

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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2:18 pm, Dec 19, 2016

In the Matter of:

Convergent Wealth Advisors LLC

Respondent.

CFTC Docket No. 17-02

**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 from in or about 2007 to at least 2014 (the “Relevant Period”), David Zier (“Zier”) violated Sections 4b(a)(1)(A), (C) and 4o(1) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 6b(a)(1)(A), (C) and 6o(1) (2012). Convergent Wealth Advisors LLC (“CWA” or “Respondent”), Zier’s employer throughout the Relevant Period, is responsible for Zier’s acts and omissions under Section 2(a)(1)(B) of the Act and Regulation 1.2, 17 C.F.R. § 1.2 (2016). 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) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (“Order”) and acknowledge 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

III.

The Commission finds the following:

A. SUMMARY

From 2007 to 2014, Zier, in connection with his operation of an exempt commodity pool, ZAM LLC (“ZAM”), solicited certain clients of CWA, among other individuals, for investment in ZAM. In connection with those solicitations, Zier made false representations as to ZAM’s performance. Zier represented ZAM as profitable; in reality, ZAM had suffered substantial losses. Zier also fabricated false performance data that he provided to existing ZAM investors to conceal ZAM’s losses.

Zier solicited CWA clients for investment in ZAM while he was an agent of CWA. He also drew upon CWA resources, such as CWA’s operations personnel, to execute certain ZAM related client transactions. Thus, Zier acted with apparent authority as CWA’s agent when he perpetrated the fraud.

B. RESPONDENT

Convergent Wealth Advisors LLC an investment advisory firm located in Potomac, Maryland. It has been registered as a Commodity Pool Operator with the Commission and has been an approved NFA swap firm since 2013. CWA and its predecessor company, Lydian, employed Zier as an investment advisor from the 1990s until 2012, when he was promoted to CEO. Zier continued to serve as CEO of CWA until October 2014.

C. FACTS

In 1998, Zier began operating ZAM, an exempt commodity pool, as an outside business activity, with permission from his then-employer Lydian and subsequently from its successor company, CWA. Through his operation of ZAM, Zier acted as an unregistered Commodity Pool Operator (“CPO”). During the course of its 16-year existence, ZAM had 20 individual pool participants including CWA’s founder and prior CEO.

In 2007, ZAM suffered severe trading losses. Zier never disclosed the losses to pool participants. Rather, Zier attempted to recoup the losses through high-risk trading. Zier’s strategy did not work, and as pool participants made withdrawals he was forced to solicit new investments to keep ZAM solvent.

Seven of the ZAM pool participants were also clients of CWA. Zier served as the CWA investment advisor to these individuals, and he recommended investments in ZAM while he was an agent of CWA. Zier’s solicitations to CWA clients were based on false representations about ZAM’s performance. To perpetuate his scheme, Zier made false representations in e-mails to pool participants about the value of their investments.

findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

Zier used CWA resources to administer ZAM. He used his official CWA email address to conduct ZAM business. Zier also used CWA personnel and resources to execute certain client related ZAM transactions. For example, CWA operations personnel handled wire transfers between ZAM funding accounts and pool participants. CWA personnel placed some ZAM trades. Zier also solicited certain CWA clients to join ZAM.

CWA had the ability to monitor ZAM's financial accounts and Zier's e-mail correspondence relating to ZAM administration. In 2014, CWA compliance personnel took a closer look at ZAM and discovered that certain of ZAM's account statements and the performance reports being provided to CWA clients who were participants in ZAM were inconsistent. When CWA compliance personnel asked Zier to account for these inconsistencies, he took his own life.

Zier had taken out several insurance policies that covered at least \$9 million in ZAM losses in the event of his death. The policies were paid to ZAM, and through these payouts ZAM pool participants received amounts that covered, at a minimum, all losses of principal.

From December 23, 2010 until Zier's death, fraudulent solicitations in ZAM totaled \$2,912,960.

IV.

LEGAL DISCUSSION

A Zier's Violations of Sections 4b(a)(1)(A), (C) of the Act

Sections 4b(a)(1)(A) and (C) of the Act provide, in relevant part, that it is unlawful for any person, in or in connection with any order to make, or the making of, a futures contract (A) to cheat or defraud or attempt to cheat or defraud another person, or (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in connection with such contract.

