BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated with FINRA	Notice Pursuant to Rule 19h-1 Securities Exchange Act of 1934 SD-2056 Date: December 6, 2017

I. Introduction

On February 26, 2015, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("the "Firm") submitted a Membership Continuance Application ("MC-400A" or "the Application") to FINRA's Department of Registration and Disclosure. The Application seeks to permit the Firm, a FINRA member subject to a statutory disqualification, to continue its membership with FINRA. A hearing was not held in this matter. Rather, pursuant to FINRA Rule 9523(a), FINRA's Department of Member Regulation ("Member Regulation") recommends that the Chairperson of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council, approve the Firm's continued membership with FINRA pursuant to the terms and conditions set forth below.

For the reasons explained below, we approve the Application.

II. The Statutorily Disqualifying Event

The Firm is subject to a statutory disqualification pursuant to Section 15(b)(4)(C) of the Securities Exchange Act of 1934 ("Exchange Act") as a result of a final judgment entered against the Firm on November 25, 2014 (the "Final Judgment"), by the U.S. District Court for the Western District of North Carolina (the "Court") that permanently enjoined the Firm from violating Sections 5(b)(1) and 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act").[1]

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[1] Exchange Act Section 3(a)(39)(F), incorporating by reference Exchange Act Section 15(b)(4)(C), provides that a member firm is subject to statutory disqualification if it is enjoined from, among other things, engaging in any conduct or practice as a broker-dealer or in connection with the purchase or sale of any security.

The Final Judgment resulted from a complaint filed by the SEC against Bank of America, N.A., its wholly owned subsidiary, Banc of America Mortgage Securities, Inc. ("BOAMS"), and its affiliate, then Banc of America Securities LLC ("BAS"), now the Firm (collectively, the "Bank of America Entities").[2] The SEC alleged that the Bank of America Entities made material misrepresentations and omissions in connection with the sale of residential mortgage-backed securities ("RMBS"). Specifically, the complaint alleged that the Bank of America Entities violated Securities Act Sections 17(a)(2) and 17(a)(3) by failing to disclose in their public filings and in loan tapes[3] they provided to investors and ratings agencies: (i) the disproportionate concentration of wholesale loans underlying the RMBS at issue as compared to prior offerings; and (ii) known risks associated with the high concentration of wholesale loans, including higher likelihood that the loans would be subject to material underwriting errors, be subject to prepayment, become severely delinquent, or fail early in the life of the loan. The complaint further alleged that the Bank of America Entities failed to disclose the material characteristics of the pool of loans underlying the RMBS at issue. Finally, the complaint alleged that BOAMS and BAS violated Securities Act Section 5(b)(1) by failing to file with the SEC certain loan tapes that it provided only to select investors.

Without admitting or denying the allegations, the Firm consented to the Final Judgment. In addition to permanently enjoining the Firm, the Final Judgment ordered that the Firm, jointly and severally with the other Bank of America Entities, disgorge $109,220,000 (plus $6,620,000 in prejudgment interest) and imposed a $109,220,000 civil penalty upon the Firm (jointly and severally with the other Bank of America Entities), which were deemed by the Court to be paid in full. The SEC did not follow up with further administrative action, nor did it require the Firm to engage in any undertakings with respect to its business.

III. Background Information

A. The Firm

The Firm has been a FINRA member since 1937 and is based in New York City. In the Application, the Firm represents that it employs 38,462 persons. Of these, 36,630 are registered representatives, 6,120 of whom are also registered principals. The Application further states that the Firm has 3,001 branch offices, 902 of which are Offices of Supervisory Jurisdiction ("OSJs").

B. Recent Routine Examinations

The most recent cycle examination of the Firm began in April 2015 and concluded in August 2016. The examination resulted in referrals to FINRA's Department of Enforcement

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2 The Firm was named in the complaint as a successor-in-interest by merger to BAS.

3 Loan tapes are documents that provide key characteristics of the underlying mortgages which comprise RMBS.

("Enforcement") for exceptions relating to consistency of pricing between securities held in the Firm's proprietary accounts and its customer accounts, supervisory and books and records deficiencies for margin accounts, procedures addressing short inventory positions, failing to execute recall instructions for stock loans with an affiliate, and improperly allocating fail-to-deliver positions under Reg SHO Rule 204.

