



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

December 17, 2018

Wendy M. Goldberg
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004-2498

Re: In the Matter of The Bank of New York Mellon
**The Bank of New York Mellon Corporation – Waiver Request of Ineligible Issuer Status
under Rule 405 of the Securities Act of 1933**

Dear Ms. Goldberg:

This is in response to your letter dated December 14, 2018, written on behalf of The Bank of New York Mellon Corporation (“BNYMCo.”) and constituting an application for relief from BNYMCo. being considered an “ineligible issuer” under clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act of 1933 (“Securities Act”). BNYMCo. requests relief from being considered an ineligible issuer under Rule 405, due to the entry on December 17, 2018 of a Commission Order (“Order”) pursuant to Section 8A of the Securities Act against The Bank of New York Mellon, a New York state chartered bank (the “Bank”). The Order requires that, among other things, the Bank cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act.

Based on the facts and representations in your letter, and assuming the Bank complies with the Order, we have determined that BNYMCo. has made a showing of good cause under clause (2) of the definition of ineligible issuer in Rule 405 and that BNYMCo. will not be considered an ineligible issuer by reason of the entry of the Order. Accordingly, the relief described above from BNYMCo. being an ineligible issuer under Rule 405 of the Securities Act is hereby granted. Any different facts from those represented or failure to comply with the terms of the Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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December 14, 2018

BY ELECTRONIC MAIL AND FEDERAL EXPRESS

Tim Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N. E.
Washington, DC 20549

Re: In the Matter of The Bank of New York Mellon Corporation

Dear Mr. Henseler:

This letter is submitted on behalf of The Bank of New York Mellon Corporation, a financial holding company under the U.S. Bank Holding Company Act of 1956, as amended, incorporated under the laws of the state of Delaware (“*BNY Mellon*”) to request that the Division of Corporation Finance of the Securities and Exchange Commission (the “*Commission*”), acting pursuant to delegated authority, determine that, for good cause shown, BNY Mellon should not be considered an “ineligible issuer” as defined in Rule 405 under the Securities Act of 1933, as amended (the “*Securities Act*”) as a result of a cease-and-desist order pursuant to Section 8A of the Securities Act entered against The Bank of New York Mellon, a New York-state chartered bank and a wholly-owned subsidiary of BNY Mellon (the “*Bank*”) (the “*Order*”), which is described below.

BNY Mellon manages its business on a consolidated basis through two principal businesses—Investment Services and Investment Management—and engages in lines of business in these principal businesses through the Bank and a number of other subsidiaries.

BACKGROUND

On November 29, 2018, the Bank entered into a settlement with the Commission, which resulted in the Commission issuing the Order. The Bank consented to the entry of the Order without admitting or denying the findings set forth in the Order, except the jurisdiction of the Commission and the subject matter of the proceeding. The Order finds

that the Bank violated Section 17(a)(3) of the Securities Act as a result of the Bank's improper practices involving the pre-release of American Depositary Receipts ("ADRs").¹ The Order finds that, from June 2011 through June 2016, the Bank at times pre-released ADRs to pre-release brokers in circumstances where the Bank was negligent with respect to whether those brokers, or the parties on whose behalf the pre-released ADRs were being obtained, beneficially owned the corresponding number of ordinary shares, as they represented to the Bank in pre-release agreements.² The Order finds that this conduct resulted in the issuance of ADRs that in many instances were not backed by ordinary shares as required by the ADR facility.

Pursuant to the Order, the Bank must (i) cease and desist from committing or causing any violations and any future violations of Section 17(a)(3) of the Securities Act, and (ii) pay disgorgement of \$33,629,232.12 (including pre-judgment interest of \$4,260,199.69) and a civil money penalty of \$20,558,322.70.

¹ ADRs are U.S. securities that represent foreign shares of a foreign company. Typically, when ADRs are issued by a depositary bank, a specified number of ordinary shares represented by the ADRs has been delivered to the depositary's foreign custodian. The practice of "pre-release" involves a depositary issuing ADRs to a recipient before the recipient deposits the corresponding foreign shares, provided that the recipient is party to a pre-release agreement with the depositary that, among other provisions, requires the recipient (or its customer) to beneficially own the ordinary shares represented by the ADRs and to assign all beneficial right, title and interest in those ordinary shares to the depositary while the pre-release transaction is outstanding.

