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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of: **Goldman Sachs & Co. LLC,** **Respondent.**	**CFTC Docket No. 23-09**

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 2015 to at least September 2016 ("Relevant Period"), Goldman Sachs & Co. LLC ("Respondent" or "Goldman") violated Section 4s(h)(1) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6s(h)(1), and Sections 23.431 and 23.433, 17 C.F.R. §§ 23.431, 23.433, 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. Respondent makes the admissions set forth in Section V(C), and otherwise neither admits nor denies the findings of fact and conclusions of law 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]

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[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

In accepting Respondent's offer, the Commission recognizes Respondent's cooperation with the Division of Enforcement's investigation of this matter.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

In 2015 and 2016, Goldman failed to satisfy the Commission's Business Conduct Standards when soliciting U.S.-based clients to trade certain equity index swaps. Specifically, in dozens of swap transactions, Goldman failed to disclose to clients the pre-trade-mid-market-mark ("PTMMM") of the swap—often disclosing a PTMMM for a different swap, thereby obscuring the value of the transacted swap. Furthermore, Goldman failed to communicate in a fair and balanced manner based on principles of fair dealing and good faith.

During the Relevant Period, Goldman solicited certain clients to enter into an unconventional type of equity index swap transaction, called a "same-day" swap. In a "same-day" equity index swap, the equity leg of the swap strikes on the "same day" as the other material terms of the swap are agreed upon, rather than—as is typical—the day after the date of agreement. Goldman opportunistically solicited or agreed to enter into same-day swaps only on days and at times that were financially advantageous to Goldman and disadvantageous to its clients. In doing so, Goldman personnel failed to provide the clients with the transparency that the regulations require and communicated in a manner that caused the same-day swaps to appear more economically advantageous to the client than they actually were.

In accepting Respondent's Offer, the Commission recognizes the cooperation of Respondent with the Division of Enforcement's investigation in this matter.

B. RESPONDENT

Goldman Sachs & Co., LLC is a limited liability company with its main office in New York City. It is registered with the Commission as a futures commission merchant and has been provisionally registered as a swap dealer since December 2012.

C. FACTS

1. *Market Background*

   a. *Equity Index Swaps*

In an equity index swap, the parties exchange exposure to an equity index for an interest rate for a set period of time, or "term," of the swap. Party A goes "long" an equity index in exchange for paying Party B an interest rate. Party B goes "short" the equity index in exchange for receiving the interest rate. If the index is higher at the end of the term of the swap than it was

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.

at the beginning, Party B pays Party A that difference, multiplied by the number of units in the swap contract. If the index declines over that time, Party A pays Party B the difference, multiplied by the number of units in the contract. Regardless of market movement, Party A pays Party B the interest rate.

The equity index leg of the swap has a "strike" price, sometimes referred to as the "initial price." This is the initial index value against which future index movement will be measured for purposes of determining profit and loss on the equity leg over the term of the swap. Importantly, equity index swaps traditionally strike on a "T+1" basis. This means that the "strike" price, or "initial price," of the swap equals the index value published the *day after* the parties agree to the trade. This one-day lag ensures that none of the components of the index that will form the initial valuation have priced at the time the swap is agreed upon, reducing the likelihood of potential information asymmetries regarding the projected index values.

Bids and offers for equity index swaps are expressed in terms of the interest rate leg—more specifically, the spread above a benchmark rate (such as 3-month LIBOR) that Party A will pay to Party B. The PTMMM—which swap dealers, like Goldman, are required to disclose to U.S. counterparties—is also expressed in terms of the interest rate. So, for example, a swap dealer might quote an equity index swap as "3mL +68/+72 (PTMMM +70)"—indicating that the swap dealer would pay 68 basis points above 3-month LIBOR to go long the index or receive 72 basis points above 3-month LIBOR to go short the index, and that the PTMMM of the swap is 70 basis points above 3-month LIBOR.

b. *MSCI EAFE Index and Corresponding Proxy Instruments*

Almost all the "same-day" equity index swaps at issue in this matter were swaps tied to the MSCI Europe Australasia and Far East ("EAFE") Index ("EAFE Index Swaps"). The MSCI EAFE Index tracks a basket of stocks from Japan, Europe, Hong Kong, Singapore, New Zealand, and Australia, among others. The MSCI EAFE Index level (or, index price) is published once per day, in the early evening, New York time ("Index Settlement Value"). It is calculated by MSCI, using a formula based on the closing prices of the index's component stocks. The foreign exchanges on which the component stocks trade, however, close hours before New York exchanges do—some before the New York trading day even begins. In other words, most of the component prices used to calculate the Index Settlement Value are stale—at least several hours old—by the time the Index Settlement Value gets published in New York.

