

II. FINDINGS

The Commission finds the following:

A. SUMMARY

On certain dates during the period from at least June 2013 through June 2016 (the “Relevant Period”), BNS, by and through traders on its precious metals trading desk (“Traders”), engaged in the disruptive trading practice of “spoofing” (bidding or offering with the intent to cancel the bid or offer before execution) in gold and silver futures products traded on the Chicago Mercantile Exchange (“CME”). BNS’s disruptive trading violated Section 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012).

In accepting the Offer, the Commission recognizes BNS’s self-reporting and cooperation during the Division of Enforcement’s (“Division”) investigation of this matter, explained in more detail below. The Commission notes that self-reporting, cooperation, and remediation by BNS are being recognized in the form of a substantially reduced civil monetary penalty.

B. RESPONDENT

The Bank of Nova Scotia is a chartered schedule I bank on the Bank Act (Canada), headquartered in Toronto, Canada. BNS has been provisionally registered with the Commission as a swap dealer since December 31, 2012. The spoofing activity described in this Order emanated from the New York Agency of BNS, which is located in New York, New York.

C. FACTS

1. BNS’s Spoofing

During the Relevant Period, the Traders worked on BNS’s precious metals trading desk at the offices of the New York Agency of BNS. As part of their responsibilities, the Traders made a market for precious metals and related derivatives products and traded futures principally to hedge customer orders to profitably manage the desk’s overall position. During the Relevant Period, on behalf of BNS and within the scope of employment at BNS, the Traders placed numerous orders for gold and silver futures on CME with the intent to cancel those orders before execution.

Generally, the spoofing strategy involved three steps. First, a trader placed a small order on one side of the market at or near the best price (the “Genuine Order”). Second, that trader placed a larger order on the opposite side of the market away from the best price (the “Spoof Order”). The trader placed these Spoof Orders to create—or sometimes exacerbate—an imbalance in the order book. This created the impression of greater buying or selling interest than would have existed absent the Spoof Orders and, in turn, induced other market participants to fill the trader’s smaller resting Genuine Orders. Third, within seconds of the Genuine Order being filled, the trader cancelled the Spoof Order before it was filled.

2. BNS's Self-Reporting, Cooperation, and Remediation

After BNS was notified by its FCM of certain problematic order activity by a trader on its precious metals trading desk, BNS conducted an internal review, and terminated that trader. Shortly thereafter, BNS self-reported the trading activity to the Division. As part of its self-reporting, BNS provided the Division valuable information and analysis regarding the Traders' trading activity. BNS also showed significant cooperation in the Division's investigation, voluntarily producing hundreds of thousands of documents, and providing important information and analysis at the Division's request. Finally, prior to the entry of this Order, BNS has represented that it implemented enhancements to detect and deter similar conduct, including taking corrective action to improve its surveillance systems and controls by hiring a full-time surveillance monitor and updating its trade surveillance systems and has enhanced its training programs with respect to spoofing.

Due to BNS's self-reporting, cooperation, and remediation, the civil monetary penalty imposed by the Commission has been substantially reduced from the otherwise applicable penalty.

III. LEGAL DISCUSSION

A. Spoofing in the Precious Metals Futures Markets in Violation of Section 4c(a)(5)(C) of the Act

Section 4c(a)(5) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012), makes it unlawful for “[a]ny person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that . . . is, is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel the bid or offer before execution).” See *United States v. Coscia*, 866 F.3d 782, 793 (7th Cir. 2017) (holding that because the Act clearly defines spoofing, it provides adequate notice of prohibited conduct), *cert denied*, 86 U.S.L.W. 3571 (U.S. May 14, 2018) (No. 17-1099).

As described above, BNS, by and through the Traders, entered numerous bids or offers on a registered entity with the intent to cancel the bids or offers before execution in violation of Section 4c(a)(5)(C) of the Act. See *CFTC v. Oystacher*, 203 F. Supp. 3d 934, 942 (N.D. Ill. 2016) (denying motion for judgment on the pleadings, holding that allegations of placing “both bids and offers with the intent to cancel those bids or offers before execution” constitutes “trading behavior [that] falls within the Spoofing Statute’s defined prohibition”); *CFTC v. Nav Sarao Futures Ltd.*, No. 15-3398, 2016 WL 8257513, at *10 (N.D. Ill. Nov. 14, 2016) (consent order) (finding that defendants engaged in spoofing techniques by, among other things, placing “bids and offers for the E-Mini S&P contract with the intent of cancelling those bids and offers before execution (*i.e.*, Spoof Orders)”; *CFTC v. Khara*, No. 15-CV-03497 (S.D.N.Y. Mar. 31, 2016), ECF No. 35 ¶ 21 (consent order) (finding that “Defendants . . . engaged in unlawful disruptive trading practices or conduct in the gold and silver futures markets . . . that were, were of the character of, or were commonly known to the trade as ‘spoofing’ (bidding and offering with the intent to cancel the bid or offer before execution).”); *In re Posen*, CFTC No. 17-20, 2017 WL 3216576, at *2 (July 26, 2017) (consent order) (finding that a manual trader entered