² The DR Division (as defined below) of the Bank handled the issuance (including pre-release) and cancellation of ADRs for the Bank. The Order finds that personnel in the DR Division did not act reasonably in pre-releasing ADRs in light of the circumstances of such transactions, which indicated that pre-release brokers and their counterparties may not have been complying with the pre-release obligations set forth in the deposit and pre-release agreements. Specifically, the Order finds that several of the largest (by share volume) pre-release brokers that obtained pre-released ADRs from the Bank during the relevant period failed in many instances to take reasonable steps to ensure that they or their counterparties complied with the pre-release obligations (the obligation to beneficially own corresponding ordinary shares, assign all beneficial right, title, and interest in the shares to the depositary bank, and not take any action with respect to such shares that is inconsistent with the transfer of beneficial ownership). Those pre-release brokers falsely certified to the Bank that they were complying with these obligations in their pre-release agreements. As a result, many of the ADRs that the Bank provided to the pre-release brokers were not actually backed by ordinary shares held for the benefit of the Bank in accordance with the terms of the relevant agreements.

DISCUSSION

In 2005, the Commission revised the registration, communications, and offering processes under the Securities Act.³ As part of this offering reform, the Commission revised Securities Act Rule 405, creating a new category of issuer, the “well-known seasoned issuer” (or “*WKSI*”), and a new category of offering communication, the “free writing prospectus.” A *WKSI* is able to take advantage of important reforms that have changed the way corporate finance transactions for larger issuers are planned and structured. These reforms include the ability to “file-and-go” (*i.e.*, eligibility for automatically effective shelf registration statements) and “pay-as-you-go” (*i.e.*, the ability to pay filing fees as the issuer sells securities off the shelf). In addition, *WKSIs* are provided with greater flexibility in terms of communications, including the ability to use free writing prospectuses in advance of filing a registration statement.

The Commission also created another category of issuer under Rule 405, the “ineligible issuer.” An ineligible issuer is excluded from the category of “*WKSI*” and is ineligible to make communications by way of free writing prospectuses, except in limited circumstances.⁴ As a result, an ineligible issuer that would otherwise be a *WKSI* does not have access to file-and-go or pay-as-you-go and cannot use certain types of free writing prospectuses.

Securities Act Rule 405 authorizes the Commission to determine, “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”⁵

BNY Mellon understands that the entry of the Order against the Bank, as a subsidiary of BNY Mellon, makes BNY Mellon an ineligible issuer under Rule 405. As an ineligible issuer, BNY Mellon would not be able to qualify as a *WKSI* and, therefore, would not have access to file-and-go and other reforms available to *WKSIs* and would not be eligible to take advantage of all of the free writing prospectus reforms of Rules 164 and 433.

³ See Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005).

⁴ See Securities Act Rules 164(e), 405 & 433, 17 C.F.R. §§ 230.164(e), 230.405 & 230.433.

⁵ Securities Act Rule 405, 17 C.F.R. § 230.405.

REASONS FOR GRANTING A WAIVER

BNY Mellon respectfully requests that the Division of Corporation Finance, acting pursuant to delegated authority, determine that it is not necessary for BNY Mellon to be considered an ineligible issuer as a result of the Order. BNY Mellon believes that the facts support a conclusion that the granting of a waiver would be consistent with the framework outlined in the Revised Statement on Well-Known Seasoned Issuer Waivers published by the Division of Corporation Finance.⁶ Applying the ineligibility provisions to BNY Mellon would be disproportionately and unduly severe, for the reasons described below.

Nature of Violation: Responsibility for the Violation

As noted above, the conduct set forth in the Order involved the Bank providing “pre-released” ADRs from 2011 to 2016. Such conduct, and the violations addressed in the Order, do not (i) pertain to activities undertaken by BNY Mellon in connection with its role as an issuer of securities (or any disclosure related thereto) or its financial reporting or any of its filings with the Commission, or (ii) otherwise involve fraud in connection with BNY Mellon’s offerings of its own securities. Rather, the conduct occurred at the subsidiary level, without involvement by BNY Mellon. The employees primarily responsible for the violations of law that will be the subject of the Order were personnel within the Bank in DR Market Solutions within the Depository Receipts Division (or “*DR Division*”). None of these individuals was responsible for, or had any influence over, the disclosures of BNY Mellon or the Bank, as issuers of securities⁷ or, with respect to BNY Mellon, in connection with any filings with the Commission. There were no findings that the conduct described in the Order occurred at the direction of senior management of BNY Mellon. Moreover, there is no indication that the wrongdoing reflected “a tone at the top” that condoned or chose to ignore the conduct. Rather, BNY Mellon has accepted responsibility for the conduct of the Bank employees as described in the Order.

⁶ SEC, Division of Corporation Finance, Revised Statement on Well-Known Seasoned Issuer Waivers, April 24, 2014, at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>.

⁷ Section 3(a)(2) of the Securities Act exempts from registration under the Securities Act any securities issued by a U.S. bank (which includes a national bank, or any banking institution organized under the laws of any state, territory or the District of Columbia and supervised by a state banking commissioner or similar authority). The Bank issues unregistered securities pursuant to this exemption. A bank holding company is not considered a “bank” for this purpose and is not entitled to the Section 3(a)(2) exemption.

