

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)
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Upstream Energy Services LLC,)
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Respondent.)
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_____)

CFTC Docket No. 20-03

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Office of Proceedings
Proceedings Clerk

3:21 pm, Oct 24, 2019

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I. INTRODUCTION

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from in or about April 2017 to at least September 2018 (“Relevant Period”), Upstream Energy Services LLC (“Respondent” or “Upstream”) violated Section 4d(a)(1) of the Commodity Exchange Act (the “Act”), as amended, 7 U.S.C. § 6d(a)(1) (2012). 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 violation set forth herein and to determine whether any order should be issued imposing remedial sanctions.

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 Section 6(c) and (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 use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondent 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.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

During the Relevant Period, Upstream accepted orders from two corporate clients to trade natural gas commodity futures and options on NYMEX, a futures exchange and designated contract market. Upstream placed orders and entered into transactions on behalf of these clients in Upstream's own trading accounts. Upstream accepted money (or extended credit in lieu thereof) and provided margin for the futures and options transactions on behalf of its clients, and was later reimbursed by its clients. In addition, Upstream received fees as compensation for its services in connection with the futures and options orders and transactions. By this conduct, Upstream acted as a futures commission merchant ("FCM") without being registered with the Commission as such. By virtue of this conduct and the further conduct described herein, Upstream violated Section 4d(a)(1) of the Act, 7 U.S.C. § 6d(a)(1) (2012).

* * * * *

In accepting the Offer, the Commission recognizes Respondent's cooperation with the Division of Enforcement's ("Division") investigation of this matter, which is explained in more detail below. The Commission notes that Respondent's cooperation is reflected in the form of a substantially reduced civil monetary penalty.

B. RESPONDENT

Upstream Energy Services LLC ("Upstream") is a Texas-based crude oil and natural gas marketing and advisory services company. Operating out of Houston and Corpus Christi, Upstream provides its clients with marketing, mid-stream support, and advisory services for physical crude oil and natural gas commodities. Upstream has never been registered with the Commission in any capacity.

C. FACTS

1. **Acting as an Unregistered Futures Commission Merchant**

During the Relevant Period, Upstream acted as an FCM without being registered with the Commission as such. Upstream routinely accepted and placed futures and options orders and entered into transactions in Upstream's trading accounts on behalf of two corporate clients of Upstream's physical advisory business. Both corporate clients are owned or controlled by the same person. Upstream extended credit by providing margin and money on behalf of or for the benefit of these clients to trade NYMEX natural gas futures and options in Upstream's trading accounts. Upstream was later reimbursed by the clients on a periodic basis for posting such margin. The clients directed the trading decisions in the Upstream accounts, but Upstream placed the orders and entered into transactions on behalf of its clients. During the Relevant Period, the relevant transactions in Upstream's trading accounts were solely for the benefit of these two clients. Upstream received fees as compensation from these clients for the aforementioned futures trading services.

2. Cooperation and Remediation

During the course of the Division's investigation of potential misconduct, Respondent fully cooperated with Division staff, allowing the Division to conserve resources and expedite its investigation. Respondent voluntarily produced documents, made its executives available for interviews and testimony, and promptly responded to multiple inquiries by Division staff. In addition, Respondent has represented that it worked proactively to remediate the issue, including by updating its policies, and providing compliance training to relevant staff.

III. LEGAL DISCUSSION

Section 4d(a)(1) of the Act makes it unlawful for any person to act as an FCM unless the person is registered with the Commission as such. 7 U.S.C. § 6d(a)(1) (2012). The Act defines an FCM as an entity that is "engaged in soliciting or in accepting orders for – (AA) the purchase or sale of a commodity for future delivery" and "in or in connection with" acceptance of such orders, "accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom." 7 U.S.C. § 1a(28)(A)(i)(I)(aa)(AA), (II) (2012).

Upstream acted as an FCM by accepting client orders for NYMEX natural gas futures and options contracts, and in connection with such orders accepting money from, or extending credit to, these clients. Because Upstream engaged in such transactions, it was required to have registered with the CFTC as an FCM. *See CFTC v. Hunter Wise Commodities, LLC*, 1 F. Supp. 3d 1311, 1325 (S.D. Fla. 2014) (entering summary judgment against purported precious metals wholesaler for failing to register as an FCM, where it engaged in off-exchange precious metal commodity transactions with retail customers on a leveraged, margined, or financed basis subject to Section 2(c)(2)(D)(i) of the Act, thus falling within the definition of an FCM under Section 1a(28) of the Act); *see also In re Davisco Foods Int'l, Inc.*, CFTC No. 17-11, 2017 WL 1195808, at *2 (March 27, 2017) (consent order) (finding that company violated Section 4d of the Act when it failed to register as FCM because it accepted orders from its milk suppliers for the purchase and sale of commodity futures contracts, and in connection with such orders, accepted money or extended credit to margin, guarantee, or secure the trades).

IV. FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondent violated Section 4d(a)(1) of the Act, as amended, 7 U.S.C. § 6d(a)(1) (2012).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges 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 (2019), 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, 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
 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, including this Order;
- 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; 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 Respondent violated Section 4d(a)(1) of the Act, 7 U.S.C. § 6d(a)(1) (2012);
 2. Orders Respondent to cease and desist from violating Section 4d(a)(1) of the Act;
 3. Orders Respondent to pay a civil monetary penalty in the amount of seventy-five thousand dollars (\$75,000), plus post-judgment interest, within ten days of the date of entry of this Order; 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 VI of this Order.

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 Section 4d(a)(1) of the Act, as amended, 7 U.S.C. § 6d(a)(1) (2012).
- B. Respondent shall pay a civil monetary penalty in the amount of seventy-five thousand dollars (\$75,000) (“CMP Obligation”) within ten days of the date of entry of this Order. If the CMP Obligation is not paid in full within ten 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).

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
Division of Enforcement
6500 S. MacArthur Blvd.
HQ Room 181
Oklahoma City, OK 73169
(405) 954-6569 office
(405) 954-1620 fax
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorne 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.

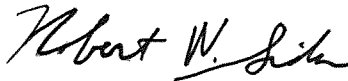
- C. Respondent and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:
 - 1. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control, shall take any action 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 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. Respondent's cooperation shall continue for a period of five years from the date of the entry of this Order.
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 this 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 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 calendar days of the change.

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: October 24, 2019