

THE NASDAQ STOCK MARKET LLC
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2021.05.318

TO: The Nasdaq Stock Market, LLC
Nasdaq Enforcement Department

RE: BofA Securities, Inc., Respondent
Broker-Dealer
CRD No. 283942

Pursuant to Rule 9216 of The Nasdaq Stock Market LLC (“Nasdaq”) Code of Procedure, BofA Securities, Inc. (the “Firm” or “Respondent”) submits this Letter of Acceptance, Waiver and Consent (“AWC”) for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, Nasdaq will not bring any future actions against the Firm alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. The Firm hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of Nasdaq, or to which Nasdaq is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by Nasdaq:

BACKGROUND AND RELEVANT DISCIPLINARY HISTORY

The Firm has been a Nasdaq member since October 2018, and its registration remains in effect. Before May 2019, the Firm’s institutional and retail broker-dealer business was conducted by Merrill Lynch, Pierce, Fenner & Smith Incorporated (“MLPFS”), CRD No. 7691. MLPFS has been a Nasdaq member since July 2006, and its registration remains in effect. In May 2019, MLPFS reorganized into two separate entities, MLPFS and BofA Securities, Inc. (“BofAS”). The legacy institutional sales and trading business of MLPFS, including its assets and liabilities, transitioned to BofAS in that reorganization.

The Firm has no relevant disciplinary history.

SUMMARY

The Nasdaq Investigations and Enforcement Team (the “staff”) reviewed the Firm’s compliance with Nasdaq rules requiring members to input the correct capacity codes on equity orders entered into exchange systems between March 2014 and May 2020 (the “Review Period”). The entry of inaccurate capacity codes causes the audit trail to be inaccurate, which can impact surveillance patterns and adversely affect self-regulatory

organizations' ("SROs") ability to surveil for conduct that may violate the SROs' rules and the federal securities laws.

As a result of its review, the staff determined that the Firm input the incorrect capacity code on several billion equity orders it entered into multiple exchanges, including over 265,303,613 agency orders it input into the Nasdaq system with a principal capacity.

In addition, the Firm's had no supervisory system, and no written supervisory procedures ("WSPs"), to achieve compliance with respect to the requirements to enter accurate capacity codes.

Based on this review, the Firm violated Nasdaq Rules 4611(a)(6), 3010 and 2010A (for conduct occurring before December 6, 2019) and Nasdaq Rule General 9, Section 20(a) and General 9, Section 1(a) (for conduct on or after December 6, 2019).

FACTS AND VIOLATIVE CONDUCT

1. Pursuant to Nasdaq Rule 4611(a)(6), now Nasdaq Equity 2, Section 3(a)(6), Nasdaq market participants are required to "input accurate information into the System, including, but not limited to, whether the member acted in a principal, agent, or riskless principal capacity."¹
2. Nasdaq Rule 2010A, now Nasdaq Rule General 9, Section 1(a), provides that, "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."²
3. During the Review Period, the Firm and its predecessor input 265,303,613 orders into the Nasdaq system with the "Principal" capacity code when they should have been marked with the "Agency" capacity code. This occurred because, during the Review Period, the Firm used three platforms for certain broker-dealer and institutional clients to send directed order flow that did not change the capacity codes on orders from those clients from "principal" (reflecting the clients' capacity) to "agency" (reflecting the Firm's capacity) before those orders reached an exchange or other market center.
4. The conduct in paragraph 3 constitutes separate and distinct violations of Nasdaq Rule 4611(a)(6) and Nasdaq Rule 2010A (for conduct before December 6, 2019) and Nasdaq General 9 Section 1(a) (for conduct on or after December 6, 2019).
5. Nasdaq Rule 3010, now Nasdaq Rule General 9, Section 20(a), provides that, "Each member shall establish and maintain a system to supervise the activities of each registered

¹ Nasdaq Rule Equity 2, Section 3 superseded Nasdaq Rule 4611 on November 23, 2020, after the Review Period.

² Nasdaq Rule General 9 Section 1(a) superseded Nasdaq Rule 2010A on December 6, 2019.

representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable Nasdaq rules.”³

6. During the Review Period, the Firm and its predecessor did not establish or maintain any supervisory system or written supervisory procedures to achieve compliance with Nasdaq Rule 4611(a)(6)’s requirement that Nasdaq market participants input accurate capacity codes. Accordingly, the Firm’s supervisory system, including its WSPs, did not provide for supervision reasonably designed to achieve compliance with respect to Nasdaq Rule 4611(a)(6).
7. The conduct described in paragraph 6 constitutes violations of Nasdaq Rules 3010 and 2010A (for conduct prior to December 6, 2019), and Nasdaq Rule General 9, Sections 20(a) and 1(a) (for conduct on or after December 6, 2019).

B. The Firm also consents to the imposition of the following sanctions:

1. A censure;
2. A total fine of \$385,000.⁴

Respondent agrees to pay the monetary sanction(s) in accordance with its executed Election of Payment Form.

Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

The sanctions imposed herein shall be effective on a date set by Nasdaq Enforcement Department staff.

³ Nasdaq Rule General 9 Section 20(a) superseded Nasdaq Rule 3010 on December 6, 2019.

⁴ Cboe BZX Exchange, Inc. (“Cboe”), New York Stock Exchange LLC (“NYSE”), and NYSE Arca Inc. (“NYSE Arca”) conducted parallel investigations to this matter. BofA Securities, Inc. consents to a fine payable to each of Cboe, NYSE, and NYSE Arca, totaling \$2,750,000.

II.

WAIVER OF PROCEDURAL RIGHTS

The Firm specifically and voluntarily waives the following rights granted under Nasdaq's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the Firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the Nasdaq Review Council and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, the Firm specifically and voluntarily waives any right to claim bias or prejudice of the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

The Firm further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

The Firm understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the Nasdaq Enforcement Department and the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs ("ODA"), pursuant to Nasdaq Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the Firm; and
- C. If accepted:
 - 1. This AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by Nasdaq or any other regulator against the Firm;
 - 2. Nasdaq may release this AWC or make a public announcement concerning this agreement and the subject matter thereof in accordance with Nasdaq Rule 8310 and IM-8310-3; and
 - 3. The Firm may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. The Firm may not take any position in any proceeding brought by or on behalf of Nasdaq, or to which Nasdaq is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects the Firm's right to take legal or factual positions in litigation or other legal proceedings in which Nasdaq is not a party.
- D. The Firm may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. The Firm understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by Nasdaq, nor does it reflect the views of Nasdaq or its staff.

The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that it has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

November 9, 2022
Date

BofA Securities, Inc.
Respondent

By: J. David Montague

Name: J. David Montague

Title: Associate General Counsel

Reviewed by:

Elizabeth J. Hogan

Elizabeth J. Hogan
Counsel for Respondent
McGuireWoods
888 16th Street N.W.
Suite 500
Black Lives Matter Plaza
Washington, DC 20006

Accepted by The Nasdaq Stock Market:

Date

Jack Macken
Senior Enforcement Counsel
Department of Enforcement

Signed on behalf of The Nasdaq Stock
Market, by delegated authority from the
Director of ODA

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