Though most of the component stocks in the EAFE Index trade on exchanges that close well before the New York markets do, there are other "proxy" instruments that generally track the market value of the components of the EAFE index and trade throughout the New York trading day. For example, there is an exchange traded fund ("ETF") that tracks the MSCI EAFE Index. It trades on the NYSE throughout the New York trading day and reflects the market's view of the *real-time* value of the basket of stocks in the corresponding index—despite the fact that the markets in which the underlying stocks trade may be closed. There are also futures contracts on the EAFE Index that trade during U.S. market hours.

The result is twofold: (1) since most of the markets in which the underlying equities traded closed hours before the Index Settlement Value was published, sophisticated parties with

the wherewithal and resources to access relevant market data could know—or have a very good approximation of—what the daily Index Settlement Value would be hours before that publication; and (2) during the New York trading day, the real-time market value of the components of the index, as reflected in proxy instruments like the EAFE ETF, can—and did—diverge from the projected Index Settlement Value. For example, during the New York trading day, the ETF and other proxies could be trading above (at a "premium" to) the projected Index Settlement Value. Or, the ETF and other proxies could be trading below (at a "discount" to) the projected Index Settlement Value.[2]

2. *Goldman Solicits Clients to Enter "Same-Day" EAFE Equity Index Swaps*

Goldman traders saw an opportunity in these premium/discount scenarios. On days and at times where the EAFE proxies were trading at a premium to the projected Index Settlement Value, if Goldman could get a client to sell it an EAFE Index swap that struck the "same-day"—as opposed to the normal, "T+1" strike—Goldman could sell the EAFE proxies at the higher, premium price and buy exposure to the EAFE Index from the client (synthetically through the swap) at the lower Index Settlement Value published at the end of the day, profiting from the difference. Conversely, on days and at times where the EAFE proxies were trading at a discount to the projected Index Settlement Value, if Goldman could get a client to buy an EAFE Index swap that struck the "same-day," Goldman could buy the EAFE proxies at the lower, discount price and sell exposure to the EAFE Index to the client (synthetically through the swap) at the higher Index Settlement Value published at the end of the day, profiting from the difference.

Put simply, through a "same-day" swap trade, Goldman could go long the index at a below-market level or go short the index at an above-market level. This was more or less a zero-sum game, however. Indeed, any client taking the other side of the trade would be buying the index at an above-market level or selling the index at a below-market level. In other words, under these circumstances, the client would start the equity leg of the swap underwater.

a. *Goldman Failed to Disclose a PTMMM for Same-Day Swaps*

In soliciting and quoting prices on "same-day" swaps with clients, however, Goldman failed to meet its disclosure obligations and obscured the cost of such swaps to the clients. As a threshold matter, Goldman did not disclose a PTMMM for the "same-day" swaps, depriving its clients of transparency into the relative value of the swap Goldman was offering them. Instead, in pre-trade communications regarding "same-day" swaps, Goldman often disclosed the PTMMM for the "T+1" swap, which, as explained below, caused Goldman's bids and offers to appear more attractive than they actually were.

Importantly, a PTMMM of the "same-day" swap, had it been disclosed, would have been different than the T+1 PTMMM. Specifically, when the proxy instruments are trading at a premium or discount to the projected Index Settlement Value, any PTMMM for the "same-day"

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[2] Goldman also traded "same-day" equity index swaps tied to the MSCI Emerging Markets Index. Many of the components stocks of this index also trade on exchanges that close many hours before the index is published. Like the EAFE Index, there are also proxy instruments such as ETFs and futures contracts that reflect the market's view of the *real-time* value of the basket of stocks in the Emerging Market Index and may diverge from the projected Index Settlement Value during the New York trading day.

swap would (or should) have accounted for the disadvantage at which the client would start the equity leg. For example, where proxy instruments are trading at a premium to the projected Index Settlement Value and transacting "same-day" would thereby entail the client selling the index to Goldman at a below-market level, the PTMMM (i.e., the mid-market interest rate that the seller should receive) for the "same-day" swap should be higher than the PTMMM for the analogous "T+1" swap—theoretically, an amount above the analogous T+1 level that would adequately compensate the client for the below-market rate at which it would be selling the Index to Goldman.

b. *Goldman Failed to Communicate in a Fair and Balanced Manner and in Good Faith*

