

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Received
C.F.T.C.

2011 NOV 28 PM 12: 07

Office of
Proceedings
2-04
Commodity Futures Trading Commission

In the Matter of:

Enskilda Futures Ltd. and
Skandinaviska Enskilda Banken AB

Respondents.

CFTC Docket No.

ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 6(c), (d) OF THE
COMMODITY EXCHANGE ACT AND MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Enskilda Futures Ltd. (“EFL”) has violated Commission Regulation (“Regulation”) 166.3, 17 C.F.R. § 166.3 (2011), and that Skandinaviska Enskilda Banken AB (“SEB”) is liable for those violations pursuant to Section 2(a)(1)(B) of the Commodity Exchange Act (“Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§ 701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. § 2(a)(1)(B). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether EFL and SEB (collectively “Respondents”) have engaged in the violations as set forth herein and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, EFL and SEB have submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, EFL and SEB consent to the entry of and acknowledge service of this Order Instituting Proceedings Pursuant to Section

6(c), (d) of the Act, as amended, to be codified at 7 U.S.C. § 6(c), (d), and Making Findings and Imposing Remedial Sanctions (“Order”).¹

III.

The Commission finds the following:

A. Summary

EFL is a registered futures commission merchant (“FCM”) located in London, England. EFL enters orders and clears trades on Globex, the CME Group, Inc.’s (“CME”) electronic trading platform, on behalf of certain clients of its ultimate parent, SEB.² SEB is a financial services group incorporated and monitored in Sweden whose activities include futures and options brokering outside of the U.S. EFL does not have any employees or offices, but relies totally on SEB and SEB employees to provide services and facilities as needed to meet its operational needs. EFL also utilizes SEB’s compliance policies and conforms to SEB’s operational procedures.

On at least 35 instances between February and June 2010, EFL accepted and entered matching buy and sell orders for E-mini S&P 500 futures (“E-mini”) contracts on CME Globex on behalf of a non-U.S. based hedge fund (the “Fund”). The executed trades had the appearance of wash or fictitious sales in possible violation of Section 4c(a) of the Act, as amended, to be codified at 7 U.S.C. § 6c(a).

At the time of these events, EFL maintained an inadequate system of supervision and internal controls to detect and deter potential violations of the Act and Regulations, such as wash or fictitious sales. Consequently, EFL failed to diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant in violation of Regulation 166.3, 17 C.F.R. §166.3 (2011). Because EFL was an agent of SEB, SEB is also liable for EFL’s violations pursuant to Section 2(a)(1)(B) of

¹ EFL and SEB consent to the entry of this Order and the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party provided, however, that Respondents do not consent to the use of the Offer, or the findings or conclusions consented to in this Order, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor do Respondents consent to the use of the Offer or this Order, or the findings or conclusions consented to in the Offer or this Order, by any other party in any other proceeding.

² EFL’s immediate parent is Skandinaviska Enskilda Limited (“SE Ltd.”), a wholly-owned subsidiary of SEB. SE Ltd. is a private limited company engaged in activities auxiliary to financial intermediation.

the Act, as amended, to be codified at 7 U.S.C. § 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2 (2011).

B. Respondents

Enskilda Futures Ltd. is a London based FCM with its address at Scandinavian House, 2 Cannon Street, London. EFL has been continuously registered with the Commission as an FCM since July 8, 2004.

Skandinaviska Enskilda Banken AB is a major financial services group headquartered in Stockholm and an exempt foreign firm pursuant to Commission Regulation 30.10. SEB's London branch is also located at 2 Cannon Street, London. SEB is authorized in the European Economic Area and its lead regulator is Finansinspektionen, the Swedish Financial Supervisory Authority.

C. Facts

1. EFL and SEB's Unique Relationship

EFL enters orders and clears trades on Globex solely for SEB and SEB's clients. Pursuant to the Enskilda Futures Limited Exchange Traded Futures & Options Mandate (the "Futures Mandate"), the most recent version of which is dated December 22, 2010, EFL clears exchange traded futures and options transactions on behalf of SEB on the U.S. futures markets. The Futures Mandate specifies that EFL "will not give advice in relation to any transactions" and SEB "will make all trade decisions." EFL provides its services exclusively to SEB and maintains only two accounts: (1) an SEB omnibus account; and (2) SEB client omnibus account.

