Securities Regulation Daily Wrap Up, TOP STORY—S.D.N.Y.: Bank of New York settles FX rigging charges for $714 million, (Mar. 19, 2015)

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The Bank of New York Mellon (BNYM) agreed to pay $714 million to settle a combination of private class action lawsuits, charges brought by the DOJ and NY Attorney General, and SEC and DOL investigations relating to the bank's foreign exchange (FX) practices. The bank admitted to conduct alleged in the civil fraud lawsuits, and agreed to fire an executive and improve information provided to customers. The settlements are subject to approval (*U.S. v. The Bank of New York Mellon*, March 19, 2015).

In a statement, Manhattan U.S. Attorney Preet Bharara said, "The Bank, after three years of litigation, has finally admitted what was always clear from the evidence—contrary to its various representations, including a claim of 'best rates,' the bank in fact gave clients prices at or near the worst interbank rates reported during the trading day. The bank repeatedly deceived its customers and is paying a heavy penalty for it."

False representations about rates. BNYM provides custodial services to public pension funds, states, colleges, charities, and foundations. Customers use the bank's FX services when purchasing or selling foreign securities or converting income from foreign investments to U.S. dollars.

BNYM misrepresented the pricing structure for its FX program. BNYM told customers that its Standing Instruction FX Program was an automated program in which the bank would obtain an FX rate and execute FX trades on the customer's behalf at the "best rates" available. The bank said that it executed Standing Instruction transactions according to "best execution" standards, that obtain the best rates for customers in the prevailing global interbank market, and that the FX service was "free of charge."

In fact, the bank got the best rates for itself, gave its customers worse rates, and kept the difference for itself. The bank monitored FX rate fluctuations throughout the day. If the client was buying foreign currency, the client got a price at or close to the highest reported interbank rate for that day or session. If the client was selling, the client received a price at or close to the lowest reported interbank rate of the day or session. In other words, BNYM bought low from and sold high to its clients. The bank recorded the spread between the rates it gave clients and the interbank market price as "sales margin."

Settlements. The New York case was triggered by a whistleblower under the False Claims Act, which allows a whistleblower to receive a percentage of any recovery made on behalf of the State of New York. BNYM will pay $167.5 million to the State of New York, most of which will be directed to a fund to compensate BNYM customers who were victims of the fraud, including the New York State Deferred Compensation Plan and the State University of New York (SUNY).

The DOJ lawsuit was brought under the Financial Institutional Reform, Recovery and Enforcement Act of 1989 (FIRREA), which allows the United States to recover civil penalties for frauds involving or affecting financial institutions. Under the proposed settlement, BNYM will pay a civil penalty of $167.5 million.

In the DOL's settlement under ERISA, BNYM will pay $14 million to the bank's ERISA plan customers, in addition to about $70 million that will be distributed to ERISA plan customers through the other settlements.

The SEC invoked Sections 31(a) and 34(b) of the Investment Company Act. BNYM will pay $30 million to the SEC under the terms of the proposed settlement, which is subject to finalization, review and approval by the Commission.

The bank also agreed to reform its business practices by providing clients additional pricing information about new standing instruction services BNYM currently offers to clients. In addition, BNYM agreed to terminate the employment of David Nichols, a BNYM Managing Director and defendant in the DOJ action. Nichols admitted and accepted responsibility for conduct alleged in the DOJ complaint.

BNYM will also pay $335 million to resolve private class action lawsuits filed by its customers.

The case is No. 11 Civ. 06969 (LAK).

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