

**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**

<b>In the Matter of:</b>	)	
	)	
	)	<b>CFTC Docket No: 02-02</b>
<b>Robert Ryan,</b>	)	
	)	
<b>Respondent.</b>	)	<b>ORDER INSTITUTING PROCEEDINGS</b>
	)	<b>PURSUANT TO SECTIONS 6(c) and 6(d)</b>
	)	<b>OF THE COMMODITY EXCHANGE</b>
	)	<b>ACT, AS AMENDED, MAKING</b>
	)	<b>FINDINGS AND IMPOSING REMEDIAL</b>
	)	<b>SANCTIONS</b>
	)	
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**I.**

The Commodity Futures Trading Commission (the “Commission”) has reason to believe that Robert Ryan (“Ryan”) has violated Section 4b(a)(i) and (iii) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 6b(a)(i) and (iii). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Ryan engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

**II.**

In anticipation of the institution of an administrative proceeding, Ryan has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact in this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions (“Order”), Ryan acknowledges service of this Order. Ryan consents to the use of the findings in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.<sup>1</sup>

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<sup>1</sup> Ryan does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. He does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, by any other person or entity in this or any other proceeding. The findings to which Ryan has consented in the Offer, as contained in this Order, are not binding on any other person or entity named as a respondent or defendant in this or in any other proceeding.

### III.

The Commission finds the following:

#### A. SUMMARY

Between August and October 1997, Ryan, a trader employed by Delphi Capital Management (“Delphi”), allocated futures trades originally placed and executed on behalf of his employer to his personal account. Ryan allocated these trades after the market had moved favorably. Ryan accomplished this by executing a give-up agreement directing the futures commission merchant (“FCM”) serving as Delphi’s primary executing and clearing broker, to give up trades placed by Ryan on behalf of Delphi to another purported Delphi account which, in fact, was Ryan’s personal trading account.<sup>2</sup> As a result of allocating these trades over a two-month period, Ryan was able to net a risk-free, personal profit.

#### B. RESPONDENT

**Robert Ryan** resides at 45 Marie Street, Staten Island, New York 10305-1411. He has never been registered with the Commission. Ryan was employed as a trader at Delphi from January 1, 1988 until September 30, 1998.

#### C. FACTS

##### 1. Background

In August 1997, Ryan worked as a Portfolio Manager for Delphi, which handled various investment and risk-management activities for Delphi Financial Group’s (“DFG”) operating subsidiaries.<sup>3</sup> At the time, Delphi maintained futures trading accounts at an FCM and Ryan was responsible for communicating to this FCM trading orders for the Delphi accounts. Separate and apart from his official responsibilities as a Delphi employee, Ryan maintained a personal trading account.

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<sup>2</sup> In a recent settlement, the Commission has defined a give-up as “a common practice in the brokerage business whereby an order may be placed with one FCM for the purpose of securing a more efficient fill and then ‘given up’ or delivered to another FCM at which the customer has a clearing relationship.” *In re Techno Trading, Inc.*, 1998 WL 4312, \*12, n. 5 (C.F.T.C. Jan. 8, 1998) (Opinion and Order making findings and accepting offers of settlement); *see generally*, *In the Matter of Scott N. Szach*, 2001 WL 15904, \*4 (C.F.T.C. Jan. 8, 2001) (trade executed by execution broker and “given-up” to a clearing firm at which the trader had an account); *see also* “CFTC Glossary: A Layman’s Guide to the Language of the Futures Industry,” which defines a “give-up” as a “contract executed by one broker for the client of another broker that the client orders to be turned over to the second broker. The broker accepting the order from the customer collects a wire toll from the carrying broker for the use of the facilities. Often used to consolidate many small orders or to disperse large ones.”

<sup>3</sup> Delphi is a Delaware corporation and a wholly owned subsidiary of DFG. DFG is an insurance holding corporation and DFG conducts some of its capital management activities through Delphi.

## **2. The Give-Up Agreement**

On August 11, 1997, Ryan, as Delphi's "Manager of Trading," executed a give-up agreement pursuant to which trades made on behalf of Delphi could be given up to another account. Although the account number identified in the give-up agreement ostensibly was for an account belonging to Delphi, in reality the account number was for Ryan's personal account. Therefore, any trades given up under the agreement would clear into Ryan's personal account and not into any account belonging to Delphi. Ryan never disclosed the give-up agreement to Delphi.

## **3. Ryan's Allocation Scheme**

Between August 11, 1997 and October 1, 1997, Ryan implemented his trading scheme by placing orders for Delphi for either U.S. Bond or 5-year Treasury note futures contracts to be executed by the FCM. On several occasions, after he received confirmations of the trades from the FCM, and he observed that the market had moved in favor of the positions, Ryan placed a limit order for an offsetting trade for the number of contracts he intended to give up to his own account. He did this in order to capture the unrealized gain on Delphi's positions for himself. He then gave instructions to the FCM to give up the best-priced Delphi contracts to his personal account pursuant to the give-up agreement.

## **D. LEGAL DISCUSSION**

### **1. Ryan Violated Section 4b(a)(i) and (iii) of the Act**

Ryan violated Section 4b(a)(i) and (iii) of the Act when he allocated futures trades originally placed and executed on behalf of his employer to his personal account. To establish violations of Sections 4b(a)(i) and (iii) requires a showing that a person:

(1) (a) cheated or defrauded or attempted to cheat or defraud another person, and

(b) willfully deceived or attempted to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person

(2) in connection with any order to make or the making of a contract of sale of a commodity for future delivery made or to be made for or on behalf of any other person.<sup>4</sup>

Section 4b(a) of the Act prohibits fraudulent commodity futures transactions made for or on behalf of other persons. The unfair allocation of favorable executed trades to one account and

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<sup>4</sup> 7 U.S.C. § 6b(a)(i) and (iii).

assignment of unfavorable executed trades to another account violates Section 4b(a).<sup>5</sup> This illegal practice permits the person who allocates the trades arbitrarily to “exercise[] discretion as to which accounts would receive the better trades.”<sup>6</sup>

In addition, it is clear that a trader trading his employer’s account owes his employer a fiduciary duty.<sup>7</sup> As an employee charged with trading commodities on behalf of Delphi, Ryan had a fiduciary duty of confidentiality and trust regarding the futures trades he handled for Delphi. Each time Ryan used information about Delphi’s unrealized gains for his own benefit, he violated that fiduciary duty.

