UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of MERRILL LYNCH COMMODITIES, INC., Respondent.	)	CFTC Docket No. 12-05

ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) 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 between January 31, 2011 and February 3, 2011 (the "relevant period"), Merrill Lynch Commodities, Inc. ("Respondent") violated Section 4a(b)(2) of the Commodity Exchange Act ("Act"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 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) ("Dodd-Frank Act"), to be codified at 7 U.S.C. § 6a(b)(2), and Commission Regulation ("Regulation") 150.2, 17 C.F.R. § 150.2 (2011). 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 as 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) and 6(d) of the Act, Making Findings and Imposing Remedial Sanctions (the "Order") and acknowledges service of this Order.[1]

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[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 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

Respondent held net short futures equivalent positions in Cotton No. 2 futures contracts in excess of speculative position limits set by the Commission as a result of its trading on the IntercontinentalExchange U.S. ("ICE") over four consecutive days from January 31, 2011 through February 3, 2011.

B. RESPONDENT

Merrill Lynch Commodities, Inc. is a Delaware corporation operating in various locations and trading commodities in Houston, Texas. Respondent is a wholly owned subsidiary of Merrill Lynch & Co., and, ultimately, a wholly owned subsidiary of Bank of America Corporation. Respondent is not registered with the Commission in any capacity and trades only Respondent's funds in the commodity markets.

C. FACTS

Trading of Cotton No. 2 futures contracts on ICE is subject to the speculative position limits set by the Commission in Regulation 150.2, 17 C.F.R. § 150.2 (2011). Unless the Commission has granted a hedge exemption, traders must hold less than net futures equivalent positions of 5,000 contracts in all months and 3,500 contracts in any single month in Cotton No. 2. During the relevant period, Respondent had a hedge exemption on the long side in Cotton No. 2 that permitted it to hold a long position of up to 7,000 contracts. Respondent did not possess a hedge exemption on the short side and thus was subject to the statutory limits for its short positions in Cotton No. 2.

Respondent traded in excess of speculative position limits from January 31, 2011 to February 3, 2011. Specifically, at the end of the trading day on January 31, 2011, Respondent held a net short position of 5,502 contracts, which was 502 contracts over the all months speculative position limit. The following day, on February 1, 2011, Respondent held a net short position of 6,059 contracts, which was 1,059 contracts over the all months speculative limit, and a net short position of 3,727 contracts in the March 2011 contract, which was 227 contracts over the single month speculative position limit. On February 2, Respondent held a net short position of 5,357 contracts, which was 357 contracts over the all months speculative position limit. On February 3, 2011, Respondent held a net short position of 5,327 contracts, which was 327 contracts over the all months speculative position limit.

Respondent held positions in excess of the speculative position limits as a result of a deficiency in its position limit monitoring system, which was intended to permit traders to ascertain Respondent's current position and its relation to the applicable speculative position limit. During the relevant period, the trader responsible for managing Respondent's position in Cotton No. 2 futures contracts consulted Respondent's position limit monitoring system, which did not alert him to the correct short side and single month position limits. Respondent

subsequently accumulated short positions in Cotton No. 2 futures in excess of 5,000 contracts in all months and 3,500 contracts in a single month.

Respondent was notified on February 1, 2011, that it was holding contracts in excess of the Cotton No. 2 futures speculative position limits, and it was notified again on February 3, 2011. Respondent did not sufficiently reduce its short Cotton No. 2 futures positions and come into compliance with the applicable speculative position limits until February 4, 2011.

Subsequent to that time, Respondent improved its position limit monitoring system and cooperated fully in the Division's investigation.

IV.

LEGAL DISCUSSION

Section 4a(b)(2) of the Act, as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. § 6a(b)(2), provides, in relevant part, that it is unlawful for any person:

> directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market or swap execution facility with respect to a significant price discovery contract in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such rule, regulation, or order.

Regulation 150.2 states that "no person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of" 3,500 contracts in a single month or 5,000 contracts in all months of Cotton No. 2. 17 C.F.R. § 150.2 (2011).

By exceeding the limits fixed by Regulation 150.2, Respondent violated Section 4a(b)(2) of the Act and Regulation 150.2. The Commission does not need to establish scienter – *i.e.*, intent to exceed position limits – in order to prove a violation of speculative position limits. *CFTC v. Hunt*, 591 F.2d 1211, 1218 (7th Cir. 1979); *Saberi v. CFTC*, 488 F.3d 1207, 1212 (9th Cir. 2007). The Act "unambiguously imposes liability" for violations of position limits. *Saberi*, 488 F.3d at 1212 (rejecting trader's contention that the Division was required to prove that he intended to violate the speculative position limits in frozen pork bellies futures set forth in CME Rule 8032.E) (*citing Hunt*, 591 F.2d at 1218.).

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the relevant period, Respondent violated Section 4a(b)(2) of the Act, as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. § 6a(b)(2), and Regulation 150.2, 17 C.F.R. § 150.2 (2011).

VI.

OFFER OF SETTLEMENT

Respondent has submitted an Offer in which it, without admitting or denying the findings herein:

A. Acknowledges receipt and service of this Order;

B. Admits the jurisdiction of the Commission with respect to all the matters set forth in 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 it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2011), relating to, or arising from, this proceeding;
7. any and all claims that it 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; and
8. 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;

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 to 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 Respondent violated Section 4a(b)(2) of the Act, as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. § 6a(b)(2), and Regulation 150.2, 17 C.F.R. § 150.2 (2011);

2. orders Respondent and its successors and assigns to cease and desist from violating Section 4a(b)(2) of the Act, as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. § 6a(b)(2), and Regulation 150.2, 17 C.F.R. § 150.2 (2011);

3. orders Respondent to pay a civil monetary penalty in the amount of three hundred and fifty thousand dollars ($350,000), plus post-judgment interest; and

4. orders Respondent to comply with the undertaking consented to in the Offer and as set forth in Part VII of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Respondent shall cease and desist from violating Section 4a(b)(2) of the Act, as amended by the Dodd-Frank Act, to be codified at 7 U.S.C. § 6a(b)(2), and Regulation 150.2, 17 C.F.R. § 150.2 (2011).

B. Respondent shall pay a civil monetary penalty in the amount of three hundred and fifty thousand dollars ($350,000) within ten (10) days of the date of the entry of this Order (the "CMP Obligation"). If the CMP Obligation is not paid in full within ten (10) 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 the 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, Respondent shall make the payment 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 405-954-6569

If payment is to be made by electronic 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 itself and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address.

C. Respondent and its successors and assigns shall comply with the following undertaking set forth in its Offer:

Public Statements: Respondent agrees that neither it nor any of its successors, assigns, agents or employees under its 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 and its successors and assigns shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.

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

By the Commission

David A. Stawick

David Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 7, 2011