EFL does not have any independent compliance policies, procedural manuals, or other documents. Rather, EFL utilizes materials prepared by SEB, including the April 2009 SEB compliance manual (the "Compliance Manual"). The introductory section of the Compliance Manual states that it "is for the use of all employees" of SEB's London branch and Enskilda, collectively defined therein as "SEB London."

The six individuals who serve on EFL's board of directors are all SEB employees. Furthermore, EFL has no fixed assets, premises or staff, but relies solely on SEB and SEB employees to "provide services and facilities to meet all of its operational needs" pursuant to the terms of a Service Agreement (the "Service Agreement"), the most recent version of which is dated December 22, 2010. These services include management services, compliance services, audit services, IT network and operations, legal services, and risk management services.

EFL is not involved in the direct solicitation or acceptance of client orders. All client contact is maintained by SEB, whose employees solicit transactions from SEB's clients generally, including those which EFL enters on the U.S. futures exchanges. Consistent with this arrangement, the Service Agreement obligates SEB to perform services "in the same manner and

to the same standard as it would if it were performing them for its own account, in accordance with all relevant SEB policies, instructions and procedures.”

2. EFL Accepted and Transmitted Orders with Characteristics of Wash Sales

From at least February 5, 2010 through June 9, 2010, EFL accepted and entered orders to Globex on behalf of the Fund. The Fund also is and was at all times relevant a client of SEB. On at least 35 occasions, EFL accepted and entered matching buy and sell orders for the same quantities of E-mini S&P 500 contracts at the same prices on behalf of the Fund. A portfolio manager at the Fund entered those orders on behalf of the Fund’s account. During investigative testimony, the portfolio manager acknowledged that he entered the matching orders in close temporal proximity, but stated that, with limited exception, he could not remember any specific transaction. He testified that he did not intend to cross orders or enter into any non-competitive transactions and offered a number of plausible explanations for the apparent wash or fictitious sales, including that the orders were part of multi-exchange spread transactions. There is no evidence that the resulting trades inappropriately affected prices or were part of any manipulative activity.

3. EFL Had An Inadequate Supervisory System

EFL relies solely on SEB to provide services and facilities to meet all of its operational needs, including management services, compliance services, and supervisory services. The supervisory system provided by SEB did not include any procedures or controls to monitor for, detect or deter potential wash or fictitious sales. Thus, EFL and SEB were not aware that the Fund had entered matching buy and sell orders at the time of execution. Moreover, while the Compliance Manual generally requires employees to understand and comply with the rules of all markets on which SEB and EFL undertake business, employees did not receive any training on the specific requirements of the Act, Commission Regulations and/or rules of any U.S. exchange.

D. Legal Discussion

1. EFL Violated Regulation 166.3

Regulation 166.3 requires that every Commission registrant (except associated persons who have no supervisory duties) diligently supervise the handling by its partners, employees and agents of all its commodity interest accounts and activities relating to its business as a registrant. Regulation 166.3 imposes on registrants an affirmative duty to supervise their employees and agents diligently by establishing, implementing, and executing an adequate supervisory structure and compliance programs. “The duty to supervise ... include[s] the broader goals of detection and deterrence of possible wrongdoing by a [registrant’s] agents.” *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 33,444 (CFTC Dec. 14, 1989).

In order to prove a violation of Regulation 166.3, it must be demonstrated that either: (1) the registrant's supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *In re Murlas Commodities*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485 at 43,161 (CFTC Sept. 1, 1995); *In re Paragon Futures Assoc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992); *Bunch v. First Commodity Corp. of Boston*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352 at 39,168-69 (CFTC Aug. 5, 1992); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,219 (CFTC Aug. 11, 1992) *aff'd sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993); 43 Fed. Reg. 31,886, 31,889 (July 24, 1978). This is a fact intensive undertaking. *In re GNP Commodities*, ¶ 25,360 at 39,219 ("a proper determination of a FCM's supervisory diligence must remain sensitive to the particular facts and circumstances that influenced the design and execution of the system at issue"). A violation under Regulation 166.3 is an independent violation for which no underlying violation is necessary. *In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 at 45,744 (CFTC Dec. 10, 1997).