Although the Order finds violations of provisions of Section 17(a)(3) of the Securities Act, these violations did not relate to BNY Mellon's disclosures regarding its own securities or filings with the Commission. The violations are not criminal in nature and are not scienter-based. Moreover, as noted under "Remedial Action" below, the Bank terminated its pre-release facility—*i.e.*, ceased issuing pre-released ADRs under any circumstances—as of June 30, 2016. Importantly, the Order does not otherwise (i) challenge BNY Mellon's disclosures in filings with the Commission, (ii) find that BNY Mellon's disclosure controls and procedures were deficient, (iii) find fraud in connection with securities offerings by BNY Mellon or the Bank, (iv) find that members of the Board of Directors, the Executive Committee, the Risk Committee or the Audit Committee, the Disclosure Committee or the SEC Reporting group of BNY Mellon knew about the violations or (v) find that members of the Board of Directors, the Executive Committee, the Risk Committee or the Audit Committee, the Disclosure Committee or the SEC Reporting group of BNY Mellon ignored any warning signs or "red flags" regarding the violations.

The wrongdoing that is the subject of the Order does not call into question the reliability of the current and future disclosures of BNY Mellon or the Bank as issuers or, with respect to BNY Mellon, in filings with the Commission and was the product of conduct committed primarily by personnel within the Bank's DR Market Solutions group within its DR Division, none of whom was responsible for, or had any influence over, the disclosures of BNY Mellon or the Bank, as issuers of securities or, with respect to BNY Mellon, in connection with any filings with the Commission. As a result, BNY Mellon believes that designation of BNY Mellon as an ineligible issuer is not necessary for the public interest or the protection of existing and potential investors in its securities.

Duration of the Violations

The conduct occurred during a period of approximately five years, from June 2011 through June 2016. However, as mentioned above, the conduct was generally isolated to the actions of the Bank personnel in the DR Market Solutions group, and remedial action, as described below, has been implemented to ensure that the conduct does not reoccur.

Remedial Action

The Bank terminated its pre-release facility as of June 30, 2016. Accordingly, the Bank ceased issuing pre-released ADRs on that date and has not issued pre-released ADRs under any circumstances since. This measure will prevent the recurrence of the conduct that is the subject of the Order.

Prior Relief

BNY Mellon has previously requested and received waivers regarding ineligible issuer status in January 2007,⁸ June 2015⁹ and June 2016.¹⁰ The January 2007 waiver related to conduct in violation of Section 17(a)(2) of the Securities Act by The Bank of New York Company, Inc., a predecessor company to BNY Mellon, in connection with the underwriting, marketing and sale of auction rate securities. The conduct that was the subject of the January 2007 waiver was wholly different than the conduct described in the Order, and none of the conduct related to the predecessor's conduct as an issuer of securities and did not call into question the predecessor's ability to make accurate disclosures in any filings with the Commission. The June 2015 waiver related to a Commission self-reporting program (known as the "MCDC Initiative") intended to address potentially widespread violations involving inaccurate statements in municipal bond offering documents about prior compliance with continuing disclosure obligations for municipal securities. Under the MCDC Initiative, the Commission's Division of Enforcement recommended favorable standardized settlement terms to institutions that self-reported possible violations. The conduct that was the subject of this previous waiver occurred in a different subsidiary and is wholly unrelated to the conduct which is the subject of this waiver request. The June 2016 waiver related to conduct in violation of Investment Company Act sections 34(b) and 31(a) and Rule 31a-1(b) thereunder by the Bank in connection with transactions in the Bank's standing instruction foreign exchange program. The conduct that was the subject of this previous waiver request occurred in a different business at the Bank and is wholly unrelated to the conduct which is the subject of this waiver request. As a result, and taking account of the remediation described above, BNY Mellon does not believe that the prior conduct covered by the previous waiver requests, nor the conduct that is the subject of this waiver request, calls into question the adequacy of BNY Mellon's internal control over financial reporting or its ability to produce reliable disclosure.

Impact on Issuer

The Order is the result of substantial negotiations between the Bank and the Commission and will direct the Bank to pay a substantial monetary penalty and cease and desist from certain conduct. The loss of BNY Mellon's status as a WKSI could, as

⁸ *In the Matter of Bank of New York* (File N. HO-09954) (Jan. 9, 2007), at <https://www.sec.gov/divisions/corpfin/cf-noaction/2007/bankofnewyork010907-405.pdf>.

⁹ *In the Matter of Certain Underwriters Participating in the Municipalities Continuing Disclosure Cooperation Initiative* (June 18, 2015), at <https://www.sec.gov/litigation/admin/2015/33-9848.pdf>.

