

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

James E. Leeney,

Respondent.

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CFTC Docket No. 20-18

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11:46 am, Jun 29, 2020

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 June 2015 to at least September 2017 (“Relevant Period”), James E. Leeney (“Respondent”) violated Section 4c(b) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 6c(b) (2018), Section 4o of the Act, 7 U.S.C. § 6o (2018), and Regulation 33.10, 17 C.F.R. § 33.10 (2019), of the Commission Regulations (“Regulations”) promulgated thereunder. 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 violations 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, Respondent, as an associated person (“AP”) of a registered introducing broker (“Entity A”), knowingly defrauded customers by making misrepresentations and omissions of material fact about profits from Entity A’s so-called options trading program (“Options Program”) in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), and Regulation 33.10, 17 C.F.R. § 33.10 (2019). By so doing, Respondent is also liable for aiding and abetting Entity A’s violations of Section 4o of the Act, 7 U.S.C. § 6o (2018), which prohibits fraud by a trading advisor (“CTA”), pursuant to Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2018).

B. RESPONDENT

Proposed Respondent James E. Leeney was registered with the Commission as an AP of Entity A from December 2013 through September 2017. Respondent has no current registration status. Respondent is a resident of Chicago, Illinois.

C. FACTS

From at least June 2015 through December 2019, Entity A, through its principals, employees, and agents, engaged in a scheme to defraud customers in connection with options on futures contracts traded on various designated contract markets.

Entity A’s fraudulent scheme involved making trade recommendations to customers as part of its options trading program (“Options Program”). In the Options Program, Entity A provided customers with trading recommendations. Each recommendation was for a different spread trade involving out-of-the-money options on futures contracts traded on certain designated contract markets.

During the Relevant Period, Respondent worked for Entity A as an AP, soliciting customers to open accounts and trade according to Entity A’s trading recommendations. Respondent made numerous false and misleading statements to customers and prospective customers about the success of the Options Program pursuant to a script provided to him by Entity A’s management. For example, Respondent told customers:

- Entity A wouldn’t be able to trade “millions of dollars for hundreds of customers” if they weren’t “being profitable for them;”
- 75.6% of Options Program trades were likely to be “winning trades,” which would result in a “successful” outcome for customers;
- It would be “easy” for customers to achieve a “12% annual return.”

In reality, substantially all customers who participated in the Options Program lost money. Respondent knew this from account statements he received on a daily basis. Respondent also knew this from customers who called to complain about losses in their accounts. Respondent nonetheless continued to misrepresent that trading under the Options Program was profitable.

Respondent deliberately withheld Entity A's dismal account performance from customers and prospective customers. When customers asked about Entity A's track record, Respondent told customers, pursuant to a script provided by Entity A's management, that Respondent could "sit here and show you trades and WOW you or something like that," but that the "success" of the Options Program was attributable to its "structure."

Entity A's customers often had difficulty understanding the account statements they received from the futures commission merchant. Respondent took advantage of customer confusion. Sometimes Respondent would tell a customer that he or she had made money when in fact the customer had lost money. Other times Respondent would tell a customer that he or she had made money on one of the recommended trades while failing to mention the customer had lost money on the other three.

For customers who understood they were losing money, Respondent would sometimes claim (falsely) that account statements did not reflect "unrealized P&L." Other times, Respondent would acknowledge the losses, but claim that Entity A tended to "perform well coming out of [] periods where we take a loss" because of "volatility." This was untrue.

During the Relevant Period, Respondent earned approximately \$225,000 from Entity A, primarily in the form of commissions from customer trades.

