

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 53709 / April 24, 2006

ADMINISTRATIVE PROCEEDING
File No. 3-12269

In the Matter of

THE BANK OF NEW YORK,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against The Bank of New York (“Respondent” or “BNY”).¹

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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-

¹ Respondent has also consented to the entry of a final judgment in the United States District Court for the Southern District of New York ordering the payment of a civil penalty for the violations described in this Order.

and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

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

Nature of the Proceedings

1. This matter arises from BNY’s failure as a transfer agent to exercise reasonable care to ascertain the correct addresses of lost securityholders. Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder require transfer agents to use reasonable care in searching for securityholders who are deemed “lost” after correspondence sent to them is returned as undeliverable. Beginning in 1998 and continuing through September 2004, BNY failed to classify certain securityholders as lost despite the return of undeliverable correspondence. In addition, coding errors affecting BNY’s system used for compiling lists of securityholders eligible for mandatory searches prevented BNY’s system from capturing certain securityholders that BNY had classified as lost. These failures caused BNY to omit thousands of securityholders from the required searches and caused approximately \$11.5 million in securityholder assets to escheat to the states. In addition, other securityholders whom BNY omitted from the mandatory searches were required to pay third parties approximately \$743,112 in unnecessary fees to recover their lost assets.

Respondent

2. The Bank of New York is a bank providing securities and banking services, and is registered with the Board of Governors of the Federal Reserve System (“Federal Reserve”) as a bank transfer agent.² BNY’s issuer-services business segment includes its stock transfer division, which acts as the transfer agent for approximately 1,900 publicly traded companies with over 16 million securityholder accounts. BNY’s principal offices are located in New York, New York.

Facts

3. Rule 17Ad-17 requires transfer agents to exercise “reasonable care” to ascertain current addresses of “lost securityholders.” Lost securityholders are those to whom the transfer agent has sent correspondence that the postal service has returned as undeliverable. Under the Rule, in exercising reasonable care, the transfer agent must perform two electronic database searches at specified intervals (subject to certain exceptions). The Rule also sets forth requirements for the scope and coverage of the databases. Transfer agents may not, in performing these two mandatory searches, use any method that results in a charge to the securityholder. However, if the two searches are unsuccessful, the Rule does not restrict the methods that the transfer agent may use or the fees it may charge securityholders if it elects to perform subsequent,

² Although the Federal Reserve is BNY’s appropriate regulatory agency, the Commission has authority, pursuant to Section 17A(d)(3)(B) of the Exchange Act, to enforce a bank transfer agent’s compliance with Section 17A of the Exchange Act and the transfer agent rules promulgated thereunder.

or “deep,” searches for securityholders not located in the two mandatory searches. Transfer agents may hire a vendor to perform both the Rule-mandated searches and the deep searches.

4. BNY identified lost securityholders by electronically culling its master securityholder files based upon an entry into the system of a “lost” code indicating that the post office had returned mail as undeliverable. BNY then provided a list of lost securityholders to a private search firm hired to perform the two searches mandated by Rule 17Ad-17 under the Exchange Act.

5. Several of BNY’s issuer clients also directly engaged the same private search firm to perform deep searches. BNY provided the search firm with lists of lost securityholders for those searches. The search firm did not charge either BNY or the issuers for this service, but collected its fees from securityholders it located in deep searches. In exchange for a fee, the search firm updated the transfer agent’s records with the new address, and, at the direction of the securityholder, either obtained a new stock certificate for the securityholder or sold the security.

6. From January 1998 to September 2004, BNY’s mailroom practices resulted in the improper exclusion of thousands of securityholders from searches required by Rule 17Ad-17. BNY classified as lost only some, but not all, securityholders whose mail had been returned as undeliverable. Specifically, BNY failed to classify as lost approximately 14,159 securityholders and never performed any searches for those securityholders. BNY escheated approximately \$11.5 million in assets belonging to those securityholders pursuant to state law.

