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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:	)	**CFTC Docket No.** 14-23
FirstRand Bank, Ltd.,	)	**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**
Respondent.	)	

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Respondent FirstRand Bank, Ltd. ("FirstRand") 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) (2013). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether FirstRand 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, FirstRand 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, FirstRand 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.

The Commission finds the following:

[1] Although Section 4c(a)(1) 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] FirstRand 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 FirstRand 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 FirstRand 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.

A. SUMMARY

On several occasions, from June 2009 to August 2011, FirstRand, a South African company, and another entity ("Company A"),[3] also a foreign-based company, prearranged noncompetitive corn and soybean futures trades on the Chicago Board of Trade ("CBOT"), a designated contract market of the CME Group. Before these trades were entered on the CBOT, employees of FirstRand and Company A had telephonic conversations with each other during which they agreed upon the product, quantity, price, direction, and timing of those trades. These prearranged trades negated market risk and price competition and constituted fictitious sales, in violation of Section 4c(a)(1) of the Act. Further, by entering prearranged trades for corn and soybean futures contracts, FirstRand also engaged in noncompetitive transactions in violation of Regulation 1.38(a).

B. RESPONDENT

FirstRand Bank, Ltd., is a financial services company with headquarters in Johannesburg, South Africa. FirstRand has never been registered with the Commission.

C. FACTS

On several occasions, from June 2009 to August 2011, FirstRand and Company A entered into prearranged trades involving CBOT corn and soybean futures contracts. During pre-trade telephonic conferences, employees for FirstRand and Company A agreed upon: (a) the CBOT futures contract for which they would trade on opposite sides; (b) the direction that each party would take on the prearranged trades; (c) the quantity of contracts that each party would trade; (d) the price that they would both accept; and (e) the timing of these prearranged trades. Regarding the timing, one party would initiate a countdown so that each party could electronically enter their respective bid and offer at as close to the same time as possible in order to increase the likelihood that their orders would cross.

FirstRand maintains that it participated in these prearranged trades as part of its strategy to hedge its position on related futures contracts traded on the Johannesburg Stock Exchange's ("JSE") SAFEX Commodity Derivatives Market (formerly the Agricultural Products Division). Those JSE futures contracts were inward listed products that were traded in the local currency (South African Rand) but referred to commodity futures contracts traded on CME exchanges. FirstRand asserts that because the JSE permits prearranged trades between market makers in these inward listed JSE futures contracts, FirstRand mistakenly believed that such prearranged trades were permissible on the CME as well. Upon being alerted to concerns about its prearranged trading on the CME, FirstRand immediately ceased such trading, and it has cooperated fully during this investigation.

[3] This Order does not address the culpability of Company A with regard to the transactions that are the subject of this Order.

D. LEGAL DISCUSSION

1. FirstRand Entered into Transactions in Violation of Section 4c(a)(1) of the Act

Section 4c(a)(1) and (2) 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 . . . a fictitious sale." The Act does not define what a "fictitious sale" is, but that term includes wash sales, accommodation trades, and prearranged trades. *In re Harold Collins*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,902-03 (CFTC Apr. 4, 1986). "[T]he central characteristic of . . . fictitious sales[ ] is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market." *Id.* at 31,902; *see also In re Fisher,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,725 at 56,052 n.11 (CFTC Mar. 24, 2004). A prearranged trade is a textbook example of a fictitious sale. "By determining trade information such as price and quantity outside the pit, then using the market mechanism to shield the private nature of the bargain from public scrutiny, both price competition and market risk are eliminated." *In re Harold Collins*, Comm. Fut. L. Rep. (CCH) at 31,903.

Congress's intent in enacting Section 4c(a) was to "'ensure that all trades are focused in the centralized marketplace to participate in the competitive determination of the price of the futures contracts.'" *In re Thomas Collins,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 at 45,742 (CFTC Dec. 10, 1997) (quoting S. Rep. No. 93-1131, 93d Cong., 2d Sess. at 16-17 (1974)). In other words, Section 4c(a) was meant "to prevent collusive trades conducted away from the trading pits," *Merrill Lynch Futures, Inc. v. Kelly*, 585 F. Supp. 1245, 1251 n.3 (S.D.N.Y. 1984), and "to outlaw insofar as possible all schemes of trading that are artificial and not the result of arms-length trading on the basis of supply and demand factors," *In re Goldwurm*, 7 Agric. Dec. 265, 276 (1948). Consistent with Section 4c(a)'s purpose, in order to establish a violation, the Commission must demonstrate that a person knowingly participated in a transaction initiated with an intent to avoid a bona fide market position. *See In re Morgan Stanley & Co.,* [2012 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 32,218 at 69,780 n.4 (CFTC June 5, 2012) (citing *In re Harold Collins,* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 31,903, and *In re Fisher,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 56,065).

