UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86693 / August 16, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19356

In the Matter of

BMO CAPITAL MARKETS CORPORATION,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, PURSUANT TO SECTION 15(b)(4) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), against BMO Capital Markets Corporation ("BMO CMC" or "Respondent").

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 Proceedings, Pursuant to Section 15(b)(4) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("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 BMO CMC's improper practices with respect to securities lending transactions involving pre-released American Depositary Receipts ("ADRs").[2]

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

3. Typically, a Depositary issues ADRs to a market participant that contemporaneously delivers the corresponding number of foreign securities to the Depositary's foreign custodian ("Custodian").[3] 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. 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.

4. From at least January 2012 until approximately December 2014, BMO CMC received pre-released ADRs from Pre-Release Brokers that had been issued by Depositaries where the Pre-Release Brokers had not complied with their obligations under the Pre-Release Agreements, nor had BMO CMC taken reasonable steps to satisfy itself that the Pre-Release Brokers had complied with their obligations under the Pre-Release Agreements. BMO CMC understood that the ADRs that it borrowed from Pre-Release Brokers may have been sourced

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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.

from Depositaries pursuant to Pre-Release Agreements. BMO CMC also understood the beneficial ownership and other representations that Pre-Release Brokers were required to make to Depositaries in order to obtain pre-released ADRs. Respondent also understood the conduit nature of Pre-Release Brokers' securities lending businesses, which under the circumstances should have indicated that the Pre-Release Brokers did not own underlying ordinary shares.

5. BMO CMC's associated persons on its securities lending desk, by obtaining ADRs from Pre-Release Brokers in circumstances where they should have known that such ADRs likely had been pre-released without compliance with the Pre-Release Brokers' obligations under the Pre-Release Agreements, violated Section 17(a)(3) of the Securities Act of 1933 ("Securities Act").[4] BMO CMC's supervisory policies and procedures were not reasonably designed and implemented to provide sufficient oversight of associated persons to prevent and detect their violations of Section 17(a)(3) of the Securities Act. As a result, BMO CMC failed reasonably to supervise its associated persons within the meaning of Section 15(b)(4)(E) of the Exchange Act.

Respondent

6. BMO CMC, part of BMO Financial Group, is a Delaware corporation headquartered in New York. BMO CMC has been registered with the Commission as a broker-dealer since 1985.

Background

ADRs and the Pre-Release of ADRs

7. ADRs are negotiable instruments that represent an ownership interest in a specified number of foreign securities that have been deposited with a Depositary.[5] ADRs may be traded on U.S. stock exchanges or over-the-counter.

8. 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

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[4] 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).

[5] In a more technical sense, ADRs evidence American Depositary Shares, or ADSs, which represent the specific number of underlying securities 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.

(*i.e.*, the sponsor), the Depositary, and ADR holders. If the ADR is unsponsored, the agreement is between the Depositary and the ADR holders.[6] In either case, the Deposit Agreement or ADR describes 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 of ADR as exhibits.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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 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.

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[6] 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.

14. 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 counterparty 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.

15. 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 counterparty 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.

BMO CMC's Practices with Respect to Securities Lending Transactions Involving Pre-Released ADRs

16. From at least January 2012 through December 2014, BMO CMC's securities lending desk borrowed securities from numerous sources, including ADRs from Pre-Release Brokers.

17. BMO CMC borrowed these ADRs pursuant to standard master securities loan agreements ("MSLAs") with Pre-Release Brokers, which did not address pre-released ADRs and did not contain any provisions requiring BMO CMC to satisfy the Pre-Release Obligations.

18. Under the circumstances of the transactions, BMO CMC securities lending personnel should have known not only that they were potentially receiving pre-released ADRs and that the Pre-Release Brokers would not be complying with the Pre-Release Obligations.

19. First, BMO CMC securities lending personnel were aware that the Pre-Release Brokers in these transactions were conduit lenders that routinely sourced securities through pre-release transactions with Depositaries. On several occasions, Pre-Release Brokers explicitly informed BMO CMC that the ADRs were coming from Depositaries. On other occasions, BMO CMC was aware that its United Kingdom affiliate (the "UK Affiliate") had negotiated the terms of pre-release transactions, or discussed the availability of pre-released ADRs, directly with Depositaries and then arranged to obtain the pre-released ADRs via the Pre-Release Brokers.