7. In addition, from January 1998 to September 2004, BNY’s program used to identify and compile lists of lost securityholders eligible for Rule 17Ad-17 searches contained two coding errors that resulted in BNY’s failure to perform the Rule-mandated searches for thousands of securityholders. The first coding error caused the program to exclude lost securityholders who did not own the last issue of a security of an issuer with multiple issues. Therefore, if a securityholder owned shares in the first issue of a security, but sold shares in the last issue, BNY’s computer program did not capture that securityholder. The second coding error caused the system to fail to capture lost securityholders who no longer owned shares, but continued to own unclaimed property, such as a dividend check. As a result of the two coding errors, BNY did not include certain lost securityholders on the lists provided to the search firm, resulting in its failure to perform the two mandatory searches.

8. Many of the securityholders BNY classified as lost, but for whom BNY did not conduct the two mandatory searches, were subjected to deep searches and many paid fees to recover their lost assets. The system BNY used to compile the deep search list of lost securityholders did not have the coding errors that affected the program used to compile the Rule 17Ad-17 search list. Consequently, the lost securityholders that BNY improperly omitted from the Rule 17Ad-17 search list were subsequently captured during the compilation of the deep search list.

9. From January 1998 to September 2004, BNY subjected approximately 1,101 securityholders to deep searches even though it had not performed the two searches required by

Rule 17Ad-17. Approximately 250 of those securityholders then paid a search firm aggregated fees totaling \$743,112 for recovery of lost assets.

10. Upon discovering the programming errors and flawed mailroom practices in September 2004, BNY implemented corrections and enhanced its procedures.

Violations

11. As a result of the conduct described above, BNY violated Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder, which (1) require every recordkeeping transfer agent whose master securityholder file includes accounts of lost securityholders to exercise reasonable care to ascertain the correct addresses of such securityholder and, in exercising reasonable care to ascertain for its master securityholder file such lost securityholders' current addresses, to conduct two database searches using at least one information database service; and (2) prohibit a transfer agent from using a search method or service to establish contact with lost securityholders that results in a charge to a lost securityholder prior to completing the two database searches using at least one information database service.

BNY's Remedial Efforts

12. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

Undertakings

13. BNY undertakes the following:

a. BNY shall retain, within 45 days from the date of entry of the Order, the services of an Independent Consultant who is not unacceptable to the Commission's staff. BNY shall require the Independent Consultant to perform all of the services and tasks as described below. BNY shall exclusively bear all costs, including compensation and expenses, associated with the retention and performance of the Independent Consultant.

b. BNY shall retain and shall require the Independent Consultant to conduct a comprehensive review of the policies and procedures related to: (i) BNY's securityholder searches, including searches made pursuant to Rule 17Ad-17 under the Exchange Act, deep searches, pre-escheatment searches and post-reorganization searches; and (ii) reconciliation of accounts in the handling of issuer reorganizations to ensure that out of proof, out of balance and other record breaks are promptly and accurately resolved. BNY shall retain the Independent Consultant to recommend policies and procedures to ensure compliance with applicable statutory and regulatory requirements in these areas.

c. BNY shall, within 60 days from the date of entry of the Order, provide to the Independent Consultant a list or lists of securityholders who either: (i) paid fees from January 1, 1998 through September 8, 2004 to a vendor to recover a lost asset, but for whom BNY failed to

perform searches required by Rule 17Ad-17 (“Payer Securityholders”); or (ii) owned assets escheated to the states by BNY, but whom BNY improperly failed to classify as lost under the meaning of Rule 17Ad-17 from January 1, 1998 through September 16, 2004, and for whom BNY improperly failed to perform searches pursuant to Rule 17Ad-17 prior to escheatment (“Escheat Securityholders”). The list or lists must include, at a minimum, the securityholders’ names and last-known contact information, or the names and contact information for the securityholders’ heirs or assignees known to BNY, the identity of the asset, the amount, if any, paid by the securityholder to a vendor, and the date of escheatment, if applicable. For Escheat Securityholders, information included on the list or lists shall be gathered from or be a result of database searches using databases that comply with Rule 17Ad-17 and performed by or on behalf of BNY since BNY’s discovery of its failure to perform searches for those securityholders as required by Rule 17Ad-17. If any Securityholder is deceased, BNY shall direct the Independent Consultant to perform reasonable tasks necessary to locate the securityholder’s heirs or assignees.

