

UNITED STATES OF AMERICA
 Before the
 COMMODITY FUTURES TRADING COMMISSION

In the Matter of:)	CFTC Docket No. <u>08-16</u>
)	
Persistent Edge Management LLC)	ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS
)	
Respondent.)	
)	

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I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that Persistent Edge Management LLC (“Persistent Edge”) has violated Commission Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008). Therefore, the Commission deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether Persistent Edge has engaged in the violations as set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of this administrative proceeding, Persistent Edge has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings herein, Persistent Edge acknowledges service 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”).¹

¹ Persistent Edge consents 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 Persistent Edge does not consent to the use of this Order or the Offer, or the findings 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 Persistent Edge consent to the use of the Offer or this Order, or the findings in the Order consented to in the Offer, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

Persistent Edge, a registered commodity pool operator (“CPO”), claimed for its commodity pools exemptions from recordkeeping, disclosure and reporting requirements under Regulation 4.7(b). Pursuant to Regulation 4.7(b)(3)(i), Persistent Edge was required to file with the National Futures Association (“NFA”) and distribute to each pool participant an annual report for each of the pools subject to this exemption within 90 days of the end of the pool’s fiscal year. Regulations 4.22(f)(1) and (f)(2) provide CPOs with extensions of this annual report deadline under certain circumstances and conditions.

Persistent Edge failed to distribute to pool participants and file with the NFA one or more of its commodity pools’ annual reports in a timely manner, in violation of Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008).

B. RESPONDENT

Persistent Edge Capital Management LLC is located at 580 California Street, Suite 2040, San Francisco, California 94104. Persistent Edge has been registered with the Commission as a CPO since October 17, 2002.

C. FACTS

Persistent Edge is a CPO for pools that operate as “fund-of-funds” (i.e., a pool that invests in one or more other collective investment vehicles). For the years 2003 through 2006, Persistent Edge’s commodity pools’ fiscal years ended on December 31st. Pursuant to Regulation 4.7(b), Persistent Edge claimed for all of its pools exemption from recordkeeping, disclosure and reporting requirements under the Regulations. Accordingly, under Regulation 4.7(b)(3)(i), Persistent Edge was required to distribute and file annual reports for all of its pools subject to this exemption within 90 days of the end of its fiscal year on December 31.

For fiscal years 2003 to 2004, Persistent Edge was required to file and distribute its commodity pools’ annual reports by March 30, 2004 and March 31, 2005, respectively. For fiscal years 2005 and 2006, Persistent Edge was required to file and distribute its commodity pools’ annual reports by June 29th, because it: requested and received from the NFA extensions of time pursuant to Regulation 4.22(f)(1); and claimed extensions of time pursuant to Regulation 4.22(f)(2).

For fiscal years 2003 to 2006, Persistent Edge failed to distribute to pool participants and file with the NFA one or more of its commodity pools’ annual reports in a timely manner.

D. LEGAL DISCUSSION

Sections 4n(3) and (4) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 6n(3) and (4) (2006), provide, in relevant part, that every CPO registered with the Commission shall file such reports, and regularly furnish statements of account to each pool participant, and that such reports and statements shall be in such form and manner as may be prescribed by the Commission. Regulation 4.22(c) requires a CPO to distribute to pool participants and file with the NFA within 90 days of the end of the commodity pools’ fiscal year annual reports for its commodity pools that contain the information required by and in accordance with Regulations 4.22(c) and (d).

Pursuant to Regulation 4.7(b)(3), a CPO may claim relief from the reporting requirements of Regulation 4.22(c) for certain pools where the CPO offers or sells participations in the pools solely to qualified eligible persons (as defined in Regulation 4.7), in an offering that is exempt from registration under the federal securities laws and the offering is not marketed to the public. However, a CPO claiming such exemption must, within 90 days after the end of the exempt pools’ fiscal year, electronically file with the NFA and distribute to each pool participant an annual report that contains, at a minimum, certain financial information in lieu of the information required by Regulations 4.22(c) and (d). Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008).

Under Regulation 4.22(f)(1), a CPO may file with the NFA an application for extension of time to a specific calendar date not more than 90 calendar days after the date its annual report was to be distributed, if it cannot distribute a timely annual report without “substantial undue hardship.”

