

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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11:09 am, Aug 04, 2016

In the Matter of:)
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BARCLAYS CAPITAL, INC.)

CFTC Docket No. 16 – 25

Respondent.)
_____)

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

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Barclays Capital, Inc. (“Barclays” or “Respondent”) has violated Commission Regulation 166.3, 17 C.F.R. § 166.3 (2015). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Barclays has 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 this administrative proceeding, Barclays 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, Barclays consents to the entry of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”) and acknowledges service of this Order.¹

¹ Respondent consents 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 Respondent does 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 does Respondent 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.

III.

The Commission finds the following:

A. SUMMARY

During the period January 2011 to April 2015 (“relevant period”), Barclays failed to diligently supervise its officers’, employees’, and agents’ processing of exchange and clearing fees it charged certain customers, in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2015).

In accepting Barclays’ Offer, the Commission recognizes the Respondent’s significant cooperation during the CFTC’s Division of Enforcement’s (“Division”) investigation of this matter, which included providing important information and analysis to the Division that helped the Division efficiently and effectively undertake its investigation.

B. RESPONDENT

Barclays Capital, Inc. is a Connecticut corporation. The company is headquartered in New York, with registered branch offices in Boston, Chicago, and Los Angeles, among other locations. Barclays operates as a subsidiary of Barclays Group US, Inc., which is a wholly owned subsidiary of Barclays Bank PLC, a United Kingdom company. Barclays has been registered with the Commission as a futures commission merchant (“FCM”) since 1990 and with the Securities and Exchange Commission as a broker-dealer since 1989.

C. FACTS

Customer transactions executed on exchanges are subject to payment of exchange and clearing fees that are applied to each transaction in the normal course of business. FCMs such as Barclays receive invoices for these fees from the exchange clearinghouses, which the FCMs pass on to their customers. The fees charged by exchanges vary based upon the different memberships held by customers. In addition, the exchanges have instituted various incentive programs which provide fee discounts or rebates based on monthly trading volumes in certain contracts. Although FCMs assess fees to their customers on a transaction-by-transaction basis, the amounts due to customers under the incentive and rebate programs are not determined until the end of each month, when the total trading volume for customers across all FCMs for the past month is known. At that point, FCMs engage in a variety of traditionally manual processes to compute discounts and credit them to their customer accounts. The process is typically complicated because of the myriad applicable rates, surcharges and fee structures.

During the relevant period, Barclays failed to implement and maintain adequate systems for reconciling invoices from exchange clearinghouses with the amounts of fees actually charged to its customers through its back-office accounting software. Barclays also failed to implement and maintain adequate policies and procedures regarding reconciliation of exchange and clearing fees (“exchange fees”), including failing to draft procedures and adequately train staff on how to complete the reconciliations.

In early 2012, shortly after Barclays had combined its futures and over-the-counter clearing business in 2011, Barclays reviewed its fee reconciliation process and determined to retain an independent service provider to enhance its exchange fee reconciliation procedures to ensure accuracy and completeness. In August 2012, that firm identified that in July 2012 Barclays had overcharged certain customers by failing to pass on to those customers fee discounts provided by one of the exchanges for a particular exchange-traded product. Barclays, which relied exclusively on manual processes for data reconciliation, determined that these overcharges had resulted from a failure to review certain exchange fee reports that identified those rebates.² Barclays then also utilized a second third-party service provider to assist, on an ongoing basis, in the reconciliation process and identify discrepancies between the invoices from exchange clearinghouses and the amounts Barclays charged its customers to pay for customers' exchange fees on a daily basis.

From 2012 through 2014, Barclays accrued but failed to timely pay out \$1.1 million in exchange fee rebates with respect to the discount program for this particular exchange-traded product. Barclays has fully refunded nearly all of the affected customers.³ Barclays' represents that its work with both third-party service providers has improved the accuracy of its reconciliation process and Barclays continues to work with both outside firms.

IV.

LEGAL DISCUSSION

Regulation 166.3, 17 C.F.R. § 166.3 (2015), 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 activities relating to its business as a registrant. Regulation 166.3 imposes upon registrants an affirmative duty to supervise their employees and agents diligently by establishing, implementing, and executing an adequate supervisory structure and compliance programs. In order to prove a violation of Regulation 166.3, the Commission must demonstrate 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).