d. Within 120 days of the date of entry of the Order, BNY shall offer: (i) Payer Securityholders repayment from BNY of monies paid to a vendor for recovery of an asset; and (ii) Escheat Securityholders payment for the value of assets escheated by BNY (the “Settlement Plan”).

e. As part of the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, submit to the Commission’s staff for review sample letters in plain English addressed to Payer Securityholders: (i) offering Payer Securityholders, their heirs or assignees, the opportunity to make a claim for repayment of fees paid to BNY’s search firm for recovery of the securityholder’s assets; (ii) specifying the amount due from BNY to the Payer Securityholder, their heirs or assignees; and (iii) explaining the reasons that the Payer Securityholder is entitled to repayment. Such letters may include other information that may assist the Payer Securityholder in recognizing the legitimacy of BNY’s offer, and may include details regarding any rights of subrogation to BNY related to the facts described herein. The letter shall not be unacceptable to the Independent Consultant and the Commission’s staff.

f. As part of the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, submit to the Commission’s staff for review sample letters in plain English: (i) offering Escheat Securityholders, their heirs or assignees, the opportunity to make a claim to recover the greater of (a) the value of the Escheat Securityholders’ asset at the time of its improper escheatment to the states by BNY, the dollar amount to be specified according to each particular asset; or (b) the value of the Escheat Securityholders’ asset as of the date of the letter, the dollar amount to be specified according to each particular asset; (ii) explaining the reasons that the Escheat Securityholder is entitled to recover the value of the escheated asset; (iii) stating that the Escheat Securityholder is entitled to all accrued dividends since BNY’s last contact with the Escheat Securityholder; and (iv) stating that the Escheat Securityholder should consult with a tax advisor to determine the federal, state, or local tax consequences associated with such compensation. Such letters may include other information that may assist the Escheat Securityholder in recognizing the legitimacy of BNY’s offer, and may include details regarding BNY’s rights of subrogation and release from any claims against BNY related to the facts

described herein. The letter shall not be unacceptable to the Independent Consultant and the Commission's staff.

g. To implement the Settlement Plan, BNY shall, within 90 days from the date of entry of the Order, develop a plan not unacceptable to the Independent Consultant or to the Commission's staff to establish and administer a fund from which it will draw monies necessary to compensate securityholders as specified under the Settlement Plan. The plan to establish and administer the fund shall specify, at a minimum: (i) the fund's location, (ii) the identity of individuals with access to the fund; (iii) the method for funding the fund; (iv) safeguards for appropriate use and oversight of the fund; and (v) payment processes. BNY shall, pursuant to the terms of the plan, establish the fund within 120 days from the date of entry of the Order. Any monies remaining in the fund shall not revert back to BNY until the Independent Consultant has executed a sworn certification and provided such certification to the staff that BNY has satisfied the terms of the Order and made all reasonable efforts to locate and compensate securityholders due such compensation from BNY as specified in the Order.

h. In the event that any Escheat Securityholder elects to recover the asset rather than receive compensation from BNY, BNY shall provide to the Escheat Securityholder the identity of the asset, the date of escheatment, the state to which the asset escheated, and any other information that the Escheat Securityholder may reasonably require or request to assist in the recovery of the asset. BNY shall provide all reasonable assistance to the Escheat Securityholder for recovery of the asset, but shall not be required to recover the asset on behalf of the Escheat Securityholder and shall not be required to pay any fees associated with the Escheat Securityholder's efforts to recover the asset.

i. The Settlement Plan shall not be unacceptable to the Independent Consultant and the Commission's staff.

j. BNY shall fully complete execution of the Settlement Plan (*i.e.*, make the payments to Payer Securityholders and Escheat Securityholders in accordance with the offer described in paragraph 13.d) within 360 days from the date of entry of the Order.