FINRA's 2014 cycle examination, a Financial/Operational, Alternative Net Capital, Sales Practice and Municipal examination, resulted in a referral to Enforcement for an exception relating to the Firm's compliance with Municipal Securities Rulemaking Board ("MSRB") Rules, and a Cautionary Action for exceptions relating to inadequate supervision and supervisory systems required for short inventory positions in municipal securities, monitoring and ensuring consistency of pricing between securities held in the Firm's inventory versus retail client accounts, and identifying and responding to regulatory changes.

C. Recent Regulatory Actions

Since March 2015, the Firm has been subject to regulatory actions by FINRA, federal regulators, state securities commissions, and other self-regulatory organizations.[4]

During that time, the Firm resolved seven FINRA matters via Letters of Acceptance, Waiver and Consent ("AWC") addressing the following matters: failing to use reasonable diligence to ascertain the best inter-dealer market in non-convertible preferred securities so that the resultant price to the Firm's customers was as favorable as possible under prevailing market conditions, reporting violations, books and records violations, failing to disclose certain information in customer confirmations, and failing to establish and maintain adequate supervisory systems and written supervisory procedures ("WSPs") regarding these matters; failing to establish and maintain adequate supervisory systems and WSPs reasonably designed to ensure the suitability of certain securities, including municipal bonds and closed-end funds, and to achieve compliance with certain federal securities laws and regulations and FINRA rules concerning securities-based loans by non-broker-dealers; systemic issues relating to trade reporting, FINRA's Order Audit Trail System ("OATS") reporting, books and records, and supervision; issuing materially misleading offering materials in connection with the sale of structured notes; transacting in municipal securities and corporate bonds with its customers at aggregate prices that were not fair and reasonable and failing to use reasonable diligence to ascertain the best inter-dealer market in corporate bonds so that the resultant price to its customers was as favorable as possible under prevailing market conditions; failing to submit required reports to OATS; and failing to fingerprint associated persons, adequately screen non-registered persons for statutory disqualification, and to create required documents relating to fingerprinting and screening of certain of its associated persons. The Firm, among other things, was censured in connection with each AWC and ordered to pay fines ranging from $100,000 to $6.25 million (and restitution totaling approximately $904,000), all of which were paid in full.

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[4] For the Application, we agree with Member Regulation's focus on the Firm's regulatory actions that occurred since March 2015 and resulted in fines of $100,000 or more, and discuss these matters herein.

In addition to the above FINRA actions, the Firm has entered into a number of settlements with other self-regulatory organizations for violations unrelated to this Application. Since March 2015, the Firm has settled regulatory actions with the NASDAQ Stock Market, New York Stock Exchange, Chicago Board Options Exchange, NYSE ARCA, Inc., NYSE MKT, LLC, International Securities Exchange, LLC, NASDAQ OMX PHLX, LLC, BATS Exchange, LLC, ISE, NASDAQ Options Market, LLC, and NASDAQ OMX BX, Inc. The settlements related to allegations involving improperly marking numerous options orders on behalf of broker-dealers with incorrect origin codes and supervisory deficiencies related to the improper marking, execution and clearance of incorrect order codes; failing to establish and maintain a system of supervision reasonably designed to prevent customers from effecting short sales in violation of applicable federal rules; and failing to establish, document and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory and other risks of market access. The Firm was ordered to pay fines ranging from $300,000 to $9 million.