Under Regulation 166.3, a registrant has a "duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents." *Samson Refining Co. v. Drexel Burnham Lambert, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,596 at 36,566 (CFTC Feb. 16, 1990) (quoting *Lobb v. J.T. McKerr & Co.*, ¶ 24,568 at 36,444). "A showing that the registrant lacks an adequate supervisory system can be sufficient" to establish a breach of duty under Regulation 166.3. *In re Collins*, ¶ 27,194 at 45,744, citing *In re First National Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 at 41,786 (CFTC July 20, 1994), *aff'd without op. sub nom. Pick v. CFTC*, 99 F.3d 1139 (6th Cir. 1996). The lack of an adequate supervisory system can be established by showing that the registrant failed to develop proper procedures for the detection of wrongdoing. See *CFTC v. Trinity Fin. Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,179 at 45,635 (S.D. Fla. Sept. 29, 1997) (controlling person failed to establish or maintain meaningful procedures for detecting fraud by firm's employees), *aff'd in part, vacated in part and remanded sub nom. Sidoti v. CFTC*, 178 F.3d 1132 (11th Cir. 1999).

In particular, on at least 35 occasions, EFL accepted and entered matching buy and sell orders for the same quantities of E-mini contracts at the same prices on behalf of the Fund. Such orders had the characteristics of wash sales. See *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991) (the factors that indicate a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price). Because EFL did not investigate these orders, EFL did not fulfill its duty to detect and deter violations of Section 4c(a) of the Act as amended, to be codified at 7 U.S.C. §6c(a).

Where, as here, "customer orders reasonably raise concerns about their lawfulness under the Act, the futures professionals who accept or monitor the orders have a duty of further inquiry." *In re U.S. Securities & Futures Corp.*, [2009-2011 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,494 at 63,572 (CFTC Oct. 7, 2009) (citations omitted) (finding that German

commodity broker perpetrated a trade allocation fraud under the “willingly or recklessly blind eyes of the respondents”); *see also In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,689 (CFTC Sept. 29, 2000) (finding that the structure of orders put defendant on notice that the transactions were designed to achieve wash results in a manner that negated risk), *aff’d, Piasio v. CFTC*, 2002 WL 18519 (2d Cir. December 31, 2002) (unpublished opinion); *In re Three Eight Corporation*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40445-46 (CFTC June 16, 1993) (holding that the receipt of paired orders for matching executions demanded clarification before execution). EFL had no system or controls in place to ensure it exercised that duty and in fact failed to exercise that duty. Therefore, EFL violated Regulation 166.3, 17 C.F.R. § 166.3 (2011).

2. SEB Is Liable For EFL’s Conduct

Although the acts constituting the violations of Regulation 166.3 were performed by EFL – or more specifically by SEB employees acting on behalf of EFL – SEB is liable as EFL’s principal. Under Section 2(a)(1)(B) of the Act and Regulation 1.2,³ strict liability is imposed upon principals for the actions of their agents acting within the scope of their employment. *See Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986) (holding that principals are strictly liable for the acts of their agents). The Commission considers a number of factors in determining an agency relationship under Section 2(a)(1)(B) of the Act and Regulation 1.2. Whether one person is an agent acting for another turns not on any one fact or talismanic formula, but on an overall assessment of the totality of the circumstances in each case. *See Berisco v. Eastern Capital Corp.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,772 at 32,223 (CFTC Oct. 1, 1985). The agent’s exclusive dealings with the principal, use of the principal’s forms and the principal’s degree of control over the agent’s activities are all relevant considerations. *See Reed v. Sage Group, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943 at 34,303-04 (CFTC Oct. 14, 1987).

