

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72922 / August 26, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3905 / August 26, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16038

In the Matter of

BRIAN SCOTT ZWERNER,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
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”) and Section 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) against Brian Scott Zwerner (“Zwerner” 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, Respondent admits the Commission’s jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2. below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds that:

1. From approximately July 1998 until approximately October 2002, Zwerner was employed as a dual officer of Banc of America Securities LLC (“BAS”) and Bank of America, N.A. (“BANA”) (collectively referred to as “BofA”). BAS, now known as Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger, was a Delaware limited liability corporation with its principal place of business in New York, New York, and was registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act and as an investment adviser pursuant to Section 203(c) of the Advisers Act.¹ BANA is a federally-chartered commercial bank with its principal place of business in Charlotte, North Carolina. During the relevant time period, Zwerner worked in BANA’s Chicago, Illinois office and was the Manager of BofA’s Municipal Derivatives Trading Desk, where his duties included calculating profitability and hedging interest rate risk for investment agreements and other municipal finance contracts sold by members of BofA’s Municipal Reinvestment and Risk Management Group. Zwerner, age 41, is a resident of Atlanta, Georgia.

2. On March 30, 2011, Zwerner pled guilty to one count of conspiracy to make false entries in bank records related to marketing profits for investment agreements and other municipal finance contracts in violation of Title 18, United States Code, Section 371, before the United States District Court for the Southern District of New York, in United States v. Brian Scott Zwerner, Criminal No. 1:11-CR-293-VM.

3. The information to which Zwerner pled guilty charged, among other things, that from at least as early as January 1999 until at least May 2002, Zwerner and others unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States of America, namely, to violate Title 18, United States Code, Section 1005 in violation of Title 18, United States Code, Section 371. It was a part and an object of the conspiracy that Zwerner and others, being officers, directors, agents or employees of a certain financial institution that is a national banking association, chartered and examined by the Comptroller of the Currency and whose deposits are insured by the Federal Deposit Insurance Corporation, would and did cause to be made, false entries in the books, reports, and statements of such bank, company, branch, agency, or organization for the purpose of deceiving and with the intent to deceive officers of such bank, while knowing that the entry or entries were false, in violation of Title 18, United States Code, Section 1005. For the purposes of effectuating the aforesaid conspiracy, Zwerner and others did those things which they conspired to do, including, among other things: (a) agreeing to misstate marketing profits on trade tickets for certain investment agreements or other municipal finance contracts; (b) understating marketing profits on trade tickets for certain investment agreements or other municipal finance contracts so that money could be held back and accumulated in an off-the-books account known as the “kitty”; (c) understating marketing profits on trade tickets for certain investment agreements or other municipal finance contracts so that money could be held back and accumulated in the kitty in order to pay kickbacks, disguised as fees to compensate brokers for purportedly brokering financial transactions between the bank and other entities. In reality, the

¹ On November 1, 2010, BAS was merged into Merrill Lynch, Pierce, Fenner & Smith Incorporated, an indirect wholly-owned subsidiary of Bank of America Corporation, which is registered with the Commission as a broker-dealer.

bank paid these kickbacks to brokers for controlling and manipulating the competitive bidding process for investment agreements and other municipal finance contracts to ensure that the bank won certain of the bids; (d) overstating marketing profits on trade tickets for investment agreements and other municipal finance contracts to make those agreements and contracts appear to the bank's officers to be more profitable than they actually were; (e) allowing misstated marketing profits to be incorporated into a computerized sales tracking and reporting database, known as STARS; and (f) deceiving certain of the bank's officers as to the true results of the municipal derivatives marketing desk. In connection with his plea agreement, Zwerner admitted that he conspired to make false entries in bank records.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Zwerner be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry 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.

By the Commission.

Jill M. Peterson
Assistant Secretary