UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 32151/ June 13, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17286

In the Matter of **The Bank of New York Mellon** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, 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 Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against The Bank of New York Mellon ("BNYM" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") that 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 in which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it, the subject matter of these proceedings, and the facts set forth in Annex A attached hereto, which are admitted, Respondent consents to the entry of this Order Instituting Administrative And Cease-And-Desist Proceedings Pursuant To Sections 9(b) And 9(f) Of The Investment Company Act Of 1940, 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 that

Summary

From at least 2000 through at least August of 2011, The Bank of New York Mellon ("BNYM") and its predecessors, The Bank of New York ("BNY") and Mellon Bank (collectively, the "Bank"), misled certain of its custodial clients with regard to its execution of their Standing Instruction foreign currency transactions. With regard to foreign currency trades executed through the Bank's Standing Instruction program, the Bank represented on the BNY and BNYM websites and in communications to certain registered investment company ("RIC") customers, among other things, that the Standing Instruction ("SI") program provided foreign exchange ("FX") execution according to "best execution standards," provided "best rates," priced the transactions at levels that "generally reflected the interbank market at the time the trade was executed," and was "free of charge." Contrary to these representations, the Bank priced its clients' Standing Instruction transactions near the end of the trading day or session at or near the worst interbank rates reported during that day or session. This resulted in substantial revenues to BNYM based on the difference between the rates that BNYM assigned to its clients and the rates that it obtained on its own behalf when buying and selling foreign currency in the interbank market.

After the transactions were executed, the Bank prepared and provided its RIC clients with trade confirmations and monthly transaction reports that contained, among other things, the date of each transaction and the rate assigned by the Bank. However, the Bank did not specify the time the transaction was executed, nor did it provide information about how specific rates were assigned. Exchange rates generally fluctuated throughout the day, and the rate assigned by the Bank was within the range of interbank rates for that day. As a result, the omission of the time of the transaction or manner of pricing in FX confirmations and transaction reports was misleading because the documents omitted the information that would have revealed that the Bank's Standing Instruction service did not, in fact, provide FX execution in the manner represented by the Bank.

Respondent

1. The Bank of New York Mellon ("BNYM") is a New York State chartered bank, headquartered in New York, New York, with approximately $1.2 trillion in assets under management and approximately $25 trillion in assets under custody and administration. Certain BNYM deposits are insured by the Federal Deposit Insurance Corporation. BNYM is one of the world's largest custodian banks. Its predecessors are The Bank of New York and Mellon Bank, which merged in 2007.

Facts

A. The Bank's Standing Instruction FX Transactions

2. BNYM acts as a custody and trust bank providing an array of services to clients, including public pension funds, states, colleges, charities and foundations, and RICs. As a custodian bank, BNYM holds and safeguards its clients' financial assets, including stocks, bonds, and currency. In this role, BNYM provides a variety of services to its foreign and domestic clients, such as settlement of the purchase and sale of securities and currency, maintenance services related to currency/cash bank accounts, management services related to cash transactions, and FX services.

3. Many of BNYM's U.S. custodial clients, including a large number of RICs, invest in foreign securities, which must be purchased and sold in the currencies of the countries in which the securities are issued. Accordingly, to trade foreign securities, BNYM's U.S.-based custodial clients must obtain related foreign currencies. In addition, dividends earned on foreign securities are paid in foreign currencies. When BNYM's domestic clients sell those foreign securities or receive dividends in foreign currencies, they may elect to convert the foreign currency back to U.S. dollars. From at least 2000 through 2011, the Bank provided a variety of FX services to its custodial clients, which clients utilized when purchasing or selling foreign securities or repatriating income from foreign investments to U.S. dollars.

4. During the relevant period, one of the FX products that the Bank provided was the Standing Instruction product. When clients selected the Standing Instruction product, in accordance with its terms, the Bank automatically processed and executed certain FX trades without supervision or direct negotiations with clients with respect to pricing. Standing Instruction transactions did not involve any negotiation, and the Bank unilaterally determined the price that the client received for the currency purchase or sale.

