

**UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION**

In the Matter of

David J. Mueller,

Respondent.

:
: **CFTC Docket No. 05-09**
:
: **ORDER INSTITUTING PROCEEDINGS**
: **PURSUANT TO SECTIONS 6(c) AND 6(d)**
: **OF THE COMMODITY EXCHANGE ACT**
: **AND MAKING FINDINGS AND**
: **IMPOSING REMEDIAL SANCTIONS**
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PROCEEDINGS
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I.

The Commodity Futures Trading Commission (the "Commission") has reason to believe that David J. Mueller ("Mueller") has violated Sections 4b(a)(2)(i) and (iii) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6b(a)(2)(i) and (iii) (2002) and Commission Regulation 166.2, 17 C.F.R. § 166.2 (2004). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Mueller engaged in the violations set forth herein, and to determine whether an order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Mueller has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Without admitting or denying the findings of fact in this Order, Mueller acknowledges service of the Order, consents to the use of the findings in the Order in this proceeding and any other proceeding brought by the Commission or to which the Commission is a party.¹

III.

A. Summary

During the months of December 2003 and March 2004, Mueller, a former associated person ("AP") of Market Integrated Services, Inc. ("MIS"), and formerly a guaranteed introducing broker ("GIB") of a registered futures commission merchant ("FCM"), bought and sold commodity futures contracts for at least three of his customers' accounts without

¹ Mueller does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission other than a proceeding to enforce the terms of this Order. He does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, by any other party in this or any other proceeding.

first obtaining their permission to effect those transactions, in violation of Sections 4b(a)(2)(i) and (iii) of the Act and Commission Regulation 166.2

B. Respondent

Mueller is 44 years old and resides in Aurora, Illinois. He was registered with the Commission as an AP and principal of MIS from September 9, 2002 to May 26, 2004. He was previously registered as: an AP of Man International Inc., a registered FCM, from April 21, 1987 to August 21, 1987; an AP of Merrill Lynch from August 19, 1987 to December 30, 1994; an AP of Summit Management Inc. from February 24, 1995 to March 1, 1995; an AP of MIS from February 24, 1995 to May 1, 2002; and an AP of Midland Commodities Group, Inc. from June 3, 2004 to June 23, 2004.

C. Facts

During the period August 9, 2002 through May 25, 2004 (the "relevant period"), MIS was a GIB of a registered FCM and Mueller was a principal and sole AP of MIS. As President and sole AP of MIS during the relevant period, Mueller placed commodity futures trades for approximately ten customer accounts. Mueller did not have written power of attorney to place trades for any of his customers' accounts, and he knew that he was not permitted to engage in discretionary trading in any customer account.

In December 2003, Mueller bought February 2004 live cattle futures contracts for at least two of his customers' commodity trading accounts without first obtaining their permission to effect those transactions. Mueller then sold the contracts at a loss to his customers.

Similarly, in March 2004, Mueller bought and sold 35 May 2004 soybean contracts for one customer's commodity trading account without obtaining his permission to effect those transactions. Those transactions also resulted in a loss to Mueller's customer.

At the time of these transactions, Mueller's and MIS's respective financial situations were poor. On May 26, 2004, the registered FCM terminated its GIB Agreement with MIS with the stated explanation that 8 out of the 10 customer accounts MIS introduced to the FCM had debit balances and the FCM determined that the likelihood of MIS covering the customers' debit balances was limited and unacceptable.

Shortly thereafter, a number of Mueller's customers complained to the FCM, alleging that Mueller had placed unauthorized futures trades for their respective commodity interest accounts.² The FCM, in turn, reimbursed Mueller's customers on a case-by-case basis for some or all of the losses attributable to his unauthorized trading.

D. Legal Discussion

An associated person engages in fraudulent unauthorized trading in violation of Section 4b of the Act when he willfully "executes trades without the customer's permission

² Most of Mueller's customers were members of a local county farm bureau. After one customer complained to the FCM about Mueller's unauthorized trading, other customers associated with the farm bureau learned of his complaint and notified the FCM about unauthorized trades Mueller placed for their accounts. Mueller admitted to some of the customers that he was responsible for their losses.

or contrary to the customer's trading instructions. *In re Interstate Securities Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,295 at 38,955 (CFTC June 1, 1992), *aff'd sub nom, Crothers v. CFTC*, 33 F 3d 405 (4th Cir. 1994); *Haltmier v. CFTC*, 554 F.2d 556, 560 (2nd Cir. 1977) (unauthorized trading falls within Section 4b's prohibition and occurs when trades are executed without the customer's permission or contrary to the customer's trading instructions).

The required scienter element of a Section 4b violation is satisfied in the context of unauthorized trading where the respondent "acted deliberately, knowing that his acts were unauthorized and contrary to instructions." *Haltmier* at 562. Proof of an evil motive is unnecessary, and a showing that the respondent acted with reckless disregard for his duties under the Act is sufficient for a finding of fraud. *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC March 1, 1990).

