

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 98080 / August 8, 2023**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-21556**

**In the Matter of**

**BMO Capital Markets  
Corp.,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE AND CEASE-AND-  
DESIST PROCEEDINGS, PURSUANT TO  
SECTIONS 15(b) AND 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
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 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against BMO Capital Markets Corp. (“Respondent” or “CMC”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”) that the Commission has determined to accept. Respondent admits the facts set forth in Section III below, acknowledges that its conduct violated the federal securities laws, admits the Commission’s jurisdiction over it and the subject matter of these proceedings, and consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, 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<sup>1</sup> that:

**Summary**

1. The federal securities laws impose recordkeeping requirements on broker-dealers to ensure that they responsibly discharge their crucial role in our markets. The Commission has

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<sup>1</sup> 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.

long said that compliance with these requirements is essential to investor protection and the Commission's efforts to further its mandate of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

2. These proceedings arise out of the widespread and longstanding failure of CMC employees throughout CMC, including at senior levels, to adhere to certain of these essential requirements and CMC's own policies. Using their personal devices, these employees communicated both internally and externally by personal text messages, or other text messaging platforms such as WhatsApp ("off-channel communications").

3. From at least January 2019, CMC employees sent and received off-channel communications that related to the business of the broker-dealer operated by CMC. Respondent did not maintain or preserve the substantial majority of these written communications. Respondent's failure was firm-wide and involved employees at various levels of authority. As a result, CMC violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.

4. CMC's supervisors, who were responsible for supervising junior employees, routinely communicated off-channel using their personal devices. In fact, heads of desks responsible for supervising junior employees themselves failed to comply with CMC's policies by communicating using non-CMC approved methods on their personal devices about CMC's broker-dealer business.

5. CMC's widespread failure to implement its policies and procedures that prohibit such communications led to its failure to reasonably supervise its employees within the meaning of Section 15(b)(4)(E) of the Exchange Act.

6. During the time period that CMC failed to maintain and preserve off-channel communications its employees sent and received related to the broker-dealer's business, CMC received and responded to Commission subpoenas for documents and records requests in numerous Commission investigations. As a result, CMC's recordkeeping failures likely impacted the Commission's ability to carry out its regulatory functions and investigate violations of the federal securities laws across these investigations.

7. Commission staff uncovered CMC's misconduct after commencing a risk-based initiative to investigate the use of off-channel and unpreserved communications at broker-dealers. CMC has initiated a review of its recordkeeping failures, and begun a program of remediation. As set forth in the Undertakings below, CMC will retain an independent compliance consultant to review and assess CMC's remedial steps relating to its recordkeeping practices, policies and procedures, related supervisory practices, and employment actions.

### **Respondent**

8. CMC is a Delaware corporation with its principal office in New York, New York and is registered with the Commission as a broker-dealer and an investment adviser. It is a direct subsidiary of BMO Financial Corp., a bank holding company and financial holding company headquartered in Illinois, and incorporated in Delaware.

## **Recordkeeping Requirements under the Exchange Act**

9. Section 17(a)(1) of the Exchange Act authorizes the Commission to issue rules requiring broker-dealers to make and keep for prescribed periods, and furnish copies of, such records as necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Exchange Act.

10. The Commission adopted Rule 17a-4 pursuant to this authority. Rule 17a-4 specifies the manner and length of time that the records created in accordance with other Commission rules, and certain other records produced by broker-dealers, must be maintained and produced promptly to Commission representatives. The rules adopted under Section 17(a)(1) of the Exchange Act, including Rule 17a-4(b)(4), require that broker-dealers preserve in an easily accessible place originals of all communications received and copies of all communications sent relating to the CMC's business as such. These rules impose minimum recordkeeping requirements that are based on standards a prudent broker-dealer should follow in the normal course of business.

11. The Commission previously has stated that these and other recordkeeping requirements "are an integral part of the investor protection function of the Commission, and other securities regulators, in that the preserved records are the primary means of monitoring compliance with applicable securities laws, including antifraud provisions and financial responsibility standards." Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f), 17 C.F.R. Part 241, Exchange Act Rel. No. 44238 (May 1, 2001).