During the same time period, the Firm has also settled civil matters with the SEC for violations unrelated to this Application. The settlements related to violations involving: the Firm failing to establish pre-trade risk management controls reasonably designed to prevent the entry of erroneous orders and orders that would exceed pre-set credit or capital limits for several of its trading desks, to establish required controls and procedures for fixed income securities, to review adequately the effectiveness of its risk management controls and supervisory procedures required by the Market Access Rule (particularly for preventing the entry of erroneous orders), and to comply with the rule's CEO certification requirements; failing to adequately disclose fixed costs of certain structured products in offering documents; improperly permitting the Firm's affiliated clearing bank to hold general liens over securities owned by customers of the Firm and using customers' cash to fund its activities; selling municipal bonds using offering documents that contained materially false statements or omissions about the bond issuers' compliance with continuing disclosure obligations, and failing to conduct adequate due diligence to identify the misstatements and omissions before offering and selling the bonds to customers; and executing short sales in reliance on the Firm's "easy to borrow" list even after certain stocks had been placed on a watch list due to countervailing factors impacting the stock's availability and for using data more than 24 hours old to construct their easy to borrow lists. The Firm was ordered to pay fines and disgorgement ranging from $500,000 to $358 million, all of which were paid in full following the settlements.[5]

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[5] Several of these SEC settlements resulted in the Firm's statutory disqualification and FINRA filing notices pursuant to Exchange Act Rule 19h-1, which the SEC acknowledged in August 2015 and May 2017. FINRA also filed another notice related to the Firm pursuant to Exchange Act Rule 19h-1 in connection with a matter not described herein, which the SEC acknowledged in September 2013.

Further, the Firm settled a matter with the Massachusetts Securities Division for presenting deficient and dated internal training materials to financial advisers without the Firm's compliance department approving their use, as required by the Firm's policies and procedures.

IV. The Firm's Proposed Continued Membership with FINRA and Proposed Supervisory Plan

The Firm has consented to a plan of supervision regarding its underwriting of U.S. non-agency securitization transactions collateralized by "residential mortgages" (as such term is defined in the final risk retention rules[6]) (referred to here as "non-agency RMBS") including, but not limited to, those that are 144A eligible private placements ("Subject Offerings"). Following approval of the Firm's continued membership in FINRA, FINRA intends to utilize its examination and surveillance processes to assess the Firm's continued compliance with the standards prescribed by FINRA Rule 9523. After the initial examination, the determination of whether to subject the plan to further review will be driven by FINRA's overall risk-based assessment of the Firm.

The plan of supervision is as follows:

1. The Firm's Global Mortgage and Securitized Products ("GMSP") Commitment Council ("GMSPCC" or "Council")[7] is responsible for evaluating, reviewing and determining, using the Global Mortgages and Securitized Products Commitment Council Policies and Procedures ("GMSPCC Policies and Procedures")[8] whether to approve or deny any Subject Offerings.

2. In connection with Subject Offerings that the Firm underwrites, the Firm employees who comprise the deal team (the "Deal Team") are responsible for

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The Firm was ordered to pay a $2.5 million fine, which the Firm paid in full.

6 *See* Regulation RR, 17 C.F.R. § 346.2.

7 The Firm represents that GMSPCC is comprised of senior business and risk executives (including a Global Credit Risk Executive and a Global Market Risk Executive), with participation from legal, compliance and finance. Additional members are generally invited to relevant meetings but are not required for approval of transactions. These include the head of mortgage finance, the head of ABS banking and finance, the head of real estate structured finance, the head of EMEA/Asia Pacific Rim mortgage products and a representative from syndicate/distribution. Additional persons who are generally invited to GMSPCC meetings include the deal team lead, any non-GMP deal sponsor, a representative from the legal department, a representative from the finance department and a representative from the compliance department.

8 The Firm represents that the GMSPCC Policies and Procedures govern approvals of securities offerings involving GMSP, including, without limitation, any offerings of asset backed securities, commercial mortgage backed securities, re-securitizations, re-remics and structured notes. Such GMSPCC Policies and Procedures are subject to change, based on changes in law or industry practices. However, such changes will not be material, unless necessary to comply with material changes in applicable law or industry best practices.