k. BNY shall require the Independent Consultant to prepare and submit to the Commission's staff, within 240 days from the date entry of the Order, a report estimating: (i) the number of Payer and Escheat Securityholders entitled to compensation under the Settlement Plan; and (ii) the dollar amount expected to be paid by BNY to Payer and Escheat Securityholders. BNY also shall require the Independent Consultant to prepare and submit to the Commission's staff, within 30 days after complete execution of the Settlement Plan: (i) a report that includes: (a) a detailed description of the efforts made to locate Payer and Escheat Securityholders; (b) the number of Payer and Escheat Securityholders located as a result of implementation of the Settlement Plan; and (c) the number of Payer and Escheat Securityholders who responded to communications sent to them as part of the Settlement Plan; and (ii) a sworn certification detailing the dollar amount paid by BNY to Payer and Escheat Securityholders as a result of implementation of the Settlement Plan.

l. BNY shall further retain and shall require the Independent Consultant to prepare and, within 120 days from the date of entry of the Order, submit to BNY and the Commission's staff an Initial Report. The Initial Report shall address, at a minimum: (i) the adequacy of BNY's policies and procedures regarding lost securityholder searches; (ii) the adequacy of the Settlement Plan, with a goal toward compensating securityholders in the manner detailed above in paragraphs 13(d), 13(e), 13(f), 13(g) and 13(h); and (iii) the adequacy of BNY's policies and procedures related to reconciliation of its issuer reorganization discrepancies.

m. Within 150 days from the date of entry of the Order, BNY shall in writing advise the Independent Consultant and the Commission's staff of the recommendations from the Initial Report that it is adopting and the recommendations that it considers to be unnecessary or inappropriate. With respect to any recommendation that BNY considers unnecessary or inappropriate, BNY shall explain why the objective or purpose of such recommendation is unnecessary or inappropriate and provide in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.

n. With respect to any recommendation with which BNY and the Independent Consultant do not agree, BNY shall attempt in good faith to reach an agreement with the Independent Consultant within 180 days from the date of entry of the Order. In the event the Independent Consultant and BNY are unable to agree on an alternative proposal, BNY shall abide by the recommendation of the Independent Consultant.

o. BNY shall further retain and shall require the Independent Consultant to complete the aforementioned review and submit a written Final Report to BNY and to the Commission's staff within 240 days from the date of entry of the Order. The Final Report must recite the efforts the Independent Consultant undertook to review: (i) the adequacy of BNY's policies and procedures regarding lost securityholder searches; (ii) the adequacy of procedures to administer the Settlement Plan and the completeness of the implementation of the Settlement Plan; and (iii) the adequacy of BNY's policies and procedures regarding reconciliation of discrepancies resulting from issuer reorganizations. The Final Report shall also set forth in detail the Independent Consultant's recommendations and a reasonable time period(s), not to exceed 300 days from the date of entry of the Order, for BNY to implement its recommendations. The Final Report must also describe how BNY proposes to implement those recommendations within the time period(s) set forth in the Final Report.

p. BNY shall take all necessary and appropriate steps to adopt and implement all recommendations and proposals contained in the Independent Consultant's Final Report.

q. To ensure the independence of the Independent Consultant, BNY: (i) shall not have the authority to terminate the Independent Consultant, without the prior written approval of the Commission's staff; (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates; and (iii) shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client or any other doctrine or

privilege to prevent the Independent Consultant from transmitting any information, reports or documents to the Commission or the Commission's staff.

r. BNY shall require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with BNY, or any of its present or former affiliates, directors, officers, employees, and agents acting in their capacity as such. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Philadelphia District Office of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with BNY, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

s. BNY shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with prompt access to BNY's books, records and personnel as the Independent Consultant reasonably deems necessary or appropriate in fulfilling any function or completing any task described in these undertakings.

t. For good cause shown, and upon receipt of a timely application from the Independent Consultant or BNY, the Commission's staff may extend or modify any of the procedural dates set forth above. Good cause shall include an inability to comply with any of the above deadlines for reasons not within BNY's control.

In determining whether to accept the Offer, the Commission has considered these undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in BNY's Offer.

Accordingly, it is hereby ORDERED that BNY cease and desist from committing or causing any violations and any future violations of Section 17A(d) of the Exchange Act and Rule 17Ad-17 thereunder.

By the Commission.

Nancy M. Morris
Secretary