## **CMC's Policies and Procedures**

12. CMC maintained certain policies and procedures designed to ensure the retention of business-related records, including electronic communications, in compliance with the relevant recordkeeping provisions.

13. CMC employees were advised that the use of unapproved electronic communications methods, including on their personal devices, was not permitted, and they should not use personal email, chats or text messaging applications for business purposes, or forward work-related communications to their personal devices.

14. Messages sent through firm-approved communications methods were monitored, subject to review, and archived. Messages sent through unapproved communications methods, such as WhatsApp and other unapproved applications on personal devices, were not monitored, subject to review or archived.

15. CMC policies were designed to address supervisors' supervision of employees' training in CMC's communications policies and adherence to CMC's books and recordkeeping requirements. Supervisory policies notified employees that electronic communications were subject to surveillance by CMC. CMC had procedures for all employees, including supervisors, requiring annual self-attestations of compliance.

16. CMC, however, failed to implement a system of follow-up and review to determine that supervisors were reasonably following CMC's policies. While permitting employees to use approved communications methods, including on personal phones, for business communications, CMC failed to implement sufficient monitoring to assure that its recordkeeping and communications policies were being followed.

### **CMC's Recordkeeping Failures Across Its Brokerage Business**

17. In September 2021, the Commission staff commenced a risk-based initiative to investigate whether broker-dealers were properly retaining business-related messages sent and received on personal devices. CMC cooperated with the investigation by voluntarily interviewing a sampling of senior personnel and gathering and reviewing messages found on the individuals' personal devices. These personnel included senior leadership, such as managing directors and desk heads.

18. The Commission staff's investigation uncovered pervasive off-channel communications at all seniority levels of CMC's broker-dealer. The investigation determined that nearly all broker-dealer personnel sampled had engaged in at least some level of off-channel communications. Overall, these personnel sent and received numerous off-channel communications, involving other CMC personnel, CMC broker-dealer customers, and other participants in the securities industry. Within CMC, significant numbers of managing directors and desk heads participated in off-channel communications.

19. From at least January 2019, CMC personnel sent and received off-channel messages that concerned the broker-dealer's business.

20. For example, from December 1, 2020 to November 19, 2021, a managing director and co-head of a desk exchanged numerous off-channel business-related messages with at least 30 CMC colleagues, with an individual at another financial services firm, and a customer. Within CMC, the individual communicated with heads of desks, managing directors, and junior employees under their supervision.

21. In addition, from December 1, 2020 to November 29, 2021, a managing director in one of CMC's trading desks exchanged numerous off-channel business-related messages with at least 34 CMC colleagues, as well as with personnel at other financial services firms and a customer. Within CMC, the managing director communicated with managing directors and a junior employee under their supervision.

22. Furthermore, from December 4, 2020 to November 29, 2021, a managing director and head of a trading desk exchanged numerous off-channel business-related messages with at least 20 CMC colleagues and at least three customers. Within CMC, the individual communicated with managing directors, directors, and junior employees under their supervision.

**CMC's Failure to Preserve Required Records Potentially  
Compromised and Delayed Commission Matters**

23. Between January 2019 and October 2022, CMC received and responded to Commission subpoenas for documents and records requests in numerous Commission investigations. By failing to maintain and preserve required records relating to its broker-dealer business, CMC likely deprived the Commission of these off-channel communications in various investigations.

**CMC's Violations and Failure to Supervise**

24. As a result of the conduct described above, from at least January 2019 through the date of this Order, Respondent willfully<sup>2</sup> violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder, which require broker-dealers to preserve for at least three years originals of all communications received and copies of all communications sent relating to its business as such.

25. As a result of the conduct described above, Respondent failed reasonably to supervise its employees with a view to preventing or detecting certain of its employees' aiding and abetting violations of Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder, within the meaning of Section 15(b)(4)(E) of the Exchange Act.

**CMC's Remedial Efforts**

26. In determining to accept the Offer, the Commission considered steps promptly undertaken by CMC prior to and after being approached by Commission staff, including providing its personnel with devices making communications through approved channels more readily accessible, and cooperation afforded the Commission staff.