¹⁰ *In the Matter of The Bank of New York Mellon* (June 13, 2016), at <https://www.sec.gov/divisions/corpfin/cf-noaction/2016/bank-new-york-mellon-corporation-061316-405.pdf>.

described in more detail below, have a significant impact on BNY Mellon's ability to raise capital and conduct its operations, which in turn could potentially harm investors and the market as a whole. Applying ineligible issuer status to BNY Mellon would not be necessary to achieve the purposes of the Order and would be unduly severe and impose a significant burden on BNY Mellon.

WKSI status provides two primary benefits to BNY Mellon: (1) additional flexibility with respect to its Form S-3 when issuing from a shelf registration, and (2) the ability to communicate more freely with investors using free writing prospectuses. BNY Mellon, the ultimate holding company, is a frequent issuer of securities that are registered with the Commission and offered and sold under their current Form S-3 automatic shelf registration statement, which provides an important means of accessing capital and funding for BNY Mellon's global operations. BNY Mellon's operations include helping clients manage and service their financial assets – facilitating liquidity and aiding clients in managing risk in financial transactions. In this capacity, BNY Mellon provides critical infrastructure for the global capital markets, making possible a significant percentage of market transactions worldwide each day.

BNY Mellon regularly relies on its WKSI status to offer securities under its automatic shelf registration statement. For BNY Mellon, the automatic shelf registration process provides a critical means of access to the United States capital markets, which generate essential funding for its operations. Losing its status as a WKSI would impose additional restrictions on BNY Mellon's use of shelf registration statements. Among other things, BNY Mellon's registration statements would be subject to a review period, limiting the flexibility and ability to access the capital markets expeditiously as the need for additional capital and liquidity arises and when market conditions are most advantageous. Further, BNY Mellon would be required to pay all fees upfront at the time of registration and include additional information in its registration statements. All of these consequences would impose additional burdens and costs on BNY Mellon. In addition, if BNY Mellon is considered an ineligible issuer, its ability to communicate with investors using free writing prospectuses would be limited. Free writing prospectuses convey targeted and relevant information to customers in a user-friendly format that is often easier to understand than the typically denser statutory prospectus. The SEC has recognized that investors and the securities markets benefit from the use of free writing prospectuses, which among other things facilitate greater transparency to investors. BNY Mellon used free writing prospectuses containing only a description of the terms of the securities in the offering or the offering itself ("*term sheet FWP*s") in connection with each of its issuances of medium term notes in 2016, 2017 and to date in 2018. Although BNY Mellon typically uses only term sheet FWP, which will continue to be available even if WKSI status is lost, BNY Mellon would lose the flexibility to communicate in other ways with investors and the markets as needed in the future.

BNY Mellon is a frequent issuer of registered securities, offering and selling securities under its automatic shelf registration statements in both one-off transactions and in an ongoing medium-term note program. The automatic shelf registration process provides BNY Mellon a critical means of access to the capital markets in a timely and efficient manner, which is essential for funding the company's business and for maintaining adequate capital and liquidity. Without the granting of a waiver, by the time BNY Mellon is able to launch an offering, the market may no longer be willing to purchase BNY Mellon's securities in the amount or at the price available upon commencement of the offering process, which could negatively impact certain of its lines of business that rely on BNY Mellon's funding. Using its automatic shelf registration statements, BNY Mellon issued approximately \$6.25 billion of debt securities in seven transactions under its medium-term note program in 2016, approximately \$4.75 billion of debt securities in five transactions under its medium-term note program in 2017, and approximately \$4.15 billion of debt securities in six transactions under its medium-term note program to date in 2018. In 2016, BNY Mellon used its automatic shelf registration statement to issue approximately \$1 billion in depositary shares. BNY Mellon also uses an automatic shelf registration statement to issue common stock under its direct stock purchase and dividend reinvestment plans.

Since 2016, BNY Mellon has been involved in approximately \$16.15 billion of offerings using its automatic shelf registration statements. These figures demonstrate the importance of the automatic shelf registration statement to BNY Mellon in meeting its regulatory, capital, funding, and business requirements.

In light of these considerations, subjecting BNY Mellon to ineligible issuer status is not necessary under the circumstances, either in the public interest or for the protection of investors, and good cause exists to determine that BNY Mellon should not be considered an ineligible issuer under Rule 405 as a result of the Order. We respectfully request the Division of Corporation Finance, acting pursuant to delegated authority, to make that determination.

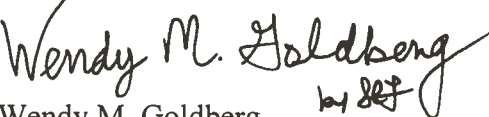
* * *

Tim Henseler, Esq.

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If you have any questions regarding any of the foregoing, please do not hesitate to contact me at goldbergw@sullcrom.com or (212) 558-7915.

Very truly yours,


Wendy M. Goldberg