

II. FINDINGS

The Commission finds the following:

A. SUMMARY

On certain trading days during the Relevant Period, MLCI held positions in the April 2023 and May 2023 ICE Futures U.S.'s ("ICE" or "Exchange") Henry LD1 Fixed Price Futures ("H") contract that violated Federal position limits. The ICE H futures contract referenced the monthly settlement price published by the New York Mercantile Exchange ("NYMEX") for its NYMEX Henry Hub Natural Gas Future ("NG"). MLCI's positions exceeded the Federal spot month² speculative position limits for NYMEX NG referenced contracts, such as ICE H, set forth in Regulation 150.2, 17 C.F.R. § 150.2 (2023), and Appendix E to Part 150 of the Regulations, 17 C.F.R. pt. 150 app. E (2023). MLCI's positions did not meet the requirements of an exemption from Federal position limits pursuant to Regulation 150.3, 17 C.F.R. § 150.3 (2023). By this conduct, MLCI violated Section 4a(b)(2) of the Act, 7 U.S.C. § 6a(b)(2), and Regulation 150.2.

In addition, MLCI exceeded the Exchange-set spot-month position limit in April 2023 and May 2023 ICE H in violation of ICE Rule 6.20, and did not comply with the terms of an exemption that had been granted by the Exchange in violation of ICE Rule 6.29. Those violations of Exchange rules constituted violations of Section 4a(e) of the Act, 7 U.S.C. § 6a(e).

During the Relevant Period, MLCI, a swap dealer registered with the Commission, did not establish and enforce written policies and procedures reasonably designed to monitor for and prevent violations of applicable Federal, designated contract market, or swap execution facility position limits and to monitor for and prevent improper reliance upon any exemptions or exclusions from such position limits. MLCI did not diligently supervise its employees by lacking an adequate internal position limit monitoring system that included, among other things, an early warning system and written policies and procedures reasonably designed to detect and alert its senior management when position limits were in danger of being breached due to improper reliance upon any exemptions or exclusions from such position limits and ensure MLCI's trading and positions relied on position limit exemptions or exclusions only when those trading and positions in fact met the applicable requirements. By this conduct, MLCI violated Section 4s(h)(1)(B) and (C) of the Act, 7 U.S.C. § 6s(h)(1)(B), (C), and Regulations 23.601(a) and 23.602(a), 17 C.F.R. §§ 23.601(a), 23.602(a) (2023).

or a proceeding to enforce the terms of this Order, in which both admitted and non-admitted findings and conclusions can be used. Respondent also does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

² Regulation 150.1, 17 C.F.R. § 150.1 (2023), defines "spot month," in relevant part, as the period of time beginning at the earlier of "(i) [t]he close of business on the trading day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market or (ii) [t]he close of business on the trading day preceding the third-to-last trading day and ending when the contract expires."

* * *

In accepting MLCI's offer, the Commission recognizes the cooperation of MLCI with the Division of Enforcement's investigation of this matter. The Commission also acknowledges MLCI's representations concerning its remediation in connection with this matter.

B. RESPONDENT

Merrill Lynch Commodities, Inc., is a registered swap dealer with a principal place of business in Houston, TX.

C. FACTS

1. Position Limit Violations

Regulation 150.2 and Appendix E to Part 150 of the Regulations set forth Federal speculative position limit levels for NYMEX NG referenced contracts, such as ICE H. Pursuant to Regulation 150.2, no person may hold or control positions in the spot month, net long or net short, in excess of the levels specified by the Commission. 17 C.F.R. § 150.2. For NYMEX NG referenced contracts, the Commission has specified a spot-month position limit of 2,000 contracts (on a futures-equivalent basis). 17 C.F.R. pt. 150 app. E, app. E n.2 (2023). No person may hold or control positions in excess of that limit unless they qualify for an exemption under Regulation 150.3. 17 C.F.R. §§ 150.2, 150.3, pt. 150 app. E (2023).

Separately, for any contract subject to a Federal speculative position limit, the exchange on which a referenced contract trades is required to set a position limit in that referenced contract no higher than the Federal level. *See* Regulation 150.5(a)(1), 17 C.F.R. § 150.5(a)(1) (2023). As relevant here, ICE fixed a 2,000 net long or short futures-equivalent limit for its ICE H futures contract.³ *See* ICE Rule 6.20(b) and ICE Position Limit Table. Under ICE Rules, this limit applies unless an exemption from Exchange position limits has been granted by the Exchange in accordance with its Rules. ICE Rule 6.20(b); ICE Rule 6.29.

