UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10672 / August 16, 2019

SECURITIES EXCHANGE ACT OF 1934
Release No. 86694 / August 16, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19357

In the Matter of

CANTOR FITZGERALD & CO.

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Cantor Fitzgerald & Co. ("Cantor").

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 Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and 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 improper practices by Cantor involving the pre-release of American Depositary Receipts ("ADRs").

2. ADRs are securities that allow U.S. investors to invest in foreign companies without having to purchase shares in foreign markets and allow foreign companies to get increased exposure to U.S. markets. Each ADR represents an ownership interest in a predetermined number of foreign shares.

3. ADR facilities, which provide for the issuance of ADRs, are established by a depositary bank (the "Depositary") pursuant to a deposit agreement ("Deposit Agreement").

4. Typically, 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.[2] 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 rights, title, and interest in those ordinary shares to the Depositary while the pre-release transaction is outstanding. In effect, the Pre-Release Broker or its customer becomes the temporary custodian of the ordinary shares that would otherwise have been delivered to the Custodian.

5. From at least January 2013 through April 2013, Cantor was a Pre-Release Broker that obtained pre-released ADRs directly from a single Depositary pursuant to a Pre-Release Agreement. Contrary to certain provisions in the Pre-Release Agreement and the Deposit Agreements, associated persons on Cantor's securities lending desk regularly obtained pre-released ADRs from the Depositary and loaned them to customers or counterparties (collectively, "Borrowers") without taking reasonable steps to determine whether the requisite number of ordinary shares was owned and custodied by Cantor or its Borrowers. The result of this conduct

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

was the issuance of ADRs that in many instances were not backed by ordinary shares as required by the Deposit Agreements. This conduct violated Section 17(a)(3) of the Securities Act.[3]

6. In addition, from at least July 2012 until May 2014, Cantor received pre-released ADRs from other Pre-Release Brokers when Cantor did not take reasonable steps to assure itself that the pre-released ADRs it received were backed by ordinary shares. Cantor's securities lending personnel understood that in many instances the ADRs they borrowed from certain Pre-Release Brokers were sourced from Depositaries pursuant to Pre-Release Agreements. Having themselves engaged in direct transactions in which Cantor was a Pre-Release Broker, these same individuals were aware of the obligations of the Pre-Release Agreements, and at a minimum should have understood that other Pre-Release Brokers similarly were acting as Pre-Release Brokers while not owning underlying ordinary shares. By engaging in these transactions in the manner described herein, the securities lending personnel violated Section 17(a)(3) of the Securities Act.

7. Cantor also failed to establish and implement effective policies and procedures to reasonably address whether its associated persons on the securities lending desk were engaging in transactions in which pre-released ADRs were appropriately obtained. As a result, Cantor's supervisory policies and procedures were not reasonably designed and implemented to provide effective oversight of associated persons to prevent and detect their violations of Securities Act Section 17(a)(3), and Cantor failed reasonably to supervise its associated persons within the meaning of Section 15(b)(4)(E) of the Exchange Act.

Respondent

8. Cantor is a Delaware corporation with its principal place of business in New York, NY. It has been registered with the Commission as a broker-dealer since 1947.

Background

ADRs and the Pre-Release of ADRs

9. ADRs are negotiable instruments that represent an ownership interest in a specified number of foreign securities that have been deposited with a Depositary. 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.[4]

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[3] 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).

[4] 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

10. 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 Deposit Agreement is between a Depositary and the ADR holders.[5] In either case, the Deposit Agreement describes fees applicable to the ADRs and the party responsible for paying those fees, and 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 form ADR as exhibits.

11. Form F-6 is used to register the offer and sale of ADRs under the Securities Act 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 to the matters here. Typically, when ADRs are issued, a specified number of the ordinary shares represented by the ADR are contemporaneously delivered to the Custodian. In this way, those underlying ordinary shares are in effect removed from the market and the total number of securities in the markets — ADRs plus ordinary shares — is unaffected.

12. 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 simultaneously delivering the corresponding ordinary shares to the Custodian.

13. The traditional rationale for pre-release transactions was to address settlement timing disparities that could delay delivery to the Custodian of recently purchased ordinary shares. In theory, following the traditional rationale, 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.

14. 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.

15. 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,

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of an ordinary share. The ADR-to-ordinary share ratio varies by ADR facility, based on pricing in the foreign and U.S. markets.

[5] 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.

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 the customer on whose behalf the Pre-Release Broker is acting 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.

16. 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 simultaneously deposited with the Custodian when the pre-released ADRs were issued.

17. 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 number of ordinary shares that corresponds 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 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.

Cantor's Pre-Release Practices

18. From at least July 2012 through May 2014, Cantor operated a securities lending desk. The desk generated revenue by lending securities it borrowed or otherwise obtained for more than it paid to borrow or obtain the securities. In borrowing securities, the Cantor securities lending desk either served its customers' settlement needs by borrowing in order to make deliveries of securities the firm did not have in custody, or it conducted a matched book or conduit operation, meaning that the desk earned a spread by borrowing and lending the securities from/to third parties without holding any position on the firm's books.

19. ADRs were among the securities the Cantor securities lending desk sourced for its customers or borrowed in matched book transactions. Cantor obtained its ADRs from a variety of sources, including by borrowing them from custodial banks and larger broker-dealers. In some cases, however, Cantor was unable to borrow the ADRs it needed from a custodial bank or large broker-dealer. In many such cases, Cantor sought to obtain pre-released ADRs from a Depositary or borrow ADRs from a Pre-Release Broker that was sourcing the ADR from a Depositary through a pre-release transaction.

