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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Cargill, Inc.,

Respondent.

CFTC Docket No. 18-03

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 at least in or about 2013 to the present (the "Relevant Period"), Cargill, Inc. ("Respondent") violated Section 4s(h)(1) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6s(h)(1) (2012), and Commission Regulations ("Regulations") 23.431(a) and (d), 45.4(d)(2), and 166.3, 17 C.F.R. §§ 23.431(a), (d), 45.4(d)(2), 166.3 (2017). 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 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

Beginning in early 2013, when it provisionally registered as a swap dealer, and continuing through the present, Cargill, through its Cargill Risk Management business ("CRM") has provided its counterparties to certain complex swaps with mid-market marks ("marks") that failed to comply with the Act and Regulations.

Swap dealers such as Cargill are required to comply with certain external business conduct requirements. These include disclosing to potential counterparties, prior to the transaction, the swap dealer's material incentives and conflicts of interest related to the swap, including the mid-market mark of the swap. The requirements also include daily disclosure to counterparties, during the life of each swap, of the mid-market mark of that swap. Regulations prohibit the mark, either pre-trade or during the life of the swap, from including any amount for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments.

In 2012 and 2013, as it prepared to register as a swap dealer, Cargill identified the mid-market mark provisions of the Act and the Commission's external business conduct regulations as potentially problematic for Cargill's business because the provisions would require Cargill to disclose its full mark up on swaps to its counterparties. In particular, Cargill was reluctant to disclose its mark up on certain complex swaps because of a concern that such transparency might ultimately reduce its revenue. As a result of this concern, Cargill chose to provide a mark that was based on a termination or "unwind" value that included a portion of Cargill's estimated revenue during the first sixty calendar days of the swap, and also credited the counterparty with a portion of its estimated revenue if the counterparty terminated the swap during that same period. This method had the effect of concealing from the counterparty the full revenue that Cargill expected to make from the swap transaction. Cargill took this approach despite concerns that its contemplated mid-market mark methodology did not meet the requirements of the Commission's regulations concerning mid-market marks, either pre-trade or during the first sixty calendar days of the swap. As a result of this conduct, Cargill violated the mid-market mark disclosure requirements and swap reporting rules, and failed to supervise its employees.

Additionally, from its provisional registration as a swap dealer, Cargill, through CRM, has failed to supervise employees in relation to certain swaps executed based on prices derived by Cargill's ProPricing program. ProPricing is a program in which direct customers and third party marketers enroll specified amounts of commodities with Cargill for forward delivery; Cargill sets the futures hedge component of the price it will pay for these commodities on delivery by hedging the enrolled commodities with futures and options. When third party marketers make use of this program, Cargill, as a swap dealer, engages in swaps with these marketers.

Cargill, through CRM, provides periodic reports to third-party marketers on the ProPricing accounts. Included in those reports is information on the percentage of the enrolled commodity that is being hedged. On a number of occasions during the Relevant Period, ProPricing accounts were short more than the amount of the enrolled commodity for that account (i.e., over-hedged) or long (i.e., under-hedged). When an account is over- or under-hedged on a periodic reporting date, CRM reports to swap counterparties that the account is one hundred percent hedged (in the case of over-hedging) or zero percent hedged (in the case of under-hedging), rather than the actual percentage the account is hedged. From 2013, when Cargill provisionally registered as a swap dealer, to the present, Cargill employees have therefore provided reports to third-party marketers on the ProPricing accounts that fail to reveal that the ProPricing accounts on which the swap is priced are over- or under-hedged.

B. <u>RESPONDENT</u>

Cargill, Inc. is a global agricultural, commodity, and financial services business headquartered in Minnesota. Cargill has been provisionally registered as a swap dealer since February 28, 2013; its application to be designated as a limited purpose swap dealer[2] was approved by the Commission on October 29, 2013. Cargill is also listed as a principal for certain of its affiliates that are registered with the Commission.

C. <u>FACTS</u>

1. Mid-Market Marks

a. Swap Dealer Business Conduct Requirements

Section 4s(h) of the Act, 7 U.S.C. § 6s(h), sets forth certain business conduct standards for swap dealers.[3] These include requirements that swap dealers disclose to counterparties (1) information about the material characteristics of the swap, (2) the swap dealer's material incentives and conflicts of interest related to the swap, and (3) a daily mark of each uncleared swap transaction.