conducting due diligence, working with counsel on offering materials and operative legal agreements, and presenting proposed offerings to the GMSPCC for review. The Deal Team is responsible for, among other things:

a. Ensuring that the offering materials for Subject Offerings include, at a minimum, the following disclosures by the issuer to the extent applicable to the offering:
    i. Transaction party information (including affiliations and information regarding possible conflicts of interest);
    ii. Material loan level information about the underlying assets;
    iii. Information regarding third party due diligence procedures and detailed disclosure regarding the results, including information about exception loans; and
    iv. If an investor's return is materially dependent upon third-party credit enhancement (including through a derivative instrument) or any other derivative contract, additional financial disclosure about the counterparty;
b. If a Subject Offering is a registered offering in the U.S. public market, evaluating how sponsors disclose current and historical information regarding demands for the repurchase of assets due to the breach of representations and warranties; and
c. If a Subject Offering is a registered offering in the U.S. public market, analyzing the processes and procedures for complying with Rule 193 under the Securities Act, the scope of any sampling employed, the role of any third parties in the review, the method for describing exceptions to underwriting criteria, and the presence of subjective determinations in underwriting criteria.

3. The Deal Team will distribute a Council memorandum describing the material aspects of the Subject Offering, and related matter in the form set forth in the GMSPCC Policies and Procedures (collectively, the "Council Materials") directly to each Council member and other attending parties. Council Materials will be distributed to each Council member and other attending parties as soon as possible and, absent exigent circumstances, at least 24 hours prior to a scheduled meeting of the GMSPCC. The Firm will maintain all Council Materials, as well as documentation of any exigent circumstances that resulted in the distribution of Council Materials less than 24 hours prior to a scheduled meeting, in a segregated file for ease of review by FINRA staff.

4. Council Materials for each Subject Offering will, at a minimum, address the following topics for consideration by the GMSPCC:

a. an overview of the transaction;
b. a summary of the terms;
c. any relevant representations and warranties;
d. any potential conflicts, tax issues or accounting considerations;

e. risks and mitigants;
f. a summary of due diligence performed; and
g. relevant regulatory considerations (including retention of rating agencies).

5. The GMSPCC review, evaluation and determination whether to approve or decline a Subject Offering will include, at a minimum, the following (collectively, the "GMSPCC Review"):

    a. Reviewing and evaluating the viability of the sponsor, asset pool, originator(s) and servicer and the timing and marketability of the Subject Offering;
    b. Ensuring that the business merits of the Subject Offering (i.e., profitability, franchise development, reputational impact, etc.) are satisfactory in light of the risks;
    c. Evaluating and reviewing the Deal Team due diligence summary (covering, if applicable, appropriate business, finance, legal and documentation due diligence for the offering) and any related disclosure matters regarding the Subject Offering, as they relate to the sponsor, asset pool or servicer, franchise risk and/or the quality, timing and marketability of the offering, to the extent applicable; and
    d. Evaluating and ensuring the mitigation of conflicts affecting the Firm, its affiliates, the sponsor, servicer and/or the investors.

6. If the GMSPCC intends to approve a Subject Offering that is not a "pre-approved offering" (as described below), such approval will be required prior to the earliest of, as applicable:

    a. Announcement and/or marketing of the Subject Offering by the Firm or its affiliates participation therein;
    b. Printing of any prospectus or offering memorandum for the Subject Offering;
    c. Filing of a registration statement with a regulator which mentions the participation of the Firm or any of its affiliates in the Subject Offering;
    d. Pricing of any Subject Offering; or
    e. Execution of any material transaction documentation in which the Firm or its affiliate are parties.

GMSPCC has the authority to provide programmatic annual approval, with only notification by the Deal Team to the GMSPCC, for certain non-agency RMBS offerings (a "pre-approved offering") when the Firm will have the Lead Manager Role or Co-Manager Role for at least two non-agency RMBS offerings in a 12-month period and the second offering, as well as any subsequent offerings, are within 12 months of the original GMSPCC "Council Notification Only" approval. Notification to the GMSPCC for pre-approval must be made prior to marketing and provides

assurances to the GMSPCC that material aspects of the current offering are substantially the same as initially approved.[9]

7. Based on the following circumstances, certain Subject Offerings that otherwise meet the pre-approval conditions (as outlined above) may require re-approval by the GMSPCC:

    a. Any Subject Offering as to which the underwriting liability of the Firm and/or its affiliates equals or exceeds $1.0 billion (which includes Best Efforts Underwriting and Firm Commitment);
    b. A GMSPCC-approved Best Efforts Underwriting changes to a Firm Commitment or the Firm expands the amount of securities to be taken down from the amount previously approved by the GMSPCC for any Back-Stopped Commitment[10] that was not previously presented to the GMSPCC in connection with the original approval process or was not a required retention of an unsold allotment pursuant to the applicable securitization documents;
    c. Any Subject Offerings involving any material, negative due diligence; or
    d. Increased potential reputational risk associated with the sponsor or any of its affiliates, the originators(s) or any other aspect of the Subject Offerings.

