

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 87302 / October 15, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19586

In the Matter of

DOMENICK MIGLIORATO

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS, PURSUANT TO SECTION
15(b) 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) of the Securities Exchange Act of 1934 (“Exchange Act”), against Domenick Migliorato (“Migliorato” 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 him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Pursuant to Section 15(b) 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 finds¹ that:

Summary

1. These proceedings arise out of Respondent's failure reasonably to supervise personnel on Industrial and Commercial Bank of China Financial Services LLC's ("ICBCFS") securities lending desk with respect to their violations of Section 17(a)(3) of the Securities Act of 1933 ("Securities Act").

2. From at least September 2011 through December 2015, ICBCFS's securities lending desk engaged in improper practices involving the pre-release of American Depositary Receipts ("ADRs"). In particular, associated persons on ICBCFS's securities lending desk had an ongoing practice of obtaining, and then lending, pre-released ADRs from depositary banks ("Depositaries") without taking reasonable steps to determine whether the requisite number of ordinary shares was owned and custodied by the person on whose behalf the pre-released ADRs were being obtained. The result of this conduct was the issuance of ADRs that in many instances were not backed by ordinary shares. This conduct violated Section 17(a)(3) of the Securities Act.²

3. During the period September 2011 through November 2015, Migliorato was directly responsible for supervising ICBCFS's securities lending desk. During the relevant period September 2011 through approximately December 2014, Migliorato failed to take reasonable steps to address whether ICBCFS personnel under his supervision confirmed ownership of the underlying ordinary shares that purportedly backed the ADRs to be pre-released. As a result, under Section 15(b)(6) of the Exchange Act, Migliorato failed reasonably to supervise employees assigned to ICBCFS's securities lending desk, who were subject to his supervision, with a view to preventing and detecting violations of Section 17(a)(3) of the Securities Act by such persons, who committed violations of Section 17(a)(3).

Respondent

4. Domenick Migliorato, age 56, resides in Staten Island, New York. Migliorato was a Managing Director at ICBCFS from July 2011 to November 2015. He holds Series 7, 24, 55, and 63 licenses. He has no disciplinary history. He is currently employed by another broker.

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 On June 14, 2019, the Commission filed a settled Order Instituting Administrative and Cease-and-Desist Proceedings against ICBCFS ("ICBCFS Order"). *Matter of Industrial and Commercial Bank of China Financial Services LLC*, Sec. Act Rel. No. 10647 (June 14, 2019) (finding that ICBCFS violated Section 17(a)(3) of the Securities Act and failed reasonably to supervise its securities lending personnel in connection with its pre-release practices).

Other Relevant Entity

5. ICBCFS, headquartered in New York, is registered with the Commission as a broker-dealer. ICBCFS has been a wholly-owned subsidiary of Industrial and Commercial Bank of China Limited since 2010.

Background

ICBCFS's Pre-Release Transactions

6. From at least September 2011 through December 2015, ICBCFS's securities lending desk had a matched book securities lending operation, whereby ICBCFS obtained securities from a bank or broker-dealer and in turn lent them to another broker-dealer. An important source of ADRs for ICBCFS in its matched book lending business were the Depositories who administer ADR programs and issue ADRs. When obtaining ADRs from Depositories, ICBCFS did so by engaging in "pre-release" transactions.

7. In pre-release transactions, a market participant obtains newly-issued ADRs from a Depository (as opposed to purchasing existing ADRs on the market) without simultaneously delivering the corresponding foreign shares to the Depository's custodian. Pre-release transactions are provided for in deposit agreements ("Deposit Agreements"), which establish and govern ADR facilities, and in pre-release agreements ("Pre-Release Agreements") entered into by Depositories and third parties, typically broker-dealers ("Pre-Release Brokers"). The Pre-Release Agreements, consistent with the Deposit Agreements, typically require the broker-dealer receiving the pre-released ADRs (or its customer on whose behalf the broker-dealer is acting) to own the ordinary shares that evidence the ADRs, and to assign all beneficial right, title, and interest in those ordinary shares to the Depository while the pre-release transaction is outstanding (the "Pre-Release Obligations").

8. Despite the obligations provided for in the Deposit Agreements and Pre-Release Agreements, associated persons on ICBCFS's securities lending desk were negligent in failing to take reasonable steps to determine whether ICBCFS complied with the Pre-Release Obligations. ICBCFS itself did not own ordinary shares in connection with any pre-release transaction with a Depository. Nor did ICBCFS's securities lending desk personnel take reasonable steps to determine whether the counterparty to whom ICBCFS lent the pre-released ADRs (or their customers) owned corresponding ordinary shares.