Regulation 23.431, 17 C.F.R. § 23.431, implements, among other provisions, the disclosure requirements of Section 4s(h), 7 U.S.C. § 6s(h). Pursuant to Regulation 23.431, swap

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[2] A "limited purpose" swap dealer is an entity that the Commission designates as a swap dealer for one type, class, or category of swap or activities without the entity being considered a swap dealer for other types, classes, categories, or activities. *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-based Swap Participant" and "Eligible Contract Participant,"* 77 Fed. Reg. 30,596, 30,643 (May 23, 2012). Cargill's swap dealer activity is conducted exclusively by its CRM business unit. *In the Matter of the Request of Cargill, Incorporated for Limited Purpose Swap Dealer Designations Under Section 1(a)(49)(B) of the Commodity Exchange Act* (CFTC Oct. 29, 2013).

[3] Section 4s(h), 7 U.S.C. § 6s(h), also sets forth business conduct standards for major swap participants. Because Cargill is a swap dealer, the remainder of this Order will discuss the Act and Regulations only as they relate to swap dealers.

dealers must disclose to counterparties,[4] among other things, "[a]t a reasonably sufficient time prior to entering into a swap," (1) the material characteristics of the particular swap, "which shall include the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap," and (2) the material incentives and conflicts of interest the swap dealer may have in connection with the swap, which shall include "[w]ith respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap."[5]

Regulation 23.431 also requires that swap dealers disclose to counterparties the mid-market mark of uncleared swaps daily during the term of the swap, as well as "[t]he methodology and assumptions used to prepare the daily mark" and "[a]dditional information concerning the daily mark to ensure a fair and balanced communication."[6] In requiring that swap dealers disclose their methodology and assumptions, the Commission noted that "[t]he statutory daily mark requirement is meaningless unless the counterparty knows the methodology and assumptions that were used to calculate the mark. To make its own assessment of the value of the swap for its own purposes, the counterparty has to have information from the swap dealer … about how the mid-market mark was calculated."[7] The Commission further noted that for swaps in illiquid markets, the mid-market mark could be calculated using a model;[8] Regulation 23.431 itself provides that a swap dealer is "not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark."[9]

Regulation 23.431 instructs swap dealers that both the pre-trade and daily mid-market marks the swap dealer discloses "shall not include amounts for profit, credit reserve, hedging,

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4 Both Section 4s(h) and Regulation 23.431 limit the disclosure requirements discussed in this Order to counterparties who are not swap dealers, major swap participants, security-based swap dealers, or major security-based swap participants. Section 4s(h)(3)(B), 7 U.S.C. § 6s(h)(3)(B); Regulation 23.431(a), (d), 17 C.F.R. § 23.431(a), (d). The remainder of this Order will use the more general term "counterparties" to refer to the requirements of the Act and Regulation.

5 17 C.F.R. § 23.431(a).

6 17 C.F.R. § 23.431(d). Communicating in a fair and balanced manner with counterparties is independently required by the Regulations. Regulation 23.433, 17 C.F.R. § 23.433 (2017) ("With respect to any communication between a swap dealer . . . and any counterparty, the swap dealer . . . shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.").

Regulation 23.431 provides three examples of additional information that could be "appropriate" to disclose to ensure a fair and balanced communication: (a) that the mark may not be a price at which the swap could be terminated or unwound; (b) that the mark may not be a basis for margin calls; and (c) that the mark may not be the same as the value of the swap on the swap dealer's books. 17 C.F.R. § 23.431(d)(3)(ii).

7 *Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties* ("Final Rule Release"), 77 Fed. Reg. 9,734, 9,768 (Feb. 17, 2012).

