

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Hope Advisors LLC,

Respondent.

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) **CFTC Docket No. 15-19**
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3:54 pm, Apr 15, 2015

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

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that during the period March 2011 through January 23, 2013, Hope Advisors LLC ("HAL") violated Section 4m(1) of the Commodity Exchange Act, ("Act"), 7 U.S.C. § 6m(1) (2012). The Commission also has reason to believe that during the period March 2011 through August 2013, HAL violated Commission Regulation ("Regulation") 4.22(d), 17 C.F.R. § 4.22(d) (2014). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether the Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, the 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 Sections 6(c) and 6(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 entry of this Order and to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor does Respondent consent to the use of the Offer or this Order, or the findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

HAL operated Hope Investments LLC (“HIL”) as a commodity pool from March 2011 through January 23, 2013, without the benefit of registration as a commodity pool operator (“CPO”), in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012). Additionally, from approximately March 2011 through August 2013, HAL provided monthly statements to HIL’s pool participants that showed only realized gains and losses, in violation of Regulation 4.22(d).

B. RESPONDENTS

Hope Advisors LLC is located in Brentwood, TN, and has been registered as a CPO since January 24, 2013. During the period March 2011 through January 23, 2013, HAL operated HIL, a commodity pool, without the benefit of registration as a CPO. Karen S. Bruton (“Bruton”) is President of HAL and is registered as its principal.

C. FACTS

HAL was formed in March 2011, and began operating HIL as a commodity pool at that time. By January 2013, HIL had approximately 131 participants and a net asset value of over \$100 million. Although HAL and HIL were formed with the assistance of outside legal counsel, neither HAL’s counsel nor its principal, Bruton, was aware of Section 4m(1)’s requirement that HAL register as a CPO. In approximately August 2012, HAL’s retained counsel contacted the National Futures Association (“NFA”) to determine whether HAL was required to register as a CPO or was exempt from registration requirements. Subsequent to that communication, HAL commenced the registration process and began drafting the required disclosure documents. HAL became registered as a CPO and approved as an NFA member on January 24, 2013.

On March 25, 2013, the NFA commenced an audit of HAL. During the audit process, NFA determined that HAL was providing monthly reporting statements to HIL participants that showed only realized gains and losses, in violation of Regulation 4.22(d). In fact, HAL’s monthly reporting statements were consistent with HAL’s disclosure statement and agreement with pool participants, which provided that participants would only be allocated realized gains and losses. HAL separately reported unrealized gains and losses to HIL participants in the form of audited K-1 statements that included realized and unrealized gains and losses on an annual basis.

After the NFA audit disclosed its reporting deficiencies, HAL took remedial action to correct the monthly pool statements it sent to participants. In particular, HAL retained a consultant, which designed a Rule 4.22 compliant performance report that HAL sends to participants each month, and the consultant trained HAL’s staff on how to prepare the monthly report and the performance disclosures contained in HIL’s disclosure document. HAL also replaced its auditing firm and hired a certified public accountant as its chief financial officer.

As of August 2013, HAL began issuing two monthly reports to HIL participants, one showing realized gains/losses which is the report consistent with the participants' investment terms, and a second based on net asset value showing realized and unrealized gains and losses, which complies with Regulation 4.22(d). HAL also retained an audit firm to conduct an independent monthly review of its performance reporting to ensure compliance with Commission Regulations. The audit firm's independent monthly review began in May 2013 and will continue until May 2015.

IV.

LEGAL DISCUSSION

A. Respondent Violated Section 4m(1) of the Act

In 1974, Congress amended the Act to establish a more "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." *CFTC v. Schor*, 478 U.S. 833, 836 (1986) (quoting H.R.Rep. No. 93-975, p. 1 (1974)). "Registration is the kingpin in ... [the Commission's] statutory machinery, giving the Commission the information about participants in commodity trading which it so vitally requires to carry out its other statutory functions of monitoring and enforcing the Act." *Flaxman v. CFTC*, 697 F.2d 782, 787 (7th Cir. 1983) (quoting *CFTC v. British American*, 560 F.2d 135, 139-40 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978)). The registration requirements ensure that persons dealing in commodities meet certain minimum financial and fitness requirements, and enable the CFTC to monitor the trading activities of market members. *Ping He (Hai Nam) Co. v. NonFerrous Metals (U.S.A.) Inc.*, 22 F. Supp. 2d 94, 102-04 (S.D.N.Y. 1998) *opinion vacated in part on reconsideration*, 187 F.R.D. 121 (S.D.N.Y. 1999).

Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), makes it unlawful for a person to act as a CPO and use the mails or any instrumentality of interstate commerce in connection with one's business as a CPO without being registered with the Commission as a CPO, subject to certain exceptions and exemptions not applicable here.² The registration requirement does not contain a "state of mind" limitation to liability. There is a "flat prohibition ... against using the facilities of interstate commerce to give commodity advice unless registered," and "[w]hile fraud and misconduct may also be violations of the Act ... violations of § 6m alone are sufficient" to warrant the granting of an injunction. *British Am. Commodity Options*, 560 F.2d at 142; *accord CFTC v. Wilson*, 19 F.Supp.3d 352, 361 (D. Mass. 2014) (investment company failed to register

² Under the Act, the Commission has statutory authority to exclude entities from the definition of "CPO," thereby relieving such exempted entities from the CFTC's registration requirements and attendant obligations. *See* 7 U.S.C. § 1a(11)(B) ("The Commission, by rule or regulation, may include within, or exclude from, the term 'commodity pool operator' any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise if the Commission determines that the rule or regulation will effectuate the purposes of this chapter."). The Commission has exercised this authority over the years to expand and contract exclusions in response to new information and changing circumstances. In connection with the registration of CPOs, Commission Regulation 4.13(a)(1), 17 C.F.R. § 4.13(a)(1) exempts a CPO from registration if it does not operate more than one commodity pool at a time, have more than 15 pool participants and the gross capital contributions do not exceed \$400,000. As noted above, HAL's pool had more than 15 participants and its gross capital contributions exceeded \$400,000.

as a CPO). As set forth above, HAL operated HIL as a commodity pool from March 2011 through January 23, 2013, without the benefit of registration as a CPO, thus violating Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012).

B. Respondent Violated Regulation 4.22(d)

Under the Act, CPOs are subject to regulatory requirements related to disclosure to investors, *see* 17 C.F.R. §§ 4.21–4.22, 4.24–4.25, recordkeeping, *id.* § 4.23, segregation of investor assets, *id.* § 4.20, and registration and reporting obligations. *Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 168-69 (D.D.C. 2012), *as amended* (Jan. 2, 2013), *aff'd*, 720 F.3d 370 (D.C. Cir. 2013). The principal purpose of financial reporting required by Commission regulation 4.22(d) is to ensure that pool participants receive accurate, fair and timely information on the overall trading performance and financial condition of the pool. As relevant here, Regulation 4.22(d) requires that commodity pool statements report both realized and unrealized gains and losses. From approximately March 2011 through August 2013, HAL provided monthly statements to HIL's pool participants that showed only realized gains and losses, in violation of Regulation 4.22(d).

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the relevant period, Respondent violated Section 4m(1) of the of the Act, 7 U.S.C. § 6m(1)(2012) and Regulation 4.22(d), 17 C.F.R. § 4.22(d) (2014).

VI.

OFFER OF SETTLEMENT

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

- A. Acknowledges receipt of 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 Commission's Regulations, 17 C.F.R. §§ 148.1-30 (2014), 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, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), 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;
- 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;
- 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 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), and Regulation 4.22(d), 17 C.F.R. § 4.22(d) (2014);
 2. orders Respondent to cease and desist from violating Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012), and Regulation 4.22(d), 17 C.F.R. § 4.22(d) (2014);
 3. orders Respondent to pay a civil monetary penalty in the amount of one hundred thousand dollars (\$100,000), plus post-judgment interest;
 4. orders Respondent and any successors or assignees of Respondent to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VII of this Order.

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

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2012) and Regulation 4.22(d), 17 C.F.R. § 4.22(d) (2014);

- B. orders Respondent to pay a civil monetary penalty in the amount of one hundred thousand dollars (\$100,000), within ten (10) days of the date of the entry of the Order ("CMP Obligation"). If the CMP Obligation is not paid in full within ten (10) days of the date of entry of the Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of the Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of the Order pursuant to 28 U.S.C. § 1961 (2012). Respondent shall pay the CMP Obligation by electronic funds transfer, or by 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, the payment shall be made payable to the Commodity Futures Trading Commission, and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
(405) 954-7262 office
(405) 954-1620 fax
Nikki.gibson@faa.gov

If payment is to be made by electronic transfer, Respondent shall contact Nikki Gibson 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 Respondent and the name and docket number of this proceeding. The Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, 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, 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 undertake all steps necessary to ensure that all of its agents and employees under its authority or control understand and comply with this undertaking.

- D. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor of 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.
- E. 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 (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: April 15, 2015