

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 8930 / June 17, 2008**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 57978 / June 17, 2008**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 2840 / June 17, 2008**

**Administrative Proceeding**  
**File No. 3-13072**

**In the Matter of**

**Preston D. Hopper, CPA**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS AND IMPOSING A CEASE-AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (the “Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (the “Exchange Act”) against Preston D. Hopper (“Hopper” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings contained herein, except that Respondent admits the Commission’s jurisdiction over him and over the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and

Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order.

### **III. FINDINGS**

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### **A. RESPONDENT**

**Preston D. Hopper, 57**, resides in Michigan and, during the relevant period, was Chief Accounting Officer of CMS Energy Corp. ("CMS"). Hopper was formerly licensed as a CPA in Michigan, but his license lapsed. CMS is a Michigan corporation with its principal place of business in Jackson, Michigan. CMS's shares are registered with the Commission under Section 12(b) of the Exchange Act and trade on the New York Stock Exchange under the symbol "CMS." During the relevant period, CMS's energy-trading division, CMS Marketing Services & Trading ("MS&T"), was active in retail marketing of gas and wholesale trading of electricity and natural gas.

#### **B. FACTS**

##### **1. Overview of Round Trip Trades.**

The round trip trades<sup>2</sup> were transactions conducted by CMS and counterparties including Reliant Energy Services, Inc. ("Reliant") whereby the parties essentially agreed to simultaneously both purchase and sell electric power or natural gas for the same volume and at the same price, with no delivery contemplated and with neither party making any profit. The transactions were intended solely to improve each company's standing in industry publications that ranked energy marketing companies based on volumes reported to the Federal Energy Regulatory Commission ("FERC"). However, the trades also had the effect of causing the companies to overstate the revenues and expenses reported in each company's respective Commission filings as the transactions were reported on a gross basis in each company's financial statements.

##### **2. Round Trip Trades at CMS.**

CMS materially overstated its revenues and expenses in 2000 and 2001 as a result of round trip energy transactions conducted by its Houston-based energy-trading subsidiary, MS&T. These overstatements appeared in certain 10-Qs and 10-Ks filed with the Commission.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> Round trip trades at CMS and Reliant were referred to variously as "Brag-a-Watts," "volumetric" deals, "back-to-back" trades, "net-zero" trades, "no margin" trades and "zero-margin" trades. The press coined the term "round trip" to describe the trades in articles reporting on the practice first published in May 2002 and it will be used in this Order.

During the relevant period, CMS also filed with the Commission several registration statements in connection with offerings of its securities.<sup>3</sup> The registration statements incorporated by reference the materially misleading Forms 10-Q and the 2000 Form 10-K, including the financial statements incorporated in the filings. The round trip trades had no impact on CMS's net earnings.

CMS's sole purpose for engaging in the round trip trades was to elevate MS&T's standing in certain industry publications that ranked energy marketing companies based on total FERC-reported volumes. Specifically, CMS sought to be among the top 20 tier ("Top 20") in such industry publications in order to attract requests for proposals from municipalities that considered such industry rankings as a useful means of identifying which companies should receive requests for proposals.

Although the purpose of the round trip trades was to boost CMS's rankings, the trades also had the effect of artificially inflating CMS's revenues and expenses. CMS reported all trades on a gross basis, which meant that its reported revenue figures were not netted against offsetting expenses. As a result, the round trip transactions conveyed an inaccurate picture of the company's revenues and expenses.

For example, on July 12, 2000, MS&T and Reliant entered into a round trip trade with a September 2000 term involving 10,000,000 MWH of power and \$380 million in revenue and expense. Before its execution, this transaction was reviewed by MS&T's Director of Credit Management, CMS's Chief Risk Officer, and CMS's Chief Financial Officer who approved the practice. On or before October 20, 2000, CMS's outside auditor learned about the transaction from its audit team in Houston responsible for MS&T. During this same period, Respondent and CMS's Audit Committee Chairman discussed the accounting for the \$380-million dollar round trip trade in a conference call on October 25, 2000 with CMS's outside auditor who advised that accounting for the trade on a gross basis was appropriate. The \$380-million dollar round trip trade also came to the attention of the CMS Director of Financial Reporting in connection with the preparation of the MS&T Results of Operations for the CMS 2000 third quarter 10-Q.<sup>4</sup>

Separately, MS&T staff informed CMS's accounting department that the \$380-million dollar round trip trade was the source of a substantial increase in current assets and liabilities for CMS for the month ended September 30, 2000. CMS's accounting staff, in turn, prepared an internal variance report for that same month that was distributed to CMS's executive officers (including CMS's Chief Executive Officer, Chief Financial Officer, Chief Operating Officer,

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<sup>3</sup> CMS filed the following registration statements during the relevant period: a Form S-3 on December 15, 2000, December 22, 2000, and December 12, 2001, and a Form S-8 on April 11, 2001.

<sup>4</sup> The initial draft of the MS&T Results of Operations for the CMS 2000 third quarter 10-Q prepared by MS&T staff did not include references to gross revenues or volumes. CMS's financial reporting staff subsequently revised the proposed draft to include references to total volumes and volume percentage increases. In response, MS&T staff specifically disclosed to the CMS Director of Financial Reporting that the trades generating the increased volumes did not contemplate physical delivery, made no margin, and were being done only for the purpose of "puffing up the volumes" and specifically suggested that he delete the volume references. Nevertheless, CMS included volume references in the MS&T Results of Operations for the CMS 2000 third quarter 10-Q and every 10-Q thereafter during the relevant time period.