8 *Id.*

9 Regulation 23.431(d)(3)(i), 17 C.F.R. § 23.431(d)(3)(i).

funding, liquidity, or any other costs or adjustments."[10] In adopting the rule, the Commission noted that the term mid-market "has been used by many industry participants since at least 1994,"[11] and characterized the mid-market mark as an "objective"[12] and "transparent"[13] value. The intention of the mid-market mark standard in the rule was "to achieve a degree of consistency in the calculation of the daily mark across swap dealers and major swap participants."[14] However, because the mid-market mark requirement was a "principal based" rule the Commission declined to "endorse any particular methodology" of calculating the mark.[15]

As part of the comprehensive regulatory regime for swaps, Regulation 23.402(a)(1), 17 C.F.R. § 23.402(a)(1) (2017), requires that swap dealers have written policies and procedures reasonably designed to ensure compliance with swap dealer business conduct standards, including Regulation 23.431, 17 C.F.R. § 23.431. In adopting Regulation 23.431, 17 C.F.R. § 23.431, the Commission noted that "the Commission will consider good faith compliance" with those policies and procedures as "a mitigating factor when exercising its prosecutorial discretion for violation of the rules."[16]

b. Cargill's Previously Existing Swaps Business

Pre-dating its registration as a swap dealer, Cargill, through its CRM business unit, has offered various swaps to its customers, primarily to allow its customers to manage commodity risk. Cargill offers a range of swaps from more standardized, or "vanilla," swaps to highly complex, customized swaps tailored to customers' specific needs or preferences. Most of the customers of Cargill's swaps business are commodity producers and commercial end users.

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[10] 17 C.F.R. § 23.431(d)(2). The Commission considered, but ultimately did not require, swap dealers to disclose their profit separately. *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties* ("Proposed Rule Release"), 75 Fed. Reg. 80,638, 80,645 (Dec. 22, 2010).

[11] Final Rule Release, 77 Fed. Reg. at 9,768.

[12] *Id*.

[13] Proposed Rule Release, 75 Fed. Reg. at 80,646.

[14] Final Rule Release, 77 Fed. Reg. at 9,811.

[15] *Id*. at 9,768.

[16] *Id*. at 9,744; see also *id*. at 9,766, 9,768 (noting specifically that good faith compliance would be relevant to violations of the mid-market mark requirements). The Commission further stated:

> To be considered good faith compliance, the Commission will consider, among other things, whether the swap dealer … made reasonable inquiry and took appropriate action where the swap dealer … had information that would cause a reasonable person to believe that any person acting for or on behalf of the swap dealer … was violating the CEA or the Commission's Regulations in connection with the swaps related business of the swap dealer ….

Id. at 9,746.

For a number of years prior to its registration as a swap dealer, the most complex swaps Cargill offered were managed by a division of CRM known as Hedging Products, or "HP." These swaps could contain features to embed volatility or optionality into the transaction, such as caps, collars, floors, knock-in or knock-out rights, or various accrual or accumulation features.

From at least 2007 to 2012, Cargill's Hedging Products division provided swap counterparties with statements that contained a "market value" of the swap. For certain complex swaps, Cargill's policy was to report to counterparties a "market value" of the swap that amortized Cargill's expected revenue[17] on the swap equally over the first sixty calendar days of the swap. If – as occasionally happened – a counterparty sought to terminate a swap early, CRM would terminate the swap at or near the reported market value, and thus counterparties who terminated early would not be charged Cargill's full expected revenue.[18] One purpose of this policy was to amortize Cargill's mark up over the first sixty calendar days of the swap instead of showing the entire mark up to the counterparty on day one.

c. Cargill's Development of a Mid-Market Mark Policy

Shortly after the Commission made public the final form of Regulation 23.431, 17 C.F.R. § 23.431, Cargill employees identified the mid-market mark requirements as meaning that Cargill would "have to show [its] mark up on swap trades."

From the beginning, this requirement concerned Cargill, particularly as it related to the Hedging Products division of CRM, which had previously been amortizing its revenue over sixty days for purposes of customer reporting. One CRM senior executive ("Cargill Executive") described the mid-market mark requirements as the number one concern about Cargill's impending registration as a swap dealer. The leadership group of Cargill's swaps business, which included a senior member of the compliance team and business executives, held at least one meeting to discuss "the implications" to Hedging Products, if Cargill had to register as a swap dealer, "of the requirement that they provide a mid-market mark price along with the execution price on each trade." In relation to that meeting, a senior member of the compliance team went on to say "Providing the mid-market mark price is concerning to HP and the impact it could have on earnings." In another email, this senior member of the compliance team described concern that "the transparency of the mid-market mark . . . could result in lower margins" for Hedging Products.

