U.S. SECURITIES AND EXCHANGE COMMISSION

In the Matter of NORTHWESTERN MUTUAL INVESTMENT SERVICES, LLC, NORTHWESTERN MUTUAL INVESTMENT MANAGEMENT COMPANY, LLC, AND MASON STREET ADVISORS, LLC, Respondents.	**File No. 3-21850** **MOTION TO MODIFY ORDERED UNDERTAKINGS IN ADMINISTRATIVE PROCEEDING**

Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC (collectively "Northwestern Mutual") respectfully move pursuant to Rules 200(d)(1), 154, and 100(c) of the Commission's Rules of Practice for an order to modify the undertakings imposed pursuant to Paragraph 7, Paragraphs 32 through 35, Paragraphs 37 through 38, and Section IV(D) of the Commission's order entered in Administrative Proceeding File No. 3-21850, dated February 9, 2024 (the "Order").

In support of its motion, pursuant to Rule 154(a) of the Commission's Rules of Practice, Northwestern Mutual files a brief in support and authorities and related exhibits.

OS Received 03/10/2025

March 10, 2025

Respectfully submitted,

/s/ James G. Lundy
James G. Lundy
Brooke D. Clarkson
Foley & Lardner LLP
321 North Clark Street, Suite 3000
Chicago, IL 60654
(312) 832-4992
jglundy@foley.com
bclarkson@foley.com

Counsel for Respondents Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC

U.S. SECURITIES AND EXCHANGE COMMISSION

In the Matter of NORTHWESTERN MUTUAL INVESTMENT SERVICES, LLC, NORTHWESTERN MUTUAL INVESTMENT MANAGEMENT COMPANY, LLC, AND MASON STREET ADVISORS, LLC, Respondents.	**File No. 3-21850**

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO MODIFY ORDERED UNDERTAKINGS IN ADMINISTRATIVE PROCEEDING

James G. Lundy
Brooke D. Clarkson
Foley & Lardner LLP
321 North Clark Street, Suite 3000
Chicago, IL 60654
(312) 832-4992
jglundy@foley.com
bclarkson@foley.com

Counsel for Respondents Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC

OS Received 03/10/2025

TABLE OF CONTENTS

Page

OS Received 03/10/2025

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Administrative Decisions and Orders

Other Authorities

OS Received 03/10/2025

I. INTRODUCTION

Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC (collectively "Northwestern Mutual") seek the Commission's relief in modifying the undertakings imposed on Northwestern Mutual in an Administrative Proceeding issued on February 9, 2024, in connection with the Commission's off-channel communications initiative.[1] The specific relief sought is to equalize the undertakings imposed on Northwestern Mutual with the undertakings imposed in the January 2025 Administrative Proceedings brought by the Commission against similarly situated firms for equivalent violations and based on materially indistinguishable conduct.[2] In equalizing Northwestern Mutual's materially disparate sanctions, the objectives of the settlement will be preserved without undermining the fundamental notions of fairness.

II. BACKGROUND

On February 9, 2024, the Commission entered Administrative Proceeding File No. 3-21850 (the "Order") against Northwestern Mutual. The Order followed a settlement offer submitted by Northwestern Mutual to the Commission, in which Northwestern Mutual admitted to certain facts, acknowledged that its conduct violated relevant provisions of federal securities laws, and consented to the entry of the Order.

The Order requires Northwestern Mutual to: cease and desist from committing or causing any violations and future violations of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder; cease and desist from committing or causing any violations and future violations of

[1] Northwestern Mutual is not seeking to modify the civil money penalty imposed on it.

[2] To the extent work in connection with the undertakings in the February 9, 2024 order has been performed by the independent compliance consultant, that work should be attributable to internal audit and not need to be reperformed.

Section 204 of the Advisers Act and Rule 204-2 thereunder; and comply with a series of undertakings, including the retention of an independent compliance consultant (the "Ordered Undertakings").[3] The Order also censured Northwestern Mutual and imposed a civil money penalty of $16.5 million. Northwestern Mutual promptly paid its civil money penalty and has maintained diligent compliance with the Order's other sanctions.

The Order closely mirrored past off-channel communications initiative settlements involving firms registered as broker-dealers or dually registered as broker-dealers and investment advisers, as well as the seven other orders issued as part of the initiative on February 9, 2024 (collectively, the "Prior Orders").[4] These Prior Orders and the Order articulated materially indistinguishable conduct and equivalent violations, resulting in the Commission requiring the settling firms to comply with substantially identical undertakings. The Commission continued to enter into settlements as part of the initiative and the orders accompanying those settlements continued to follow the same structure.[5] The Commission's uniform treatment of settling firms was deliberate and was communicated to the settling firms as universal and non-negotiable.