III. LEGAL DISCUSSION

A. Respondent Violated Section 4c(b) of the Act and Regulation 33.10 by Committing Fraud in Connection with Options on Futures Transactions

Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), provides that no person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity which is of the character of, or is commonly known to the trade as, an "option," contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

Regulation 33.10, 17 C.F.R. § 33.10 (2019), provides that it shall be unlawful for any person directly or indirectly to: (a) cheat or defraud or attempt to cheat or defraud any other person; (b) make or cause to be made to any other person any false report or statement thereof; or (c) deceive or attempt to deceive any other person by any means whatsoever, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

In order to establish liability for fraud, the CFTC has the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission;

(2) scienter; and (3) materiality. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002). Reliance is not an element in public enforcement cases. *CFTC v. Wilson*, 19 F. Supp. 3d 352, 363 (D. Mass. 2014), *aff'd sub nom. CFTC v. JBW Capital*, 812 F.3d 98 (1st Cir. 2016). Whether a misrepresentation has been made depends on the “overall message,” and how that message would be interpreted by an objectively reasonable receiver of that information. *R.J. Fitzgerald*, 310 F.3d at 1328.

Scienter is established if the defendants intended to defraud, manipulate, or deceive, or if the defendants’ conduct represents an extreme departure from the standards of ordinary care, i.e., recklessness. *Id.* Recklessness is present when the defendant’s conduct involves highly unreasonable omissions or misrepresentations that present a danger of misleading customers which is known to the defendant or so obvious the defendant must have been aware of it. *Id.*

A representation or omission is material if a reasonable investor would consider it important in deciding whether to make an investment. *Id.* When the language of a solicitation obscures the important distinction between the possibility of substantial profit and the probability that it will be earned, it is likely to be materially misleading to customers. *CFTC v. Kratville*, 796 F.3d 873, 895 (8th Cir. 2015). Misrepresentations about profit potential and risk “go to the heart of a customer’s investment decision and are therefore material as a matter of law.” *Id.* (internal quotation omitted).

Respondent engaged in a fraudulent scheme with respect to trading options on futures contracts via the Options Program. Respondent made false and misleading statements to customers and prospective customers about the profitability of trading pursuant to the Options Program. *CFTC v. Matrix Trading Grp., Inc.*, No. 00-8880-CIV, 2002 WL 31936799, at *6 (S.D. Fla. Oct. 3, 2002) (finding defendants in out-of-the-money options scheme “misrepresented and omitted material facts concerning the likelihood and extent of profits to be made trading commodity options, the risks inherent in trading such options, and the actual performance record in trading commodity options pursuant to the [] strategy”).² Moreover, Respondent omitted to advise customers and potential customers that substantially all of Entity A’s customers lost money. *R.J. Fitzgerald*, 310 F.3d at 1332 (“[A] reasonable investor surely would want to know—before committing money to a broker—that 95% or more of [] investors lost money.”).

Respondent made these misstatements and omissions knowingly or recklessly, since he knew from account statements and complaints from customers who had lost money trading pursuant to the Options Program. *JBW Capital*, 812 F.3d at 106 n.15 (holding defendant acted which scienter where he received “daily account statements” showing customer losses). Respondent’s false statements and omissions were material, since they related to customer profits and losses.

² See also *Kratville*, 796 F.3d 873, 892 (finding misleading statements as to firm’s “track record” were fraudulent); *CFTC v. Carnegie Trading Grp., Ltd.*, 450 F. Supp. 2d 788, 799 (N.D. Ohio 2006) (finding defendants “misrepresented profit potential and the risks of trading to potential customers” in out-of-the-money options scheme).

B. Respondent Is Liable for Aiding and Abetting Entity A’s Violations of Section 4o of the Act, which Prohibits Fraud by a CTA

During the Relevant Period, Entity A acted as a CTA within the meaning of Section 1a(12)(A)(i)(III) of the Act, 7 U.S.C. § 1a(12)(A)(i)(III) (2018), in that it, for compensation or profit, engaged in the business of advising others as to the value of or the advisability of trading in commodity options, including options on futures contracts.³

Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2018), provides that it shall be unlawful for a CTA, directly or indirectly, to: (a) employ any device, scheme, or artifice to defraud a customer or prospective customer; or (b) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any customer or prospective customer.

As set forth above, Entity A engaged in a scheme to defraud customers and prospective customers by, among other things, knowingly making numerous false and misleading statements about the success of the Options Program and failing to disclose Entity A’s actual account performance to customers and prospective customers.