**Undertakings**

27. Prior to this action, Respondent enhanced its policies and procedures, and increased training concerning the use of approved communications methods, including on personal devices, and began implementing significant changes to the technology available to employees. In addition, Respondent has undertaken to:

28. Independent Compliance Consultant.

a. CMC shall retain, within thirty (30) days of the entry of this Order, the services of an independent compliance consultant ("Compliance Consultant") that is not unacceptable to the Commission staff. The Compliance Consultant's compensation and expenses shall be borne exclusively by CMC.

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<sup>2</sup> "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act "means no more than 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)).

b. CMC will oversee the work of the Compliance Consultant.

c. CMC shall provide to the Commission staff, within sixty (60) days of the entry of this Order, a copy of the engagement letter detailing the Compliance Consultant's responsibilities, which shall include a comprehensive compliance review as described below. CMC shall require that, within ninety (90) days of the date of the engagement letter, the Compliance Consultant conduct:

i. A comprehensive review of CMC's supervisory, compliance, and other policies and procedures designed to ensure that CMC's electronic communications, including those found on personal electronic devices, including without limitation, cellular phones ("Personal Devices"), are preserved in accordance with the requirements of the federal securities laws.

ii. A comprehensive review of training conducted by CMC to ensure personnel are complying with the requirements regarding the preservation of electronic communications, including those found on Personal Devices, in accordance with the requirements of the federal securities laws, including by ensuring that CMC personnel certify in writing on a quarterly basis that they are complying with preservation requirements.

iii. An assessment of the surveillance program measures implemented by CMC to ensure compliance, on an ongoing basis, with the requirements found in the federal securities laws to preserve electronic communications, including those found on Personal Devices.

iv. An assessment of the technological solutions that CMC has begun implementing to meet the record retention requirements of the federal securities laws, including an assessment of the likelihood that CMC personnel will use the technological solutions going forward and a review of the measures employed by CMC to track employee usage of new technological solutions.

v. An assessment of the measures used by CMC to prevent the use of unauthorized communications methods for business communications by employees. This assessment should include, but not be limited to, a review of CMC's policies and procedures to ascertain if they provide for any significant technology and/or behavioral restrictions that help prevent the risk of the use of unapproved communications methods on Personal Devices (e.g., trading floor restrictions).

vi. A review of CMC's electronic communications surveillance routines to ensure that electronic communications through approved communications methods found on Personal Devices are incorporated into CMC's overall communications surveillance program.

vii. A comprehensive review of the framework adopted by CMC to address instances of non-compliance by CMC employees with CMC's policies and procedures concerning the use of Personal Devices to communicate about CMC business in the past. This review shall include a survey of how CMC determined which employees failed to comply with CMC policies and procedures, the corrective action carried out, an evaluation of who violated policies and why, what penalties were imposed, and whether penalties were handed out consistently across business lines and seniority levels.

d. CMC shall require that, within forty-five (45) days after completion of the review set forth in sub-paragraphs c.i. through c.vii. above, the Compliance Consultant shall submit a detailed written report of its findings to CMC and to the Commission staff (the "Report"). CMC shall require that the Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the Compliance Consultant's recommendations for changes in or improvements to CMC's policies and procedures, and a summary of the plan for implementing the recommended changes in or improvements to CMC's policies and procedures.

e. CMC shall adopt all recommendations contained in the Report within ninety (90) days of the date of the Report; provided, however, that within forty-five (45) days after the date of Report, CMC shall advise the Compliance Consultant and the Commission staff in writing of any recommendations that CMC considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that CMC considers unduly burdensome, impractical, or inappropriate, CMC need not adopt such recommendation at that time, but shall propose in writing an alternative policy, procedure, or disclosure designed to achieve the same objective or purpose.

