

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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4:08 pm, Sep 23, 2014

In the Matter of:)

YOUNG SCOTT & ASSOCIATES,)
LLC and TODD YOUNG)

Respondents.)
_____)

CFTC Docket No. 14-27

**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” or “CFTC”) has reason to believe that during the period from May 2012 through April 2013 (the “relevant period”), Young Scott & Associates, LLC (“YSA”) and its controlling person, Todd Young (“Young”) (collectively, “Respondents”), violated Section 4(a) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 6(a) (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondents 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, Respondents have submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings and conclusions herein, Respondents consent to the entry of this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Act Making Findings, and Imposing Remedial Sanctions (“Order”) and acknowledge service of this Order.¹

¹ Respondents consent 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 Respondents do 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 do Respondents 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

During the relevant period, Respondents violated Section 4(a) of the Act, 7 U.S. C. § 6(a) (2012), by offering to enter into, entering into, confirming the execution of, and conducting an office and business in the United States for the purpose of soliciting, accepting orders for, and otherwise dealing in illegal, off-exchange retail commodity transactions. Specifically, the transactions were financed precious metals transactions with individual investors. Young is directly liable for such violations, and he is also liable as the controlling person of YSA. YSA received commissions and fees totaling \$162,487 for these transactions.

B. RESPONDENTS

Young Scott & Associates, LLC was a Florida limited liability company formed in May 2012. Its principal place of business was Boynton Beach, Florida. YSA was a telemarketing firm that solicited retail customers to invest in financed precious metals transactions. YSA has never been registered with the Commission in any capacity.

Todd Young is a resident of Atlanta, Georgia. Young was the controlling person of YSA. At the request of Hunter Wise Commodities, LLC (“Hunter Wise”), Young had his wife, Linda Suarez, act as YSA’s owner and president. However, according to Young and confirmed by Suarez, Suarez held those positions in name only and never actively managed the company. Young controlled the day-to-day operations of YSA. Young has never been registered with the Commission in any capacity.

C. FACTS

During the relevant period, YSA was a telemarketing firm that solicited retail customers to engage in financed precious metals transactions. Although YSA offered precious metals on a fully paid basis, the vast majority of its business was in financed precious metals transactions, which were purportedly executed through Hunter Wise, a third-party trading firm that claimed to sell physical commodities, including gold, silver, platinum, palladium and copper, in off-exchange transactions to retail customers throughout the United States.

YSA conducted nearly all of its solicitations by telephone. Young, the controlling person and sole employee of YSA, directly solicited customers. When soliciting customers for financed precious metals transactions, Young represented that to purchase a certain quantity of metal, the customer needed to deposit only a percentage of the total metal value, typically 25%. YSA represented that the customer would receive a loan for the remaining 75%, and that the customer would have to pay a finance charge on the loan, as well as a storage charge. In addition, in order to purchase the metal, YSA represented that the customer needed to pay commission on the total metal value and a mark-up on the spot price of the metal.

If the customer agreed to the transaction, YSA confirmed the transaction and directed the customer to send YSA a lump sum, which represented the total of the 25% equity deposit, the

commission amount, and the mark-up amount. Upon receipt of those funds, YSA sent the funds in their entirety to Hunter Wise who then sent YSA any commission and fees due. During the relevant period, YSA received approximately \$162,487 in commissions and fees for the retail financed precious metals transactions from Hunter Wise.

Neither YSA nor Hunter Wise bought, sold, loaned, stored or transferred any physical metals for these financed precious metals transactions. Likewise, neither YSA nor Hunter Wise delivered any precious metals to any customers.

On February 19, 2014, the U.S. District Court for the Southern District of Florida, in an action captioned *CFTC v. Hunter Wise Commodities, LLC*, Case No. 9:12-cv-81311-DMM (SD Fla. Feb. 19, 2014), granted the Commission's Motion for Summary Judgment finding that Hunter Wise and the other defendants violated 7 U.S.C. § 6(a).

IV.

LEGAL DISCUSSION

A. Relevant Statutory Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376 (2010) ("the Dodd-Frank Act") amended the Commodity Exchange Act to add, among other things, new authority over certain leveraged, margined, or financed retail commodity transactions, including authority to prohibit fraud in connection with such transactions.

Section 742(a) of the Dodd-Frank Act added Section 2(c)(2)(D), 7 U.S.C. § 2(c)(2)(D) (2012), to the Act.² Section 2(c)(2)(D) broadly applies to any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a non-eligible contract participant ("non-ECP")³ or non-eligible commercial entity on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis. 7 U.S.C. § 2(c)(2)(D)(i) (2012). Section 2(c)(2)(D) further provides that such an agreement, contract, or transaction shall be subject to Sections 4(a), 4(b), and 4b, 7 U.S.C. §§ 6(a), 6(b) & 6b (2012), "as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery." 7 U.S.C. § 2(c)(2)(D)(iii) (2012).