5. In its post-merger SI Procedures, BNYM published on its website by 9:00 A.M. a "daily schedule" of the specific buy and sell rates for Standing Instruction transactions. BNYM advised its clients that the actual rates on Standing Instruction transactions would be "not less favorable to the account than the corresponding rates indicated on the Daily Schedule for that day," at rates not worse than these published rates, and that rates would "not deviate by more or less than three (3) percent from the relevant Interbank bid or ask rates."

6. The Bank's Standing Instruction FX service was its most profitable FX product offering. The Bank's sales margins on Standing Instruction FX transactions in currencies not subject to governmental transfer restrictions were generally substantially higher than on negotiated FX transactions in the same currencies, in which the custodial client negotiated directly with an FX trader at BNYM to purchase or sell currency at a particular price.

B. The Bank's Representations to its Custodial Clients

7. During the relevant period, BNY and BNYM represented that its Standing Instruction service was provided according to "best execution" standards. The Bank made these representations on the BNY and BNYM Global Markets websites and in responses to inquiries from certain RIC clients about the Bank's pricing arrangements.

8. From 2006 until late 2009, BNY and BNYM stated on the Global Markets websites that their Standing Instruction FX service provided many benefits to their clients, including "FX execution according to best execution standards."

9. In addition, a standard comment of the Bank in response to questions about FX transactions that was provided to certain RIC clients represented, among other things, that: (a) "[u]nderstanding the fiduciary role of the fund manager, it is our goal to provide best execution for all foreign exchange executed in support of our clients' transactions;" (b) "we price foreign exchange at levels generally reflecting the interbank market at the time the trade is executed by the foreign exchange desk;" and (c) "Best execution encompasses a variety of services designed to maximize the proceeds of each trade… ."

10. Moreover, a Bank "Question and Answer" document used for responding to requests for proposal ("RFPs"), equated best execution with obtaining the best available rates on FX transactions. That material stated that the Bank "ensures best execution [by actively engaging in] making markets and taking positions in numerous currencies so that we can provide the best rates for our clients."

11. The Bank was aware that many market participants equated "best execution" with best price or considered best price to be one of the most important factors in determining best execution. For example, the employee who drafted the Bank's standard definition of "best execution" noted that the language he used came from "industry standard definitions of 'best execution'; namely, to achieve the goal of 'maximizing the value of the client portfolio under the particular circumstances at the time.'" The Bank also sponsored an industry survey in which market participants were asked to define "best execution," and in 2007, half of the respondents defined "best execution" as "price."

12. On their websites, in welcome packages sent to clients, and in responses to requests for proposals, BNY and BNYM also described their Standing Instruction service as "free of charge." Until late 2009, BNY and BNYM described the Standing Instruction service on the Global Markets websites as "[o]perationally simple, free of charge and

integrated with the client's activity on the various securities markets, FX Standing Instruction is designed to help clients minimize risks and costs related to the foreign exchange and concentrate on their core business."

C. How the Bank Priced its Standing Instruction FX Transactions

13. The Bank generated, or received from its customers, Standing Instruction FX trade requests throughout the trading day. The Bank's practice was to aggregate FX transactions for all SI clients and group them by currency pair. Near the end of the trading day or session, the Bank assigned prices to the Standing Instruction FX trade requests it had received from its clients throughout that day or session. During the relevant period, the Bank priced its clients' Standing Instruction transactions at or near the worst interbank rates reported during that day or session, in the way that was most beneficial to the Bank, which obtained more favorable rates on its own behalf when buying and selling foreign currency in the interbank market.

14. After the merger of Mellon Bank and Bank of New York, to determine the price to assign to U.S. clients' FX transactions, BNYM's U.S. transaction desks started with a programmed spreadsheet that was designed to calculate a "suggested" client price at or near the high and low ends of the range of rates available on the interbank market that day or session.