In light of its concerns about the effect of the mid-market mark requirements on its earnings and margins, Cargill explored various other options for calculating and providing mid-

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[17] As used in this Order, the term "expected revenue" means the revenue Cargill expected to realize over the life of the swap.

[18] Cargill calculated market value using a sophisticated propriety model that would value the various components of the complex swap using a common valuation methodology that accounted for past and present market conditions, the underlying price of the commodity or commodities, volatility, and prevailing interest rates, among other factors. Changes in the market value reported to customers over the life of the swap would be affected not only by the amortization of expected revenue, but also by changes in these model inputs, such as changes to the price of the underlying commodity and other market conditions.

market marks. During this process, certain Cargill employees identified an opportunity to raise questions about the mid-market mark requirement with the Commission, but ultimately decided not to raise the topic because it was "too sensitive" and asking questions might "tip [Cargill's] hand" and result in an answer from the Commission that Cargill did not like.

Ultimately, Cargill decided to continue to use its prior practice of amortizing its expected revenue over sixty days for certain complex swaps, including complex swaps offered by Hedging Products, and providing an "unwind" or "termination" value as the mid-market mark. As a result, instead of showing the entire mark up on day one, after registration as a swap dealer Cargill reported a mid-market mark that did not reveal the unamortized revenue, both pre-trade and during the first sixty days of the swap.

Cargill, however, made one modification to its previous practice. Rather than amortizing all of its expected revenue over the first sixty days – which resulted in a "market value" of the swap on the date of the transaction that closely matched the price the customer had paid for the swap – Cargill decided to "recognize" ten percent of its expected revenue on the day of the swap and amortize the remaining ninety percent over the next sixty calendar days. One consideration in recognizing ten percent of expected revenue on the day of the swap was to create a mid-market mark that, pre-trade and shortly after the trade, was sufficiently different than the price the counterparty had paid that it would be believable to counterparties as Cargill's mark up.[19] Multiple Cargill employees, including the Cargill Executive, discussed whether ten percent would be a believable number to counterparties, and concluded that it would be.

The result of Cargill's amortization methodology for complex swaps was that, pre-trade and on the transaction date, Cargill provided mid-market marks to counterparties that concealed ninety percent of Cargill's expected revenue, including Cargill's expected profits and all other costs and adjustments Cargill used when setting the price it would charge to its counterparty. Cargill then reduced the mark over the next sixty days as it amortized the remaining revenue equally each day.

From its registration as a swap dealer until June 2016, Cargill did not disclose to its counterparties that it used an amortization methodology in connection with its complex swaps. In June 2016, after it learned of the Division of Enforcement's investigation, Cargill began disclosing that it employed a "revenue recognition policy" for complex swaps that "factored" ten percent of Cargill's revenue on the trade date and the remaining ninety percent equally over the next sixty calendar days, and disclosed elsewhere that it would calculate a daily mid-market mark "in accordance with [its] revenue recognition policy." Even after June 2016, Cargill did not directly disclose that, because the mid-market mark was calculated based on unamortized revenue, the mark failed to reveal all of Cargill's mark up.

Certain employees expressed concern within Cargill about Cargill's use of the amortization methodology, both before and after Cargill's registration as a swap dealer. Among

[19] Another consideration was Cargill's view that recognizing ten percent of expected revenue at the inception of a trade, even if the counterparty immediately unwound the transaction, was a reasonable amount to compensate Cargill for the upfront costs associated with structuring and selling complex swaps to its counterparties.

the concerns expressed was that the methodology masked the actual value of the swap from counterparties and did not comport with the requirements of the rule.[20] These concerns were expressed to employees at the highest level within Cargill's swap business, including to business leaders of Cargill's CRM division and CRM's compliance leadership. Nevertheless, despite the fact that certain Cargill employees identified issues with Cargill's mark methodology and raised their concerns with CRM leadership, Cargill has used the amortization methodology to calculate its mid-market marks on certain complex swaps from its provisional registration as a swap dealer until the date of this Order.

