

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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12:16 pm, Sep 24, 2015

In the Matter of:

Cargill de México S.A. De C.V.,

Respondent.

CFTC Docket No. 15-34

**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 Respondent Cargill de México S.A. De C.V. (“Cargill de México”) violated Section 4c(a)(1) of the Commodity Exchange Act (“the Act”), 7 U.S.C. § 6c(a)(1) (2012),¹ and Commission Regulation (“Regulation”) 1.38(a), 17 C.F.R. § 1.38(a) (2015) Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Cargill de México engaged in the violations set forth herein and to determine whether any order imposing remedial sanctions should be issued.

II.

In anticipation of the institution of an administrative proceeding, Cargill de México 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, Cargill de México consents to the entry of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act, Making Findings, and Imposing Remedial Sanctions (“Order”) and acknowledges service of this Order.²

III.

¹ Although Section 4c(a)(1)(A) was amended as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.), that amendment did not affect the operative language for the violations described in this Order.

² Cargill de México 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 Cargill de México 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 Cargill de México 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

On multiple occasions between March 2010 and August 2014 Cargill de México engaged in wash trades in certain agricultural futures products, including corn, soybeans and wheat, on the Chicago Board of Trade (“CBOT”) as well as in hard red wheat traded on the Kansas City Board of Trade (“KCBT”), which at the time was a designated contract market. Before orders for these trades were entered on an exchange, employees of Cargill de México, either acting alone or with another employee of Cargill de México, entered equal and opposite transactions in the same futures product for another account that was also owned by Cargill de México, and matched the product, quantity, price, and timing of those orders and trades. Further, by so structuring or prearranging and entering these orders, which negated the risk incidental to an open and competitive marketplace, Cargill de México also engaged in noncompetitive transactions in violation of Regulation 1.38(a).

B. RESPONDENT

Cargill de México S.A. De C.V. is a Mexican corporation that, among other things, trades in global futures markets in connection with Cargill’s Mexican agricultural import and export business in grains and oilseeds. Cargill de México is not registered with the Commission in any capacity.

C. FACTS

On multiple occasions between April 2010 and August 2014 Cargill de México entered into wash trades involving CBOT corn, soybean, and wheat futures contracts and KCBT hard red wheat futures contracts. Cargill de México traders, acting either alone or with a colleague, moved futures positions between accounts owned by Cargill de Mexico by entering into equal and opposite transactions in the same contract, contract month, quantity, and price. They entered the orders for these trades electronically and timed the order entry to be as close to simultaneously as possible—often entering orders within less than a second.

Cargill de México maintains that it participated in these prearranged trades in order to move hedging positions for its physical business among numerous accounts. Each account was used to hedge physical trading conducted by Cargill de México, and each account was linked to a particular source for the physical product. If the source of the physical product was later changed because of availability, customer demand, or price, Cargill de México maintains that it would, as a matter of internal policy, transfer the futures position to the account linked to the new source of the physical product.

Cargill de México typically effected transfers between accounts by contacting its clearing broker and effecting transfers pursuant to the policies of the clearing broker and the rules of a designated contract market. However, in some instances, and in particular near or after the notice

date, its clearing broker would not make the back office transfers due to applicable contract market rules. In these situations Cargill de México traders transferred the positions using the market but did so in a non-competitive fashion by entering equal and opposite transactions. Cargill de México entered into numerous such transactions beginning in March 2010 and continuing into August 2014.

Upon being alerted by CME Group to concerns about its prearranged trading, Cargill de México instituted a number of changes in its policies and procedures in order to prevent future violations. Cargill de México has cooperated fully during this investigation.

D. LEGAL DISCUSSION

1. Cargill de México Entered into Wash Sales in Violation of Section 4c(a)(1)(A) of the Act

Section 4c(a) of the Act makes it “unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction” that is or “is of the character of, or is commonly known to the trade as, a ‘wash sale’ ...” 7 U.S.C. §6c(a). A wash sale is a form of fictitious sale. *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988).

In order to establish that a wash sale has occurred, it must initially be demonstrated that the transaction at issue achieved a wash result. The Commission may demonstrate that the trades resulted in a wash by showing “(1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price.” *Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir. 2003) *citing In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991); *see also In re Citadel Trading*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (“Orders to purchase and sell for the account of the same customer the identical quantity of the same futures contract at identical prices were entered virtually simultaneously.”)

In addition to the factors enumerated in *Gilchrist*, intent must be proven to establish a violation of Section 4c of the Act. *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999). The intent to negate risk or price competition and avoid a bona fide market position can properly be inferred from prearrangement but it can also be inferred “from the intentional structuring of a transaction in a manner to achieve the same result as prearrangement.” *In re Three Eight Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 n.15 (CFTC Jun.16, 1993) (*citing In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH)22,982 at 31,900-01 (CFTC Apr. 4, 1986), *rev 'd on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) (“*Collins*”). The placement of offsetting orders to buy and sell, while simultaneously taking steps to “enhance the likelihood that the buy and sell orders would be filled at the same or a similar price” is persuasive evidence that the trader intends to negate risk and price competition. *Collins* at ¶ 31,900; *see also In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685, 50,689-691 (CFTC Sep. 29, 2000) (finding customer who placed paired buy and sell orders, with specific pricing and loss limitation instructions, “structured orders to negate risk” and thus had intent to violate Section 4c), *aff'd sub nom.*

Piasio v. CFTC, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,251 (2d Cir. Dec. 31, 2002).