General Counsel, and Vice President in Charge of Investor Relations) and the entire CMS Board of Directors that attributed CMS's increase in receivables and payables to MS&T's "electric wholesale activities with Reliant Energy." Thereafter, through July 2001, every time MS&T did round trip trades, MS&T staff would identify the round trip trades by dollar amounts as the source of the corresponding increases in current assets and liabilities and CMS's accounting staff would then attribute those increases to "buy/sale" "deals" with Reliant in the monthly variance reports given to the CMS executive officers and Board.

During its audit of the 2001 first quarter financial statements, MS&T disclosed to CMS's outside auditor three "no-margin" transactions with Reliant with revenues and corresponding expenses of \$1.2 billion. CMS's outside auditor, in turn, brought the round trip trades to the attention of CMS's Audit Committee Chairman who discussed the trades first with MS&T's Chief Executive Officer and CMS's Chief Executive Officer<sup>5</sup> and then with CMS's outside auditor and Respondent. At the request of the CMS Audit Committee Chairman, MS&T's Chief Executive Officer explained to the CMS Board of Directors what MS&T's round trip trades were, their purpose, and how they worked and answered the questions asked by the Board.

The outside auditor's review of the round trip trades continued into the second quarter of 2001.<sup>6</sup> At that time, a member of the MS&T audit team concluded that revenues and expenses from the round trip trades should be recorded on a net basis – contrary to MS&T's (and CMS's) practice and the audit team's prior guidance. Neither Respondent, others at CMS, nor the CMS audit team, however, were apprised of this conclusion.

A few days prior to October 2001 (prior to the filing of CMS's third quarter Form 10-Q), CMS's outside auditor recommended to CMS that it record the revenues and expenses from round trip trades only if:

- ◆ The parties to the trade bear both credit and performance risk;
- ◆ Title to the related commodity transfers to the buyer; and
- ◆ Settlement is for the gross proceeds (checks must be exchanged and cashed for the gross amount of the transaction).

The round trip trades – which involved no risk, no net transfer of title and no exchange of cash – could not satisfy these criteria. On or about October 2, 2001, Respondent informed MS&T's Chief Executive Officer and MS&T's Controller that CMS had decided to change the way it accounted for the round-trip trades in the financial statements it filed with the SEC. Nevertheless, CMS reported in the third quarter of 2001 the revenues and expenses from MS&T's third quarter round trip trades, resulting in material financial misstatements.

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<sup>5</sup> CMS's Audit Committee Chairman asked CMS's Chief Executive Officer and MS&T's Chief Executive Officer about the "zero-margin" trades. CMS's Chief Executive Officer responded that the trades were: (i) commonly done in the industry, (ii) done to establish MS&T on league tables as a means of showing MS&T as a viable commodities trader, and (iii) that such trading did not affect earnings, cash flow or the balance sheet/shareholders' equity. MS&T's Chief Executive Officer told the CMS Audit Committee Chairman that the trades were ongoing, arranged transactions with RES that represented "more than half" of MS&T's volume.

<sup>6</sup> This review included round trip trades that MS&T had done for that quarter that were disclosed by MS&T to the outside auditors.

By recording revenues and expenses from the round trip trades, CMS overstated its revenues and expenses by a total of \$5.2 billion over a one-year period: \$1.0 billion (10%) in 2000, and \$4.2 billion (36%) for the first three quarters of 2001. On March 24, 2002, CMS's auditors advised CMS that the financial results of the round trip trades conducted in 2001 would have to be reclassified to record them all on a net basis, which CMS did in its annual report for 2001.<sup>7</sup> However, CMS did not reclassify the financial results of the round trip trades conducted in 2000 until May 29, 2002.

On March 17, 2004, the Commission issued a settled cease-and-desist order against CMS Energy Corp. and MS&T's Controller, finding that each had violated Section 17(a) of the Securities Act and Sections 10(b), 13(a) and 13(b)(2) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1 and 13a-13 thereunder. *In the Matter of CMS Energy Corp. and Terry Woolley*, Administrative Proceeding File No. 3-11436.

### **Respondent's Conduct**

In his role as Chief Accounting Officer of CMS, Hopper maintained oversight responsibility for recording MS&T's commodities transactions. The inclusion of those transactions caused CMS's financial statements to present a materially misleading picture of CMS's actual business activity. Additionally, after CMS's auditors determined that the round trip trades should be recorded on a net basis in October 2001, Hopper did not ensure that CMS's quarterly report, which was filed with the Commission, omitted these transactions. Finally, Hopper had responsibility for properly disclosing the nature and extent of CMS's restatement of earnings to exclude the round trip trades in the explanation included in its March 29, 2002 Form 10-K, which failed adequately to disclose the facts and circumstances of MS&T's round trip trades.

Respondent's conduct with respect to the round trip trades was negligent and, as such, he was a cause of CMS' filing of reports, including offering materials, that included revenues and expenses related to round trip trades. Respondent was also a cause of CMS's misstatement of the company's transactions in its books, records, and accounts.

As a result of the conduct described above, Respondent Hopper was a cause of CMS's violations of Sections 17(a)(2) and (3) of the Securities Act, Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.<sup>8</sup>

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions specified in the Respondent's Offer.

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<sup>7</sup> MS&T conducted additional round trip trades in November and December of 2001. However, the revenues and expenses from those trades were not included in Commission filings.

<sup>8</sup> *KPMG, LLP. v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002) (negligence alone is sufficient to establish causing liability for non-scienter violations under Section 21C of the Exchange Act).

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, that

Respondent Hopper cease and desist from committing or causing any violation and any future violation of Sections 17(a)(2) and (3) of the Securities Act, and cease and desist from causing any violation or future violation of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder.

By the Commission.

Florence E. Harmon  
Acting Secretary