All swap dealers are subject to the mid-market mark requirements in Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulation 23.431, 17 C.F.R. § 23.431. While the swaps for which Cargill uses its amortization methodology are complex and tailored to particular customers, certain other swap dealers offer similar products. By providing counterparties with mid-market marks that had the effect of concealing up to ninety percent of Cargill's estimated revenue, Cargill potentially advantaged itself over other swap dealers and may have prevented customers from making fully informed decisions about their options for hedging.

Since its registration as a swap dealer, Cargill has provided hundreds of customers with mid-market marks that amortized estimated revenue, in thousands of swap transactions.

d. Swap Data Repository Reporting

Cargill, as a swap dealer, was a reporting counterparty required to report certain data about its swaps transactions to a swap data repository ("SDR").[21] This includes reporting "valuation data" for each uncleared swap daily.[22] Valuation data is defined by the Commission as "all of the data elements necessary to fully describe the daily mark of the transaction" pursuant to Section 4s(h), 7 U.S.C. § 6s(h), and Regulation 23.431, 17 C.F.R. § 23.431.[23]

Cargill, from the time it was required to begin reporting data to the SDR until the date of this Order, has reported valuation data to the SDR that is consistent with the mid-market marks it reports to counterparties. As a result, Cargill has reported valuation data to the SDR for thousands of complex swaps calculated by use of Cargill's mid-market mark amortization methodology and which therefore has been inaccurate.

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[20] Cargill employees, including the Cargill Executive, also recognized that Cargill's marks included anticipated profit, and that Regulation 23.431, 17 C.F.R. § 23.431, did not allow profit to be included in the marks. A compliance employee explained to the Cargill Executive that Cargill was choosing not to follow that portion of the Regulation.

[21] Section 4r(a)(1), (3), 7 U.S.C. § 6r(a)(1), (3) (2012); Regulation 23.204, 17 C.F.R. § 23.204 (2017). The Act and Regulations provide guidance about which counterparty to a swap must report data about the transaction to the SDR. Because Cargill was the reporting counterparty for the swaps it dealt, the remainder of this Order does not discuss this guidance further.

[22] Regulation 45.4(d)(2), 17 C.F.R. § 45.4(d)(2). This subsection was previously numbered Regulation 45.4(c)(2). *Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps*, 81 Fed. Reg. 41,736, 41,747 (June 27, 2016).

[23] Regulation 45.1, 17 C.F.R. § 45.1 (2017).

2. Supervision Relating to ProPricing Swaps

a. ProPricing

For more than ten years, Cargill has offered its customers a grain marketing program called ProPricing. Farmers enroll volumes (or bushels) of certain agricultural commodities for forward delivery through a ProPricing grain marketing contract. Additionally, Cargill also licenses the ProPricing program to third party marketers, who enter into forward delivery cash contracts directly with farmers.

After the enrollment of bushels of a commodity with a specific start date for forward delivery in a certain contract month and year, Cargill prices the forward contracts and swap commitments by hedging the enrolled commodities with futures and options. Each commodity with a specific start date and delivery month and year is hedged in its own account. At delivery, where a third party marketer has licensed the program, Cargill provides the hedge price it achieved to the third party marketers by use of a swap. These swap transactions constitute swap dealing and are conducted through CRM.

CRM provides third party marketers with ProPricing-based swaps with regular updates on the program. These update communications include an estimate of what the futures hedge price for the contract would be as of a reporting date, based on the hedging that Cargill has undertaken in the account for that contract.[24] Additionally, the update communication provides the counterparty with information about the percent of enrolled bushels for a particular ProPricing contract that have been hedged in the corresponding account (also known as a "percent hedged"). CRM has an internal policy that communications with swap counterparties, including counterparties on swaps with third party marketers, must be accurate.

b. Over- and Under-Hedging and Customer Reporting

In Cargill's terminology, if a hedging account is short more than the total volume of enrolled commodities for the ProPricing contract, the account is more than one hundred percent hedged; if an account is long, the account is less than zero percent hedged.

On a number of occasions during the Relevant Period, ProPricing accounts have been more than one hundred or less than zero percent hedged ("over" or "under" hedged). This may occur for a number of reasons, including changes in the deltas of options held in hedging accounts, the withdrawal of bushels from a ProPricing contract, and trades allocated to the wrong hedging account. In some instances, known over- and under-hedging was not quickly corrected by Cargill employees.