Liability under Section 4b(a) of the Act requires proof of scienter, i.e., proof that Ryan committed the alleged wrongful actions “intentionally or with reckless disregard for [his] duties” under the Act.<sup>8</sup> The facts demonstrate that Ryan was intentionally allocating trades. Ryan acted intentionally by initially setting up the fraudulent give-up agreement that allowed him to successfully allocate the most profitable trades to his own account.

Ryan directed the FCM to re-assign the best-priced trades to his own account as per the give-up agreement after they had been executed on behalf of Delphi. In doing so, Ryan breached his fiduciary duties to Delphi. As a trader for Delphi, Ryan had a duty to seek the best price for his employer.<sup>9</sup> Ryan violated that duty by intentionally choosing instead to act on his own behalf to the disadvantage of his employer.

#### **IV. OFFER OF SETTLEMENT**

Ryan submitted an Offer in which he neither admits nor denies the findings in the Order. Subject to the foregoing, Ryan: acknowledges service of this Order and admits the jurisdiction of the Commission with respect to the matters set forth in this Order; waives: (1) the service and filing

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<sup>5</sup> *In re Shahrokh Nikkhah*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,460, 47,202 (CFTC Nov. 5, 1998).

<sup>6</sup> *Id.*

<sup>7</sup> *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (“a fiduciary relationship involves discretionary authority and dependency, i.e., one person depends on another, the fiduciary, to serve his interests”); *See generally SEC v. O’Hagan*, 521 U.S. 642 (1997) (the undisclosed misappropriation of a company’s confidential information in violation of a fiduciary duty constitutes fraud); *Lamdin v. Broadway Surface Advertising Corporation*, 5 N.E. 66, 67 (N.Y. 1936) (an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties).

<sup>8</sup> *Hammond v. Smith Barney, Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659, n.21 (CFTC March 1, 1990); *CFTC v. Savage*, 611 F.2d 270, 283 (9<sup>th</sup> Cir. 1979) (finding of scienter supported by proof of recklessness).

<sup>9</sup> *See, e.g., In re Murphy*, [1984 – 1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,798 at 31,351-52 (CFTC Sept. 25, 1985) (altering records and reports and ignoring open outcry offers violates fiduciary duty to customers and is fraud in violation of Section 4b(a)); *see also U.S. v. Ashman*, 979 F.2d 469, 477 (7<sup>th</sup> Cir. 1992) (brokers assigned prices to customers thereby denying them the opportunity to obtain a better price).

of a Complaint and Notice of Hearing; (2) a hearing and all post-hearing procedures; (3) judicial review by any court; (4) any objection to the staff's participation in the Commission's consideration of the Offers; (5) all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63, and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, et seq., relating to or arising from this action; and (6) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

Ryan stipulates that the record basis on which this Order is entered consists of the Order and the findings to which he has consented in the Offer, which are incorporated in this Order. Ryan consents to the Commission's issuance of this Order, which makes findings as set forth herein, and orders that Ryan (1) cease and desist from violating the provisions of the Act and the Regulations he is found to have violated; (2) comply with his undertakings as set forth in the Offer and incorporated in this Order; (3) be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1(a)(29) of the Act and all registered entities shall refuse Ryan privileges, beginning on the third Monday after the date of this Order; and (4) pay a civil monetary penalty in an amount of Forty Thousand Dollars (\$40,000).

## **V.** **FINDINGS OF VIOLATIONS**

Solely on the basis of the consent evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Ryan violated Sections 4b(a)(i) and (iii) of the Act.

## **VI.** **ORDER**

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Ryan shall cease and desist from violating Sections 4b(a)(i) and (iii) of the Act;
- B. Ryan be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1(a)(29) of the Act, and all registered entities shall refuse Ryan privileges, beginning on the third Monday after the date of this Order;
- C. Ryan shall pay a civil monetary penalty in the amount of Forty Thousand Dollars (\$40,000) which is due within ten (10) days of the signing of this Order. Ryan shall make such payment by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581 under cover of a letter that identifies Ryan and the name and docket number of the proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Phyllis J. Cela,

Acting Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581;

D. Ryan shall comply with his undertakings as set forth in the Offer:

1. Ryan shall never apply for registration or seek exemption from registration with the Commission in any capacity, except as provided for in Section 4.14(a)(9) of the Regulations, 17 C.F.R. § 4.14(a)(9) (2001), and shall never engage in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Regulations, or act as a principal, agent, officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Section 4.14(a)(9) of the Regulations; this includes, but is not limited to soliciting, accepting or receiving any funds, revenue, or other property from any person, giving advice for compensation, or soliciting prospective customers, related to the purchase or sale of any commodity futures or options on commodity futures contracts; and

2. Ryan, nor any of his agents or employees under his authority or control, shall take any action or make any public statements denying, directly or indirectly, any finding in this Order, or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Ryan's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.

The provisions of this Order shall be effective on this date.

By the Commission.

Dated: October 31, 2001

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Jean A. Webb  
Secretary to the Commission  
Commodity Futures Trading Commission