² In addition to over-accruing from customers during the fee reconciliation process, Barclays also under-accrued from some customers.

³ Approximately \$25,000 has not been rebated back, solely to customers who have either refused the rebates or who no longer have a trading relationship with Barclays and have been unreachable. These funds will escheat to an unclaimed funds account with the state of New York.

Throughout the relevant period, in failing to timely pay rebates with respect to the affected discount program, Barclays failed to supervise and implement adequate systems and procedures capable of preparing, handling and processing exchange fees charged to its customers in violation of Regulation 166.3. Barclays was required to ensure the accuracy of the exchange fees charged to customers; instead, Barclays allowed its officers, agents, and employees to establish and maintain exchange fee reconciliations that were inaccurate and faulty. Barclays also failed to detect the fact that it was overcharging certain customers exchange fees and that its fee reconciliations were inaccurate and faulty until mid-2012, after it retained a third-party service provider to enhance its exchange fee reconciliation procedures. Barclays should have monitored its officers, employees, and agents responsible for the fee reconciliations more closely to ensure that the reconciliations were being done accurately and that the employees conducting and supervising the conduct of the reconciliations were adequately trained and had sufficient systems and procedures in place.

Evidence of violations that “should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations have occurred repeatedly” is probative of a failure to supervise. *Paragon Futures*, ¶ 25,266 at 38,850. By such acts, Barclays violated Regulation 166.3, 17 C.F.R. § 166.3 (2015). See also *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CFTC Docket No. 14-22 (CFTC Aug. 26, 2014) (In consent order, CFTC found that FCM’s fee reconciliation process for identifying and correcting discrepancies between the invoices from the exchange clearinghouses and the amounts charged its customers had been faulty for more than two years and ordered FCM to pay a \$1.2 million civil monetary penalty).

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds during the relevant period Respondent violated Commission Regulation 166.3, 17 C.F.R. § 166.3 (2015).

VI.

OFFER OF SETTLEMENT

Respondent has submitted an Offer in which it, 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 it may possess under the Equal Access to Justice Act, 5 U.S.C. §504 (2012) 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 (2015), 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, 857-868 (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 Barclays 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 Barclays violated Regulation 166.3, 17 C.F.R. § 166.3 (2015);
 2. orders Barclays to cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2015); and
 3. orders Barclays to pay a civil monetary penalty in the amount of eight-hundred thousand dollars (\$800,000), plus post-judgment interest; and
 4. orders Barclays and its successors and assigns, 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 Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Barclays shall cease and desist from violating Commission Regulation 166.3, 17 C.F.R. § 166.3 (2015);
- B. Civil Monetary Penalty: Barclays shall pay a civil monetary penalty in the amount of eight-hundred thousand dollars (\$800,000), plus post-judgment interest, within ten (10) days of the date of the entry of this Order (the "CMP Obligation"). Should Barclays not satisfy its 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. Barclays 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
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
405-954-7262 office
405-954-1620 fax
nikki.gibson@faa.gov

If payment by electronic funds transfer is chosen, Barclays shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Barclays shall accompany payment of the penalty with a cover letter that identifies Barclays and the name and docket number of this proceeding. Barclays shall simultaneously transmit copies of the cover letter and the form of payment to: 1) the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, DC 20581, 2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address, and 3) Regional Counsel, Commodity Futures Trading Commission, Chicago Regional Office, 525 West Monroe, 11th Floor, Chicago, IL. 60661. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2), if this amount is not paid in full within fifteen (15) days of the due date, Barclays shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has

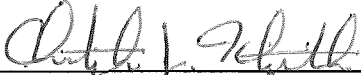
shown to the satisfaction of the Commission that payment of the full amount of the penalty, with interest thereon to the date of the payment, has been made.

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

1. Public Statements: Barclays 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 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 Barclays': (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Barclays 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.
2. Cooperation with the Commission: Barclays shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.
3. Partial Satisfaction: Barclays understands and agrees that any acceptance by the Commission of partial payment of Barclays' 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.
4. Change of Address/Phone: Until such time as Barclays satisfies in full its CMP Obligation as set forth in this Order, Barclays shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten (10) calendar days of the change.

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

By the Commission.



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

Dated: August 4, 2016