III. ARGUMENTS

A. The Commission's most recent off-channel communications settlements result in significantly disparate sanctions for similarly situated firms.

In January 2025, the Commission entered into settlements against three broker-dealers and a dually registered broker-dealer/investment adviser (the "January 2025 Orders") involving

[3] Northwestern Mutual's compliance with the Ordered Undertakings is mandated by Section IV(D) of the Order.

[4] *See* SEC Press Release No. 2024-18, *Sixteen Firms to Pay More than $81 Million Combined to Settle Charges for Widespread Recordkeeping Failures* (Feb. 9, 2024) and accompanying orders, *available at* https://www.sec.gov/newsroom/press-releases/2024-18.

[5] *See* SEC Press Release No. 2024-98, *Twenty-Six Firms to Pay More Than $390 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures* (Aug. 14, 2024) and accompanying orders, *available at* https://www.sec.gov/newsroom/press-releases/2024-98 and SEC Press Release No. 2024-144, *Eleven Firms to Pay More Than $88 Million Combined to Settle SEC Charges for Widespread Recordkeeping Failures* (Sept. 24, 2024) and accompanying orders, *available at* https://www.sec.gov/newsroom/press-releases/2024-144.

sanctions that significantly deviated from the sanctions previously imposed as part of the off-channel communications initiative, breaking with two years of demanded standardized treatment.[6] Specifically, the Commission eliminated costly and burdensome undertakings and compliance requirements in the January 2025 Orders in two significant ways.

First, the undertakings enumerated by the Commission in the January 2025 Orders are significantly more tailored to the underlying conduct and less onerous than the undertakings enumerated in the Order and the Prior Orders. The January 2025 Orders did not require the settling firms to engage in the following undertakings, as had consistently been required: retain an independent compliance consultant; require the independent compliance consultant to engage in a multiyear review of the firm's recordkeeping practices and policies; prepare multiple reports to be submitted to the Commission staff; and compel firms to prospectively report relevant disciplinary actions promptly to the Commission staff.

Second, the Commission did not order compliance with the undertakings in the January 2025 Orders, as it did in the Order and the Prior Orders, thereby initiating additional obligations and an additional six years of ongoing examination and supervision by FINRA for settling broker-dealers. By ordering compliance with the undertakings, the settlements triggered the requirement for broker-dealers to submit an application for continuing FINRA membership (an

[6] *See* SEC Press Release No. 2025-6, Twelve Firms to Pay More than $63 Million Combined to Settle SEC's Charges for Recordkeeping Failures (Jan. 13, 2025) and accompanying orders, *available at* https://www.sec.gov/newsroom/press-releases/2025-6.

"MC-400A Application"),[7] the approval of which imposed plans of heightened supervision.[8] The plans of heightened supervision include requirements for: costly and burdensome training, disclosures, and recordkeeping, as well as ongoing examination and supervision by FINRA for a period of six years.

Northwestern Mutual is, and will continue to be for six years, subject to significant consequences – both in terms of expenses and resources – that similarly situated firms settling to equivalent violations in the same off-channel communications initiative are not subject to. Furthermore, the Commission's departure from its past uniformity in the January 2025 Orders indicates that it has determined that less costly and burdensome measures are appropriate sanctions for conduct commensurate to that engaged in by similarly situated firms and addressed in the Order and the Prior Orders. There is no discernable justification for the materially disparate sanctions imposed in the Order and the Prior Orders as compared those in the January 2025 Orders. As a result, Northwestern Mutual is seeking to modify the Ordered Undertakings to equalize them with the undertakings in the January 2025 Orders. The relief being sought is narrow and prospective in nature. It would also serve the public interest in that it would strengthen fundamental notions of fairness, avoid arbitrary and capricious outcomes, and not

[7] Willful violations of federal securities laws or failure to reasonably supervise a firm's employees within the meaning of Section 15(b)(4)(E) of the Exchange Act constitute a statutory disqualification under Section 3(a)(39) and Section 15(b)(4)(D) and (E) of that act ("15(b)(4)(D) & (E) Disqualifications"). Firms subject to a statutory disqualification under the Exchange Act must "obtain approval from FINRA to enter or remain in the securities industry." FINRA Regulatory Notice 09-19. For 15(b)(4)(D) & (E) Disqualifications, however, "if [a] sanction is no longer in effect, no [MC-400A] application [is] required," but "if [a] sanction is still in effect, then [an MC-400A] application [is] required." FINRA Regulatory Notice 09-19, Appendix B. FINRA considers ordered undertakings, like those in the Order, to be sanctions that are still in effect, therefore requiring the filing of an MC-400A application. If compliance with undertakings is not ordered by the Commission in an ordering clause of an administrative order, like the January 2025 Orders, then FINRA does not consider the sanctions still in effect and no MC-400A application needs to be submitted.

