

CLIENT ALERT

# CFTC Sanctions Chief Compliance Officer for Fraud and Making False Statements to NFA

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## AUTHORS

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Federal agencies historically have been reluctant to bring charges against chief compliance officers. Last week, however, the Commodity Futures Trading Commission entered into a settlement order with the chief compliance officer (“**CCO**”) of a registered commodity pool operator and commodity trading advisor.<sup>1</sup> In finding violations and imposing sanctions against Rafael Marconato, the CCO of Phy Capital Investments LLC, the Order makes clear that CCOs are not above the law. According to the Order, Marconato was involved in a scheme perpetuated by Phy Capital’s chief executive officer (“**CEO**”) to misappropriate customer funds. In May 2019, the CFTC filed a related complaint in federal district court alleging that the CEO and the firm committed fraud.<sup>2</sup>

### CFTC: The CCO Committed Fraud and Made False Statements to NFA

According to the Order, the CEO formed Phy Capital and a commodity pool to trade futures contracts on behalf of customers. The CEO solicited investors for the pool, including Marconato. Marconato subsequently joined Phy Capital as the CCO and registered with the CFTC as an associated person of the firm. In addition to his role as CCO, Marconato solicited potential investors. As alleged by the CFTC, the trading firm and the commodity pool were shams.

From February 2016 through November 2017, Phy Capital issued statements to its pool participants showing up to 50% profits when, in fact, the CEO had misappropriated funds without conducting any trading. In early November 2017, the National Futures Association (“**NFA**”) conducted an examination of Phy Capital, and during the course of the examination,

<sup>1</sup> *In Re Marconato*, CFTC Docket No. 19-23 (Sept. 12, 2019) (the “**Order**”).

<sup>2</sup> *CFTC v. Bretas de Freitas et al.*, Civil Action No. 19-cv-4238 (May 9, 2019).

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Marconato falsely told NFA that the firm had no customers. Marconato also sent NFA a purported limited liability company agreement which stated that the pool was a “private equity fund in other business related to creation and production of software.” According to the Order, Marconato knew that the pool’s private placement memorandum stated that the objective of the pool was to trade futures and swaps.

In addition, the CFTC alleged that in January and September 2018, Marconato told a pool participant that another participant wanted to sell shares in the pool, so the participant invested additional funds in the pool. Marconato failed to disclose that he was the seller of the shares, and he subsequently transferred the additional investment to his personal bank account.

### Violations of the Commodity Exchange Act

The Order found that Marconato violated Section 4o(1)(B) of the Commodity Exchange Act, which prohibits an associated person of a commodity pool operator or commodity trading advisor from engaging in “any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.” Specifically, Marconato failed to disclose that he was selling his own shares to another pool participant, concealed the existence of the pool from NFA, and failed to disclose to the buyer of his shares that he concealed the existence of the pool from NFA. The Order also found that Marconato violated CEA Section 9(a)(4), which makes it unlawful for any person to willfully make a false statement to a futures association, such as NFA, that is acting in furtherance of its official duties under the CEA. In particular, Marconato knowingly misrepresented the purpose and the funding of the commodity pool to NFA.

The Order requires Marconato to pay \$125,000 in restitution and a \$25,000 civil penalty. Marconato is also permanently barred from trading commodity interests, soliciting or accepting funds for the purpose of trading commodity interests, and from registering with the CFTC.

### Key Takeaways

Although imposing civil sanctions against the CCO is a rare event, the settlement is an important reminder of the consequences of making misrepresentations to NFA and/or the CFTC. All market participants, but CFTC registrants in particular, should be mindful of the accuracy of statements provided to the government or a self-regulatory organization to avoid a perception that the information was intentionally misleading.

The settlement with Marconato is “low-hanging fruit” in terms of making material misstatements to NFA because he appears to have misrepresented the nature of his firm’s business. By contrast, a legitimate business under examination by NFA will face a host of questions ranging from basic to more complicated. The response to each question should be carefully considered and vetted in order to avoid even a close call in an enforcement inquiry related to material misrepresentations.

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