into “bids or offers on a registered entity with the intent to cancel the bids or offers before execution in violation of Section 4c(a)(5)(C) of the Act”).

B. BNS Is Liable for the Acts of Its Agents

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Commission Regulation (“Regulation”) 1.2, 17 C.F.R. § 1.2 (2018), provide that “[t]he 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.” Pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, strict liability is imposed on principals for the actions of their agents. *See, e.g., Dohmen Ramirez & Wellington Advisory, Inc. v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988); *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *CFTC v. Byrnes*, 58 F. Supp. 3d 319, 324 (S.D.N.Y. 2014).

The Traders engaged in the conduct described herein within the course and scope of their employment; therefore, pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, Respondent is liable for the acts, omissions, and failures of the Traders in violation of Section 4c(a)(5) of the Act.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, BNS violated Section 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012).

V. OFFER OF SETTLEMENT

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

- A. Acknowledges 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 a 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 it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2018), 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, tit. II, §§ 201-253, 110 Stat. 847, 857-74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
 8. Any claims 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, including this Order;
- 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. Requests, for the reasons set forth in BNS's letter dated September 14, 2018 ("Request Letter"), that the Commission advise that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the Securities & Exchange Commission ("SEC"), 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order; and
- F. 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 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012);
 2. Orders Respondent to cease and desist from violating Section 4c(a)(5)(C) of the Act;
 3. Orders Respondent to pay a civil monetary penalty in the amount of eight hundred thousand dollars (\$800,000), plus post-judgment interest if the civil monetary penalty is not paid in full within ten days of the date of entry of this Order;
 4. Orders Respondent and its successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order; and
 5. Advises that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC should not arise as a consequence of this Order.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent and its successors and assigns shall cease and desist from violating Section 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012).
- B. Respondent shall pay a civil monetary penalty in the amount of eight hundred thousand dollars (\$800,000) (“CMP Obligation”), within ten days of the date of the entry of this Order. If the CMP Obligation is not paid in full within ten 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 (2012).

Respondent shall pay the CMP Obligation and any post-judgment interest 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:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorn 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, NW, Washington, DC 20581.

- C. Respondent and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:
 - 1. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action or make any public statement on behalf of Respondent 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 comply with this agreement, and 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.

2. Procedures and Controls to Detect Spoofing Activity: Respondent shall continue to implement systems and controls reasonably designed to detect spoofing activity by its traders, such as the systems and controls Respondent developed and implemented in response to the spoofing activity described in this Order. These systems and controls shall, at a minimum, be designed to detect and generate a report regarding patterns of trading that might constitute spoofing activity. Respondent's personnel shall promptly review such reports and follow up as necessary to determine whether spoofing activity has occurred.
3. Training: Respondent shall continue to provide annual training addressing the legal requirements of the Act with regard to spoofing, to be given to all employees trading on behalf of Respondent or other affiliated entities who submit any orders on futures markets, and their supervisors.
4. Cooperation, in General: Respondent shall cooperate fully and expeditiously with the Commission, including the Division, in this action, and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate with the Commission in any investigation, civil litigation, or administrative matter related to, or arising from, this action. As part of such cooperation, Respondent agrees to do the following for a period of five (5) years from the date of the entry of this Order:
 - i. Preserve and produce to the Commission in a responsible and prompt manner, as requested by Division Staff, all non-privileged documents, information, and other materials wherever located, including but not limited to audio files, electronic communications, and trading records and data, in Respondent's possession, custody, or control;
 - ii. Comply fully, promptly, completely, and truthfully, subject to any legally recognized privilege or applicable law and regulations, with any inquiries or requests for information and documents by the Commission;
 - iii. Identify and authenticate relevant documents and other evidentiary materials, execute affidavits or declarations, and provide a corporate representative to testify completely and truthfully at depositions, trial, and other judicial proceedings, when requested to do so by Division Staff;
 - iv. Use its best efforts to produce any current (as of the time of the request) officer, director, employee, or agent of BNS, regardless of the individual's location and at such a location that minimizes Commission travel

expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation, subject to applicable law and regulations; and