Section 2(c)(2)(D)(ii) of the Act, 7 U.S.C. § 2(c)(2)(D)(ii) (2012), excepts certain transactions from Section 2(c)(2)(D). Section 2(c)(2)(D)(ii)(III)(aa) excepts a contract of sale that "results in actual delivery within 28 days or such other longer period as the Commission

² Section 2(c)(2)(D) became effective July 16, 2011.

³ As is relevant to this matter, 7 U.S.C. § 1a(18)(xi) (2012), defines an eligible contract participant as an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of \$10,000,000, or which is in excess of \$5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.”⁴ Section 2(c)(2)(D)(ii)(III)(bb) excepts a contract of sale that creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer.

The Commission has stated that it is the view of the Commission that the determination of whether “actual delivery” has occurred within the meaning of Section 2(c)(2)(D)(ii)(III)(aa) requires a consideration of evidence beyond the four corners of the contract documents. This interpretation of the statutory language is based on Congress’ use of the word “actual” to modify “delivery” and on the legislative history of Section 2(c)(2)(D)(ii)(III)(aa). Consistent with this interpretation, in determining whether actual delivery has occurred within 28 days, the Commission will employ a functional approach and examine how the agreement, contract, or transaction is marketed, managed, and performed, instead of relying solely on language used by the parties in the agreement, contract, or transaction.⁵ Unless the Commission provides otherwise, the 28 days for actual delivery is 28 days from the date the agreement, contract, or transaction is confirmed to the buyer or seller, typically, a retail customer.

Other than these exceptions, Congress did not express any intent to limit the reach of Section 2(c)(2)(D). Rather, in enacting the statute Congress expressed its intent that Section 2(c)(2)(D) should be applicable to a broad range of agreements, contracts, and transactions.

Section 2(c)(2)(D) applies to all agreements, contracts, and transactions entered into with, or offered to, non-ECPs on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis, as those terms are commonly used in the industry.

B. The Commission’s Jurisdiction

Respondents offered precious metals transactions to, and entered into such transactions with, persons who were not eligible contract participants (“ECPs”) or eligible commercial entities. Generally, Respondents’ customers were unsophisticated, individual investors who did not meet the \$10 million discretionary investment threshold to be considered ECPs. Moreover, Respondents offered and entered into such transactions on a margined or leveraged basis, or financed by YSA, or a third-party retail metals trading firm, which acted in concert with Respondents. Respondents’ retail financed precious metals transactions fall squarely within the Commission’s jurisdiction under Section 2(c)(2)(D).

⁴ The Commission has not adopted any regulations permitting a longer actual delivery period for any commodity pursuant to § 2(c)(2)(D)(ii)(III)(aa). Accordingly, the 28 day actual delivery period set forth in this provision remains applicable to all commodities.

⁵ See Retail Commodity Transactions Under Commodity Exchange Act, 76 Fed. Reg. 77,670 (Dec. 14, 2011).

Respondents' retail financed precious metals transactions executed through third-party retail metals trading firms did not result in actual delivery to the customer. As found by the district court in *Hunter Wise*, Case No. 9:12-cv-81311-DMM, slip op. at 12-14 (S.D. Fla. Feb. 19, 2014) (granting summary judgment), Hunter Wise had no actual metal to deliver. Accordingly, Respondents' transactions are not excepted from the Commission's jurisdiction under § 2(c)(2)(D) (ii)(III)(A). *CFTC v. Hunter Wise Commodities, LLC*, Case No. 13-10993 (11th Cir. April 15, 2014) (holding that the CFTC had enforcement authority over metals transactions).

C. Respondents Violated Section 4(a) of the Act: Illegal, Off-Exchange Transactions

As stated above, retail commodity transactions within the scope of Section 2(c)(2)(D) are subject to enforcement under Section 4(a), among other provisions, as if such transactions are commodity futures contracts. Under Section 4(a), it is unlawful for any person to offer to enter into, enter into, execute, confirm the execution of, or conduct an office or business in the United States for the purpose of soliciting, or accepting any order for, or otherwise dealing in any transaction in, or in connection with, a commodity futures contract, unless such transaction is made on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market or derivatives transaction execution facility for the specific commodity.

Respondents offered to enter into, entered into, and confirmed the execution of retail financed precious metals transactions. Respondents also conducted an office and business in the United States for the purpose of soliciting, accepting orders for, and otherwise dealing in retail financed precious metals transactions. None of the retail financed precious metals transactions were conducted on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market or derivatives transaction execution facility for precious metals. Respondents therefore violated Section 4(a).

D. YSA Is Liable for the Violations of its Agents

YSA is liable for the violations of its agents, including Young. Under Section 2(a)(1)(B) of the Act, 7 U.S.C. § 2(a)(1)(B) (2012), as well as Commission Regulation 1.2, 17 C.F.R. § 1.2 (2013), a principal is strictly liable for the violations of its agents made within the scope of the agents' employment. *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 966 (7th Cir. 1986). Young, along with other YSA telemarketers, were agents of YSA, and in the scope of their employment they violated Section 4(a). YSA is therefore liable for these violations.

E. Young Is Liable as the Controlling Person Under Section 13(b) of the Act for YSA's Violations

Young is directly liable for violations of Section 4(a). In addition, Young directly controlled YSA and directly and knowingly induced YSA's conduct constituting violations of the Act; therefore, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13(b) (2012), Young is liable for YSA's violations of Section 4(a). Section 13(b) states that a controlling person of an entity is liable for the violations of that entity, provided that the controlling person knowingly induced, directly or indirectly, the violations, or provided that the controlling person did not act in good

faith. “A fundamental purpose of Section 13b [sic] is to allow the Commission to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals as well as the corporation itself.” *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1334 (11th Cir. 2002) (internal quotation marks and citation omitted), *cert. denied*, 543 U.S. 1034 (2004).

To establish controlling person liability under Section 13(b), the Division must show both: (1) control; and (2) lack of good faith or knowing inducement of the acts constituting the violation. *In re First Nat'l Trading Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 at 41,787 (CFTC Jul. 20, 1994), *aff'd without opinion sub nom. Pick v. CFTC*, 99 F.3d 1139 (6th Cir. 1996). To establish the first element, control, a defendant must possess general control over the operation of the entity principally liable. *See, e.g., R.J. Fitzgerald*, 310 F.3d at 1334 (recognizing an individual who “exercised the ultimate choice-making power within the firm regarding its business decisions” as a controlling person). Evidence that a defendant is an officer, founder, principal, or the authorized signatory on the company’s bank accounts indicates the power to control a company. *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,103 at 34,767 (CFTC Jan. 12, 1988). The Division must also show that a defendant possessed specific control, which is “the power or ability to control the specific transaction or activity upon which the primary violation was predicated.” *Monieson v CFTC*, 996 F.2d 852, 860 (7th Cir. 1993) (internal quotation marks and citation omitted). The defendant does not need to participate in or benefit from the wrongdoing; the issue is whether the defendant has the power to address the illegal conduct. *Id.* (finding that, in a trade allocation case, the fact that the defendant could fire or discipline responsible employees, end the placement of orders without numbers as soon as the defendant knew of it, or order a full investigation was sufficient to show specific control).

With respect to control, Young was the owner and operator of YSA, as well as its sole employee. He managed the day to day operations, conducting all of YSA’s solicitations of retail customers by himself. Young was the ultimate decision maker and controlled all aspects of YSA’s business. Young had both general control over YSA and specific control over the conduct underlying YSA’s violations, *i.e.*, YSA offering to enter into, entering into, and confirming the execution of retail financed precious metals transactions, and YSA conducting an office and business in the United States for soliciting, accepting, and otherwise dealing in retail financed precious metals transactions.

In addition to control, the Division must show the controlling person knowingly induced, directly or indirectly, the acts constituting the violation or did not act in good faith. To show knowing inducement, the Division must show that a defendant had actual or constructive knowledge of the core activities that constituted the violation and allowed the activities to continue. *In re Spiegel*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,767. To show lack of good faith, the Division must show that a defendant did not have an adequate system of internal supervision, or that a defendant did not enforce such system with reasonable diligence. *Monieson*, 996 F.2d at 860.

Young had actual knowledge that YSA’s business was in off-exchange, retail financed precious metals transactions, because it was the basic nature or essence of the business. He also

allowed the business to continue. Thus, Young knowingly induced the conduct in violation of Section 4(a).

V.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the relevant period, Respondents violated Section 4(a) of the Act, 7 U.S.C. § 6(a) (2012).

VI.

OFFER OF SETTLEMENT

Respondents have submitted the Offer in which they, without admitting or denying the findings and conclusions herein:

- A. Acknowledge receipt of service of this Order;
- B. Admit 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 the Order;
- C. Waive:
 - 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 they 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, 17 C.F.R. §§ 148.1-30 (2013), relating to, or arising from, this proceeding;
 - 7. any and all claims that they 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. Stipulate that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondents have consented in the Offer; and
- E. Consent, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. makes findings by the Commission that Respondents violated Section 4(a) of the Act, 7 U.S.C. § 6(a) (2012);
 2. orders Respondents to cease and desist from violating Section 4(a) of the Act, 7 U.S.C. § 6(a) (2012);
 3. orders Respondents, jointly and severally, to pay restitution of one hundred sixty two thousand four hundred eighty seven dollars (\$162,487), plus post-judgment interest;
 4. orders that Respondents be permanently prohibited from engaging, directly or indirectly, in trading on or subject to the rules of any registered entity (as that term is defined in 7 U.S.C. § 1a (2012)), and all registered entities shall refuse them trading privileges;
 5. orders Respondents and their successors and assigns to comply with the conditions and undertakings consented to in the Offer and set forth below in Part VII of this Order.

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

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondents shall cease and desist from violating Section 4(a) of the Act, 7 U.S.C. § 6(a);
- B. Respondents, jointly and severally, shall pay restitution in the amount of one hundred sixty two thousand four hundred eighty seven dollars (\$162,487) within ten (10) days of the date of entry of this Order ("Restitution Obligation"). Should Respondents not satisfy this Restitution Obligation in full within ten (10) days of the date of entry of the Order, post-judgment interest shall accrue on the Restitution 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).

Respondents shall make their payments of the Restitution Obligation under the Order to Melanie Damian, Esq., the corporate monitor appointed by the court in *CFTC v. Hunter Wise Commodities, LLC*, No. 12-81311-CIV (S.D. Fla. Feb. 25, 2013) ("Hunter Wise corporate monitor" or "Monitor"). Respondents shall make such payments in the name of the "Young Scott & Associates, LLC/Todd Young (Hunter Wise Transactions)

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 Melanie Damian, Esq., Damian & Valori LLP, 1000 Brickell Ave. Ste. 1020, Miami, FL, 33131, under 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. To the extent any funds accrue to the U.S. Treasury for satisfaction of the Restitution Obligation, such funds shall be transferred to the Hunter Wise corporate monitor.

- C. Respondents are permanently prohibited from engaging, directly or indirectly, in trading on or subject to the rules of any registered entity (as that term is defined in § 1a), and all registered entities shall refuse them trading privileges;
- D. Respondents and their successors and assigns shall comply with the following undertakings as consented to and set forth in the Offer:
 - 1. Public Statements: Respondents agree that neither they nor any of their successors and assigns, or 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 Respondents’: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondents and their successors and assigns 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. Respondents agree that they shall never, directly or indirectly:
 - a. enter into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in 17 C.F.R. § 1.3(hh) (2013)), security futures products, swaps (as that term is defined in 7 U.S.C. § 1a(47) (2012), and as further defined by 17 C.F.R. § 1.3(xxx) (2013)) (“swaps”), and/or foreign currency (as described in 7 U.S.C. § 2(c)(2)(B) & 2(c)(2)(C)(i) (2012)) (“forex contracts”) for their own personal account(s) or for any account(s) in which they have a direct or indirect interest;
 - b. have any commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts traded on Respondents’ behalf;
 - c. control or direct the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving

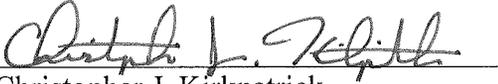
commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts;

- d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts;
- e. apply for registration or claim exemption from registration with the Commission in any capacity, and engage in any activity requiring such registration or exemption from registration with the Commission except as provided for in 17 C.F.R. § 4.14(a)(9) (2013); and/or
- f. act as a principal (as that term is defined in 17 C.F.R. § 3.1(a) (2013)), agent, or any other officer or employee of any person (as that term is defined in § 1a) registered, exempted from registration, or required to be registered with the Commission except as provided for in 17 C.F.R. § 4.14(a)(9).

- E. Cooperation with the Monitor: Respondents shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondents' customers, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments. Respondents shall execute any documents necessary to release funds that they have in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.
- F. Cooperation with the Commission: Respondents shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.
- G. Partial Satisfaction: Respondents understand and agree that any acceptance by the Commission or the Monitor of partial payment of Respondents' Restitution Obligation shall not be deemed a waiver of their obligation to make further payments pursuant to the Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
- H. Change of Address/Phone: Until such time as Respondents satisfy in full their Restitution Obligation as set forth in this Consent Order, Young shall provide written notice to the Commission by certified mail of any change to his 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 23, 2014