

**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**

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**In the Matter of:** ) **CFTC Docket No. 10- 12**  
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 ) **ORDER INSTITUTING PROCEEDINGS**  
 ) **PURSUANT TO SECTIONS 6(c) and 6(d)**  
**Noble Americas Corp.,** ) **OF THE COMMODITY EXCHANGE ACT,**  
 ) **AS AMENDED, MAKING FINDINGS AND**  
**Respondent.** ) **IMPOSING REMEDIAL SANCTIONS**

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**I.**

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Noble Americas Corp. (“Noble Americas” or “Respondent”) has violated Section 4c(a) of the Commodity Exchange Act (the “Act”), as amended, 7 U.S.C. § 6c(a) (2006), and Commission Regulation (“Regulation”) 1.38(a), 17 C.F.R. § 1.38(a) (2009). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Noble Americas 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, Noble Americas 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, Noble Americas, acknowledges service 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”).<sup>1</sup>

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<sup>1</sup> Respondent consents 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 in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than 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 consented to in the Offer or this Order, by any other party in any other proceeding.

The Commission finds the following:

A. **Summary**

On several occasions during the period of March 30, 2007 through July 30, 2007, Noble Americas, through its employees, entered into certain commodity futures contract trades (“future trades”) and exchange for physical (“EFP”) trades in heating oil and gasoline<sup>2</sup> on the New York Mercantile Exchange (“NYMEX”) and Globex that are, are of the character of, or are commonly known as wash sales. These trades were for the same contract, quantity and same or similar price with Noble Americas on both sides of each trade.

In certain instances, Noble Americas prearranged the execution of these trades on NYMEX through a Futures Commission Merchant (“FCM”). In other instances, Noble Americas used EFPs in order to transfer positions from one Noble Americas trader to another Noble Americas trader. Lastly, Noble Americas effectuated these trades directly by entering virtually simultaneous buy and sale orders on Globex with Noble Americas on both sides of the trades. As a result of the wash sales executed on NYMEX and Globex, Noble Americas caused non-bona fide prices to be reported to NYMEX.

Because Noble Americas intended to negate market risk and price competition, and thereby avoid a *bona fide* market transaction and produce a virtual financial nullity, Noble America engaged in wash sales transactions and fictitious sales and caused non-bona fide prices to be reported in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006). By knowingly engaging in trades that avoided market risk and price competition, Noble Americas also engaged in noncompetitive transactions in violation of Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2009).

B. **Respondent**

**Noble Americas Corp.** is a subsidiary of Noble Group, Ltd., a global supply chain manager of agricultural, industrial and energy products. Noble Americas’ Clean Fuels and Petroleum Products Division (“Clean Fuels Division”) was responsible for the conduct at issue in this Order.

C. **Facts**

On several occasions during the period of March 30, 2007 through July 30, 2007, Noble Americas entered into certain futures trades and EFPs in heating oil and gasoline on the NYMEX and Globex that were wash sales. These trades were for the same contract, quantity and same or similar price with Noble Americas on both sides of each trade. Noble America executed almost all these trades through one FCM.

In certain instances, Noble Americas prearranged the trades with the FCM so that Noble Americas was the customer on each side of the transaction. In other instances, Noble Americas

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<sup>2</sup> The NYMEX futures contract for gasoline is known as the reformulated gasoline blendstock for oxygen blending or RBOB contract.

traded with itself through the FCM by taking both sides of EFPs in order to transfer positions from a departing Noble Americas trader to another trader. Noble Americas itself described the transactions to the FCM as a “Noble – Noble” EFP.

On July 30, 2007, after the FCM had sent Noble Americas the NYMEX rules relating to wash trades and refused to execute more wash trades on behalf of Noble Americas,<sup>3</sup> the Noble Americas trader effectuated wash trades directly by using instant messages to submit simultaneous buy and sell orders on Globex, again with the result being that Noble Americas was on both sides of the trades.

In each instance, the trades resulted in no market risk or price competition and a virtual financial nullity.

#### D. Legal Discussion

##### 1. **Noble Americas Entered into Transactions in Violation of Section 4c(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, is of the character of, or is commonly known to the trade as, a ‘wash sale’ . . .” A wash sale is a form of fictitious transaction. *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); *In re Goldwurm*, 7 A.D. 265, 274 (CEA 1948).

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 factors that indicate a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price. *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991).

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). In a wash sale case, a violator’s intent may be proven if the “transactions were initiated without the intent to make a bona fide trading transaction.” *In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,900-01 (CFTC Apr. 4, 1986) (“*Collins I*”), *rev’d on other grounds sub nom. Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987); *see also In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993, at 37,653 (CFTC Jan. 25, 1991) (finding an absence of intent to undertake a bona fide trading transaction where the transactions were “structured in a manner to negate price competition or market risk” to be sufficient to establish intent for a wash sale violation); *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685, 50,689-691 (CFTC Sep. 29, 2000) (customer intended to negate market risk or price competition, and participant knew that the orders were designed to achieve

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<sup>3</sup> FCM and certain of its employees were subject to NYMEX disciplinary action relating to the wash trades at issue here.

wash results in a manner that negated risk), *af'd sub nom. Piasio v. CFTC*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,251 (2d Cir. Dec. 31, 2002). Market risk or price competition is negated “when it is reduced to a level that has no practical impact on the transactions at issue.” *Gimbel*, ¶ 24,213 at 35,004 n.7.

The intent to avoid a bona fide market position can properly be inferred from prearrangement; 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 Corporation*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 n.15 (CFTC Jun. 16, 1993) (citing *Collins I*, ¶ 22,982 at 31,900-01). “In an individual transaction . . . , a trader may avoid a bona fide market transaction in many instances merely by structuring the buy and sell orders so that they are simultaneous, or practically so, and by signaling . . . , directly or indirectly, that a price match is the objective of the transaction.” *Collins I*, ¶ 22,982 at 31,900-01.

Here, Noble Americas prearranged and structured purchases and sales of the same delivery month of the same futures contract (and EFPs) at the same or similar price to avoid a bona fide transaction using accounts with the same beneficial owner. Accordingly, Noble Americas entered into transactions that were wash sales and fictitious sales in violation of Section 4c(a) of the Act.

Section 4c(a) of the Act also makes it unlawful to offer to enter into, enter into or confirm the execution of a commodity futures transaction that “is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.” The wash sales executed by Noble Americas caused non-bona fide prices to be reported or recorded in violation of Section 4c(a). *In re Gilchrist*, ¶ 24,993 at 37,653.<sup>4</sup>

## **2. Noble Americas Executed Non-competitive Trades in Violation of Commission Regulation 1.38(a)**

Commission 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. Non-competitive trades are generally transacted in accordance with expressed or implied agreements or understandings between and among the traders. *Gilchrist*, ¶ 24,993 at 37,652. Trades can be noncompetitive even though they were executed in the pit. *In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,683 (CFTC Jan. 25, 1991) (citing *Laiken v. Dep't of Agriculture*, 345 F.2d 784, 785 (2d Cir. 1965)).

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<sup>4</sup> Because Noble Americas employees were acting within the scope of their employment with Noble Americas, Noble Americas is liable for such violations pursuant to Section 2(a)(1)(B) of the Act.

By engaging in the wash sales, Noble Americas' trading was not open and competitive and thus Noble Americas avoided market risk and price competition. Accordingly, Noble Americas violated Commission Regulation 1.38(a).<sup>5</sup>

### III.

#### FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Respondents violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006) and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a).<sup>6</sup>

### IV.

#### OFFER OF SETTLEMENT

Noble Americas has submitted the 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;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims that it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2009), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act, 1996 HR 3136, Pub. L. No. 104-121, §§ 231-232, 110 Stat. 862-63 (Mar. 29, 1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to, or arising from, this proceeding; and any claim of double jeopardy based upon 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 upon which this Order is entered shall consist solely of the findings contained in this Order to which the Respondent has consented; and
- E. Consents, solely on the basis of the Offer, to entry of this Order that:

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

1. makes findings by the Commission that Noble Americas violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2009).
2. orders Noble Americas and its successors and assigns to cease and desist from violating Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and/or Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2009);
3. orders Noble Americas to pay a civil monetary penalty in the amount of one hundred and thirty thousand dollars (\$130,000), plus post-judgment interest, within ten (10) days of the date of the entry of this Order; and
4. orders Noble Americas and its successors and assigns to each comply with the undertakings consented to in the Offer and set forth below in Part V of this Order.

Upon consideration, the Commission has determined to accept Noble Americas' Offer.

**V.**

**Accordingly, IT IS HEREBY ORDERED THAT:**

1. Noble Americas and its successors and assigns shall cease and desist from violating Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006), and/or Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2009).

2. Noble Americas shall pay a civil monetary penalty in the amount of one hundred and thirty thousand dollars (\$130,000.00), plus post-judgment interest, within ten (10) days of the date of the entry of this Order. Post-judgment interest shall accrue beginning eleven (11) days after 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. Noble Americas shall pay this civil monetary penalty by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission  
Division of Enforcement  
ATTN: Marie Bateman – AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone 405-954-6569

If payment by electronic transfer is chosen, Noble Americas shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Noble Americas shall accompany payment of the civil penalty with a cover letter that identifies Noble Americas and the name and docket number of this proceeding. Noble Americas shall simultaneously submit copies of the cover letter and the form of payment to: (1)

the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581; and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2) (2006), if this amount is not paid in full within fifteen (15) days of the due date, Noble Americas shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

3. Noble Americas shall comply with the undertakings set forth below:
  - a. Noble Americas shall institute internal controls, policies and procedures necessary to ensure that transactions by Noble Americas on U.S. commodity futures and options markets comply with the laws, rules and regulations governing those markets.
  - b. Respondent agrees that neither it nor any of its 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 the Order, or creating, or tending to create, the impression that the Order is without factual basis; provided, however, that nothing in this provision affects Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary to assure that all of its agents and employees under its authority or control understand and comply with this agreement.

**The provisions of this Order shall be effective as of this date. By the Commission.**



David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: May 3, 2010