[8] Pursuant to FINRA Rule 9523(b), "after an [MC-400A] application is filed," continued FINRA membership may be approved, but only "pursuant to a supervisory plan" that imposes additional regulatory requirements on settling firms.

disincentivize prompt engagement and cooperation with the Commission during enforcement initiatives.

B. Commission precedent supports granting narrow relief to modify prospective undertakings when the enforcement scheme evolves to issue less severe undertakings for materially indistinguishable conduct involving similarly situated firms.

When the Commission has considered motions similar to this one in the past, it has followed federal court guidance regarding Fed. R. Civ. P. 60(b) which holds that modifications to final judgements are reserved for "exceptional circumstances"[9] or "compelling circumstances"[10] wherein prospective application of the final judgement, order, or proceeding "is no longer equitable."[11] Commission precedent supports granting narrow requests to modify undertakings—equalizing more costly and burdensome settlement orders consistently made over several years, with less costly and burdensome settlement orders made later in time—as precisely the kind of exceptional and compelling circumstances necessitating relief.[12]

For example, in the early 2000s, the Commission instituted an enforcement initiative targeting improper market-timing and late trading market participants.[13] As with the recent off-

[9] *SEC v. Allaire,* No. 03-cv-4087, 2019 WL 6114484, at *2 (S.D.N.Y. Nov. 18, 2019).

[10] *In the Matter of Gregory Bolan,* Exch. Act Rel. No. 85971, 2019 WL 2324336, at *3 (May 30, 2019) (settlements "should be upheld whenever equitable and policy considerations so permit").

[11] *See Collins v. SEC,* 736 F.3d 521, 525-26 (D.C. Cir. 2013); *see also Lorenzo v. SEC,* 872 F.3d 578, 596 (D.C. Cir. 2017), *aff'd* 587 U.S. 71 (2019); *see generally* 5 U.S.C. § 706(2)(A).

[12] *See, e.g., In the Matter of Millenium Partners et al.,* Rel. No. 34-78364 at 2 (July 19, 2016); *In the Matter of Putnam Investment Management, LLC,* Rel. No. IAA-3600 (May 3, 2013); *In the Matter of Massachusetts Financial Services Co., et al.*, IAA Rel. No. 29858 (Nov. 9, 2011); *In the Matter of Janus Capital Management, LLC,* Rel. No. IAA-3065 (Aug. 5, 2010); and *In the Matter of MDC Holdings, Inc.*, Rel. No. 34-39537 (Jan. 9, 1998).

[13] *See* Sec. & Exch. Comm'n, *Performance and Accountability Report (2004)* at 23–24 (describing numerous enforcement actions that were the result of "risk-targeted sweeps" relating to inappropriate market timing and late trading); Sec. & Exch. Comm'n, *Performance and Accountability Report (2005)* at 7 (describing additional settled actions involving improper market-timing and late trading); Sec. & Exch. Comm'n, *Performance and Accountability Report (2006)* at 9–10 (stating that the Commission "continued to address abuses relating to the market timing of mutual funds" and "brought several notable cases against traders and brokers who carried out market timing schemes to the detriment of mutual fund shareholders").

OS Received 03/10/2025

channel communications initiative, many firms implicated in the market-trading initiative settled with the Commission through administrative enforcement actions in which they agreed to comply with certain universal, prospective undertakings. As the Commission's approach to ordering undertakings evolved over time, however, the firms that had settled during the early parts of that enforcement initiative were subject to more burdensome undertakings relative to the firms that settled later. The same is true for Northwestern Mutual and the firms implicated in the Prior Orders, as compared to the firms implicated in the January 2025 Orders.