15. In calculating the suggested rate, the spreadsheet took into account two constraints. The first was the daily rate schedule that BNYM published each morning. BNYM's U.S. transaction desks determined the daily buy and sell rate for each currency pair by taking the reported interbank bid or offer at that particular time and applying a spread; the amount of that spread varied over time and by currency. The rate ranges reported on the daily schedule were "worst case scenario" rates; they were set with an eye toward ensuring that BNYM would be able to profit on each Standing Instruction FX transaction absent unusual circumstances. The second general pricing constraint was a restriction that the actual rate assigned to each Standing Instruction transaction would not be greater than three percent from the interbank bid and offer rates as reported by certain reporting services.

16. BNYM's U.S. transaction desks then considered the actual trading range for each currency on the interbank market that day and multiplied each end of the actual range by a modifier to arrive at the "suggested" bid and offer rates. In most cases on any given day, both the daily published buy and sell rates, and the three percent limit, were far broader than the actual range of prices traded on the interbank market. Accordingly, absent unusual circumstances, the spreadsheet simply multiplied the day's highest interbank offer by a modifier number of slightly less than 1 to produce the "suggested" offer rate and multiplied the day's lowest bid by a modifier number of slightly more than 1 to produce the suggested "bid" rate. If the suggested price was one that had occurred during the New York trading day, the suggested price became the price that was assigned to the client, logged in BNYM's records for the client, and reported on client statements. If the suggested rate was not one that had occurred during the New York trading day, BNYM would assign a rate that had occurred during the New York trading day. In this

way, BNYM assigned rates to its clients that were always near the extreme ends, but still within, the daily interbank market range for each currency pair.

D. The Bank's Representations to its Clients About its Standing Instruction Services were Misleading

17. Contrary to the representations set forth above, the Bank priced its clients' Standing Instruction transactions near the end of the trading day at or near the worst rates available on the interbank market that day or session. This generated substantial revenues for BNYM based on the difference between the rates that BNYM assigned to its clients and those that it obtained on its own behalf when buying and selling foreign currency in the interbank market.

E. The Bank Provided its RIC Clients with Misleading Transaction Reports

18. The Bank's contracts with its RIC clients provided that the Bank would furnish the RICs with, among other things, daily trade confirmations and monthly transaction reports of all transfers to and from the accounts. The contracts further provided that the books and records in the possession of the Bank were the property of the RIC and would be prepared and maintained as required by the Investment Company Act of 1940 and the rules thereunder.

19. The daily trade confirmations and monthly transaction reports that the Bank provided to its RIC clients included, among other things, the date of each transaction and the assigned rate. However, the Bank did not specify the time the transaction was executed, nor did it provide information about how it assigned specific rates. Because exchange rates generally fluctuated throughout the day, and the rate assigned by the Bank was within the range of interbank rates for that day, the omission in FX confirmations and transaction reports of the time of execution and pricing methodology was misleading because the documents omitted the information that would have revealed that the Bank's Standing Instruction service did not provide FX execution in the manner represented by the Bank.

20. From April 8, 2008 through August 8, 2011, BNYM obtained Standing Instruction FX revenues as a result of the conduct described herein in the amount of approximately $120 million from its RIC clients.

Violations

21. As a result of the conduct described above, BNYM willfully[1] violated Section 34(b) of the Investment Company Act, which prohibits any person from making

[1] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that

any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to the Act or the keeping of which is required pursuant to Section 31(a), and provides that it shall be unlawful for any person so filing, transmitting, or keeping any such document to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading, and BNYM also caused violations of Section 31(a) of the Investment Company Act and Rule 31a-1(b) thereunder, which require RICs to maintain records containing certain information about their transactions.

IV.

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

Accordingly, pursuant to Section 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent BNYM cease and desist from committing or causing any violations and any future violations of Sections 31(a) and 34(b) of the Investment Company Act and Rule 31a-1(b) thereunder.

