



UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

ABN AMRO Clearing Chicago
LLC ,

Respondent.

CFTC Docket No. 18-31

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 January 2014 to at least August 2015 (“Relevant Period”), ABN AMRO Clearing Chicago LLC (“ABN” or “Respondent”) violated Section 4g(a) of the Commodity Exchange Act (the “Act”), 7 U.S.C. § 6g(a) (2012), and Commission Regulations (“Regulations”) 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2018), 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

From January 24, 2014 through August 28, 2015, ABN, a registered Futures Commission Merchant (“FCM”), failed to maintain certain required records, specifically electronic audit trail information (“audit trail”) for a total of sixty-five (65) clients. ABN represents that it received audit trail data routed through the Trading Technologies (“TT”) gateway; however, ABN’s systems corrupted the data, leaving gaps and discrepancies. Specifically, ABN’s legacy archival system inadvertently failed to properly copy data it received through TT. As a result of its legacy archival system’s failures, approximately 8.4 million records were corrupted. The Division of Enforcement (the “Division”) became aware of ABN’s failure when, in connection with an investigation into one of ABN’s clients (“Client A”), the Division requested audit trail data for Client A, which ABN was required to preserve, maintain, and promptly produce under Section 4g(a) of the Act and Regulations 1.31 and 1.35.

ABN failed to supervise its employees and agents to ensure that ABN fulfilled its statutory and regulatory obligation to keep and promptly produce required records, such as the audit trail data at issue here. Specifically, ABN did not have a system in place to confirm that it was accurately preserving audit trail data. In fact ABN was unaware that it was not archiving audit trail data from the TT gateways until after the Division brought the issue to ABN’s attention.

After ABN was alerted to the problem by the Division, it made substantial efforts to repair and reconstruct the audit trail data impacted by the system failure, and ultimately did reconstruct substantially all affected records.

B. RESPONDENT

ABN AMRO Clearing Chicago LLC is a registered FCM with its principal place of business in Chicago, Illinois.

C. FACTS

1. ABN’s Data Collection and Retention Failures

On March 31, 2016, the Division issued a request pursuant to Section 4g, 7 U.S.C. § 6g (2017), for certain required records—specifically, the audit trail data of Client A who the Division was investigating. The data at issue relates to the trading of derivatives, including futures, options, swaps, and spreads.

Thereafter, the Division discovered significant gaps and missing transactions in the audit trail data that ABN had produced. The Division followed up with ABN regarding these issues, including providing specific examples of errors in the audit trail production. ABN was

not aware of the gaps and missing transaction data until the Division notified ABN of these problems.

Following the Division's notice, ABN initially attempted to restore audit trail data for only those transactions the Division specifically identified. However, approximately six weeks after the Division's notice, ABN compliance staff advised the Division of its inadvertent failures to produce relevant information and confirmed that ABN's initial investigation revealed numerous instances of missing data ("Audit File Problem"). ABN then undertook an internal investigation to determine the scope and extent of the Audit File Problem for all its clients for a five-year period.

On June 14, 2017, ABN submitted to the Division an "Information Technology Incident Report" ("IT Report") reporting that audit trail data was corrupted during the time period January 24, 2014, through August 28, 2015. ABN isolated the cause of the failure to an archiving system which copied data supplied to ABN through the TT gateway. ABN reported that the Audit File Problem also affected the data of sixty-four other ABN clients. The IT Report concluded that the Audit File Problem fortuitously ceased on August 28, 2015, when ABN replaced its legacy archival program with upgraded software.

Although ABN had a recordkeeping system in place, the system was inadequate in that it failed to confirm that it was accurately preserving audit trail data. ABN had no system in place to monitor—and did not routinely monitor—whether anomalies existed in its data collection or archiving processes. Ultimately, ABN's late production of Client A's records delayed the Division's investigation into Client A.

2. ABN's Cooperation and Remediation

Following its acknowledgement of the Audit File Problem, ABN immediately took steps to determine the cause and scope of the problem, and to explore solutions. Ultimately, ABN undertook an in-depth internal investigation to determine the scope and extent of the problem across all ABN clients during the preceding five years. ABN employed multiple personnel to address the Audit File Problem, some of whom worked on the matter on a full time basis. ABN's actions included interviewing TT to determine the source of the gaps in the data and building software tools internally and with vendors to advance its investigation. ABN also voluntarily informed the Division of its progress and responded to the Division's inquiries regarding the scope and breadth of its review.

ABN remedied the Audit File Problem by locating other internal sources of data, acquiring historical data from third parties, and comparing and ultimately repairing or reconstructing substantially all affected records. ABN also represented that it now tests its archival systems for their effectiveness, including installing monitoring alerts to alert ABN to data collection and/or preservation errors.

