

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

RECEIVED CFTC



Office of Proceedings
Proceedings Clerk

4:26 pm, Nov 27, 2012

In the Matter of:)

Benjamin Hutchen,)

Respondent.)

CFTC Docket No. 13-07

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTIONS 6(c), 6(d) AND 8a OF THE COMMODITY EXCHANGE ACT, AS
AMENDED, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that, from on or about April 18, 2008 through at least October 29, 2009, Benjamin Hutchen (“Respondent” or “Hutchen”) violated Section 4c(a) of the Commodity Exchange Act (the “CEA” or the “Act”), 7 U.S.C. § 6c(a) (2006) and Commission Regulation (“Regulation”) 1.38(a), 17 C.F.R. § 1.38(a) (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent 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, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Sections 6(c), 6(d) and 8a of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions (“Order”) and acknowledges service of this Order.¹

¹ Respondent consents to the entry of this Order and to 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 Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, 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 does Respondent consent to the use of the Offer or this Order, or the findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

III.

The Commission finds the following:

A. Summary

Over an 18 month period, from at least April 18, 2008 through October 29, 2009 (the “Relevant Period”), while registered as an Associated Person (“AP”) and acting as a salesman and eventually Managing Director and branch manager at Morgan Stanley & Co. LLC (“Morgan Stanley”), a registered Futures Commission Merchant (“FCM”), Hutchen arranged the execution of numerous off-exchange trades primarily in Eurodollar and Treasury Note futures contracts and caused those trades to be improperly reported to the Chicago Mercantile Exchange (“CME”) and Chicago Board of Trade (“CBOT”) as exchanges for related positions (hereinafter, “EFRPs”). The trades, however, were not lawful EFRPs as they lacked the corresponding and related cash, over-the-counter (“OTC”) swap, OTC Option, or other OTC derivative (collectively, “cash or OTC derivative”) positions required to constitute valid EFRPs, pursuant to CME and CBOT rules.

Because the futures trades were executed noncompetitively and not in accordance with the rules governing EFRPs, the trades constituted “fictitious sales” and resulted in non-bona fide prices being reported in violation of Section 4c(a) of the Act and Regulation 1.38(a).

B. Respondent

Benjamin Hutchen resides in Winnetka, Illinois. During the Relevant Period, Hutchen was registered as an AP of Morgan Stanley. After the conduct at issue was discovered, Morgan Stanley permitted Hutchen to resign. Hutchen is now registered as an AP of a registered Introducing Broker.

C. Facts

On numerous occasions throughout the Relevant Period, Hutchen caused the execution of off-exchange futures trades, primarily in Eurodollar and Treasury Note futures contracts, and caused them to be improperly designated and reported by Morgan Stanley to the CME or CBOT as EFRPs.

Pursuant to CME Rule 538 and CBOT Rule 538, which are identical in substance, a valid EFRP is a privately negotiated and simultaneous exchange of a futures position for a corresponding and offsetting cash or OTC derivative position. EFRPs must be cleared and reported to the appropriate exchange.

During the Relevant Period, Hutchen was an interest rate salesman and ultimately a Managing Director and branch manager for Morgan Stanley. In order to limit his clients’ market risk, and to minimize the “slippage” or price difference between the long and short positions purchased on their behalf, Hutchen caused the execution of numerous off-exchange futures trades. On behalf of his clients, Hutchen negotiated the futures trades either with Morgan Stanley’s U.S. Government Bond Trading Desk or the U.S. Interest Rate Derivatives Trading

Desk (collectively, "Government and Swaps Desks"), which are located in Morgan Stanley's New York office. Morgan Stanley acted as the counterparty to the trades with Hutchen's clients.

Hutchen, through his assistants and others at Morgan Stanley, then caused the trades, effected on behalf of his clients, to be incorrectly designated and reported by Morgan Stanley to the CME or CBOT as EFRPs.² However, the trades did not have the corresponding and related cash or OTC derivative positions, which are required for EFRPs to be bona fide.³

IV.