B. Respondent shall pay disgorgement, which represents revenue gained from its RIC clients as a result of the conduct described herein, of $120,000,000.00 and prejudgment interest of $13,022,207.00, but that payment of such amount shall be deemed satisfied by its payment of $133,022,207.00 under the terms of the Bank's settlements with the U.S. Department of Justice and the New York Attorney General in *U.S. v. The Bank of New York Mellon*, No. 12-md-02335-LAK-JLC (S.D.N.Y.) and *People v. The Bank of New York Mellon Corp.*, No. 09/114735 (N.Y. Sup. Ct.). If timely payment is not made in accordance with the terms of the settlements in the aforementioned actions, additional interest shall accrue pursuant to SEC Rule of Practice 600, but the payment of such additional interest also shall be deemed satisfied by the payments in these actions to the extent the accrued interest does not exceed the amounts paid by the Bank to the U.S. Department of Justice and the New York Attorney General.

C. Respondent shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of $30,000,000.00 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.

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the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id*. (quoting *Gearhart & Otis, Inc. v. SE*C, 348 F.2d 798, 803 (D.C. Cir. 1965)).

(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 BNYM 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 Kathryn Pyszka, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson Boulevard, Chicago, IL 60604.

D. Respondent shall report to the Commission staff once a year for a three year period the status of its remediation and implementation of compliance measures relating to the Standing Instruction FX trading program offered to its RIC custodial clients discussed in the Order, its Defined Spread and Session Range Standing Instruction FX Trading Programs offered to RIC custodial clients, and any successor Standing Instruction FX Trading Programs offered to RIC custodial clients (hereinafter, the "Programs"). During this three-year period, Respondent shall promptly report (within thirty days) to the Commission any potential misconduct involving the Programs that Respondent discovers or any allegations of such misconduct that Respondent receives. During this three-year period, Respondent shall: (1) conduct an initial review and submit an initial report, and (2) conduct and prepare two annual follow-up reviews and reports, as described below:

(1) Respondent shall submit to the Commission staff, within 180 days of the entry of the Order, a written report setting forth a complete description of its remediation efforts relating to the Programs, including measures taken to date and any additional proposals reasonably designed to improve its remediation and implementation of compliance measures concerning the Programs, and also including procedures for subsequent internal audits to ensure the effectiveness of such remedial efforts and compliance measures (the "Initial Report").

The Initial Report shall be transmitted to Kathryn Pyszka, Assistant Director, Division of Enforcement, United States Securities and Exchange Commission, 175 W. Jackson St., Ste. 900, Chicago, IL 60604. Respondent shall also provide a copy of the Initial Report to its external auditors. Respondent may extend the time period for submission of the Initial Report with prior written approval of the Commission staff.

(2) Respondent shall undertake two annual follow up reviews and submit to Commission staff two follow up reports (the "Follow-up Reports"), incorporating any comments provided by the Commission staff on the previous report, to further report on its remediation and implementation of compliance measures relating to the Programs. In the Follow-up Reports, Respondent shall also provide the Commission staff with its updated assessment of the effectiveness of these policies and procedures.

(3) The first Follow-up Report shall be completed by no later than 365 days after the Initial Report. The second Follow-up Report shall be completed no later than 365 days after the completion of the first Follow-up Report. Each Follow-up Report shall be provided to Kathryn Pyszka at the address listed above. Respondent shall also provide a copy of each Follow-up Report to its external auditors. Respondent may extend the time period for issuance of the Follow-up Reports with prior written approval of the Commission staff.

(4) During this three-year period of review, Respondent shall provide its external auditors with the results of the internal audits of its remedial efforts and compliance measures discussed in paragraph 1 above.

(5) During this three-year period of review, Respondent shall provide the Commission staff with any written reports, responses or recommendations provided to it by Respondent's external auditors in connection with the information provided by Respondent to the external auditors pursuant to paragraph 4 above.

By the Commission.