By disclosing a PTMMM for a T+1 swap, rather than the same-day swap, Goldman gave clients the impression they were getting advantageous pricing when, in fact, they were not. For example, on January 21, 2016, Goldman told a client that Goldman could "bid" for a nine-month EAFE Index Swap. Specifically, Goldman said: "normal T[+]1 is 3mL+55 bid (+60 mid). for today's strike can show 3mL+91." By bidding the same-day swap at a rate that appeared to be 31 basis points *over* the PTMMM for the T+1 swap, Goldman gave the client the impression that the same-day swap was a better deal for the client than the T+1 swap. It was not. Indeed, at the time, the EAFE index proxies were trading at a premium to the projected Index Settlement Value—meaning that the client would be selling the equity leg to Goldman at a below-market rate. Although Goldman offered the client a higher interest rate than the client would have received by trading a T+1 swap, Goldman's higher same-day interest rate did not adequately compensate the client for the disadvantage on the equity leg.

This was typical of the same-day swap transactions Goldman entered with clients. As noted above, Goldman would only solicit or agree to a "same-day" swap when the client would be buying or selling the equity leg underwater and Goldman, conversely, would be selling or buying the equity leg at a level it could immediately cash in for a profit through the index proxy instruments. Yet, the "preferential" interest rates that Goldman offered clients to entice them to transact same-day did not fully compensate the clients for the disadvantage at which the client would start the equity leg. Indeed, on many occasions, the value of the net interest rate benefit to the client paled in comparison to the value of Goldman's advantage of the equity leg.

As a result, "same-day" swaps were particularly lucrative for Goldman. For example, on August 25, 2015, Goldman offered to enter a same-day swap with a client at an interest rate that, according to internal communications, was 15 basis points above what the client would have received in an analogous "T+1" swap. The client agreed to transact "same-day" at this seemingly preferential rate. The strike price the client received on the equity leg, however, was at least 60 basis points below market at or around the time of the agreement. As a result, Goldman traders estimated that they had earned a $1,620,000 profit that day on this swap and the corresponding index proxy trades alone.[3] The client, for its part, thought it was getting a good deal; it did not understand why Goldman was offering the high interest rate.

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[3] By way of another example, the same-day swaps and corresponding index proxy trades that Goldman entered on October 5, 2015, netted an estimated profit that day of approximately $1,200,000. On several other

To be sure, the market prices of the index underliers, as well as projections of the end-of-day Index Settlement Value based on then-prevailing market prices of underliers (or, for underliers that had closed for the day, the closing prices), as well as the pricing of the index proxy instruments are publicly available. Parties with the resources and wherewithal to do so could, like Goldman, see when the proxy instruments were trading at a premium or a discount to the projected Index Settlement Value and, therefore, whether the projected Index Settlement Value was above or below the real-time market value of the components of the Index. Goldman's clients, however—particularly, the ones to whom Goldman repeatedly returned to execute "same-day" swaps—rarely demonstrated such sophistication and often appeared to believe they were receiving an advantageous interest rate, with no strings attached.

Goldman's efforts to induce clients that did not demonstrate such sophistication to enter same-day swaps went beyond simply communicating bids and offers that, on their face, appeared preferential. In a June 24, 2016, communication to one particular client, a Goldman personnel stated: "we're bidding wayyy above our PTMMMs today"—indicating that Goldman was offering the client great deal. When the client responded with interest, Goldman quoted a bid that appeared to be 34 basis points over the PTMMM. This was not actually the case. Rather, any marginal benefit Goldman offered on the interest rate leg would be more than outweighed by the cost to the client on the equity leg when transacting "same-day." That information was not disclosed.

On another occasion, in January 2016, Goldman personnel asked a client: "any interest in [EAFE swaps]? We have an axe if you're looking to put on more short exposure." When the client, who had never traded "same-day" before responded with interest to sell $90 million notional, the Goldman salesperson quoted:

> For Tomorrow's strike: 3mL+50 bid (PTMM +53)
> for TODAY's strike: 3mL+100

When the client responded with interest in the T+1 strike, the Goldman salesperson replied: "tomorrow's strike? You're not interested in today's at the much better level?"—explicitly suggesting that the client would be better off trading same-day. Yet, the salesperson failed to disclose the disadvantage—that the client's equity leg would start underwater, at a below-market strike price.

Additional communications by Goldman's trading and sales personnel reflect their efforts to emphasize the benefits to the client on the interest rate leg, without disclosing the client's disadvantage on the equity leg. Furthermore, communications show that Goldman personnel believed that the less the clients understood about the economics of the same-day swaps, the more profit Goldman could make. As a Goldman trader told a Goldman salesperson, disclosing more detail about same-day swaps "makes it easier for them to squeeze us; we usually just say we have an axe."

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occasions, Goldman's estimated profit that day on same-day swaps and the corresponding index proxy trades was in the mid or high-six figures, at least.