20. Second, BMO CMC securities lending personnel and their supervisors were aware of the obligations attendant to obtaining pre-released ADRs from a Depositary, including the obligation of the party interfacing with the Depositary to hold the requisite number of ordinary shares while the pre-release transaction was open. During the Relevant Period, BMO CMC's UK Affiliate was a party to a Pre-Release Agreement with a Depositary Bank and employed special procedures designed to comply with the obligation to hold the required number of underlying shares. BMO CMC securities lending personnel and their supervisors were generally aware of the UK Affiliate's Pre-Release Agreement and related procedures.

21. Finally, BMO CMC securities lending personnel should have recognized that Pre-Release Brokers were not complying with the Pre-Release Obligations. In early 2007 one of the Pre-Release Brokers ("Pre-Release Broker A") sent a letter to an individual at a predecessor firm, who would later be a supervisor of the BMO CMC securities lending desk, stating as a general matter that Pre-Release Broker A, when it obtained pre-released ADRs, was relying on its customer owning the underlying ordinary shares to satisfy the Pre-Release Obligations. This letter, involving an entity that would later become a significant source of pre-released ADRs for BMO CMC, also should have raised questions as to whether other similarly situated Pre-Release Brokers were complying with their obligations.

22. In addition, BMO CMC regularly engaged in transactions in advance of dividend record dates that should have cast doubt upon the Pre-Release Brokers' ownership of the ordinary shares. In these transactions, BMO CMC sought to obtain ordinary shares of foreign issuers in order to facilitate various trading strategies by non-US affiliates or customers. These strategies included a tax arbitrage in which the party holding the ordinary share would obtain a larger portion of the dividend than a U.S. party subject to foreign withholding tax. These trades were profitable provided that the cost of borrowing the pre-released ADR was less than the excess dividend obtained by the party holding the ordinary shares over record date.

23. Rather than seeking to borrow the ordinary shares from the Pre-Release Brokers to facilitate this trading strategy, BMO CMC requested and obtained pre-released ADRs, which it then converted into ordinary shares. If the Pre-Released Brokers had access to the ordinary shares, BMO CMC could have avoided the additional complexity and expense of obtaining and converting the pre-released ADRs.

24. BMO CMC did not have supervisory policies and procedures in place specifically governing the firm's potential indirect borrowing of pre-released ADRs from Pre-Release Brokers.

25. BMO CMC failed to establish and implement policies and procedures that would be reasonably expected to detect whether its associated persons on the securities lending desk were engaging in transactions in which pre-released ADRs were inappropriately obtained by Pre-Release Brokers and lent to BMO CMC, and used by BMO CMC for settling customer trades, lending to customers, or proprietary trading strategies.

26. From January 2012 until approximately November 2014, BMO CMC's net revenues from the securities lending transactions with Pre-Release Brokers described above totaled approximately $2.2 million.

27. BMO CMC cooperated with the staff's investigation, including by voluntarily providing factual summaries of relevant information and analyses, and by entering into tolling agreements with the Commission.

Failure Reasonably to Supervise

28. 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. BMO CMC was responsible for supervising its securities lending desk personnel to address whether they were borrowing and lending pre-released ADRs that were not backed by underlying ordinary shares. BMO CMC failed reasonably to fulfill such supervisory responsibilities within the meaning of Section 15(b)(4)(E) of the Exchange Act because BMO CMC 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. If BMO CMC 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.

BMO CMC's Cooperation

29. 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 BMO CMC's Offer.

Accordingly, pursuant to Section 15(b)(4) of the Exchange Act, it is hereby ORDERED that:

A. Respondent is censured.

B. BMO CMC shall, within 30 days of the entry of this Order, pay disgorgement of $2,218,363.04 and prejudgment interest of $546,340.40 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. BMO CMC shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $1,200,000.00 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 BMO CMC 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 $1,200,000.00 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 Countryman
Secretary