20. Cantor pre-release transactions with the Depositary were governed by a Pre-Release Agreement Cantor entered into with the Depositary ("Depositary A"). As part of the Pre-Release Agreement, Cantor represented that it would comply with the Pre-Release Obligations, including the representation that either Cantor or its customer owned, and held in custody for Depositary A, the number of foreign shares corresponding to the pre-released ADRs it received. Cantor further represented that it would have policies and procedures in place to ensure compliance with these obligations.

21. From January 2013 through April 2013, Cantor engaged in hundreds of pre-release transactions with Depositary A without having adopted adequate policies and procedures. Cantor did not take reasonable steps to comply with the Pre-Release Obligations, such as holding the ordinary shares on behalf of Depositary A, or ascertaining whether its Borrowers did. Instead, Cantor lent the pre-released ADRs to Borrowers in ordinary securities lending transactions that their personnel understood included facilitation of ordinary trade settlement obligations.

22. Under the circumstances, Cantor personnel should have understood that Cantor was acting as a conduit through which a Depositary was issuing ADRs that in many instances were not backed by ordinary shares held by anyone for the benefit of Depositary A.

23. In January 2013, Depositary A requested that Cantor certify in writing its ongoing compliance with the representations in the Pre-Release Agreement ("Certification"). The firm's securities lending personnel relayed the request for the Certification to their supervisor, but it was never executed. Cantor nonetheless continued to engage in pre-release transactions until April 2013, when Cantor ceased its use of the Pre-Release Agreement.

24. In addition to obtaining pre-released ADRs from Depositary A, from at least July 2012 through May 2014, Cantor obtained pre-released ADRs from certain Pre-Release Brokers. The Cantor securities lending personnel who engaged in these transactions understood that these Pre-Release Brokers typically obtained the pre-released ADRs pursuant to their own Pre-Release Agreements with Depositaries. At least one former member of the Cantor securities lending desk also discussed the source of the ADRs with the Pre-Release Brokers on some occasions.

25. Based on their experience in pre-release transactions, including engaging in numerous transactions with Depositary A under the Cantor Pre-Release Agreement, the Cantor securities lending personnel understood the Pre-Release Obligations, which were standard across the industry. The Cantor employees knew, or should have known, that Cantor did not have the underlying shares and therefore was not satisfying the obligations. They also knew, or should have known, that Pre-Release Brokers who lent Cantor ADRs were engaged in matched book, or conduit, lending whose goal was not to hold any position on those firms' books, and should thus have known that the Pre-Release Brokers were not complying with their Pre-Release Obligations.

26. One former member of Cantor's securities lending desk also understood that one of its main sources of pre-released ADRs ("Pre-Release Broker A") informed its counterparties

that Pre-Release Broker A was relying on its counterparties in order to comply with its Pre-Release Obligations.

27. Cantor securities lending personnel also had no basis to believe that any of Cantor's Borrowers were complying with the Pre-Release Obligations. For example, Cantor loaned the pre-released ADRs pursuant to standard master securities loan agreements ("MSLAs"). The MSLAs did not address pre-released ADRs, and did not contain any provisions requiring compliance with any of the Pre-Release Obligations.

28. As a result of these transactions, in many instances, Cantor borrowed pre-released ADRs from Pre-Release Brokers that were not actually backed by ordinary shares held for the benefit of a Depositary in accordance with the Pre-Release Obligations and the terms of the relevant Deposit Agreements.

29. From July 2012 through May 2014, Cantor's net revenues from the securities lending transactions with the Depositary and Pre-Release Brokers described above totaled $359,448.05.

30. Cantor did not have reasonable supervisory policies and procedures in place governing the firm's borrowing of pre-released ADRs from either Depositary A or Pre-Release Brokers.

31. Cantor failed to establish and implement policies and procedures that would be reasonably expected to determine whether its associated persons on the securities lending desk were engaging in transactions in which pre-released ADRs were inappropriately obtained by Cantor, which then made money by lending the ADRs to its Borrowers.

32. Throughout the staff's investigation, Cantor provided analyses at the staff's request and entered into tolling agreements with the Commission.

Violations and Failure Reasonably to Supervise

33. In connection with obtaining pre-released ADRs directly from Depositaries, Respondent and its associated persons 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.

34. Under Section 15(b)(4)(E) of the Exchange Act, broker-dealers are responsible for supervising, with a view to preventing and detecting violations of the federal securities laws, persons subject to their supervision. Cantor was responsible for supervising its securities lending personnel to address whether they were borrowing and lending pre-released ADRs that were not backed by underlying ordinary shares. Cantor failed reasonably to fulfill such supervisory responsibilities within the meaning of Section 15(b)(4)(E) of the Exchange Act because Cantor failed to establish reasonable policies and procedures, and a system for implementing such policies and procedures, that would reasonably be expected to prevent and detect the violations of Section 17(a)(3) of the Securities Act by the associated persons on the securities lending desk described above (including pre-release transactions directly with Depositaries and through other

Pre-Release Broker). If Cantor had developed reasonable policies and procedures and systems to implement those procedures, it is likely that the firm would have prevented and detected the violations of its associated persons on the securities lending desk.

Cantor's Cooperation

35. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondent Cantor's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondent Cantor shall cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act.

B. Respondent Cantor is censured.

C. Cantor shall, within ten (10) days of the entry of this Order, pay disgorgement of $359,448.05, prejudgment interest of $88,463.14, and a civil penalty of $200,000 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 and/or 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 Cantor as a 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.

F. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of $200,000 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.

Vanessa A. Countryman
Secretary