

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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12:51 pm, Sep 29, 2016

In the Matter of:)
)
)

Aden Rusfeldt,)
)

Respondent.)
)
)
_____)

CFTC Docket No. 16-35

**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”) has reason to believe that from in or about July 2008 to at least April 2015 (the “Relevant Period”), Aden Rusfeldt (“Rusfeldt” or “Respondent”) violated Sections 4b(a)(1)(A) and (C), and 4o(1) of the Commodity Exchange Act (the “CEA”), 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6o(1) (2012). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent 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, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry 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”) and acknowledge service of this Order.¹

¹ Respondent consents 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 Respondent does 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 does Respondent consent to the use of the Offer or this Order, or the

III.

The Commission finds the following:

A. SUMMARY

During the Relevant Period, Rusfeldt sold a variety of commodity-related services and educational materials to more than 500 customers, without disclosing that he had been previously sued by the Commission for engaging in fraud, and as a result he had been permanently enjoined from engaging in any commodity-related activity. These omissions were fraudulent pursuant to Sections 4b(a)(1)(A) and (C), and 4o(1) of the CEA, 7 U.S.C. §§ 6b(a)(1)(A) and (C), 6o(1) (2012).

B. RESPONDENT

Aden Rusfeldt is a resident of Vail, Arizona, and is the former owner of ETF Trend Trading (“Trend Trading”), a company that specialized in commodity futures trading systems and education, among other things. Rusfeldt has never been registered with the Commission, but was sued by the Commission in 2007 in the U.S. District Court for the Southern District of Texas.

C. FACTS

On March 12, 2007, the Commission filed a complaint in the Southern District of Texas, alleging that Rusfeldt, through his company Rusfeldt Investments LLP (“Rusfeldt Investments”), fraudulently solicited members of the public to trade retail foreign currency (“forex”) in violation of the CEA. On March 27, 2008, the Court entered a Consent Order of Permanent Injunction and Other Equitable Relief (“Consent Order”), which includes findings of fact and conclusions of law that Defendants violated certain anti-fraud provisions of the CEA. The Consent Order also orders Defendants to pay restitution and a CMP, and permanently enjoins Rusfeldt and Rusfeldt Investments from engaging in certain activities.

The injunctive provisions of the Consent Order permanently enjoin Rusfeldt and Rusfeldt Investments from “engaging, directly or indirectly, in any activity related to trading in any commodity.” The Consent Order also provides specific examples of prohibited activities, including, but not limited to the following:

- “[G]iving advice...or other information in connection with the purchase or sale of commodity interest contracts for themselves and others;”
- “Introducing customers to any other person engaged in the business of commodity interest trading;”
- “Issuing statements or reports to others concerning commodity interest trading;”
and
- “Engaging in any business activities related to commodity interest trading.”

findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

Approximately four months after the entry of the Consent Order, Rusfeldt opened Trend Trading, using the alias “Big A.” Specifically, during the Relevant Period, Trend Trading offered, among other things, the following services:

- “Day Trade Memberships,” and “Day Trade Indicators,” both of which reference trading in various commodity futures contracts;
- Automated commodity signals to subscribers through a section of the website called “Done For You Commodity Signals;”
- Automated commodity trading systems, including an “Oil Auto Trade System” and an “Automated Day Trade System;” and
- Various educational materials regarding commodity trading.

Rusfeldt, through Trend Trading, offered these services to more than 500 customers without disclosing that he was prohibited from engaging in such activity under the terms of the Consent Order. Rusfeldt continued this misconduct until he sold Trend Trading in April 2015.

IV.

LEGAL DISCUSSION

Through the conduct described above, Rusfeldt defrauded customers by failing to disclose that he is subject to the Consent Order, which permanently prohibits him from engaging in any commodity-related activity. By engaging in this misconduct, Rusfeldt violated Sections 4b(a)(1)(A) and (C) and 4c(1) of the CEA, 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6c(1) (2012).

A. Respondent’s Violations of Sections 4b(a)(1)(A) and (C) of the CEA

To establish that a respondent made fraudulent omissions in violation of Sections 4b of the CEA, the Division must prove three elements: (1) that the respondent failed to disclose certain information; (2) that the omission was material; and (3) that the respondent acted with scienter. *See CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002). In this case, Rusfeldt made numerous fraudulent omissions by failing to disclose the Consent Order to approximately 500 Trend Trading customers.