9. In effect, ICBCFS's securities lending personnel treated the pre-released ADRs as if they were ordinary shares used in typical securities lending transactions. Accordingly, ICBCFS's securities lending personnel routinely obtained pre-released ADRs without taking any steps to comply with the Pre-Release Obligations.

10. Because ICBCFS routinely lent pre-released ADRs to broker-dealers who were looking to fulfill settlement obligations, ICBCFS's lending desk practices resulted in ICBCFS at times facilitating short selling and enabling the settlement of trades with ADRs that were not

actually backed by ordinary shares held for the benefit of the Depository in accordance with the terms of the Pre-Release Agreements.

11. In addition, ICBCFS also routinely obtained pre-released ADRs prior to dividend record dates and lent them to counterparties that were seeking to profit by holding ordinary shares in a tax advantaged situation. This lending activity resulted in ICBCFS at times facilitating profitable tax dividend arbitrage through the issuance and lending of ADRs that were not backed by ordinary shares. That meant that ADR investors were at times holding ADRs not backed by ordinary shares. And because of the economics of the tax dividend arbitrage transactions, ICBCFS securities lending desk personnel should also have known that the borrowers may not have been paying dividend withholding taxes owed to foreign jurisdictions and that ordinary shares were not properly custodied for the benefit of ADR holders.

12. As a result of the conduct described above, and as previously found by the ICBCFS Order, ICBCFS 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. In addition, ICBCFS securities lending personnel violated Section 17(a)(3) of the Securities Act by engaging in the conduct described above.

Domenick Migliorato's Conduct

13. Migliorato joined ICBCFS in July 2011, having been hired to reorganize and supervise the firm's securities lending desk. As part of ICBCFS's securities lending business, Migliorato sought to have the firm obtain pre-released ADRs from Depositories, having been familiar with the pre-release business from his time as a lending desk supervisor at previous broker-dealers. At ICBCFS, Migliorato contacted each of the Depositories in order to obtain Pre-Release Agreements for the firm to execute, he coordinated efforts to establish credit lines to support the business, and he hired personnel to work on and support the securities lending desk.

14. Prior to coming to ICBCFS, Migliorato was already aware of the Pre-Release Obligations. He also understood from his years of experience that, at times when ADRs were difficult to borrow, such as in advance of dividend record dates, Depositories were a significant source of ADRs that could be obtained through pre-release transactions. In his first year at the firm, ICBCFS became one of the major Pre-Release Brokers on the market in ADRs and pre-release transactions constituted a significant source of the firm's revenue.

15. Migliorato supervised personnel on ICBCFS's securities lending desk during the period September 2011 through approximately December 2014, approving all daily securities lending activity, and by approximately January 2013 his responsibilities included final approval of the policies and procedures that applied to that desk.

16. From at least late 2011 through approximately 2014, Migliorato should have known that ICBCFS securities lending personnel under his supervision routinely obtained pre-released ADRs without taking sufficient reasonable steps to comply with the Pre-Release Obligations. For example, Migliorato knew that these ICBCFS securities lending personnel routinely obtained

pre-released ADRs through the Pre-Release Agreements and then lent them to counterparties pursuant to standard lending agreements (Master Securities Lending Agreements, or “MSLAs”) that did not address pre-released ADRs, and did not contain any provisions requiring compliance with any of the Pre-Release Obligations. Consistent with the firm’s use of such MSLAs, he was not aware of anyone at ICBCFS confirming whether counterparties complied with the Pre-Release Obligations. Nor was he aware of any other procedures at ICBCFS addressing compliance with the Pre-Release Agreements.

17. If Migliorato had taken reasonable steps to follow-up with respect to the handling of ICBCFS’s pre-release transactions by securities lending desk personnel, it is likely that he would have prevented and detected ICBCFS’s securities lending desk personnel’s ongoing misconduct.

Failure Reasonably to Supervise

18. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who has failed reasonably to supervise, with a view to preventing and detecting violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision. Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer who have failed reasonably to supervise.

19. As a result of the conduct described above, Respondent Migliorato failed reasonably to supervise members of ICBCFS’ securities lending desk with a view to preventing and detecting their violations of the federal securities laws.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Migliorato Offer.

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

- A. Respondent is censured.
- B. Respondent shall be, and, hereby is, subject to the following limitations on his activities:
 - 1. Respondent shall not act in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.
 - 2. Respondent may apply to act in such a supervisory capacity after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any application to act in such a supervisory capacity will be subject to the applicable laws and regulations governing the reentry process, and permission to act in such a supervisory capacity may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

C. Respondent shall, within 10 days entry of this Order, pay a civil money penalty in the amount of \$150,000 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 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 Domenick Migliorato 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary