

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)
)

Merrill Lynch Commodities, Inc.,)

Respondent.)

) CFTC Docket No. 19-07
)
)

RECEIVED CFTC



Office of Proceedings
Proceedings Clerk

11:27 am, Jun 25, 2019

**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 at least 2008 through 2014 (“Relevant Period”), Merrill Lynch Commodities, Inc. (“MLCI” or “Respondent”) has violated Section 9(a)(2) of the Commodity Exchange Act (the “Act” or “CEA”), 7 U.S.C. § 13(a)(2) (2012), and, for conduct occurring on or after August 15, 2011, Sections 4c(a)(5)(C), 6(c)(1), and 6(c)(3) of the Act, 7 U.S.C. §§ 6c(a)(5)(C), 9(1), 9(3) (2012), and Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1, 180.2 (2018), of the Commission Regulations (“Regulations”). 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, except to the extent that Respondent admits those findings in any related action against Respondent by, or any agreement with, the United States Department of Justice or any other governmental agency or office, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 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 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

On numerous occasions throughout the Relevant Period, Respondent, by and through certain of its traders (“Traders”) placed orders to buy or sell gold, silver, platinum, and palladium (“Precious Metals”) futures contracts, traded on the Commodity Exchange, Inc. (“COMEX”), with the intent to cancel the orders before execution. The Traders engaged in this conduct with the intent to manipulate market prices and ultimately did cause artificial prices. By and through the acts of these Traders, Respondent engaged in manipulation and attempted manipulation in violation of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012), and, for conduct occurring on or after August 15, 2011, spoofing in violation of Section 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012), and manipulation and attempted manipulation in violation of Section 6(c)(1) and 6(c)(3) of the Act, 7 U.S.C. § 9(1), 9(3) (2012), and Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1, 180.2 (2018).

* * * * *

In accepting the Offer, the Commission recognizes Respondent’s significant cooperation with the Division of Enforcement’s (“Division”) investigation of this matter, which is explained in more detail below. The Commission notes that Respondent’s cooperation is reflected in the form of a substantially reduced civil monetary penalty.

B. RESPONDENT

Merrill Lynch Commodities, Inc. is a Delaware corporation engaged in, among other things, the trading of commodities. The company is headquartered in Houston, Texas and operates in various locations including New York, New York. The company is an indirectly wholly owned subsidiary of Bank of America Corporation (“BAC”). MLCI has been provisionally registered with the Commission as a Swap Dealer since December 31, 2012.

C. FACTS

1. Spoofing, Manipulation, and Attempted Manipulation

During the Relevant Period, in connection with its Precious Metals business, MLCI and affiliates employed the Traders and others at trading desks in the United States, the United Kingdom, and elsewhere. As part of the Precious Metals business, the Traders on behalf of MLCI, placed orders and entered into transactions for futures contracts in Precious Metals, which were traded on COMEX, a futures exchange and designated contract market which is owned and operated by CME Group, Inc. (“CME”), and options related to Precious Metals.

On numerous occasions throughout the Relevant Period, the Traders manually placed orders for futures contracts in Precious Metals with the intent to cancel those orders before execution. The Traders’ spoofing strategy frequently involved placing a relatively small bid or offer with the intent to execute that order (the “Genuine Order”) and, prior to the execution of the

Genuine Order, placing a larger order (or multiple orders) on the opposite side of the same market with the intent to cancel the order or orders before execution (the “Spoof Order”). Generally, the Traders would receive a partial or complete fill of the Genuine Order and cancel the Spoof Order before it was filled.

On occasion, certain Traders acknowledged spoofing to affect prices of Precious Metals futures contracts in electronic “chat” conversations. For example, in a November 16, 2010 chat one of the Traders, Trader A, stated:

“guys the algos are really geared up in here. [I]f you spoof this it really moves”

In another chat, on or about February 11, 2011, Trader A discussed spoofing again, offering to help Trader B, a trader at an entity affiliated with MLCI:

Trader A: that was me pushing it
Trader A: dont do it yourself I will help you
Trader A: dont spoof it
Trader A: what did you get 70 lots there?
Trader B: ok
Trader B: yep

Consistent with this chat, Trader A did, in fact, engage in spoofing in the market for silver futures contracts.

The Traders placed one or more Spoof Orders to create a false impression of buying or selling interest in Precious Metals futures markets, with the intent to manipulate prices to reflect their desired price and not the legitimate forces of supply and demand. Ultimately, the Traders were successful, and they executed trades at their desired price.

2. Cooperation and Remediation

During the course of the Division’s investigation of potential misconduct in the precious metals market, Respondent expended significant time and resources to promptly provide information to the Division, including a detailed data analysis, and identified relevant documents, which allowed the Division to conserve resources and expedite its investigation. Further, Respondent has worked proactively to remediate the issues, and has represented that it has significantly enhanced its compliance systems and policies related to spoofing and other manipulative conduct in Precious Metals futures contracts, and futures contracts generally.

III. LEGAL DISCUSSION

A. Spooing in Precious Metals Futures Markets, in Violation of Section 4c(a)(5)(C) of the Act

Section 4c(a)(5)(C) of the Act makes it unlawful for “[a]ny person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that . . . is, is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel the bid or offer before execution).” 7 U.S.C. § 6c(a)(5)(C) (2012).

As described above, on numerous occasions during the Relevant Period, the Traders entered bids or offers on a registered entity with the intent to cancel the bids or offers before execution, in violation of Section 4c(a)(5)(C) of the Act. *See, e.g., CFTC v. Oystacher*, 203 F. Supp. 3d 934, 942 (N.D. Ill. 2016) (denying motion for judgment on the pleadings, holding that allegations of placing “both bids and offers with the intent to cancel those bids or offers before execution” constitutes “trading behavior [that] falls within the Spoofing Statute’s defined prohibition”).

B. Manipulation and Attempted Manipulation of the Price of Precious Metals Futures Contracts, in Violation of Section 9(a)(2) of the Act, and (for Conduct Occurring on or After August 15, 2011) Section 6(c)(1) and 6(c)(3) of the Act and Regulations 180.1 and 180.2

Section 9(a)(2) of the Act makes it unlawful for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.” 7 U.S.C. § 13(a)(2) (2012).

For conduct occurring on or after August 15, 2011, Section 6(c)(1) of the Act prohibits the use or attempted use of any manipulative or deceptive device in connection with any swap or contract of sale of any commodity in interstate commerce, or for future delivery, in violation of Regulation 180.1(a)(1), which makes it “unlawful . . . , directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to . . . (1) [u]se . . . or attempt to use . . . any manipulative device, scheme or artifice to defraud.” Section 6(c)(3) of the Act prohibits the manipulation or attempted manipulation of the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, and Regulation 180.2 makes it “unlawful . . . directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.”

As described above, Respondent, by and through the acts of the Traders, manipulated and attempted to manipulate the price of Precious Metals futures contracts by utilizing manual spoofing techniques, in violation of: Section 9(a)(2) of the Act; and, for conduct occurring on or after August 15, 2011, Section 6(c)(1) and 6(c)(3) of the Act and Regulations 180.1 and 180.2.

C. Respondent Is Liable for the Acts of Its Agents

Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), and Regulation 1.2, 17 C.F.R. § 1.2 (2018), provide that “[t]he act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust.” Pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, strict liability is imposed on principals for the actions of their agents. *See, e.g., Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986); *Dohmen-Ramirez & Wellington Advisory, Inc. v. CFTC*, 837 F.2d 847, 857-58 (9th Cir. 1988); *CFTC v. Byrnes*, 58 F. Supp. 3d 319, 324 (S.D.N.Y. 2014).

The Traders engaged in the conduct described herein within the course and scope of their employment with MLCI; therefore, pursuant to Section 2(a)(1)(B) of the Act and Regulation 1.2, Respondent is liable for the acts, omissions, and failures of the Traders in violation of the provisions of the Act and Regulations cited above.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, the Respondent, by and through its agents, the Traders, engaged in manipulation and attempted manipulation in violation of Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2012), and, for conduct occurring on or after August 15, 2011, spoofing in violation of Section 4c(a)(5)(C) of the Act, 7 U.S.C. § 6c(a)(5)(C) (2012), and manipulation and attempted manipulation in violation of Section 6(c)(1) and 6(c)(3) of the Act, 7 U.S.C. § 9(1), 9(3) (2012), and Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1, 180.2 (2018).

V. OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it without admitting or denying the findings and conclusions herein except to the extent that Respondent admits those findings in any related action against Respondent by, or any agreement with, the United States Department of Justice or any other governmental agency or office:

- 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, §§ 201-253, 110 Stat. 847, 857-74 (codified 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;
- E. Requests, for the reasons set forth in Respondent's letter dated June 12, 2019 ("Request Letter"), that the Commission advise that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the Securities & Exchange Commission ("SEC"), 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order; and
- F. 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, by and through its agents, the Traders, violated Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) and, for conduct occurring on or after August 15, 2011, violated Sections 4c(a)(5)(C), 6(c)(1) and 6(c)(3) of the Act, 7 U.S.C. § 6c(a)(5)(C), 9(1), 9(3) (2012), and Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1, 180.2 (2018)
 2. Orders Respondent to cease and desist from violating Sections 4c(a)(5), 6(c)(1), 6(c)(3), and 9(a)(2) of the Act and Regulations 180.1 and 180.2.
 3. Orders Respondent to pay restitution in the amount of two million three hundred sixty-four thousand five hundred eighty-five dollars (\$2,364,585), within ten days of the date of entry of this Order, plus post-judgment interest, if applicable; provided however, that the restitution will be offset, up to the full amount by the amount of any payment made pursuant to the agreement between Respondent and the United States Department of Justice, Criminal Division, Fraud Section entered into in June 2019 ("DOJ Agreement");

4. Orders Respondent to pay a civil monetary penalty in the amount of eleven million five hundred thousand dollars (\$11,500,000) within ten days of the date of entry of this Order, plus post-judgment interest, if applicable;
 5. 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, including but not limited to, Respondent's undertaking to pay disgorgement in the amount of eleven million one hundred thousand dollars (\$11,100,000) within ten days of the date of the entry of this Order, plus post-judgment interest, if applicable; provided, however, that the disgorgement will be offset, up to the full amount, by the amount of any payment made pursuant to the DOJ Agreement; and
 6. Advises that, under the circumstances, disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC, should not arise as a consequence of this Order; and
- G. Represents that, in coordination with BAC, Respondent proactively engaged in remedial measures relating to the trading of spot, options, and futures contracts in its Precious Metals business and related supervision of those desks within its Precious Metals business, prior to the commencement of the Commission's investigation and thereafter, including enhancing its compliance program and internal controls designed to detect and deter potential spoofing and other manipulative conduct through, among other things:
1. Enhanced policies and procedures relating to ethical behavior, prohibited conduct, and escalation of potential misconduct;
 2. Updated routine and ongoing training concerning appropriate market conduct;
 3. Improved transaction monitoring and communications surveillance systems and processes;
 4. Investment in enhanced transaction monitoring technology;
 5. Reviews of the compliance control framework by the internal audit functions; and
 6. Significant resources dedicated to improving its systems and controls.

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 Sections 4c(a)(5), 6(c)(1), 6(c)(3), and 9(a)(2) of the Act, 7 U.S.C. §§ 6c(a)(5)(C), 9(1), 9(3), 13(a)(2) (2012), and Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1, 180.2 (2018).

- B. Respondent shall pay restitution in the amount of two million three hundred sixty-four thousand five hundred eighty-five dollars (\$2,364,585) (“Restitution Obligation”), within ten days of the date of entry of this Order. If the Restitution Obligation is not paid in full or otherwise satisfied within ten days of the date of entry of this Order, then post-judgment interest shall accrue on the Restitution 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).

The Restitution Obligation will be offset, up to the full amount of the Restitution Obligation, by the amount of any payment made pursuant to the DOJ Agreement.² Respondent shall provide (to the persons and addresses listed below) proof of any payment under the DOJ Agreement, including the case name(s) and number(s) in connection with which such payment has been made, and the amount by which the Restitution Obligation is to be reduced, within ten days of making such payment.

To effect payment by Respondent and the distribution of any portion of the Restitution Obligation that has not been offset, the Commission appoints the National Futures Association (“NFA”) as “Monitor.” The Monitor shall receive payments of the Restitution Obligation and any post-judgment interest from Respondent and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor other than actions involving fraud.

Respondent shall make its payments of any portion of the Restitution Obligation that has not been offset and any post-judgment interest under this Order in the name of the “MLCI Settlement Fund” and shall send such payments by electronic funds transfer, or U.S. postal money order, certified check, bank cashier’s check, or bank money order to the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, under a cover letter that identifies Respondent and the name and docket number of this proceeding. 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.

The Monitor shall oversee Respondent’s Restitution Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion or may defer distribution until such time as the Monitor may deem appropriate. In the event that the amount of payments of the Restitution Obligation to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a restitution distribution is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission, as discussed below. To the extent any funds accrue to the

² However, such offset shall only be permitted on the condition that Respondent has fully satisfied all of its obligations for monetary payment pursuant to the DOJ Agreement and has provided proof, in the manner specified by this Order, that its monetary obligation under the DOJ Agreement has been satisfied in its entirety.

U.S. Treasury for satisfaction of Respondent's Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in this Order.

- C. Respondent shall pay a civil monetary penalty of eleven million five hundred thousand dollars (\$11,500,000), within ten days of the date of the entry of this Order ("CMP Obligation"). 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 (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:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables --- AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-7262
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 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.

- D. 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 their 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 their agents and/or employees under their authority or control understand and comply with this agreement.

2. Disgorgement: Respondent agrees to pay disgorgement in the amount of eleven million one hundred thousand dollars (\$11,100,000) (“Disgorgement Obligation”) within ten days of the date of the entry of this Order. If the Disgorgement Obligation is not paid or otherwise satisfied in full within ten days of the date of entry of this Order, then post-judgment interest shall accrue on the Disgorgement 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).

The Disgorgement Obligation will be offset, up to the full amount of the Disgorgement Obligation, by the amount of any payment made pursuant to the DOJ Agreement.³ Respondent shall provide (to the persons and addresses listed below) proof of any payment under the DOJ Agreement, including the case name(s) and number(s) in connection with which such payment has been made, and the amount by which the Disgorgement Obligation is to be reduced, within ten days of making such payment.

Respondent shall pay any portion of the Disgorgement Obligation that has not been offset 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
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 Disgorgement Obligation with a cover letter that

³ However, such offset shall only be permitted on the condition that Respondent has fully satisfied all of its obligations for monetary payment pursuant to the DOJ Agreement and has provided proof, in the manner specified by this Order, that its monetary obligation under the DOJ Agreement has been satisfied in its entirety.

identifies Respondent and the name and docket number of this proceeding. 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.

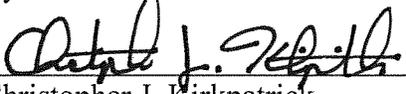
3. Cooperation with Monitor: Respondent shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to formulate a plan for the distribution of any restitution payments. Respondent shall execute any documents necessary to release funds that it has in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.
 4. 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 with the Commission in any investigation, civil litigation, or administrative matter related to, or arising from, the subject matter of this action.
 5. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's Restitution Obligation, Disgorgement Obligation, or 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.
 6. 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.
 7. Remediation: As set forth above, MLCI represents that it has already undertaken and continues to undertake remedial measures to implement and strengthen its internal controls and procedures relating to the trading of spot, options, and futures contracts in its Precious Metals business and related supervision of those desks within its Precious Metals business. MLCI shall maintain and update its compliance program as appropriate to effectively detect and deter violations of the CEA and shall comply with the obligations relating to its corporate compliance program and reporting requirements as set forth in Attachments B and C to the DOJ Agreement.
- E. Based on the nature of the violations; the findings made, and the sanctions, conditions, and undertakings imposed in this Order; and the facts and representations in Respondent's Request Letter, the Commission advises⁴ that, under the circumstances,

⁴ Rule 506(d)(1)(iii)(B) disqualifies an issuer from relying on the private offering exemptions provided for in Rule 506 if they or certain related parties are "subject to a final order of . . . [*inter alia*] the U.S. Commodity Futures Trading Commission . . . that: . . . [c]onstitutes a final order based on a violation of any law or regulation that

disqualification under Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D of the SEC, 17 C.F.R. §§ 230.262(a), 230.506(d)(1) (2018), should not arise as a consequence of this Order.⁵

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 25, 2019

prohibits fraudulent, manipulative, or deceptive conduct.” Rule 506(d)(2)(iii), however, provides that disqualification “shall not apply” if the CFTC “advises in writing” that disqualification under Rule 506(d)(1) “should not arise as a consequence of such order.” *See also* 17 C.F.R. §§ 262(a)(3)(ii), (b)(3) (parallel provisions under Regulation A); SEC, Exemptions to Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83,494, 83,545 (Nov. 21, 2016) (stating that disqualification under Rule 504 arises “absent a waiver or other exception provided in Rule 506(d)”).

⁵ In providing this advice, the Commission considered factors similar to those considered by the SEC when it issues waivers of disqualification under Regulation A and Regulation D. The SEC grants waivers where an applicant has shown “good cause and ... if the [SEC] determines that it is not necessary under the circumstances that an exemption be denied,” 17 C.F.R. §§ 230.262(b)(2), 230.506(d)(2)(ii), based on its analysis of how the identified misconduct bears on the applicant’s fitness to participate in offerings exempted under Regulation A and Regulation D. *See* SEC, Div. of Corp. Fin., *Waivers of Disqualification Under Regulation A and Rules 505 and 506 of Regulation D*, <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>; SEC, Div. of Corp. Fin., Rule 504 of Regulation D: A Small Entity Compliance Guide for Issuers, <https://www.sec.gov/divisions/corpfin/guidance/rule504-issuer-small-entity-compliance.html>. The SEC considers the following primary factors in determining whether to grant a waiver request: (i) the nature of the violation and whether it involved the offer or sale of securities; (ii) whether the violation required scienter; (iii) who was responsible for the misconduct; (iv) what was the duration of the misconduct; (v) what remedial steps have been taken; and (vi) the impact on the party seeking a waiver and third parties if a waiver is denied.

The Commission considers these factors in the context of the markets it regulates, and also takes into account whether it determined that a statutory disqualification under the Act should arise solely based on the misconduct found herein and leading to disqualification under Regulation A and Regulation D. The Commission is guided by waivers granted by the SEC in prior cases involving similar facts and circumstances. *See, e.g., In re JPMorgan Chase Bank, N.A.*, Securities Act Release No. 9993, 2015 WL 9256636 (Dec. 18, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 of Regulation D, where disqualification had been triggered by a CFTC order relating to JPMCB’s failure to adequately disclose certain conflicts of interest to clients); *In re UBS AG*, Securities Act Release No. 9787, 2015 WL 2395516 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506, where disqualification had been triggered by a criminal guilty plea relating to FX benchmark manipulation); *In re Barclays PLC*, Securities Act Release No. 9786, 2015 WL 2395515 (May 20, 2015) (SEC order determining that good cause had been shown that it was not necessary to deny reliance on the exemption under Rule 506 where disqualification had been triggered by a CFTC order relating to FX benchmark and ISDAFIX manipulation); *see also, e.g., Piper Jaffray & Co.*, SEC No-Action Letter, 2015 WL 4451053 (July 20, 2015) (SEC no-action letter determining that good cause had been shown that it was not necessary to deny reliance on the exemptions under Regulation A and Rule 506 of Regulation D, where disqualification had been triggered by an SEC order, and applying the same factors to consideration of waiver for both exemptions).