On certain trading days during the Relevant Period, MLCI held positions in April 2023 ICE H contracts and May 2023 ICE H contracts, respectively, that ranged from more than 200 contracts to nearly 1,000 contracts in excess of both the 2,000-contract Federal speculative position limit and the 2,000-contract Exchange speculative position limit, and MLCI's positions did not meet the requirements of an exemption under Regulation 150.3. For instance, certain of MLCI's ICE H positions during the Relevant Period did not qualify as pass-through swap offsets because MLCI had not obtained the written representations required by the "bona fide hedging transaction or position" definition set forth in Regulation 150.1(2)(i)(C). MLCI also had not been granted an exemption applicable to the relevant positions by the Exchange in accordance

³ Because financially settled positions can be held in contracts with size other than 10,000 MMBtus, which is NYMEX NG's contract size, all positions referred to in this Order are converted to be NYMEX NG futures equivalents.

with ICE’s Rules during the Relevant Period.

2. Swap Dealer Supervision and Position Limit Monitoring Failures

In supervising trading and monitoring position limits, MLCI relied on an early warning system that sent “position limit break alerts” for any position that exceeded a threshold set internally by MLCI. That internal threshold was set as a specified percentage of the applicable exchange-set position limit less any exchange-granted exemption to those limits, irrespective of the limitations or conditions of the exemption granted by the exchange. Put differently, the system’s default setting was to apply the exemption. Upon receiving a position limit break alert, the trading desk supervisor was required to review the desk’s positions to ensure that the relevant position remained below the internal threshold.

Because the early warning system did not adequately take into consideration the limitations or conditions of the exemption granted by an exchange, the monitoring system did not ensure that an exchange-granted exemption included in the internal threshold in fact applied to the relevant trading strategy or strategies. That qualitative task—confirming that trading or positions met the terms of an exemption to a position limit and properly relied on the exemption—was delegated to the trading desk supervisor, who would confirm whether reliance on the exemption was proper only after receiving a position limit break alert from the early warning system. As a result, for positions entered into for a purpose that was not covered by an exemption, but that remained below the internally set threshold (a specified percentage of the applicable limit after exemptions are taken into consideration), the firm’s policies and procedures and early warning system would not alert a supervisor to confirm that that the position in fact fell within the parameters of the granted exemption. While MLCI had written policies and procedures that prohibited a trading desk from improperly relying on an exemption, MLCI’s policies and procedures were not reasonably designed to monitor for and prevent improper reliance upon any exemptions or exclusions from such position limits.

III. LEGAL DISCUSSION

A. MLCI Violated Federal Position Limits

Section 4a(b)(2) of the Act makes it unlawful for any person “directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market . . . in excess of any position limit fixed by the Commission for or with respect to such commodity. . . .” 7 U.S.C. § 6a(b)(2). Pursuant to Regulation 150.2 and Appendix E to Part 150 of the Regulations, no person may hold NYMEX NG referenced contract positions, such as the ICE H contract relevant here, during the spot month, net long or short, in excess of 2,000 contracts unless they qualify for an exemption under Regulation 150.3. 17 C.F.R. §§ 150.2, 150.3, pt. 150 app. E (2023).

On certain trading days during the Relevant Period, MLCI held positions in the April 2023 and May 2023 ICE H futures contracts in excess of the NYMEX NG referenced contract spot-month speculative position limit of 2,000 contracts. MLCI’s positions did not meet the requirements of any exemption under Regulation 150.3. By this conduct, MLCI violated Section 4a(b)(2) of the Act and Regulation 150.2.

The Commission does not need to establish scienter—i.e., proof of intent to exceed the applicable speculative position limit—in order to prove a violation of the Commission’s speculative position limit provisions. *CFTC v. Hunt*, 591 F.2d 1211, 1218 (7th Cir. 1979); *Saberi v. CFTC*, 488 F.3d 1207, 1212 (9th Cir. 2007). The Act “unambiguously imposes liability” for violations of speculative position limits. *Saberi*, 488 F.3d at 1212.

B. MLCI Violated Exchange Rules Related to Position Limits

Section 4a(e) of the Act makes it unlawful for any person “to violate any bylaw, rule, regulation, or resolution of any contract market . . . designated . . . by the Commission fixing limits on . . . positions which may be held by any person under contracts of sale of any commodity for future delivery . . . if such bylaw, rule, regulation, or resolution has been approved by the Commission or certified by a registered entity pursuant to section 5c(c)(1)” 7 U.S.C. § 7a-2(c)(1).

During the Relevant Period, the Exchange position limit for ICE H was set equivalent to the Federal limit of 2,000 contracts. *See* ICE Rule 6.20(b) and ICE Position Limit Table.⁴ Under Exchange Rules, those limits applied unless an exemption had been granted by the Exchange in accordance with its Rules. ICE Rule 6.20(b). ICE Rule 6.29 set forth the recognized exemptions from exchange-set position limits and the process to obtain such exemptions.