On occasions where accounts were over- or under-hedged on a reporting date, Cargill employees would change the "percent hedged" number in the update communication so that the communication would reflect that the contract was either one hundred percent, or zero percent, hedged, rather than more than one hundred percent or less than zero percent hedged. CRM did

[24] Cargill has variously called this estimate the "current market value" or "current ProPricing value" of the ProPricing contract.

not disclose to swap counterparties that at times update communications did not reflect the actual percent that the contracts were hedged.

Cargill failed to have in place systems, controls, policies, or procedures that were reasonably designed to detect and prevent the misreporting of "percent hedged" values to swap counterparties in the update communications.

IV.

LEGAL DISCUSSION

A. Section 4s(h)(1) and Regulation 23.431 – Mid-Market Mark and Related Disclosures

As discussed above, both Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulation 23.431, 17 C.F.R. § 23.431, require swap dealers to disclose to counterparties (1) information about the material characteristics of the swap, (2) the swap dealer's material incentives and conflicts of interest related to the swap, and (3) a daily mark of each uncleared swap transaction. The Regulation additionally requires, as part of the disclosure of material incentives and conflicts of interest, disclosure of a pre-trade mark. 17 C.F.R. § 23.431. Regulation 23.431 requires that both the daily mark and the pre-trade mark "shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments." *Id.* Finally, the Regulation requires the swap dealer to disclose the "methodology and assumptions used to prepare the daily mark" and any additional information about the mark necessary to "ensure a fair and balanced communication." *Id.* In adopting Regulation 23.431, 17 C.F.R. § 23.431, the Commission stated that it would "consider good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules as a mitigating factor when exercising its prosecutorial discretion for violation of the rules." Final Rule Release, 77 Fed. Reg. at 9,744.

Cargill, a swap dealer, provided counterparties with both pre-trade and daily mid-market marks that had the effect of concealing Cargill's full mark-up from counterparties, in that they were calculated based on amortizing Cargill's estimated revenue. Cargill further did not disclose to counterparties that it was employing this methodology for its marks until June 2016; as a result, Cargill's communications with counterparties prior to June 2016 were not "fair and balanced." Cargill also did not disclose to counterparties prior to June 2016 that counterparties who terminated complex swaps within the first sixty calendar days would not be charged Cargill's full estimated revenue, and therefore failed to disclose information about a material characteristic of its complex swaps. Cargill therefore violated Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulation 23.431(a) and (d), 17 C.F.R. § 23.431(a), (d).

Moreover, in engaging in these violations, Cargill did not act in "good faith compliance with policies and procedures reasonably designed to comply with the business conduct standards rules." Final Rule Release, 77 Fed. Reg. at 9,744. Various Cargill employees expressed concerns that Cargill's marks for certain complex swaps did not accurately reflect the mid-market mark of the swaps during the first sixty calendar days of the trade. Further, Cargill employees chose not to seek Commission guidance on Cargill's mid-market mark methodology for these swaps out of concern that the Commission would disagree with Cargill's methodology.

In light of these facts, Cargill does not meet the requirements of the Commission's policy statement regarding mitigation.

B. Regulation 45.4(d)(2) – Reporting of Valuation Data to SDR

Section 2(a)(13) of the Act, 7 U.S.C. § 2(a)(13) (2012), requires that all swaps, both cleared and uncleared, be reported to an SDR and establishes requirements for such reporting. This Section and the Commission's implementing regulations in Parts 43 and 45, 17 C.F.R. pt. 43, 45 (2017), were designed to enhance transparency, promote standardization, and reduce systemic risk. The accuracy and completeness of swap reporting are critical to the Commission's mission to protect market participants and to ensure market integrity. *See, e.g.*, *In re ICE Futures U.S.*, CFTC No. 15-17, 2015 WL 1276463 (CFTC Mar. 16, 2015) (consent order); *In re Deutsche Bank Secs. Inc.*, CFTC No. 15-11, 2015 WL 1508451 (CFTC Dec. 22, 2014) (consent order).