Section 13(a) of the Act, 7 U.S.C. § 13c(a) (2018), provides, in relevant part, that “[a]ny person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of [the Act or Regulations], or who acts in combination or concert with any other person in any such violation . . . may be held responsible for such violation as a principal.”

Establishing aider and abettor liability requires proof that: (1) the Act was violated; (2) the defendant had knowledge of the wrongdoing underlying the violation; and (3) the defendant intentionally assisted the principal wrongdoers. *In re Shahrokh Nikkhah*, CFTC No. 95-13, 2000 WL 622872, at *11 & n.28 (May 12, 2000); *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376 (S.D.N.Y. 2009) (citing *In re: Natural Gas Commodity Litig.*, 337 F. Supp. 2d 498, 511 (S.D.N.Y. 2004)).

Respondent aided and abetted Entity A’s CTA fraud by knowingly making material misstatements or omissions to customers and prospective customers. Respondent did so in order to further Entity A’s fraudulent scheme. Respondent is therefore liable for Entity A’s violations pursuant to Section 13(a) of the Act.

³ Although registered with the Commission as an introducing broker (“IB”), Entity A was not eligible for an exemption from registration as a CTA under Regulation 4.14(a)(6), 17 C.F.R. § 4.14(a)(6) (2019), because its trading advice program was not solely in connection with its business as an IB, but rather constituted its primary business activity.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, James E. Leeney violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), Section 4o of the Act, 7 U.S.C. § 6o (2018), and Regulation 33.10, 17 C.F.R. § 33.10 (2019).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, 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 he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2018), and 28 U.S.C. § 2412 (2018), 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 he 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 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), Section 4o of the Act, 7 U.S.C. § 6o (2018), and Regulation 33.10, 17 C.F.R. § 33.10 (2019);
 2. Orders Respondent to cease and desist from violating Section 4c(b) and Section 4o of the Act, and Regulation 33.10;
 3. Orders Respondent to pay a civil monetary penalty in the amount of three hundred fifty thousand dollars (\$350,000), plus post-judgment interest;
 4. Orders that Respondent be prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2018)), for a period of five years after the date of entry of this Order, and all registered entities shall refuse him trading privileges during that period.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent shall cease and desist from violating Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), Section 4o of the Act, 7 U.S.C. § 6o (2018), and Regulation 33.10, 17 C.F.R. § 33.10 (2019);
2. Respondent shall pay a civil monetary penalty in the amount of three hundred fifty thousand dollars (\$350,000) ("CMP Obligation"). If the CMP Obligation is not paid immediately, 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 (2018).

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

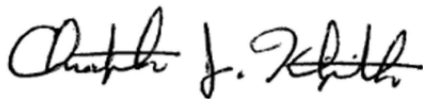
If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies 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.

3. Respondent is prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2018)), for a period of five years after the date of entry of this Order, and all registered entities shall refuse him trading privileges during that period; and
4. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
 1. **Public Statements:** Respondent agrees that neither he nor any of his successors and assigns, agents or employees under his 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 his successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of their agents and/or employees under their authority or control understand and comply with this agreement.
 2. Respondent agrees that he, for a period of five years after the date of entry of this Order, shall not, directly or indirectly:
 - a. enter into any transactions involving commodity interests (as that term is defined in Regulation 1.3, 17 C.F.R. § 1.3 (2019), for Respondent's own personal account or for any account in which Respondent has a direct or indirect interest;
 - b. have any commodity interests traded on Respondent's behalf;
 - c. control or direct the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;
 - d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity interests;

- e. apply for registration or claim exemption from registration with the Commission in any capacity, and engage in any activity requiring such registration or exemption from registration with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2019); and/or
 - f. act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2019)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2018)), registered, required to be registered, or exempted from registration with the Commission except as provided for in Regulation 4.14(a)(9).
3. 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, this action.
 4. 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 his 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.
 5. Change of Address/Phone: Until such time as Respondent satisfies in full his CMP Obligation as set forth in this Order, Respondents shall provide written notice to the Commission by certified mail of any change to his 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.



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 29, 2020