III. LEGAL DISCUSSION

A. Violations of Commission Regulation 23.431 and 7 U.S.C. 6s(h)(1): Failure to Disclose All Material Information, Including the Pre-Trade-Mid-Market Mark

Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulation 23.431, 17 C.F.R. § 23.431, require swap dealers to disclose to certain counterparties (1) information about the material characteristics of the swap, (2) the swap dealer's material incentives and conflicts of interest related to the swap, and (3) a daily mark of each uncleared swap transaction. The Regulation additionally requires, as part of the disclosure of material incentives and conflicts of interest, disclosure of a PTMMM. 17 C.F.R. § 23.431. These disclosure rules "are intended to level the information playing field . . . to enable counterparties to make their own informed decisions about the appropriateness of entering into the swap." Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734, 9759 (February 17, 2012). The PTMMM should represent "an objective value," providing counterparties with "a baseline to assess swap valuations . . . ." *Id.* at 9768.

As described above, in connection with dozens of same-day swap transactions with U.S.-based clients, Goldman failed to disclose the PTMMM. In connection with many of these same-day swap transactions, Goldman disclosed a PTMMM for the wrong swap. Indeed, Goldman disclosed a PTMMM for the analogous "T+1" swap, not for the "same-day" swap that had been transacted—sometimes making it appear that the PTMMM for the T+1 swap applied to the same-day swap when, in fact, it did not. This conduct violated Section 4s(h)(1) of the Act and Regulation 23.431.

B. Violations of Commission Regulation 23.433 and 7 U.S.C. 6s(h)(1): Failure to Communicate in Good Faith and in a Fair and Balanced Manner

Section 4s(h)(1) and Regulation 23.433 require swap dealers to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. The rule "supplement[s] requirements to inform counterparties of material incentives and conflicts of interest that would tend to be adverse to the interests of the counterparty," *see* 77 Fed. Reg. 9770, and highlights the importance of "complete" disclosures, *id*. As described above, Goldman opportunistically solicited and entered same-day swap transactions on days and at times that were advantageous to Goldman and disadvantageous to its clients. In doing so, not only did Goldman fail to provide clients the minimum level of transparency the Regulations require; communications by its sales and trading personnel caused these transactions to appear economically favorable to the client, when they were not. By touting the supposed benefits of same-day swap transactions but not the corresponding costs, Goldman failed to communicate in a fair and balanced manner. Moreover, Goldman understood that the lucrative nature of the same-day swaps for Goldman depended on this informational imbalance. Under these circumstances, Goldman's communications were not fair and balanced and reflected a lack of good faith. This conduct violated Section 4s(h)(1) of the Act and Regulation 23.433.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, Goldman violated Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulations 23.431 and 23.433, 17 C.F.R. §§ 23.431, 23.433.

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it:

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. Admits that for nearly all "same-day" swaps executed in 2015 and 2016,[4] it either failed to disclose any PTMMM or failed to disclose an accurate PTMMM, and that this conduct violated Regulation 23.431;

D. Otherwise neither admits nor denies the findings and conclusions set forth herein;

E. 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 (2022), 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

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[4] The "same-day" swaps at issue in this matter were swaps tied to (i) the MSCI Europe Australasia and Far East ("EAFE") Index or (ii) the MSCI Emerging Markets Index.

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;

F. 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

G. 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 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulations 23.431 and 23.433, 17 C.F.R. §§ 23.431, 23.433;

2. Orders Respondent to cease and desist from violating Section 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulations 23.431 and 23.433, 17 C.F.R. §§ 23.431, 23.433;

3. Orders Respondent to pay a civil monetary penalty in the amount of fifteen million dollars ($15,000,000), plus any post-judgment interest; 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 4s(h)(1), 7 U.S.C. § 6s(h)(1), and Regulations 23.431 and 23.433, 17 C.F.R. §§ 23.431, 23.433.

B. Respondent shall pay a civil monetary penalty in the amount of fifteen million dollars ($15,000,000) within 10 business days of the date of the entry of this Order ("CMP Obligation"). If the CMP Obligation is not paid in full within 10 business days of the date of 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 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, and to Manal Sultan, Commodity Futures Trading Commission, 290 Broadway, 6th Floor, New York, NY 10007.

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. 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.

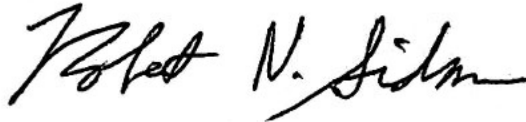
3. Change of Address/Phone: Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

4. 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.



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

Dated: April 10, 2023