An omission is material if “there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest.” *R&W Tech. Servs. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000). Any fact that enables customers to assess independently the risk inherent in their investments and the likelihood of profit is a material fact. *See In re Commodities Int’l Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,557-67, (Jan. 14, 1997).

The existence of a court order addressing misconduct in the commodity futures market is clearly relevant to a reasonable investor. *See SEC v. Merchant Capital, LLC*, 483 F.3d 747, 771-72 (11th Cir. 2007) (omission of state cease and desist order was material); *see also SEC v. Levine*, 671 F. Supp. 2d 14, 27-28 (D.D.C. 2009) (failure to disclose previous violation of the securities law was material omission); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla.

2007) (information regarding prior disciplinary history would assist investors in judging “veracity and whether [the] businesses were legitimate and sound”); *SEC v. Physicians Guardian Unit Inv. Trust*, 72 F. Supp. 2d 1342, 1351 (M.D. Fla.1999) (omission of state cease and desist order supported fraud claim); *SEC v. Paro*, 468 F. Supp. 635, 646 (N.D.N.Y. 1979) (failure to disclose cease and desist orders were material omissions); *Breard v. Sachnoff & Weaver, Ltd.*, 941 F.2d 142, 143-44 (2d Cir. 1991) (failure to disclose key financier and guarantor pled guilty to fraud in similar scheme was material). As a result, Rusfeldt’s repeated failures to disclose the Consent Order and its prohibitions were material omissions.

Scienter requires that individual’s acts are performed “with knowledge of their nature and character.” *Wasnick v. Refco*, 911 F.2d 345, 348 (9th Cir. 1990) (internal quotation marks and citation omitted). Under Section 4b of the CEA, “a degree of intent beyond carelessness or negligence” is required, and “recklessness is sufficient to satisfy [S]ection 4b’s scienter requirement.” *See Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988). To prove that conduct is intentional, the Commission must demonstrate that it is “intentional as opposed to accidental.” *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985). To prove that conduct is reckless, the Commission must show it “departs so far from the standards of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing.” *Drexel Burnham Lambert*, 850 F.2d at 748 (alteration in original) (internal quotation marks and citation omitted); *see also, Kirkland*, 521 F. Supp. 2d at 1303. (respondent possessed requisite scienter when he omitted prior securities law violations).

Rusfeldt intentionally failed to disclose the Consent Order to Trend Trading customers. Rusfeldt went so far as to correspond with customers by using the alias “Big A” to conceal the Consent Order and its prohibitions from customers. Accordingly, Rusfeldt acted with the requisite scienter to violate Sections 4b(a)(1)(A) and (C).

B. Respondent’s Violations of Section 4o(1) of the CEA

Section 1a(12) of the CEA defines a commodity trading advisor (“CTA”) in relevant part as

any person who—(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of (I) any contract of sale of a commodity for future delivery, security futures product, or swap;...(ii) for compensation or profit, as a part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i)...

Sections 4o(1)(A) and (B) of the CEA make it unlawful for a CTA to use the mails or any other means of interstate commerce to (i) employ any device, scheme or artifice to defraud any pool participant or prospective pool participant; or (ii) engage in any transaction, practice or course of business that operates as a fraud or deceit upon any pool participant or prospective pool participant. *See* 7 U.S.C. §§ 6o(1) (2012). Section 4o(1) “broadly prohibits fraudulent conduct” and applies to all CTAs, whether registered, required to be registered, or exempted from registration.” *CFTC v. ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985). The same fraudulent conduct that violates Section 4b of the CEA also violates Section 4o(1) of

the CEA. *See Skorupskas*, 605 F. Supp. at 932-33; *In re R&W Technical Servs. Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,745 (Mar. 16, 1999), *aff'd in part*, *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165 (5th Cir. 2000).

Rusfeldt acted as a CTA by offering a variety of trading systems relating to commodity trading, as well as numerous educational publications and courses, through the Trend Trading website. Given that the Consent Order prohibits Rusfeldt from engaging in any commodity-related activity—including acting as a CTA—Rusfeldt should have disclosed this information to customers. His failure to do so constitutes fraud by a CTA in violation of Section 4o(1) of the CEA, 7 U.S.C. § 6o(1) (2012).

V.

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondent violated Sections 4b(a)(1)(A) and (C), and 4o(1) of the CEA, 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6o(1) (2012).

