seek to change the designated agent to receive such requests, notice of such intention shall be given to the Division fourteen (14) days before it occurs. Any person designated to receive such request shall be located in the United States of America.

3. PROHIBITED OR CONFLICTING UNDERTAKINGS

Should the Undertakings herein be prohibited by, or be contrary to, the provisions of any obligations imposed on Respondent by any presently existing, or hereinafter enacted or promulgated laws, rules, regulations, or regulatory mandates, then Respondent shall promptly transmit notice to the Commission

(through the Division) of such prohibition or conflict, and shall meet and confer in good faith with the Commission (through the Division) to reach an agreement regarding possible modifications to the Undertakings herein sufficient to resolve such inconsistent obligations. In the interim, Respondent will abide by the obligations imposed by the laws, rules, regulations, and regulatory mandates. Nothing in these Undertakings shall limit, restrict or narrow any obligations pursuant to the Act or the Commission's Regulations promulgated thereunder, including, but not limited to, Regulations 1.31 and 1.35, 17 C.F.R. §§ 1.31, 1.35 (2018), in effect now or in the future.

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: (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.

5. PARTIAL SATISFACTION

Respondent understands and agrees that any acceptance by the Commission of 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.

- D. Based on the nature of the violations; the findings made, and the sanctions, conditions, and undertakings imposed in the Order; and the facts and representations in the Bank's Request Letter, the Commission advises⁹ that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC, 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order.¹⁰

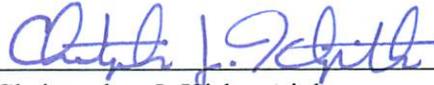
⁹ Rule 506(d)(1)(iii)(B) disqualifies an issuer from relying on the private offering exemptions provided for in Rule 506 if they or certain related parties are "subject to a final order of . . . [*inter alia*] the U.S. Commodity Futures Trading Commission . . . that: . . . [c]onstitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct." Rule 506(d)(2)(iii), however, provides that disqualification "shall not apply" if the CFTC "advises in writing" that disqualification under Rule 506(d)(1) "should not arise as a consequence of such order." See also 17 C.F.R. §§ 262(a)(3)(ii), (b)(3) (parallel provisions under Regulation A); SEC, Exemptions to Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83,494, 83,545 (Nov. 21, 2016) (stating that disqualification under Rule 504 arises "absent a waiver or other exception provided in Rule 506(d)").

¹⁰ In providing this advice, the Commission considered factors similar to those considered by the SEC when it issues waivers of disqualification under Regulation A and Regulation D. The SEC grants waivers where an applicant has

The Commission notes that if the facts are different from those represented, or Bank of America fails to comply with the terms of the Order, the Commission may, in its discretion, revisit its advice that disqualification should not arise. The Commission reserves the right, in its sole discretion, to withdraw or otherwise revoke or further condition its advice under those circumstances.

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 19, 2018

shown “good cause and ... if the [SEC] determines that it is not necessary under the circumstances that an exemption be denied,” §§ 17 C.F.R. 230.262(b)(2), 230.506(d)(2)(ii), based on its analysis of how the identified misconduct bears on the applicant’s fitness to participate in offerings exempted under Regulation A and Regulation D. *See* SEC, Div. of Corp. Fin., *Waivers of Disqualification Under Regulation A and Rules 505 and 506 of Regulation D*, <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>; SEC, Div. of Corp. Fin., *Rule 504 of Regulation D: A Small Entity Compliance Guide for Issuers*, <https://www.sec.gov/divisions/corpfin/guidance/rule504-issuer-small-entity-compliance.html>. The SEC considers the following primary factors in determining whether to grant a waiver request: (i) the nature of the violation and whether it involved the offer or sale of securities; (ii) whether the violation required scienter; (iii) who was responsible for the misconduct; (iv) what was the duration of the misconduct; (v) what remedial steps have been taken; and (vi) the impact on the party seeking a waiver and third parties if a waiver is denied. Respondent’s Request Letter addressed these factors in the context of this Order.

The Commission considers these factors in the context of the markets it regulates, and also takes into account whether it determined that a statutory disqualification under the Act should arise solely based on the misconduct found herein and leading to disqualification under Regulation A and Regulation D. The Commission is guided by waivers granted by the SEC in prior cases involving similar facts and circumstances. *See, e.g., In re JPMorgan Chase Bank, N.A.*, Securities Act Release No. 9993, 2015 WL 9256636 (Dec. 18, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 of Regulation D, where disqualification had been triggered by a CFTC order relating to JPMCB’s failure to adequately disclose certain conflicts of interest to clients); *In re UBS AG*, Securities Act Release No. 9787, 2015 WL 2395516 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506, where disqualification had been triggered by a criminal guilty plea relating to FX benchmark manipulation and noting the entry of parallel CFTC orders); *In re Barclays PLC*, Securities Act Release No. 9786, 2015 WL 2395515 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 where disqualification had been triggered by a CFTC order relating to FX benchmark and ISDAFIX manipulation); *see also, e.g., Piper Jaffray & Co.*, SEC No-Action Letter, 2015 WL 4451053 (July 20, 2015) (SEC no-action letter determining that good cause had been shown that it was not necessary to deny reliance on the exemptions under Regulation A and Rule 506 of Regulation D, where disqualification had been triggered by an SEC order, and applying the same factors to consideration of waiver for both exemptions).