III. LEGAL DISCUSSION

A. Recordkeeping Violations

As an FCM, ABN is required to comply with the recordkeeping obligations set forth in Section 4g(a) of the Act, 7 U.S.C. § 6g(a) (2012), and Regulations 1.31(a) and 1.35(a), 17 C.F.R. §§ 1.31, 1.35 (2018). Section 4g “provides that every person registered as a futures commission merchant . . . shall keep books and records pertaining to transactions and positions of their customers and commodities for future delivery, and shall make such records available for inspection by the Commission.” *In re Woods*, CFTC No. 15-02, 2014 WL 5089105, at *5 (Oct. 8, 2014) (consent order) (citing 7 U.S.C. § 6g(a)(2012)). Regulation 1.35 requires FCMs to keep “full, complete, and systematic records (including all pertinent data and memoranda) of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions” 17 C.F.R. § 1.35(a)(1)(i). Regulation 1.31 requires that such records be preserved for five years. *Id.* § 1.31(b)(1). Moreover, if such records are preserved electronically, registrants must “establish appropriate systems and controls that ensure the authenticity and reliability of electronic regulatory records” and “monitor compliance with the Act and Commission regulations” as well as “ensure[] the records entity is able to produce electronic regulatory records in accordance with [the Regulations].” *Id.* § 1.31(c).

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 such records for inspection to Commission staff constitutes a violation of Section 4g of the Act and Regulations 1.31 and 1.35. *Woods*, 2014 WL 5089105, at *4-6, 8 (consent order) (finding that an introducing broker violated Section 4g of the Act and Regulation 1.35 by failing to preserve certain customer order records); *In re Forex Capital Mkts. LLC*, CFTC No. 12-01, 2011 WL 4689390, at *4-5 (Oct. 3, 2011) (consent order) (holding that an FCM violated Section 4g of the Act and Regulation 1.35 by failing to promptly produce records requested by Division of Enforcement staff). A violation of these record-keeping regulations does not require scienter. *Id.* (citing *In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158 at *15 (Aug. 11, 1992), *aff'd in part and rev'd in part sub nom., Monieson v. CFTC*, 996 F. 2d 852 (7th Cir. 1993)); *see also In re DiPlacido*, CFTC No. 01-23, 2004 WL 2036910, at *11 (Sept. 14, 2004), *aff'd*, 364 F. App'x 657 (2d Cir. 2009).

The facts set forth above demonstrate that ABN failed to retain and preserve complete audit trail data for 65 clients from January 2014 through August 2015. This failure to retain and preserve these required records violated Section 4g(a) of the Act and Regulations 1.31(a) and 1.35(a).

B. Supervision Failures

ABN failed to develop and diligently administer adequate procedures to ensure compliance with the recordkeeping requirements of Section 4g(a) of the Act, in violation of Regulation 166.3, 17 C.F.R. §166.3 (2018). Prior to the Division’s notice to ABN, ABN was not aware of the Audit File Problem, and had no system in place to detect gaps and problems with its audit trail data preservation.

A violation of Regulation 166.3 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. *In re Murlas Commodities*, CFTC No. 85-29, 1995 WL 523563, at *9 (Sept. 1, 1995); *GNP Commodities*, at *17-19 (providing that, even if an adequate supervisory system is in place, Regulation 166.3 can still be violated if the supervisory system is not diligently administered); *Sansom Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1990 WL 282783, at *11 (Feb. 16, 1990) (noting that, under Regulation 166.3, an FCM has a "duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents" (internal quotation omitted)). 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. *In re Paragon Futures Ass'n*, CFTC No. 88-18, 1992 WL 74261 at *14 (April 1, 1992). A violation under Regulation 166.3 is an independent violation for which no underlying violation is necessary. *See In re Collins*, CFTC No. 94-13, 1997 WL 761927 at *10 (Dec. 10, 1997).

Under Section 4g, 7 U.S.C. § 6g (2017), and Regulations 1.31(a) and 1.35(a), 17 C.F.R. §§ 1.31, 1.35 (2018), FCMs have an obligation to keep and promptly produce required records, like audit trail data. From at least January 2014 to August 2015, ABN had no system in place to confirm that its archive system was accurately preserving audit trail data. During at least that same time period, ABN also had no system in place that identified that the audit trail data ABN received from the TT gateways was corrupted. In fact, ABN was not aware of this issue until after the Division raised concerns. Because of these supervision failures, ABN could not meet its recordkeeping obligations under the Act and Regulations. Accordingly, ABN has violated Regulation 166.3.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, ABN violated Section 4g(a) of the Act, 7 U.S.C. § 6g(a) (2012), and Regulations 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2018).

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 (2018), 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, §§ 201-53, 110 Stat. 847, 857-74 (codified as amended in 28 U.S.C. § 2412 and in scattered sections of 5 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) (2012), and Regulations 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2018);
 2. Orders Respondent to cease and desist from violating Section 4g(a) of the Act and Regulations 1.31, 1.35, and 166.3;
 3. Orders Respondent to pay a civil monetary penalty in the amount of One Hundred Sixty Thousand Dollars (\$160,000) within ten (10) 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 and its successors and assigns shall cease and desist from violating Section 4g(a) of the Act, 7 U.S.C. § 6g(a) (2012), and Regulations 1.31, 1.35, and 166.3, 17 C.F.R. §§ 1.31, 1.35, 166.3 (2018).
- B. Respondent shall pay a CMP in the amount of one hundred sixty thousand dollars (\$160,000) (“CMP Obligation”), within ten (10) days of the date of the entry of this Order. If the CMP Obligation is not paid in full within ten (10) 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.
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 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. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP 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 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 (10) 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: September 14, 2018