

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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9:22 am, Sep 23, 2022

In the Matter of:

XP Investments US, LLC,

Respondent.

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) **CFTC Docket No. 22-32**
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**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 May 2019 to at least June 2019 (“Relevant Period”), XP Investments US, LLC (“XP” or “Respondent”) violated Section 4g(a) of the Act (the “Act”), 7 U.S.C. § 6g(a), and Commission Regulations (“Regulations”) 1.31(b)(2) and 1.35(a)(1)(iii), 17 C.F.R. §§ 1.31(b)(2), 1.35(a)(1)(iii) (2021). 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

II. FINDINGS

The Commission finds the following:

A. SUMMARY

XP failed to maintain certain audio recordings for dates in May and June 2019, which XP as a registered introducing broker, was required to make and keep for a period of not less than one year. This failure occurred because XP's audio recording system was improperly installed by a third-party vendor following an office move. Once the error was discovered in June 2019, XP promptly took steps to remediate the problem.

In accepting Respondent's Offer, the Commission recognizes the cooperation of Respondent with the Division of Enforcement's ("Division") investigation of this matter. The Commission also acknowledges Respondent's representations concerning its remediation in connection with this matter.

B. RESPONDENT

XP Investments US, LLC is a Delaware corporation with headquarters in New York, New York. XP provides brokerage services for non-deliverable forwards and other commodity interests. XP has been registered with the Commission as an introducing broker since 2012.

C. FACTS

Between April 12 and May 15, 2019, XP relocated its New York office, which was responsible for maintaining the relevant audio recording system. The audio recording system was improperly installed at the new office location by an external vendor, causing the inconsistent and incomplete recording of audio calls on twenty-five days in May and June 2019. In particular, the vendor failed to properly sync the system so that it would record audio for both handsets and speakers for XP's turret system.² Following installation of the recording system in the new office, XP conducted an unknown number of "spot checks" to confirm that calls were being recorded, but these checks failed to reveal a recording issue. Similarly, the system's "heartbeat" outage warning system did not indicate errors in recording.³

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.

² A trader turret is a communication device generally used by financial traders on their trading desks in place of a telephone. The trader turret is specifically designed for the traders' high call volume and need to quickly place single-button outgoing calls. This was traditionally accomplished through use of multiple parallel phone lines but more recently with digital or internet protocol structures.

³ XP had a back-up recording server in place, but, since some of the calls in question were not recorded in the first instance, they were not saved on the back-up server.

XP discovered the audio recording issue in June 2019 when it attempted to locate a particular recording. XP personnel discovered that the vendor installation error had resulted in an intermittent failure to record calls from the speakers associated with the turrets.⁴ The unrecorded calls included oral communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and/or prices that led to the execution of a transaction in a commodity interest and/or related cash or forward transactions.

XP's recording failures did not stem from a recording outage, a system without a back-up, or technology that was obviously faulty or in a state of neglect. On the contrary, XP's system actually recorded some audio during the Relevant Period, and the system maintained a "red flag" warning that did not trip due to its configuration by the external vendor. Shortly after discovering the missing audio, XP began steps to fully remediate this audio recording issue in 2019. In addition to applying a technical fix to sync its recording system, XP enhanced its reporting logic channels to distinguish between speaker and handset calls; replaced its vendor; formalized its process of spot-checking recordings; and, in February 2020, instituted a surveillance trade reconstruction initiative which tests the capture of recordings attendant to trades.

III. LEGAL DISCUSSION

As a registered introducing broker, XP is required to comply with the recordkeeping obligations set forth in Section 4g(a) of the Act, 7 U.S.C. § 6g(a), and Regulations 1.31 and 1.35, 17 C.F.R. §§ 1.31, 1.35 (2021). Specifically, Section 4g(a) of the Act requires introducing brokers and other records entities to keep books and records pertaining to transactions and positions in such form and manner and for such period as required by the Commission. Regulation 1.31(b)(2) provides that a records entity required to retain oral communications as part of its recordkeeping obligations shall keep those communications for a period of not less than one year from the date of the communication. Finally, Regulation 1.35(a)(1)(iii) requires introducing brokers, which have generated over the preceding three years more than \$5 million in aggregate gross revenues from its activities as an introducing broker⁵, to keep all oral communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and any related cash or forward transaction.

Recordkeeping includes the obligation of ensuring that the data has been correctly archived and the data will be able to be used. The failure to retain and promptly produce required records for inspection to the Commission constitutes a violation of Section 4g of the Act and Regulations 1.31 and 1.35. *See, e.g., In re Woods*, CFTC No. 15-02, 2014 WL 5089105, at *4-6, *8 (Oct. 8, 2014) (consent order) (finding that an introducing broker violated Section 4g of the Act and Regulations 1.31 and 1.35 by failing to preserve certain customer order records).

⁴ XP addressed the outage problem prior to the opening of the Division's investigation.

⁵ XP satisfies this element.

As detailed above, from May 1 to June 19, 2019, XP failed to retain twenty-five days of audio recordings that included communications concerning quotes, solicitations, bids, offers, instructions, trading, and/or prices leading to transactions in commodity interests and/or related forward transactions for the required one-year period set forth in Regulation 1.31(b)(2). Consequently, XP violated Section 4g(a) of the Act and Regulations 1.31(b)(2) and 1.35(a)(1)(iii).

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, XP Investments US, LLC violated Section 4g(a) of the Act, 7 U.S.C. § 6g(a), and Commission Regulations 1.31(b)(2) and 1.35(a)(1)(iii), 17 C.F.R. §§ 1.31(b)(2), 1.35(a)(1)(iii) (2021).

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, and 28 U.S.C. § 2412, and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2021), 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 4g(a) of the Act, 7 U.S.C. § 6g(a), and Commission Regulations 1.31(b)(2) and 1.35(a)(1)(iii), 17 C.F.R. §§ 1.31(b)(2) and 1.35(a)(1)(iii) (2021);
 2. Orders Respondent to cease and desist from violating Section 4g(a) of the Act and Regulations 1.31(b)(2) and 1.35(a)(1)(iii);
 3. Orders Respondent to pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000.00), plus post-judgment interest within ten days of the date of entry of this Order;
- F. Represents that, as described above, it has remediated the recordkeeping problem that is the subject of this Order.

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

VI. ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Respondent and its successors and assigns shall cease and desist from violating Section 4g(a) of the Act, 7 U.S.C. § 6g(a), and Commission Regulations 1.31(b)(2) and 1.35(a)(1)(iii), 17 C.F.R. §§ 1.31(b)(2), 1.35(a)(1)(iii) (2021).
2. Respondent shall pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000.00) ("CMP Obligation"), within ten days of the date of the 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.

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 266
Oklahoma City, OK 73169
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Tonia King 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.

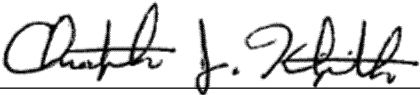
3. Respondent and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:
 - A. **Public Statements:** Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action 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.
 - B. **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.
 - C. **Change of Address/Phone:** Until such time as Respondent satisfies in full its CMP Obligation as set forth in this 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.
 - D. 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 under 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 N.W.
Washington, DC 20581

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: September 23, 2022