To establish that Zier violated Sections 4b(a)(1)(A) and (C) of the Act by making oral and written misrepresentations to prospective and then-current ZAM participants, the Commission must prove that: (1) a misrepresentation, misleading statement, or deceptive omission was made; (2) with scienter; and (3) that the misrepresentation, misleading statement, or deceptive omission was material. *See, e.g., CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002). Scienter requires proof that a defendant committed the alleged wrongful acts "intentionally or with reckless disregard for his duties under the Act." *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988). A statement is material if "it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *R.J. Fitzgerald*, 310 F.3d at 1328 (internal quotation marks omitted).

In this case, Zier made false representations about the performance of ZAM while soliciting investments in the pool. Zier also concealed ZAM's losses by sending e-mails to pool participants that misrepresented the value of their investments.

Zier made these misrepresentations knowingly or with reckless disregard of the truth in order to induce pool participants to invest or reinvest with him. These misrepresentations are material in that reasonable pool participants would consider accurate information about pool performance to be important in making an investment decision.

Accordingly, each of the elements under Sections 4b(a)(1)(A) and (C) of the Act is met in this case.

B. Zier's Violations of Section 4o of the Act

Section 4o(1) of the Act makes it unlawful for a commodity pool operator ("CPO") to use the mails or any other means of interstate commerce to (i) employ any device, scheme or artifice to defraud any pool participant or prospective pool participant, or (ii) engage in any transaction, practice or course of business that operates as a fraud or deceit upon any pool participant or prospective pool participant. Unlike Sections 4b(a) and 4o(1)(A) of the Act, the language of Section 4o(1)(B) does not require "knowing" or "willful" conduct as a prerequisite for establishing liability. *See, e.g., Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988). Section 4o of the Act applies to all CPOs, whether registered, required to be registered, or exempted from registration. *See, e.g., Skorupskas*, 605 F. Supp. at 932.

During the Relevant Period, Zier, while acting as a CPO, solicited, accepted or received funds from others to be pooled for the purpose of trading forex contracts. The same conduct that constitutes violations of Section 4b(a) of the Act, as described above, constitutes violations of Section 4o of the Act. *See, e.g., Skorupskas*, 605 F. Supp. at 932-33.

C. CWA is Liable For Zier's Violations of the Act

Section 2(a)(1)(B) of the Act and Regulation 1.2, 17 C.F.R. § 1.2 (2016), 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.

As described above, certain of Zier's acts, omissions, and failures and his use of CWA resources to conduct ZAM business occurred within the course and scope of his employment with CWA. Therefore, CWA is liable for Zier's conduct pursuant to Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B) (2012) and Regulation 1.2, 17 C.F.R. § 1.2 (2016).

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that during the Relevant Period, Convergent Wealth Advisors LLC is liable pursuant to Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B) (2012) and Regulation 1.2, 17 C.F.R. § 1.2 (2016) for the acts, omissions and failures of Zier that violated Sections 4b(a)(1)(A), (C) and 4o(1) of the Act, 7 U.S.C §§ 6b(a)(1)(A), (C) and 6o(1) (2012).

VI.

OFFER OF SETTLEMENT

Respondent has submitted the 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 (2012), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Commission's Regulations, 17 C.F.R. § 148 (2014), 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 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 Respondent violated Sections 4b(a)(1)(A), (C) and 4o(1) of the Act, 7 U.S.C §§ 6b(a)(1)(A), (C) and 6o(1) (2012);
 2. Orders Respondent to cease and desist from violating Sections 4b(a)(1)(A), (C) and 4o(1) of the Act, 7 U.S.C §§ 6b(a)(1)(A), (C) and 6o(1) (2012);
 3. Orders Respondent to pay a civil monetary penalty in the amount of \$800,000 (eight hundred thousand dollars) ("CMP Obligation"), plus post-judgment interest; and
 4. Orders Respondent and their 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. Respondent shall cease and desist from violating Sections 4b(a)(1)(A), (C) and 4o(1) of the Act, 7 U.S.C §§ 6b(a)(1)(A), (C) and 6o(1) (2012).
- B. Orders Respondent to pay a civil monetary penalty in the amount of \$800,000 (eight hundred thousand dollars), plus post-judgment interest. Post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of the 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 (2012).

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
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

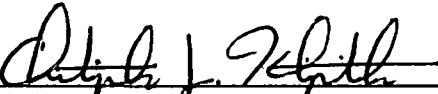
If payment is to be made by electronic funds transfer, Respondent shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies Respondent and the name and docket number of this proceeding. 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, D.C. 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 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.
 2. **Cooperation with the Commission:** Respondent 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:** 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.

4. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Consent Order, 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.



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

Dated: December 19, 2016