LEGAL DISCUSSION

A. Hutchen Caused the Execution of Fictitious Sales and Noncompetitive Trades In Violation of Section 4c(a) of the Act and Commission Regulation 1.38(a)

Section 4c(a) of the Act, in relevant part, makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that constitutes a "fictitious sale." 7 U.S.C. § 6c(a) (2006). "By enacting Section 4c(a), Congress sought to ensure that all trades are focused in the centralized marketplace to participate in the competitive determination of the price of the futures contracts." *In re Thomas Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194, at 45,742 (CFTC Dec. 10, 1997), quoting S. Rep. No. 93-1131, 93d Cong., 2d Sess. 16-17 (1974); see also *Merrill Lynch Futures, Inc. v. Kelly*, 585 F. Supp. 1245, 1251 n.3 (S.D.N.Y. 1984) (Section 4c(a)(A) was generally intended to prevent collusive trades conducted away from the pits). If a person attempts to evade the risks and price competition of the open market, such trading schemes are generally prohibited as fictitious sales pursuant to Section 4c(a) of the Act. *Id.*

The Commission has long held that illegitimate noncompetitive trading is a form of fictitious sales. *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982, at 31,903 (CFTC Apr. 4, 1986), *modified*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,401 (CFTC Nov. 26, 1986), *rev'd on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987). "By determining trade information such as price and quantity outside the pit, then using the market mechanism to shield the private nature of the bargain from public scrutiny, both price competition and market risk are eliminated." *Id.* Trades may constitute fictitious sales even where they do not create the false appearance of having been submitted to the open market. See *In re Thomas Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 45,742 (holding that the transfer of futures contracts among accounts with different ownership through book entries constituted fictitious sales in violation of Section 4c(a)

² Each futures trade must be cleared through a clearing house, and the price of each futures trade must be submitted to the exchange in order to be cleared. See CME Rules 536, 538, and CME Advisory Notice RA1006-5. The CME Advisory Notice provides that "an EFRP may be executed at any commercially reasonable price agreed upon by both parties . . ." In the Commission's related action against Morgan Stanley, Commission Order No. 12-22, Morgan Stanley represented that the transactions at issue were executed at commercially reasonable prices, and the Commission found no evidence to the contrary.

³ A few of the futures trades had partially offsetting, related cash or OTC derivative components that were insufficient to satisfy the requirements of CME Rule 538 and CBOT Rule 538.

of the Act even though they did not give the false appearance of submitting trades to the open market). In fact, even where there is an exchange for value, the noncompetitive trading of futures contracts, not subject to an exception under exchange rules, constitutes fictitious sales in violation of Section 4c(a) of the Act. See *In re Emil Voytek*, 11 A.D. 778 (1963) (holding that futures contracts traded off-exchange were not valid “changer trades” permitted by the exchange, and therefore constituted noncompetitive fictitious sales in violation of Section 4c of the Act). Thus, Section 4c(a) of the Act broadly prohibits trades intended to avoid the risks and price competition of the open market.

In order to establish a violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), the Commission also must demonstrate that a person knowingly participated in transactions initiated with intent to avoid a bona fide market position. See *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 31,903; *In re Fisher*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,725, at 56,065 (CFTC Mar. 24, 2004).

Commission Regulation 1.38(a) allows for certain types of futures trades to be executed noncompetitively, but only if such trades are executed in accordance with the rules of the exchange. Generally, Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2012), requires that all purchases and sales of commodity futures be executed “openly and competitively.” This general requirement, however, “shall not apply to transactions which are executed noncompetitively in accordance with written rules of the contract market . . . specifically providing for the noncompetitive execution of such transactions.” CME Rule 538 and CBOT Rule 538 provide such an exception and allow the noncompetitive execution of EFRPs. If, however, a noncompetitive trade does not qualify for such an exception, it violates Section 4c(a) of the Act and Regulation 1.38(a).

Here, Hutchen’s purpose was to limit his clients’ market risk and reduce the slippage or price difference between the long and short positions purchased on their behalf. He therefore structured the trades with the intent to negate market risk, thereby avoiding a bona fide market transaction. Accordingly, Hutchen knowingly caused Morgan Stanley to execute numerous off-exchange noncompetitive futures trades with the intent to avoid a bona fide market position. However, the trades lacked the corresponding related cash or OTC derivative positions required to constitute bona fide EFRPs. By causing the noncompetitive trading of those futures contracts, Hutchen was able to avoid price competition and market risk. Accordingly, the transactions constituted “fictitious sales” and noncompetitive trades, in violation of Section 4c(a) of the Act and Commission Regulation 1.38(a).