In the market-trading initiative, firms that were issued early-in-time and more burdensome undertakings subsequently sought to modify the undertakings to equalize them with the later-in-time and less burdensome undertakings. The Commission granted those requests. For example, in *Millenium Partners*, the Commission granted respondent's motion "to relieve [it] of its ongoing obligations" to comply with certain undertakings, thereby conforming its undertakings with "similar undertakings in other administrative proceedings related to [the same conduct] and other actions."[14]

Just like in *Millenium Partners*, Northwestern Mutual seeks only to modify the prospective application of the Ordered Undertakings. Northwestern Mutual does not seek to vacate the Order or contest the civil money penalty. Instead, Northwestern Mutual seeks simply to modify undertakings that have become "impractical or outdated" in light of recent developments—namely, the issuance of the January 2025 Orders, reflecting the Commission's determination that the Ordered Undertakings are not necessary to remedy equivalent violations for materially indistinguishable conduct by similarly situated firms, ensure prospective

[14] *In the Matter of Millenium Partners et al.*, Rel. No. 34-78364 at 2 (July 19, 2016) (quotation marks and citation omitted).

compliance, protect investors, or vindicate the public interest. Finally, like in *Millenium Partners*, Northwestern Mutual has complied with the relevant Ordered Undertakings and all other sanctions, including payment of the civil money penalty, since the issuance of the Order more than one year ago. Accordingly, the Commission should follow its *Millenium Partners* precedent and grant Northwestern Mutual's motion to modify prospective undertakings in the Order to equalize sanctions across the off-channel communications initiative.

Precedent from federal courts compels the same result. The D.C. Circuit has held that sanctions imposed by the Commission that are "out of line with the agency's decisions in other cases"[15] involving "comparable situations" invite judicial challenges that the Commission's disparate treatment is arbitrary and capricious.[16] A failure by the Commission to conform Northwestern Mutual's sanctions to those issued against similarly situated firms for comparable conduct would violate fundamental notions of fairness and be arbitrary and capricious.[17]

C. Northwestern Mutual presents compelling circumstances under which equitable and policy considerations do not permit issuance of significantly disparate sanctions against similarly situated firms for equivalent violations and materially indistinguishable conduct.

As explained above in connection with relevant Commission precedent, the Commission is authorized to amend its orders and modify undertakings when prospective application of those undertakings is no longer equitable.[18] If a movant "establish[es] that changed circumstances

[15] *Collins v. SEC*, 736 F.3d 521, 525-26 (DC Cir. 2013).

[16] *Lorenzo v. SEC*, 872 F.3d 578, 596 (D.C. Cir. 2017), *aff'd* 587 U.S. 71 (2019).

[17] *See Collins v. SEC*, 736 F.3d 521, 525-26 (D.C. Cir. 2013); *see also Lorenzo v. SEC*, 872 F.3d 578, 596 (D.C. Cir. 2017), *aff'd* 587 U.S. 71 (2019); *see generally* 5 U.S.C. § 706(2)(A).

[18] *See, e.g., In the Matter of Millenium Partners et al.*, Rel. No. 34-78364 (July 19, 2016) (Commission order granting motion to modify undertakings imposed in settled administrative proceeding); *see also In the Matter of F.X.C. Investors Corp. and Francis X. Curzio*, Rel. No. ID-218 (Dec. 9, 2002) ("If Respondents believed that the 1981 censure [imposed in a settled administrative proceeding] was no longer equitable after [an intervening decision], the burden was on them to file a motion to vacate the 1981 sanction."); *see also* 17 C.F.R. § 201.200(d)(1) (authorizing the Commission to amend an order instituting proceeding "at any time" "[u]pon motion by a party"); 17 C.F.R. § 201.154 (authorizing the filing of motions); 17 C.F.R. § 201.100(c) (explaining that, notwithstanding any

warrant relief," it is an abuse of discretion to "refuse[] to modify [the order] in light of such changes."[19] And while modifications of a settlement are reserved only for "compelling circumstances," as settlements "should be upheld whenever equitable and policy considerations so permit,"[20] equitable and policy considerations do not permit issuance of significantly disparate sanctions against similarly situated firms for equivalent violations and materially indistinguishable conduct, particularly when the matters are part of the same initiative and it is represented that the sanctions are universal and non-negotiable.

First, the Ordered Undertakings imposed on Northwestern Mutual are needlessly burdensome. Remedial sanctions should be tailored to remedy relevant violations considering the facts and circumstances[21] and should be no more burdensome than are necessary to remedy the violations.[22] The remedial sanctions ordered by the Commission against Northwestern Mutual, however, have caused and will continue to cause Northwestern Mutual to incur greater costs and regulatory obligations than similarly situated firms subject to the January 2025 Orders, despite the fact that the Commission's departure from the uniform undertakings in the January 2025 Orders demonstrate precisely that it views more tailored undertakings exist to remedy the

particular provision of the Commission's Rules of Practice, the Commission may take action that "would serve the interests of justice and not result in prejudice to the parties to the proceeding").

[19] *Hornes v. Flores*, 557 U.S. 433, 447 (2009) (discussing Fed. R. Civ. P. 60(b)(5)).