Among the requirements of the Act and Regulations related to swap reporting, Regulation 45.4(d)(2)(i), 17 C.F.R. § 45.4(d)(2)(i), provides that any swap dealer or major swap participant who is a reporting counterparty for a swap must report "valuation data" for each uncleared swap daily.[25] Valuation data is defined as "all of the data elements necessary to fully describe the daily mark of the transaction" pursuant to Section 4s(h), 7 U.S.C. § 6s(h), and Regulation 23.431, 17 C.F.R. § 23.431. Regulation 45.1, 17 C.F.R. § 45.1.

Cargill, a swap dealer and reporting counterparty, reported valuation data that did not comply with the requirements of Section 4s(h), 7 U.S.C. § 6s(h), and Regulation 23.431, 17 C.F.R. § 23.431, for thousands of complex swaps. Cargill therefore violated Regulation 45.4(d)(2)(i), 17 C.F.R. § 45.4(d)(2)(i).

C. Regulation 166.3 – Failure to Supervise

Regulation 166.3, 17 C.F.R. § 166.3, provides that:

> Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

A violation under Regulation 166.3, 17 C.F.R. § 166.3, is an independent violation for which no underlying violation is necessary. *See In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194, at 45,744 (CFTC Dec. 10, 1997).

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[25] This subsection was previously numbered Regulation 45.4(c)(2). *Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps*, 81 Fed. Reg. 41,736, 41,747 (June 27, 2016).

A violation of Regulation 166.3, 17 C.F.R. § 166.3, is demonstrated by showing either that (1) the registrant's supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *See In re Forex Capital Markets LLC*, [2012-2013 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 32,658, at 73,166 (Oct. 3, 2011) (citing *In re Murlas Commodities*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485, at 43,161 (CFTC Sept. 1, 1995)); *see also In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360, at 39,219 (CFTC Aug. 11, 1992) (providing that, even if an adequate supervisory system is in place, Regulation 166.3 can still be violated if the supervisory system is not diligently administered), *aff'd sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993); *Samson Refining Co. v. Drexel Burnham Lambert, Inc.* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,596, at 36,566 (CFTC Feb. 16, 1990) (noting that, under Regulation 166.3, a registrant has a "duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents" (internal quotation marks omitted)). 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. *In re Paragon Futures Ass'n*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266, at 38,850 (CFTC Apr. 1, 1992). A registrant can also be liable for failure to supervise if it "knew of specific instances of misconduct, yet failed to take reasonable steps to correct the problems." *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999).

Cargill has been a Commission registrant since February 28, 2013, when it provisionally registered as a swap dealer. Since that time, it failed to have in place an adequate supervisory system and failed to perform its supervisory duties diligently as to the mid-market mark and related disclosures, in that multiple Cargill employees, including compliance personnel, were aware that Cargill's mid-market marks for complex swaps did not reveal Cargill's full mark up, and yet no steps were taken to bring Cargill's marks into compliance by providing accurate mid-market marks or to make any disclosure concerning any aspect of the amortization policy until June 2016, nor did Cargill have in place a supervisory system to ensure that incorrect valuation data was not sent to the SDR. Further, Cargill failed to have in place an adequate supervisory system within CRM and failed to perform its supervisory duties diligently as to communications about swaps with third party marketers, in that violations of CRM's internal communications policies repeatedly occurred and communications with counterparties were inaccurate regarding the percent accounts were hedged, but Cargill failed to develop systems or procedures to prevent the violations or correct the conduct.

Cargill therefore failed to supervise diligently its officers, employees, and agents and did not have sufficient procedures in place to detect and deter misconduct, in violation of Regulation 166.3, 17 C.F.R. § 166.3.

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, Cargill violated Section 4s(h)(1) of the Act, 7 U.S.C. § 6s(h)(1), and Regulations 23.431(a) and (d), 45.4(d)(2), and 166.3, 17 C.F.R. §§ 23.431(a), (d), 45.4(d)(2), 166.3.