- v. Subject to applicable laws and regulations, use its best efforts to assist in locating and contacting any prior (as of the time of the request) officer, director, employee, or agent of BNS.
5. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP Obligation shall not be deemed a waiver of its 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.
6. Based on the nature of the violations; the findings made, and the sanctions, conditions, and undertakings imposed in this Order; and the facts and representations in Respondent's Request Letter, the Commission advises² that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC, 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order.³

² Rule 506(d)(1)(iii)(B) disqualifies an issuer from relying on the private offering exemptions provided for in Rule 506 if they or certain related parties are "subject to a final order of . . . [*inter alia*] the U.S. Commodity Futures Trading Commission . . . that: . . . [c]onstitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct." Rule 506(d)(2)(iii), however, provides that disqualification "shall not apply" if the CFTC "advises in writing" that disqualification under Rule 506(d)(1) "should not arise as a consequence of such order." *See also* 17 C.F.R. §§ 262(a)(3)(ii), (b)(3) (parallel provisions under Regulation A); SEC, Exemptions to Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83,494, 83,545 (Nov. 21, 2016) (stating that disqualification under Rule 504 arises "absent a waiver or other exception provided in Rule 506(d)").

³ In providing this advice, the Commission considered factors similar to those considered by the SEC when it issues waivers of disqualification under Regulation A and Regulation D. The SEC grants waivers where an applicant has shown "good cause and . . . if the [SEC] determines that it is not necessary under the circumstances that an exemption be denied," 17 C.F.R. §§ 230.262(b)(2), 230.506(d)(2)(ii), based on its analysis of how the identified misconduct bears on the applicant's fitness to participate in offerings exempted under Regulation A and Regulation D. *See* SEC, Div. of Corp. Fin., *Waivers of Disqualification Under Regulation A and Rules 505 and 506 of Regulation D*, <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>; SEC, Div. of Corp. Fin., *Rule 504 of Regulation D: A Small Entity Compliance Guide for Issuers*, <https://www.sec.gov/divisions/corpfin/guidance/rule504-issuer-small-entity-compliance.html>. The SEC considers the following primary factors in determining whether to grant a waiver request: (i) the nature of the violation and whether it involved the offer or sale of securities; (ii) whether the violation required scienter; (iii) who was responsible for the misconduct; (iv) what was the duration of the misconduct; (v) what remedial steps have been taken; and (vi) the impact on the party seeking a waiver and third parties if a waiver is denied.

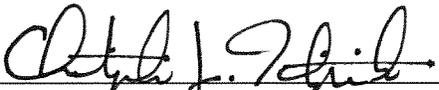
The Commission considers these factors in the context of the markets it regulates, and also takes into account whether it determined that a statutory disqualification under the Act should arise solely based on the misconduct

The Commission notes that if the facts are different from those represented, or Respondent fails to comply with the terms of the Order, the Commission may, in its discretion, revisit its advice that disqualification should not arise. The Commission reserves the right, in its sole discretion, to withdraw or otherwise revoke or further condition its advice under those circumstances.

7. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

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

By the Commission



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 28, 2018

found herein and leading to disqualification under Regulation A and Regulation D. The Commission is guided by waivers granted by the SEC in prior cases involving similar facts and circumstances. *See, e.g., In re JPMorgan Chase Bank, N.A.*, Securities Act Release No. 9993, 2015 WL 9256636 (Dec. 18, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 of Regulation D, where disqualification had been triggered by a CFTC order relating to JPMCB's failure to adequately disclose certain conflicts of interest to clients); *In re UBS AG*, Securities Act Release No. 9787, 2015 WL 2395516 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506, where disqualification had been triggered by a criminal guilty plea relating to FX benchmark manipulation and noting the entry of parallel CFTC orders); *In re Barclays PLC*, Securities Act Release No. 9786, 2015 WL 2395515 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 where disqualification had been triggered by a CFTC order relating to FX benchmark and ISDAFIX manipulation); *see also, e.g., Piper Jaffray & Co.*, SEC No-Action Letter, 2015 WL 4451053 (July 20, 2015) (SEC no-action letter determining that good cause had been shown that it was not necessary to deny reliance on the exemptions under Regulation A and Rule 506 of Regulation D, where disqualification had been triggered by an SEC order, and applying the same factors to consideration of waiver for both exemptions).