EFL limits its FCM services to SEB and SEB’s clients, and SEB controls and directs every aspect of EFL’s business activities as an FCM. Consequently, EFL is SEB’s agent and pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, SEB is liable for EFL’s acts, omissions and failures, and accordingly, violated Regulation 166.3, 17 C.F.R. § 166.3 (2011).

³ Specifically, Section 2(a)(1)(B) and Regulation 1.2 provide that the “act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.”

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that EFL violated Regulation 166.3, 17 C.F.R. § 166.3 (2011). The Commission further finds that, pursuant to Section 2(a)(1)(B) of the Act, as amended, to be codified at 7 U.S.C. § 2(a)(1)(B), and Regulation 1.2, 17 C.F.R. § 1.2 (2011), SEB is liable for EFL's acts, omissions, and failures, and accordingly, violated Regulation 166.3, 17 C.F.R. § 166.3 (2011).

V.

OFFER OF SETTLEMENT

EFL and SEB have submitted an Offer in which they acknowledge service of the Order and admit the jurisdiction of the Commission with respect to the matters set forth in the Order and waives (1) the service and filing of a complaint and notice of a hearing; (2) a hearing and all post-hearing procedures; (3) judicial review by any court; (4) any objection to the participation by any member of the Commission's staff in the Commission's consideration of the Offer; (5) any and all claims that they may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-68 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from this proceeding; (6) any and all claims that they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. §§ 148.1-30 (2011); and (7) 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.

EFL and SEB stipulate that the record basis upon which this Order is entered shall consist solely of the findings in this Order to which EFL and SEB have consented to in the Offer. EFL consents to the entry of this Order, which: (1) makes findings by the Commission that EFL violated Regulation 166.3, 17 C.F.R. § 166.3 (2011), and that SEB, as principal, is liable for EFL's actions; (2) orders EFL and SEB to cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2011); (3) orders EFL and SEB to jointly pay a civil monetary penalty in an amount of \$150,000 (One Hundred Fifty Thousand Dollars), plus post-judgment interest, within ten (10) days of the date of the entry of this Order; and (4) orders EFL, SEB, and their successors and assigns to comply with the undertaking consented to in its Offer and set forth below in Section VI of this Order.

Upon consideration, the Commission has determined to accept EFL and SEB's Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. EFL and SEB shall cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2011).

- B. EFL and SEB shall pay a civil monetary penalty in the amount of one hundred fifty thousand dollars (\$150,000), plus post-judgment interest, within ten (10) days of the date of the entry of this Order (the "CMP Obligation"). EFL and SEB are jointly and severally liable for payment of the CMP Obligation. Should EFL and SEB not satisfy their CMP Obligation within ten (10) days of the date of entry of this Order, post judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. EFL and SEB shall pay this penalty by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
Attn: Accounts Receivables – AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-5644

If payment by electronic funds transfer is chosen, EFL and/or SEB shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. EFL and SEB shall accompany payment of the penalty with a cover letter that identifies EFL and SEB and the name and docket number of this proceeding. EFL and SEB shall simultaneously transmit copies of the cover letter and the form of payment to: (1) Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, DC 20581; and (2) Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, as amended, 7 U.S.C. § 9a(2), if this amount is not paid in full within fifteen (15) days of the due date, EFL shall be prohibited automatically from the privileges of all registered entities, and, if registered with

the Commission, such registration shall be suspended automatically until they have shown to the satisfaction of the Commission that payment of the full amount of the penalty, with interest thereon to the date of the payment, has been made.

- C. EFL, SEB and their successors and assigns shall comply with the following undertaking set forth in their Offer: Neither EFL nor SEB, or any of their successors, assigns, agents or employees under their authority or control, shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions 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 EFL and/or SEB's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. EFL, SEB and their successors and assigns shall take all steps necessary to assure that all of their agents and employees under their authority or control understand and comply with this undertaking.

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

By the Commission



David A. Stawick

Secretary of the Commission

Commodity Futures Trading Commission

| Dated: November 28, 2011