B. Hutchen Caused Non-Bona Fide Prices to be Reported in Violation of Section 4c(a)

Section 4c(a) of the Act also makes it unlawful to offer to enter into, enter into, or confirm the execution of a commodity futures transaction that “is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.” 7 U.S.C. § 6c(a) (2006). Where a transaction is non-bona fide, in violation of Regulation 1.38(a), the prices reported for such transactions are also non-bona fide. See *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993, at 37,653 (CFTC Jan. 25, 1991) (finding non-bona fide price in violation of Section 4c(a) of the Act where trades were non-bona fide in violation of

Regulation 1.38). In fact, the prices reported on unlawfully executed noncompetitive trades are non-bona fide even if they accurately reflect the prices agreed upon by the parties and the current price for similar contracts traded on exchange. *Id.*

In this case, Hutchen caused the noncompetitively executed futures trades, effected for his clients, to be reported to the CME or CBOT as bona fide EFRPs, including the reporting of their prices, even though they lacked sufficient corresponding and related cash or OTC derivative positions and therefore were non-bona fide EFRPs. As a result, Hutchen violated Section 4c(a).

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, Hutchen violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2012).

VI.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;
- C. Waives:
 - 1. the filing and service of a complaint and notice of hearing;
 - 2. a hearing;
 - 3. all post-hearing procedures;
 - 4. judicial review by any court;
 - 5. any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
 - 6. any and all claims that he 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 Commission's Regulations, 17 C.F.R. §§ 148.1-30 (2012), relating to, or arising from, this proceeding;

7. any and all claims that he may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding; and
 8. any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer;
- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. makes findings by the Commission that Hutchen violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2012);
 2. orders Hutchen to cease and desist from violating Section 4c(a) of the Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, to be codified at 7 U.S.C. § 6c(a), as well as Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2012);
 3. orders Hutchen to pay a civil monetary penalty in the amount of Three Hundred Thousand Dollars (\$300,000), within thirty (30) days of the date of entry of this Order (the "CMP Obligation"). If the CMP Obligation is not paid in full within thirty (30) days of the date of entry of this Order, then 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 (2006). Respondent shall pay the CMP Obligation 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 other than by electronic funds transfer, then 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 is to be made by electronic funds transfer, Respondent shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall

accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581; and

4. suspends Hutchen's registration with the Commission for a period of four (4) months from the date of entry of the Order; and
5. orders Hutchen to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VII of this Order.

Upon consideration, the Commission has determined to accept the Respondent's Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Section 4c(a) of the Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, to be codified at 7 U.S.C. § 6c(a), as well as Commission Regulation 1.38(a), 17 C.F.R. § 1.38 (2012).
- B. Respondent shall pay a civil monetary penalty in the amount of Three Hundred Thousand Dollars (\$300,000) within thirty (30) days of the date of entry of this Order. If the CMP Obligation is not paid in full within thirty (30) days of the date of entry of this Order, then 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 (2006). Respondent shall pay the CMP Obligation 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 other than by electronic funds transfer, then 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

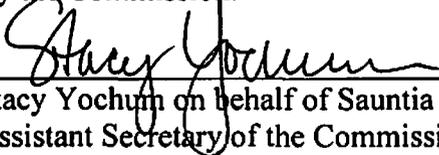
If payment is to be made by electronic funds transfer, Respondent shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall

fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies the paying Respondent and the name and docket number of this proceeding. The paying Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

- C. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
1. For a period of four (4) months from the date of entry of the Order, Hutchen shall not apply for registration, claim any exemption from registration with the Commission in any capacity, or engage in any activity requiring registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012).
 2. Public Statements: Respondent agrees that neither it, nor any of his agents or employees under his 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 Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary to ensure that all of his agents and/or employees under his authority or control understand and comply with this agreement.
 3. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of partial payment of Respondent's CMP Obligation shall not be deemed a waiver of his obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
 4. Change of Address/Phone: Until such time as Respondent satisfies in full his CMP Obligation as set forth herein, Respondent shall provide written notice to the Commission by certified mail of any change to his telephone number and mailing address within ten (10) calendar days of the change.

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

By the Commission.



Stacy Yochum on behalf of Sauntia S. Warfield
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: November 27, 2012