On certain trading days during the Relevant Period, MLCI held positions in ICE H that exceeded the Exchange-set 2,000-contract spot-month position limit and that was not within the scope of, and thus misused, the existing exemptions for certain other positions that had been granted by the Exchange in accordance with its Rules, in violation of ICE Rule 6.20(b) and ICE Rule 6.29. MLCI’s violations of ICE Rules 6.20(b) and 6.29 also constituted violations of Section 4a(e) of the Act.

The plain language of Section 4a(e) of the Act imposes liability for violations of designated contract market position limit rules such as ICE Rules 6.29(b) and 6.20(b) at issue here. *Saberi*, 488 F.3d at 1212 (rejecting argument that proof of intent was required to establish violation of contract market’s position limits) (citing *Hunt*, 591 F.2d at 1218).

C. MLCI Failed to Comply with Swap Dealer Position Limit Monitoring Requirements

Section 4s(h)(1)(C) of the Act, 7 U.S.C. § 6s(h)(1)(C), requires swap dealers to conform with business conduct standards prescribed by Commission rule or regulation that “relate to . . . adherence to all applicable position limits.” Regulation 23.601(a), 17 C.F.R. § 23.601(a) (2023), requires swap dealers to establish “Position Limit Procedures,” i.e., policies and procedures

⁴ *See* ICE Rule 6.20(b) and Position Limit Table, available at https://www.ice.com/publicdocs/otc/advisory_notices/IFUS_Energy_Position_Limit_Accountability_and_Reportable_Levels.xlsx.

reasonably designed to monitor, detect, and prevent violations of position limits established by the Commission, a designated contract market (such as ICE), or a swap execution facility, and to monitor for and prevent improper reliance upon any exemptions or exclusions from such position limits. To prevent violations of position limits, each swap dealer and major swap participant would, among other things, actively monitor trading, implement an early warning system, and test the effectiveness of its policies and procedures. 17 C.F.R. § 23.601(a)-(i) (2023).

MLCI did not implement adequate procedures and systems reasonably designed to monitor, detect, and prevent violations of applicable position limits, and MLCI's Position Limit Procedures were not reasonably designed to monitor for and prevent improper reliance on position limit exemptions or exclusions. By this conduct, MLCI violated Section 4s(h)(1)(C) of the Act and Regulation 23.601(a).

D. MLCI Failed to Supervise Diligently

Section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B), requires "diligent supervision of the business of the registered swap dealer[.]" Implementing this requirement, Regulation 23.602(a) requires that each swap dealer "shall establish and maintain a system to supervise, and shall diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar status or performing a similar function)." 17 C.F.R. § 23.602(a) (2023). The operative language of Regulation 23.602(a) is similar to the language of the Commission's longstanding supervision regulation for futures and options, Regulation 166.3, 17 C.F.R. § 166.3 (2023).

Under Regulation 23.602(a), a violation 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 JPMorgan Chase Bank, N.A.*, CFTC No. 22-07, 2021 WL 6098347, at *6 (Dec. 17, 2021) (consent order); *see also In re Commerzbank AG*, CFTC No. 19-03, 2018 WL 5921385, at *10-11 (Nov. 8, 2018) (consent order) (noting textual similarities between Regulation 23.602(a) and Regulation 166.3, applying case law concerning Regulation 166.3, and citing *In re Murlas Commodities, Inc.*, CFTC No. 85-29, 1995 WL 523563, at *9 (Sept. 1, 1995), and *In re Paragon Futures Assoc.*, CFTC No. 88-18, 1992 WL 74261, at *14 (Apr. 1, 1992)); *In re INTL FCStone Markets, LLC*, CFTC No. 15-27, 2015 WL 4980321, at *3 (Aug. 19, 2015) (consent order) (same). Either showing "alone is sufficient to establish a violation of the supervision requirement." *Commerzbank*, 2018 WL 5921385, at *10 (interpreting Regulation 23.602(a) in light of Regulation 166.3 precedents). No evidence of an underlying violation is necessary. *In re Collins*, CFTC No. 94-13, 1997 WL 761927, at *10 (Dec. 10, 1997) (interpreting Regulation 166.3). 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." *See In re Bank of Nova Scotia*, CFTC No. 20-26, 2020 WL 4926053, at *10 (Aug. 19, 2020) (consent order) (quoting *In re Société Générale Int'l Ltd.*, CFTC No. 19-38, 2009 WL 4915485, at *7 (Sept. 30, 2019) (consent order)).