8. Where rating agency engagement agreements include certain representations, warranties or indemnities to be made by the Firm and/or its affiliates, or that otherwise would result in the Firm taking on an increased level of risk or exposure, the GMSPCC must review, evaluate and determine whether to approve or decline the rating agency engagement. Unless otherwise provided for in the GMSPCC Policies and Procedures, such approval for rating agency engagements will be sought for any subject transaction or proposed transaction and must be obtained prior to the engagement of a rating agency. The Firm shall maintain records of all such determinations by the GMSPCC in a segregated file for ease of review by FINRA staff.

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9 As of April 2017 there were no non-agency RMBS pre-approved offerings.

10 For purposes of the GMSPCC Policies and Procedures, the term "Back-Stopped Commitment" shall mean the Firm as underwriter or initial purchaser (in a public or private offering, as applicable) is legally obligated under the relevant underwriting agreement or note purchase agreement to purchase any bonds or tranche(s) of bonds from the issuer at a predetermined price so that the Firm is guaranteeing the purchase at a certain price to the issuer and taking the risk of unsold allotments by agreeing to take down such bonds or tranche(s) whether such bonds or tranche(s) clear the market or not.

9. The Firm will provide to FINRA, upon request, those written materials retained in a Subject Offering's deal file, including, but not limited to, email approval; minutes of any GMSPCC meetings; any documentation of the GMSPCC's reviews, evaluations and determinations; and any offering and marketing materials for the Subject Offering that have been reviewed by the Deal Team.

10. The Firm shall retain the GMSPCC Policies and Procedures and all amendments thereto in a segregated file, or in another readily accessible manner, and will provide them for review by FINRA staff upon request.

11. Currently, Subject Offerings are limited to those sponsored by third parties. Prior to acting as an underwriter of Bank of America[11] sponsored non-agency RMBS to be offered in a registered offering in the U.S. public market (a "Bank of America sponsored registered non-agency RMBS"), each of the Firm's relevant business groups will have received training as to the Firm's then current policies and procedures with regard to underwriting such Bank of America sponsored non-agency RMBS. The Firm shall retain the training materials and scripts, and applicable policies and procedures and all amendments thereto, related to underwriting Bank of America sponsored non-agency RMBS in a segregated file for ease of review by FINRA staff, upon request.

12. Prior to acting as an underwriter of Bank of America sponsored registered non-agency RMBS, the Firm will certify in writing to FINRA that it has confirmed and reinforced policies addressing those provisions of the Securities Act, including but not limited to Sections 5(b)(1), 17(a)(2) and 17(a)(3), and related rules and regulations that pertain to registered offerings of non-agency RMBS.[12]

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[11] "Bank of America" refers here to the affiliates of Bank of America Corporation engaged in banking and investment banking services.

[12] The Firm represents that Bank of America has sponsored Commercial Mortgage-Backed Securities ("CMBS") deals since the mid-1990s, and the practices regarding diligence and disclosure relating to CMBS deals have been enhanced. These enhancements include but are not limited to the following: Since 2010, Bank of America has included greater detail on the underlying mortgage loans in certain sections of the disclosure including the "Risk Factors" and the "Description of the Mortgage Loans;" Bank of America now includes a summary of the Top 15 Mortgage Loans (based on principal balance) in the disclosure rather than the Top 10 Mortgage Loans; Bank of America also notes in the offering documents the exceptions to the representations and warranties in order to facilitate investor review; and Bank of America has voluntarily complied with SEC commentary made to other registrants such as those concerning filing documentation relating to split loans. In addition, Bank of America, in conjunction with its partner sponsors for public CMBS deals, has (a) implemented an Investor Q&A Forum which allows investors to ask questions of CMBS deal participants, and (b) adopted a Certificateholder Registry which allows investors to request names of other certificateholders to facilitate communications between investors.