In this case, FirstRand engaged in pre-trade discussions with a counterparty in order to agree to enter into virtually simultaneous trades against each other in the same market, for the same product, and at the same quantity and price. By entering orders for these prearranged trades on the CBOT, FirstRand donned the appearance of submitting trades to the open market when, in fact, it was negating the risk and price competition incident to such a market. Consequently, by entering orders for prearranged trades, FirstRand violated Section 4c(a)(1) of the Act, which makes it unlawful to offer to enter into, or to enter into, any commodity futures transaction that is a fictitious sale.

2. FirstRand 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 sales 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, employees of FirstRand violated Commission Regulation 1.38(a).

IV.

OFFER OF SETTLEMENT

FirstRand 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 FirstRand 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 FirstRand 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 FirstRand 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 FirstRand violated Section 4c(a)(1) of the Act and Regulation 1.38(a);

2. Orders FirstRand 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 FirstRand to pay a civil monetary penalty in the amount of one hundred fifty thousand dollars ($150,000), 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 FirstRand 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 several occasions from June 2009 to August 2011, FirstRand 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. FirstRand 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. FirstRand shall pay a civil monetary penalty in the amount of one hundred fifty thousand dollars ($150,000) 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). FirstRand 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 --- AMZ 340
   Email Box: 9-AMC-AMZ-AR-CFTC
   DOT/FAA/MMAC
   6500 South MacArthur Boulevard
   Oklahoma City, OK 73169
   Telephone: (405) 954-5644

   If payment is to be made by electronic funds transfer, FirstRand shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. FirstRand shall accompany payment of the CMP Obligation with a cover letter that identifies FirstRand and the name and docket number of this proceeding. FirstRand 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. FirstRand and its successors and assigns shall comply with the following undertakings set forth in the Offer:

   a. FirstRand agrees that neither FirstRand nor any of its successors and assigns, agents, or employees under their 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 FirstRand's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. FirstRand and its successors and assigns shall undertake all steps necessary to ensure that all of FirstRand's agents and/or employees under FirstRand's authority or control understand and comply with this agreement.

b. FirstRand shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement and any other governmental agency in this action, 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. As part of such cooperation, FirstRand agrees to:

(i) preserve, for a period of five (5) years from the date of this Order, all records relating to the subject matter of this proceeding, including, but not limited to, audio files, electronic mail, other documented communications, and trading records;

(ii) comply fully, promptly, completely, and truthfully, subject to any legally recognized privilege, with any inquiries and requests for information or documents;

(iii) provide authentication of documents and other evidentiary material;

(iv) subject to applicable laws and regulations, make its best efforts to produce any current (as of the time of the request) officer, director, employee, or agent of FirstRand, regardless of the individual's location, and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceedings, or Commission investigation related to the subject matter of this proceeding, including, but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation;

(v) subject to applicable laws and regulations, make its best efforts to assist in locating and contacting any prior (as of the time of the request) officer, director, employee, or agent of FirstRand; and

(vi) not undertake any act that would limit its ability to cooperate fully with the Commission.

c. FirstRand further agrees that it shall comply with the following additional undertakings for a period of two (2) years from the date of this Order. FirstRand agrees and undertakes that:

(i) FirstRand shall institute, update, and/or strengthen policies and procedures designed to detect, deter, discipline, and correct 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 FirstRand on United States markets, including the type of violative conduct found by the Commission in this Order;

(ii) FirstRand shall mandate annual training 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 professional staff, including all directors, officers, managers, portfolio managers, traders, associated persons, execution desk personnel, compliance personnel, and employees involved in any aspect of FirstRand's commodity and/or commodity derivatives businesses;

(iii) FirstRand shall submit a confidential report to the Commission's Division of Enforcement within 120 days of the issuance of this Order. The report shall include the steps taken to comply with this Order and the results of FirstRand's compliance with the above undertakings; and

(iv) For two years, FirstRand shall submit a confidential annual report to the Commission's Division of Enforcement on the yearly anniversary of the date of this Order that shall describe a review and evaluation of FirstRand's compliance with this Order.

4. FirstRand understands that any acceptance by the Commission of partial payment of FirstRand'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: August 27, 2014