[20] *In the Matter of Gregory Bolan,* Exch. Act Rel. No. 85971, 2019 WL 2324336, at *3 (May 30, 2019).

[21] *See* Section 15(b)(4) of the Exchange Act (stating that remedial sanctions must be in the public interest); *In the Matter of Shawn K. Dicken,* Rel. No. 34-89526 at 1 (Aug. 12, 2020) (Commission order) ("When determining whether remedial action . . . is in the public interest under Exchange Act Section 15(b), the Commission must consider the question with reference to the underlying facts and circumstances of the case.").

[22] *See McCarthy v. SEC,* 406 F.3d 179, 189–90 (2d Cir. 2005) (vacating purportedly remedial sanction because the "facts in the record that suggest the sanction may be excessive and punitive"); *Arthur Lipper Corp. v. SEC,* 547 F.2d 171, 184 (2d Cir. 1976) (Friendly, J.) (vacating purportedly remedial sanction that was "too severe" and "unnecessary" in the circumstances).

violations. Failure to grant Northwestern Mutual's requested modification, therefore, would be against equitable and policy considerations.

Second, the less costly and burdensome undertakings enumerated in the January 2025 Orders indicate that the undertakings that Northwestern Mutual seeks to modify are not necessary to protect investors or support the public interest. The conduct and violations underlying the January 2025 Orders are indistinguishable from the conduct and violations underlying the Order and the Prior Orders. Nonetheless, the January 2025 Orders do not contain the Ordered Undertakings. Because the Commission has determined that the undertakings enumerated in the January 2025 Orders are sufficient to protect investors and support the public interest in enforcement of the off-channel communications initiative, the Order should be modified to equalize the Ordered Undertakings with the January 2025 Orders undertakings.

Failure by the Commission to do so would constitute an abuse of discretion as the Ordered Undertakings are no longer equitable, are needlessly burdensome, and have been proven unnecessary to protect investors or support the public interest. As a result, the Commission should grant Northwestern Mutual's motion for relief requesting narrow equalizing of the undertakings imposed on it with the undertakings enumerated in the January 2025 Orders.

OS Received 03/10/2025

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Northwestern Mutual's motion to modify the Ordered Undertakings.

March 10, 2025

Respectfully submitted,

/s/ James G. Lundy
James G. Lundy
Brooke D. Clarkson
Foley & Lardner LLP
321 North Clark Street, Suite 3000
Chicago, IL 60654
(312) 832-4992
jglundy@foley.com
bclarkson@foley.com

Counsel for Respondents Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC

OS Received 03/10/2025

CERTIFICATE OF SERVICE

Pursuant to Commission Rules of Practice 150 and 151, I certify that on March 10, 2025, I filed this document using the eFAP system, and that a true and correct copy was served the following persons via electronic mail.:

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
APfilings@sec.gov

Amy S. Cotter, Esq.
Securities and Exchange Commission
Enforcement Division
Chicago Regional Office
175 W. Jackson Blvd., Ste. 1450
Chicago, IL 60604
Cottera@sec.gov

/s/ James G. Lundy
James G. Lundy
Brooke D. Clarkson
Foley & Lardner LLP
321 North Clark Street, Suite 3000
Chicago, IL 60654
(312) 832-4992
jglundy@foley.com
bclarkson@foley.com

Counsel for Respondents Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Commission Rule of Practice 151(e), I certify that on March 10, 2025, I have omitted any sensitive personal information, as required by Commission Rule of Practice 151(e)(3) from this filing.

/s/ James G. Lundy
James G. Lundy
Brooke D. Clarkson
Foley & Lardner LLP
321 North Clark Street, Suite 3000
Chicago, IL 60654
(312) 832-4992
jglundy@foley.com
bclarkson@foley.com

Counsel for Respondents Northwestern Mutual Investment Services, LLC, Northwestern Mutual Investment Management Company, LLC, and Mason Street Advisors, LLC

OS Received 03/10/2025

U.S. SECURITIES AND EXCHANGE COMMISSION

In the Matter of NORTHWESTERN MUTUAL INVESTMENT SERVICES, LLC, NORTHWESTERN MUTUAL INVESTMENT MANAGEMENT COMPANY, LLC, AND MASON STREET ADVISORS, LLC, Respondents.	**File No. 3-21850**

INDEX OF ATTACHMENTS

Attachment	**Description**
A	Northwestern Mutual's Proposed Amended Order
B	Redline between the Proposed Amended Order (Exhibit A) and the Order dated February 9, 2024