In addition, where a pool is a fund-of-funds, a CPO, under Regulation 4.22(f)(2), may claim by a notice filed with the NFA an extension of time to file and distribute the pool’s annual report. Under this extended deadline, the CPO is required to file and distribute its pool’s annual report no later than 150 days after the end of the pool’s fiscal year (*i.e.*, up to 60 days beyond the original 90-day deadline).

For fiscal years 2003 and 2004, Persistent Edge did not request or claim any extensions of time. For fiscal years 2005 and 2006, Persistent Edge: requested and received from the NFA extensions of time pursuant to Regulation 4.22(f)(1); and claimed extensions of time pursuant to Regulation 4.22(f)(2).

As described above, between fiscal years 2003 and 2006, Persistent Edge failed to distribute to pool participants and file with the NFA one or more of its commodity pools’ annual reports in a timely manner. Persistent Edge, therefore, violated Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7(b)(3)(i) (2008).

The furnishing of the annual report was designed to “provide [pool] participants with the information necessary to assess the overall trading performance and financial condition of the pool.” Commodity Pool Operators and Commodity Trading Advisors; Final Rules, 44 Fed. Reg. 1918 (Jan. 8, 1979) (announcing the adoption of Regulation 4.22). Without timely reporting, the Commission’s goal of providing pool participants with complete and necessary data is hampered.

IV.

FINDING OF VIOLATIONS

Based on the foregoing, the Commission finds that Persistent Edge violated Regulation 4.7(b)(3)(i), 17 C.F.R. § 4.7 (b)(3)(i)(2008).

V.

OFFER OF SETTLEMENT

Persistent Edge has submitted the Offer in which it, without admitting or denying the findings herein:

- A. Acknowledges receipt of service of the Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in the Order;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims which it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2008), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Act, Pub. L. 104-121, Subtitle B, Section 223, 110 Stat. 862-63 (March 29, 1996), relating to or arising from this proceeding; and any claim of Double Jeopardy based upon 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 upon which this Order is entered shall consist solely of the findings contained in this Order to which the Respondent has consented; and
- E. Consents, solely on the basis of the Offer, to entry of this Order that:
 - 1. makes findings by the Commission that Persistent Edge violated Regulation 4.7(b)(3)(i), 17 C.F.R. §§ 4.7(b)(3)(i) (2008);
 - 2. orders Persistent Edge and its successors and assigns to cease and desist from violating Regulation 4.7(b)(3)(i), 17 C.F.R. §§ 4.7(b)(3)(i) (2008);
 - 3. orders Persistent Edge to pay a civil monetary penalty in the amount of one hundred and twenty thousand dollars (\$120,000.00) within ten (10) days of the date of the entry of this Order; and

4. orders Persistent Edge and its successors and assigns to each comply with its undertaking consented to in its Offer and set forth below in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Persistent Edge's Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

A. Persistent Edge and its successors and assigns shall cease and desist from violating Regulation 4.7(b)(3)(i), 17 C.F.R. §§ 4.7(b)(3)(i) (2008);

B. Persistent Edge shall pay a civil monetary penalty in the amount of one hundred and twenty thousand dollars (\$120,000.00) within ten (10) days of the date of the entry of this Order. Persistent Edge shall pay its civil monetary penalty by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than 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: Marie Bateman – AMZ-300
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone 405-954-6569

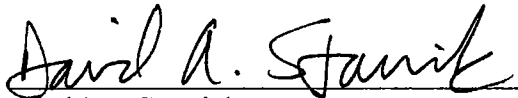
If payment by electronic transfer is chosen, Persistent Edge shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Persistent Edge shall accompany payment of the penalty with a cover letter that identifies Persistent Edge, and the name and docket number of this proceeding. Persistent Edge shall simultaneously submit a copy of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581 and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. §9a(2)(2006), if this amount is not paid in full within fifteen (15) days of the due date, Persistent Edge shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

C. Persistent Edge and its successors and assigns shall comply with the following undertaking set forth in its Offer:

Public Statements: Neither Persistent Edge nor any of its successors, assigns, employees, agents, or representatives shall take any action or make any public statement denying, directly or indirectly, any finding in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision affects Persistent Edge's (i) testimonial obligations; or (ii) right to take appropriate legal positions in other proceedings to which the Commission is not a party. Persistent Edge and its successors and assigns shall undertake all steps necessary to assure that all of their agents and employees under their authority and/or actual or constructive control understand and comply with this undertaking.

The provisions of the Order shall be effective as of this date.

By the Commission.



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 23, 2008