Mueller is a former principal of an introducing broker and an experienced associated person. He was well aware of the legal limitations on his trading authority. By effecting unauthorized transactions for his customers' accounts, Mueller violated Sections 4b(a)(2)(i) and (iii) of the Act.

Regulation 166.2 makes it unlawful for an associated person to effect a transaction in a customer's commodity interest account unless (a) the customer has specifically authorized the transaction in advance, or (b) the customer has executed a written authorization (e.g., a "power of attorney") for the associated person to trade without the customer's specific authorization. A transaction cannot be "specifically authorized" within the meaning of Regulation 166.2(a) "unless the customer selects the type of transaction (purchase or sale), the commodity interest, and the exact amount of the commodity interest, in *advance* of the transaction." [Italics in original] *In re Heitschmidt* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,263 at 42,204 (CFTC November 9, 1994).

Because none of Mueller's customers executed a written power of attorney authorizing him to trade their accounts on a discretionary basis, section (b) of Regulation 166.2 does not permit Mueller to trade for their accounts. In addition, Mueller did not have specific, oral authority to make the trades, and, therefore, he cannot seek refuge in subsection (a). Even assuming that Mueller was able to show that one or more of his customers orally granted him general authority to trade, such oral grants of authority do not satisfy the specific requirements of Regulation 166.2(b) and are void. *Heitschmidt*, ¶ 26,263 at 42,205. See also *In re Paragon Futures Association, et al.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266, at 38,850 (CFTC April 1, 1992). Accordingly, Mueller effected each of the transactions in question in violation of the unauthorized trading prohibition of Regulation 166.2.

IV.

OFFER OF SETTLEMENT

Mueller has submitted an Offer of Settlement in which he acknowledges service of this Order and admits the jurisdiction of the Commission with respect to the matters set forth in the Order and waives (1) the service and filing of a complaint and notice of hearing, (2) a hearing and all post-hearing procedures, (3) judicial review by any court, (4) any objection to the staff's participation in the Commission's consideration of the Offer, (5) all claims that he may possess under the Equal

Access to Justice Act, 5 U.S.C. § 504 (2000) and 28 U.S.C. § 2412 (2000) and part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2004), relating to, or arising from this action, and (6) 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.

Mueller stipulates that the record basis on which this Order is entered consists of this Order and the findings in this Order consented to in the Offer. Mueller consents to the Commission's issuance of this Order, which makes findings as set forth herein and orders that Mueller: (1) cease and desist from violating the provisions of the Act and Commission Regulations he has been found to have violated; (2) be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1(a)(29) of the Act, 7 U.S.C. § 1(a)(29) (2002), and that all such registered entities shall refuse Mueller trading privileges, beginning on the third Monday after the date of entry of this Order; (3) pay a civil monetary penalty in an amount of \$30,000; and (4) comply with his undertakings as set forth in the Offer and incorporated in this Order.

V.

FINDING OF VIOLATIONS

Solely on the basis of Mueller's consent, as evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Mueller violated Sections 4b(a)(2)(i) and (iii) of the Act and Commission Regulation 166.2.

VI.

ORDER

Accordingly, **IT IS HEREBY ORDERED THAT:**

- A. Mueller shall cease and desist from violating Sections 4b(a)(2)(i) and (iii) of the Act and Regulation 166.2;
- B. Mueller shall be permanently prohibited from trading on or subject to the rules of any registered entity, as that term is defined by Section 1(a)(29) of the Act, and all such registered entities shall refuse Mueller trading privileges, beginning on the third Monday after the date of entry of this Order;
- C. Mueller shall pay a civil monetary penalty in the amount of \$30,000 (THIRTY THOUSAND DOLLARS) within thirty (30) days of entry of this Order, by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Mueller and the name and docket number of this proceeding. Copies of the cover letter and the form of payment shall be simultaneously transmitted to Gregory Mocek, Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581,

and to Rosemary Hollinger, Regional Counsel, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 525 W. Monroe Street, Suite 1100, Chicago, IL 60661; and

D. Mueller shall comply with the following undertakings set forth in the Offer:

1. Mueller shall never apply for registration or seek exemption from registration with the Commission in any capacity, except as provided for in Section 4.14(a)(9) of the Regulations, 17 C.F.R. § 4.14(a)(9) (2004), and shall never engage in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Regulations, or act as a principal, agent, officer or employee of any person registered with the Commission or required to be registered with the Commission, except as provided for in Section 4.14(a)(9) of the Regulations; this includes, but is not limited to soliciting, accepting or receiving funds, revenue or other property from any person, giving advice for compensation, or soliciting prospective customers, related to the purchase or sale of any commodity futures or option on commodity futures contact; and
2. Neither Mueller, nor any of his agents or employees under his authority or control, shall take any action or make any public statement denying, directly or indirectly, any finding 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 Mueller's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party.

The provisions of this Order shall be effective on this date.

By the Commission:


Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: June 3, 2005