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 Regulations, 17 C.F.R. pt. 148 (2017), 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 (codified as amended 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 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 Section 4s(h)(1) of the Act, 7 U.S.C. § 6s(h)(1), and Regulations 23.431(a) and (d), 45.4(d)(2), and 166.3, 17 C.F.R. §§ 23.431(a), (d), 45.4(d)(2), 166.3;

2. orders Respondent to cease and desist from violating Section 4s(h)(1) of the Act, 7 U.S.C. § 6s(h)(1), and Regulations 23.431(a) and (d), 45.4(d)(2), and 166.3, 17 C.F.R. §§ 23.431(a), (d), 45.4(d)(2), 166.3;

3. orders Respondent to pay a civil monetary penalty in the amount of ten million dollars ($10,000,000), plus post-judgment interest; and

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 VII of this Order.

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

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Respondent and its successors and assigns shall cease and desist from violating Section 4s(h)(1) of the Act, 7 U.S.C. § 6s(h)(1), and Regulations 23.431(a) and (d), 45.4(d)(2), and 166.3, 17 C.F.R. §§ 23.431(a), (d), 45.4(d)(2), 166.3.

B. Respondent shall pay a civil monetary penalty in the amount of ten million dollars ($10,000,000) ("CMP Obligation"), plus post-judgment interest. 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 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 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, 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 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. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor 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.

3. 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 its telephone number and mailing address within ten (10) calendar days of the change.

4. Undertakings:

   a. Within 60 days of the date of this Order, CRM will develop and employ a model using mid-market values to generate a pre-trade mark and daily mark ("mid-market marks") in compliance with Regulation 23.431, 17 C.F.R. § 23.431, for its complex swaps. The mid-market marks generated by CRM's model and provided by CRM to swaps counterparties under Regulation

23.431, 17 C.F.R. § 23.431, will reflect CRM's full estimated revenue and shall not include any amortization of estimated revenue.

b. CRM may provide an additional mark ("unwind mark") that reflects the unwind or termination value of the swap, and for such unwind mark, CRM may use an amortization methodology. Any such unwind mark shall clearly be labeled as such, and CRM shall inform customers of the material characteristics of the swap as they relate to such an unwind mark, including the time period over which CRM amortizes estimated revenue and the circumstances under which CRM will unwind or terminate the swap at or close to the unwind mark.

c. Cargill will provide counterparties mid-market marks for complex swaps employing a model using mid-market values as described in paragraph a for so long as Cargill is required to provide a mid-market mark to counterparties under the Act and Regulations.

d. Within 60 days of the date of this order, CRM will provide updated disclosures reflecting its revised model in accordance with paragraph a above to counterparties with open complex swaps. By the same date, CRM will also inform such counterparties that they may request corrected mid-market marks for such swaps, and, on request, will provide counterparties with corrected mid-market marks.

e. Within 60 days of the date of this Order, CRM will provide to its Swap Data Repository corrected valuation data for its open complex swaps that is calculated in accordance with paragraph a above.

f. Within 90 days of the date of this Order, CRM will implement and improve internal controls and procedures in a manner reasonably designed to ensure that CRM's mid-market marks for complex swaps comply with the Act and Regulations. Remediation improvements will include:

   i. enhanced training of traders, marketers, supervisors, and others involved in calculating and providing marks for complex swaps;

   ii. enhanced training of compliance employees to ensure that compliance employees are providing adequate compliance oversight of the CRM business;

   iii. periodic audits (at least annually) of CRM's mark methodology;

   iv. periodic review of communications with customers relating to the mark on complex swaps.

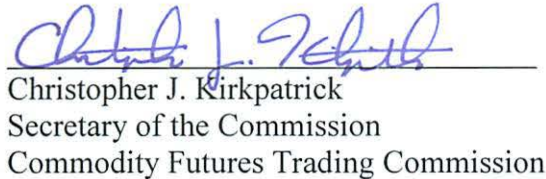
g. Within 90 days of the date of this Order, CRM will implement and improve its internal controls and procedures in a manner reasonably designed to ensure compliance with internal policies and the accuracy of reports provided to swap counterparties in connection with the ProPricing program. Remediation improvements will include:

   i. enhanced training of traders, marketers, supervisors, and others involved in swap dealing as related to the ProPricing program;

   ii. periodic audits (at least annually) of compliance with internal policies and the accuracy of reports provided to swap counterparties in connection with the ProPricing program.

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: November 6, 2017