MLCI failed to establish and maintain an adequate supervisory system for monitoring the trading of their personnel involving products subject to position limits. By this conduct, MLCI failed to diligently supervise the activities of its swap dealer business in violation of Section

4s(h)(1)(B) of the Act and Regulation 23.602(a).

IV. FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that during the Relevant Period, MLCI violated Sections 4a(b)(2) and (e), and 4s(h)(1)(B) and (C) of the Act, 7 U.S.C. §§ 6a(b)(2), (e), and 6s(h)(1)(B), (C), and Regulations 23.601(a), 23.602(a), and 150.2, 17 C.F.R. §§ 23.601(a), 23.602(a), and 150.2 (2023).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it:

- A.** Consents to the resolution of this matter in an administrative proceeding;
- B.** Acknowledges service of this Order;
- C.** Admits the facts described in Section II.C.1 above and acknowledges that this conduct violated Sections 4a(b)(2) and (e) of the Act, 7 U.S.C. §§ 6a(b)(2), (e), and Regulation 150.2 (2023);
- D.** Otherwise neither admits nor denies the findings set forth herein;
- E.** 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;
- F.** Waives:
 - 1.** The filing and service of a complaint and notice of hearing;
 - 2.** A hearing;
 - 3.** All post-hearing procedures;
 - 4.** Any and all rights or defenses that Respondent has or might have for the matter to be adjudicated in a federal district court in the first instance, including but not limited to any associated right to a jury trial;
 - 5.** Judicial review by any court;
 - 6.** Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of this Offer;
 - 7.** Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412 (2022), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148, relating to, or arising from, this proceeding;

8. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201–253, 110 Stat. 847, 857–74 (codified as amended at 28 U.S.C. §2412 and in scattered sections of 5 U.S.C. and 15 U.S.C., relating to, or arising from, this proceeding); and
 9. 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, including the Order;
- G.** Agrees that Respondent is not the prevailing party in this action for purposes of the waiver of any and all rights under the Equal Access to Justice Act specified in subpart 7 of paragraph F;
- H.** 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; and
- I.** Consents, solely on the basis of the Offer, to the Commission’s entry of this Order that:
1. Makes findings by the Commission that Respondent violated Sections 4a(b)(2) and (e), and 4s(h)(1)(B) and (C) of the Act and Regulations 23.601(a), 23.602(a), and 150.2;
 2. Orders Respondent to cease and desist from violating Sections 4a(b)(2) and (e), and 4s(h)(1)(B) and (C) of the Act and Regulations 23.601(a), 23.602(a), and 150.2;
 3. Orders Respondent to pay a civil monetary penalty in the amount of one million five hundred thousand dollars (\$1,500,000), plus any post-judgment interest;
 4. Orders Respondent and their successors and assigns to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order; and
- J.** Represents that Respondent instituted a program of remediation, including but not limited to the following:
1. Updated its policies and procedures related to Federal and exchange position limits to ensure the proper utilization of exemptions from limits;
 2. Updated its position limits surveillance and supervision process to monitor for potentially exempt positions and promote proper utilization of exemptions; and
 3. Instituted additional compliance training related to Federal and exchange positions limits and the exemptions therefrom.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 4a(b)(2) and (e), and 4s(h)(1)(B) and (C) of the Act, and Regulations 23.601(a), 23.602(a), and 150.2.
- B. Respondent shall pay a civil monetary penalty in the amount of one million five hundred thousand dollars (\$1,500,000) (“CMP Obligation”) within ten (10) days of the date of the entry of this Order. If the CMP Obligation is not paid within ten (10) days of the date of the entry of this Order, then post-judgment interest shall accrue on the unpaid portion of 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.

Respondent shall pay the CMP Obligation and any post-judgment interest 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:

MMAC/ESC/AMK326
Commodity Futures Trading Commission
6500 S. MacArthur Blvd.
HQ Room 266
Oklahoma City, OK 73169
9-amz-ar-cftc@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact the Federal Aviation Administration at the above email 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 of their 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 the Order or creating, or tending to create, the impression that the 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 comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.

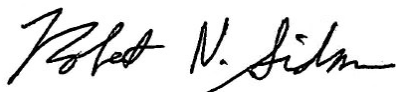
2. Cooperation, in General: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this action, and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, the subject matter of this action.
3. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant to the Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
4. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in the Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

Until such time as Respondent satisfies in full its CMP Obligation, upon the commencement by or against Respondent of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of Respondent's debts, all notices to creditors required to be furnished to the Commission Title 11 of the United States Code or other applicable law with respect to such insolvency, receivership bankruptcy, or other proceedings, shall be sent to the address below:

Secretary of the Commission
Office of the General Counsel
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

The provisions of this Order shall be effective as of this date.

By the Commission.



Robert N. Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 25, 2024