f. As to any recommendation concerning CMC's policies or procedures on which CMC and the Compliance Consultant do not agree, CMC and the Compliance Consultant shall attempt in good faith to reach an agreement within sixty (60) days after the date of the Report. Within fifteen (15) days after the conclusion of the discussion and evaluation by CMC and the Compliance Consultant, CMC shall require that the Compliance Consultant inform CMC and the Commission staff in writing of the Compliance Consultant's final determination concerning any recommendation that CMC considers to be unduly burdensome, impractical, or inappropriate. CMC shall abide by the determinations of the Compliance Consultant and, within sixty (60) days after final agreement between CMC and the Compliance Consultant or final determination by the Compliance Consultant, whichever occurs first, CMC shall adopt and implement all of the recommendations that the Compliance Consultant deems appropriate.

g. CMC shall cooperate fully with the Compliance Consultant and shall provide the Compliance Consultant with access to such of CMC's files, books, records, and personnel as are reasonably requested by the Compliance Consultant for review.

h. CMC shall not have the authority to terminate the Compliance Consultant or substitute another compliance consultant for the initial Compliance Consultant, without

the prior written approval of the Commission staff. CMC shall compensate the Compliance Consultant and persons engaged to assist the Compliance Consultant for services rendered under this Order at their reasonable and customary rates.

i. For the period of engagement and for a period of two years from completion of the engagement, Respondent shall not (i) retain the Compliance Consultant for any other professional services outside of the services described in this Order; (ii) enter into any other professional relationship with the Compliance Consultant, including any employment, consultant, attorney-client, auditing or other professional relationship; or (iii) enter, without prior written consent of the Commission staff, into any such professional relationship with any of the Compliance Consultant's present or former affiliates, employers, directors, officers, employees, or agents acting in their capacity as such.

j. The Report by the Compliance Consultant will likely include confidential financial, proprietary, competitive business or commercial information. Public disclosure of the Report could discourage cooperation, impede pending or potential government investigations or undermine the objectives of the reporting requirement. For these reasons, among others, the Report and the contents thereof are intended to remain and shall remain non-public, except (1) pursuant to court order, (2) as agreed to by the parties in writing, (3) to the extent that the Commission determines in its sole discretion that disclosure would be in furtherance of the Commission's discharge of its duties and responsibilities, or (4) is otherwise required by law.

29. One-Year Evaluation. CMC shall require the Compliance Consultant to assess CMC's program for the preservation, as required under the federal securities laws, of electronic communications, including those found on Personal Devices, commencing one year after submitting the Report required by Paragraph 28.d above. CMC shall require this review to evaluate CMC's progress in the areas described in Paragraph 28.c.i-vii above. After this review, CMC shall require the Compliance Consultant to submit a report (the "One Year Report") to CMC and the Commission staff and shall ensure that the One Year Report includes an updated assessment of CMC's policies and procedures with regard to the preservation of electronic communications (including those found on Personal Devices), training, surveillance programs, and technological solutions implemented in the prior year period.

30. Reporting Discipline Imposed. For two years following the entry of this Order, CMC shall notify the Commission staff as follows upon the imposition of any discipline imposed by CMC, including, but not limited to, written warnings, loss of any pay, bonus, or incentive compensation, or the termination of employment, with respect to any employee found to have violated CMC's policies and procedures concerning the preservation of electronic communications, including those found on Personal Devices: at least 48 hours before the filing of a Form U-5, or within ten (10) days of the imposition of other discipline.

31. Internal Audit. In addition to the Compliance Consultant's review and issuance of the One Year Report, CMC will also have its Internal Audit function conduct a separate audit(s) to assess CMC's progress in the areas described in Paragraph 28.c.i-vii above. After completion of



this audit(s), CMC shall ensure that Internal Audit submits a report to CMC and to the Commission staff.

32. Recordkeeping. CMC shall preserve, for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of compliance with these undertakings.

33. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

34. Certification. CMC shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Alison R. Levine, Assistant Regional Director, Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, NY, 10004-2616, or such other person as the Commission staff may request, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

#### IV.

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

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder.
- B. Respondent is censured.
- C. Respondent shall comply with the undertakings enumerated in paragraphs 27 to 34 above.
- D. Respondent shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$25,000,000 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 CMC 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 Thomas P. Smith, Jr., Associate Regional Director, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, New York 10004-2616.

E. 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.

By the Commission.

Vanessa A. Countryman  
Secretary