The Cargill de México traders entered into trades for the purchase and sale in the same delivery month of the same futures contract at the same prices, and thus achieved wash results. Additionally, the Cargill de México traders knowingly entered into the purchase and sale of the same delivery month of the same futures contracts at the same (or a similar) price for the purpose of transferring positions between Cargill de México accounts. In doing so, Cargill de México violated Section 4c(a)(2)(A) of the Act by entering into transactions of the character of and commonly known as wash sales.

2. Cargill de México Executed Noncompetitive Trades in Violation of Commission Regulation 1.38(a)

Regulation 1.38(a) requires that all purchases and sales of commodity futures be executed “openly and competitively.” The purpose of this requirement is to ensure that all trades are executed at competitive prices and that all trades are directed into a centralized marketplace to participate in the competitive determination of the price of futures contracts. Noncompetitive trades are generally transacted in accordance with express or implied agreements or understandings between and among the traders. *See, e.g., In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,652 (CFTC Jan. 25, 1991). Noncompetitive trades are also a type of fictitious sale because they negate the risk incidental to an open and competitive market. *In re Fisher*, Comm. Fut. L. Rep. (CCH) at 56,052 n.11. Prearranged trading is a form of anti-competitive trading that violates Regulation 1.38(a). *In re Shell US Trading Co.*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,161 at 57,632 (CFTC Jan. 4, 2006); *In re Gimbel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988), *aff’d as to liability*, 872 F.2d 196 (7th Cir. 1989).

By knowingly structuring and entering into prearranged noncompetitive trades, Cargill de México violated Commission Regulation 1.38(a).

IV.

OFFER OF SETTLEMENT

Cargill de México has submitted an Offer in which it, without admitting or denying the findings 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 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 Cargill de México 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. §§ 148.1-30 (2013), relating to, or arising from, this proceeding;
7. any and all claims that Cargill de México may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (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 Cargill de México has consented in the Offer; and

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 Cargill de México violated Section 4c(a)(1) of the Act and Regulation 1.38(a);
2. Orders Cargill de México and its successors and assigns to cease and desist from violating Section 4c(a)(1) of the Act and Regulation 1.38(a);
3. Orders Cargill de México to pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000), plus post-judgment interest if the civil monetary penalty is not paid in full within ten (10) days of the entry of this Order; and

4. Orders Cargill de México and its successors and assigns to comply with the conditions and undertakings as set forth in Section VI of this Order.

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that on multiple occasions between March 2010 and August 2014 Cargill de México violated Section 4c(a)(1) of the Act, 7 U.S.C. § 6c(a)(1), and Regulation 1.38(a), 17 C.F.R. § 1.38(a).

VI.

ORDER

Accordingly, it is hereby ordered that:

1. Cargill de México and its successors and assigns shall cease and desist from violating Section 4c(a)(1) of the Act, 7 U.S.C. § 6c(a)(1), and Regulation 1.38(a), 17 C.F.R. § 1.38(a).
2. Cargill de México shall pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000) due within ten (10) days of the date of this Order (the "CMP Obligation"). If the CMP Obligation is not paid in full within ten (10) days of the date of entry of this Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order, pursuant to 28 U.S.C. § 1961 (2012). Cargill de México 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, Cargill de México shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Cargill de México shall accompany payment of the CMP Obligation with a cover letter that identifies Cargill de México and the name and docket number of this proceeding. Cargill de México 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, N.W., Washington, D.C. 20581.

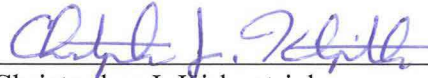
3. Cargill de México and its successors and assigns shall comply with the following undertakings set forth in the Offer:
 - a. Cargill de México agrees that neither Cargill de México nor any of its successors and assigns, agents, or employees under its authority or control shall take any action or make 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 the: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party, of Cargill de México and its successors and assigns, agents and employees. Cargill de México shall undertake all steps necessary to ensure that all of Cargill de México's agents and/or employees under Cargill de México's authority or control understand and comply with this agreement.
 - b. Cargill de México further agrees that it shall comply with the following additional undertakings. Cargill de México agrees and undertakes that:
 - (i) Cargill de México shall mandate a training course in 2016 addressing the ethics, compliance, and legal requirements of the Act and Regulations with regard to prearranged, fictitious, or noncompetitive trading in violation of Section 4c(a)(1) of the Act and Section 1.38(a) of the Regulations, to be given to employees involved in any transactions made by Cargill de México on United States futures markets, including the type of violative conduct found by the Commission in this Order;
 - (ii) Within 60 days after the issuance of this Order, Cargill de México shall submit to the Commission's Division of Enforcement a report that contains the following: (a) a representation that policies and procedures have been adopted by Cargill de México that are designed to prevent any potential prearranged, fictitious or noncompetitive trading in violation of Section 4c(a)(1) of the Act and Section 1.38(a) of the Regulations with regard to transactions made by Cargill de México on United States futures markets; (b) a

representation that training sessions were held respectively in 2014 and 2015 addressing the ethics, compliance, and legal requirements of the Act and Regulations with regard to prearranged, fictitious, or non-competitive trading in violation of Section 4c(1) of the Act and Section 1.38(a) of the Regulations, for relevant managers and traders involved in transactions made by Cargill de México on United States futures markets; and (c) a representation that Cargill de México has begun using the self-match prevention technology available on the front end system provided by its primary clearing firm.

4. Cargill de México understands that any acceptance by the Commission of partial payment of Cargill de México'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 the remaining balance.

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 24, 2015