13. Prior to acting as an underwriter of privately offered Bank of America sponsored non-agency RMBS, the Firm will certify in writing to FINRA that the policies outlined in this Supervisory Plan for Subject Offerings (and any training previously conducted) apply to underwriting private offerings of Bank of America sponsored non-agency RMBS.

14. Each certification described above and any supporting documentation may be sent directly to:

Lorraine Lee-Stepney
Manager, Statutory Disqualification Program
FINRA
1735 K Street NW
Washington, DC 20006
Lorraine.Lee@finra.org

V. Discussion

Member Regulation recommends approving the Firm's request to continue its membership in FINRA. After carefully reviewing the entire record in this matter, we approve the Application.

In evaluating an application like this, we assess whether the statutorily disqualified firm seeking to continue its membership in FINRA has demonstrated that its continued membership is consistent with the public interest and does not create an unreasonable risk of harm to the market or investors. *See* FINRA By-Laws, Art. III, Sec. (3)(d); *cf. Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"). Factors that bear on our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, and whether there has been any intervening misconduct.

We recognize that the Final Judgment involved serious violations of securities rules and regulations. We note, however, that the violative conduct occurred in 2008, and was related to a single non-agency RMBS offering. Currently, the Firm has exited the public RMBS market and now limits their RMBS activities to the underwriting of offerings sponsored by third parties. Further, the supervisory plan addresses the Firm's involvement with any future underwritings of Bank of America sponsored registered non-agency RMBS. Moreover, the Final Judgment did not impose an expulsion or suspension of the Firm, did not require any undertakings or remedial measures, and the SEC did not follow up the Final Judgment with further administrative action.[13]

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[13] We have also considered that the SEC, in connection with the Final Judgment, has granted the Firm a waiver of the disqualification provisions of the Securities Act (specifically, Securities Act Rule 506(d)(1)(ii)).

The Firm represents that since 2008, it has independently undertaken remedial efforts intended to prevent future regulatory issues of the type addressed in the Final Judgment. Following the disqualifying event, the Firm, in collaboration with outside counsel, adopted policies and procedures with regard to all asset backed securities, including the type of RMBS that are the subject of the Final Judgment. Under these procedures, the GMSPCC was created, which has responsibility for, among other things, ensuring that the Firm complies with all relevant legal and regulatory requirements in the course of any of its asset-backed securities offerings. The Firm has also consented to a supervisory plan that Member Regulation represents sufficiently addresses the misconduct that resulted in the Firm's disqualification.

We further find that although the Firm has recent disciplinary history, the record shows that it has taken corrective actions to address the noted deficiencies. We agree with Member Regulation that the Firm's disciplinary history should not prevent it from continuing as a FINRA member, and conclude that notwithstanding its regulatory history, the continued membership of the Firm is in the public interest and does not present an unreasonable risk of harm to the market or investors.

At this time, we are satisfied, based in part upon the Firm's representations, Member Regulation's representations concerning FINRA's future monitoring of the Firm, and the record currently before us, that the Firm's continued membership in FINRA is consistent with the public interest and does not create an unreasonable risk of harm to the market or investors.[14] Accordingly, we approve the Firm's Application to continue its membership in FINRA as set forth herein. In conformity with the provisions of Exchange Act Rule 19h-1, the continued membership of the Firm will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith
Executive Vice President and Corporate Secretary

[14] FINRA certifies that the Firm meets all qualification requirements and represents that it is registered with the NYSE ARCA, C2 Options Exchange, and MIAX, as well as BATS, CBOE, CHX, EDGA Exchange, Inc., EDGX Exchange, Inc., NYSE, NYSE MKT LLC, NASDAQ ISE, LLC, NASDAQ OMX PHLX, NASDAQ OMX BX, NASDAQ Stock Market, DTC, NSCC, and FICC, which concur with the Firm's proposed continued membership.