Brent J. Fields
Secretary

Annex A

Respondent admits the facts set forth below:

1. BNYM's Standing Instruction Service

a. BNYM and its predecessors the Bank of New York and Mellon Bank (collectively, the "Bank") act as a custody and trust bank providing an array of custodial services to clients, including public pension funds, states, colleges, charities and foundations. In providing such custodial services, the Bank is obligated to act in certain circumstances as a fiduciary with respect to those clients.

b. From at least 2000 through 2011, the Bank provided FX products to its custodial clients, which clients utilized when purchasing or selling foreign securities or repatriating income from foreign investments to U.S. dollars. One of the FX products the Bank provided was the Standing Instruction ("SI") product. When clients or their investment managers selected the SI product in accordance with the terms of the SI product, the Bank would automatically process and execute the clients' FX trades without supervision or direct involvement from clients.

2. How BNYM Priced Standing Instruction Foreign Exchange Transactions

a. Throughout a trading day or session (which could be as long as 24 hours), as each custodial client's account generated FX transactions to be executed pursuant to SIs, the Bank's practice was to aggregate those FX transactions for all SI clients and group them by currency pair. Near the end of the trading day or session, the Bank priced those SI FX trade requests it had received throughout that day or session.

b. To determine the price for each SI FX transaction for most currencies, the Bank examined the range of reported interbank rates from the trading day or session and assigned the rate on SI trades as follows: if the client was purchasing foreign currency, the client received a price at or close to the highest reported interbank rate for that day or session (at or near the least favorable interbank price for the client reported during the trading day or session), and if the client was selling foreign currency, the client received a price at or close to the lowest reported interbank rate of the day or session (also at or near the least favorable interbank price for the client reported during the trading day or session).

c. Because SI clients received pricing at or near the high end of the reported interbank range for their currency purchases and at or near the low end of the reported interbank range for their sales, the Bank was generally buying low from, and selling high to, its own clients. The Bank recorded the difference or "spread" between the rates it gave clients and the interbank market price at the time the SI transactions were priced as "sales margin."

3. **<u>BNYM's Representations to Its Clients</u>**

a. The Bank made representations to existing and potential custodial clients concerning the SI product. The Bank made these representations in various written and oral communications with clients, including certain responses to requests for proposals and on the Bank's website.

b. Specifically, the Bank made the following representations to certain existing and potential clients concerning the SI product:

   i. The service provided "benefits" to its clients, including "FX execution according to best execution standards."

   ii. The Bank "ensures best execution on foreign exchange transactions through the following mechanisms: As a major market participant, the Bank is actively engaged in making markets and taking position in numerous currencies so that we can provide the best rates for our clients."

   iii. "Understanding the fiduciary role of the fund manager, it is our goal to provide best execution for all foreign exchange executed in support of our clients' transactions."

   iv. "Best execution encompasses a variety of services designed to maximize the proceeds of each trade, while containing inherent risks and the total cost of processing."

   v. "We price foreign exchange at levels generally reflecting the interbank market at the time the trade is executed by the foreign exchange desk."

   vi. "We also support post-trade analysis ... to assist the fund manager in demonstrating that the execution of each trade was consistent with the goal of maximizing the value of the client portfolio."

   vii. "If the client has standing income exchange instructions with us, our system automates the conversion process based on the current foreign exchange rate input."

   viii. The Bank's "primary focus is on securing the best possible rates for our clients rather than on trading for the bank's own account."

ix. "Operationally simple, free of charge and integrated with the client's activity on the various securities markets, FX standing instruction is designed to help clients minimize risks and costs related to the foreign exchange and concentrate on their core business."

4. <u>BNYM Did Not Provide Its SI Clients with the Best Price</u>

a. Contrary to the representations set forth above, including that BNYM offered "best rates," the Bank gave SI clients prices that were at or near the worst interbank rates reported during the trading day or session.

b. The Bank generally did not disclose its SI FX pricing methodology discussed above to its custodial clients or their investment managers.

c. The Bank was aware that many clients did not fully understand the Bank's pricing methodology for SI transactions.

d. The Bank was aware that many market participants equated "best execution" with best price or considered best price to be one of the most important factors in determining best execution.