VI.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits 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 this Order;
- C. Waives:
 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 he 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, Part 148 of the Commission's

Regulations, 17 C.F.R. §§ 148.1-30 (2016), relating to, or arising from, this proceeding;

7. Any and all claims that he 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. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer;
- E. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Respondent violated Sections 4b(a)(1)(A) and (C), and 4o(1) of the CEA, 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6o(1) (2012);
 2. Orders Respondent to cease and desist from violating Sections 4b(a)(1)(A) and (C), and 4o(1) of the CEA, 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6o(1) (2012) ;
 3. Orders Respondent to pay restitution in the amount of two million two-hundred thirty-eight thousand one-hundred seventy dollars (\$2,238,170), plus post-judgment interest;
 4. Orders Respondent to pay a civil monetary penalty in the amount of nine-hundred eighty thousand dollars (\$980,000), plus post-judgment interest;
 5. Appoints the National Futures Association ("NFA") as Monitor in this matter;
 6. Orders that Respondent be permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse him trading privileges; and
 7. Orders Respondent to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VII of this Order.

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

VII.
ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Sections 4b(a)(1)(A) and (C), and 4o(1), 7 U.S.C. §§ 6b(a)(1)(A) and (C), and 6o(1) (2012).
- B. Respondent shall pay restitution in the amount of two million two-hundred thirty-eight thousand one-hundred seventy dollars (\$2,238,170) (“Restitution Obligation”), plus post-judgment interest. Post-judgment interest shall accrue on the Restitution Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

To effect payment by Respondent and the distribution of restitution to Respondent’s customers, the Commission appoints the NFA as “Monitor.” The Monitor shall collect payments of the Restitution Obligation from Respondent and make distributions as set forth below. Because the Monitor is not being specially compensated for these services, and these services are outside the normal duties of the Monitor, it shall not be liable for any action or inaction arising from its appointment as Monitor other than actions involving fraud.

Respondent shall make his payments of the Restitution Obligation under this Order in the name of the “Aden Rusfeldt’s 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 the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606, 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.

The Monitor shall oversee Respondent’s Restitution Obligation and shall have the discretion to determine the manner of distribution of funds in an equitable fashion to the Respondent’s customers or may defer distribution until such time as the Monitor may deem appropriate. In the event that the amount of payments of the Restitution Obligation to the Monitor are of a *de minimis* nature such that the Monitor determines that the administrative cost of making a restitution distribution is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission, as discussed below. To the extent any funds accrue to the U.S. Treasury for satisfaction of Respondent’s Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth in this Order.

- C. Respondent to pay a civil monetary penalty in the amount of nine-hundred eighty thousand dollars (\$980,000) (“CMP Obligation”), plus post-judgment interest. Post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2012).

Respondent shall pay the CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, then 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: Accounts Receivables
DOT/FAA/MMAC/AMZ-341
CFTC/CPSC/SEC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
(405) 954-7262 office
(405) 954-1620 fax
nikki.gibson@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Nikki Gibson or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with 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.

- D. Respondent is permanently prohibited from, directly or indirectly, engaging in trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the Act, 7 U.S.C. § 1a(40) (2012)), and all registered entities shall refuse him trading privileges; and
- E. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
1. Public Statements: Respondent agrees that neither he 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 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 Respondent’s: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary

to ensure that all of his agents and/or employees under his authority or control understand and comply with this agreement.


2. Respondents agrees that he shall never, directly or indirectly:
 - a. enter into any transactions involving “commodity interests” (as that term is defined in Regulation 1.3(yy), 17 C.F.R. § 1.3(yy) (2016)) for Respondent’s own personal account or for any accounts in which Respondent has a direct or indirect interest;
 - b. have any commodity interests traded on Respondent’s 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 interests;
 - d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity interests;
 - 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 Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2016); and/or
 - f. act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2016)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, 7 U.S.C. § 1a(38) (2012) registered, required to be registered, or exempted from registration with the Commission except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2016).
3. Cooperation with Monitor: Respondent shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondent’s customers, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any restitution payments. Respondent shall execute any documents necessary to release funds that he has in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.
4. Cooperation with the Commission: Respondent 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.
5. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor of any partial payment of Respondent’s Restitution

Obligation or CMP Obligation shall not be deemed a waiver of his obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.

6. Change of Address/Phone: Until such time as Respondent satisfies in full Restitution Obligation and CMP Obligation as set forth in this Consent Order, Respondent 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.
7. Respondent affirms that he has read and agreed to this Order voluntarily and that no promise or threat has been made by the Commission or any member officer, agent, or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.

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 29, 2016