

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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2:40 pm, Dec 12, 2013

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In the Matter of: )

David R. Lynch, )

Respondent. )  
\_\_\_\_\_ )

CFTC Docket No. 14-04

**ORDER INSTITUTING PROCEEDING PURSUANT TO SECTIONS 6(c) and 6(d) OF  
THE COMMODITY EXCHANGE ACT, AS AMENDED,  
MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from in or about December 2008 through July 4, 2013 (the “Relevant Period”), David R. Lynch (“Lynch” or “Respondent”) violated Section 4b(a)(2)(A)-(C) of the Commodity Exchange Act (the “Act”), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII, §§ 13101-13204, 122 Stat. 1651 (the CFTC Reauthorization Act of 2008 (the “CRA”)), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII, §§ 701-774, 124 Stat. 1376 (the Wall Street Transparency and Accountability Act of 2010 (the “Dodd-Frank Act”)), to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), and Commission Regulation 5.2(b)(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (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 instituting 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 herein, Respondent acknowledges service of this *Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as amended, Making Findings and Imposing Remedial Sanctions* (“Order”).<sup>1</sup>

<sup>1</sup> Respondent does not consent to the use of the *Offer*, or the findings or conclusions in the *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 the *Order*. Nor does Respondent consent to the use of this *Offer* or the *Order*, or the findings or conclusions in the *Order* consented to in the *Offer*, by any other party in any other proceeding.

### III.

The Commission finds the following:

#### A. Summary

During the Relevant Period, Lynch fraudulently solicited and accepted at least \$348,450 from at least 14 persons to participate in a commodity pool trading leveraged or margined off-exchange foreign currency contracts (“forex”). During the Relevant Period, Lynch made misrepresentations and material omissions to pool participants and prospective pool participants, falsely telling them, among other things, that he was consistently profitable and achieved high returns and that he had been earning 7% per month trading forex. Lynch also guaranteed that a pool participant could never lose principal trading forex while misrepresenting the risks of trading forex.

Lynch failed to trade most of his pool participants’ funds. Instead, he misappropriated pool participants’ assets to pay his personal expenses, including paying for a cruise, and to pay pool participants false profits and false returns of capital. Lynch also sent monthly account statements to pool participants that falsely showed that he had earned consistent profits trading forex. In reality, Lynch’s forex trading resulted in losses in almost every month he traded.

#### B. Respondent

**David R. Lynch’s** last known residential address is in Stuart, Florida. For part of the Relevant Period, from December 2008 through approximately the last quarter of 2011, Lynch resided in Cary, North Carolina. Lynch has never been registered with the Commission in any capacity.

#### C. Facts

During the Relevant Period, Lynch solicited neighbors and family. Lynch told pool participants and prospective pool participants that he had a successful track record trading forex, and that he could provide them with consistent gains and high returns. For example, between May and July 2009, Lynch told at least two prospective pool participants that he had been earning 5% to 7% per month, or 60% to 84% per year, in forex trading profits. He also misrepresented the risks of trading forex. Lynch also failed to disclose that his claims to have had success trading forex were false, that there was no basis for his representations that pool participants could achieve the inflated trading profits that he falsely claimed he had earned, and that pool participants could get their funds back at any time.

Lynch solicited and accepted at least \$348,450 from at least 14 persons, who relied on his misrepresentations and omissions in deciding to trade forex through Lynch. Lynch directed only a portion of pool participants’ funds to forex trading accounts titled in his name, and which only he was authorized to trade, rather than opening trading accounts in the name of the forex pool or pool participants. Lynch also opened a forex trading account in his former spouse’s name that he controlled. Of the approximately \$75,000 deposited into trading accounts, Lynch lost

approximately \$45,069 trading and withdrew approximately \$31,179.<sup>2</sup> During the Relevant Period, Lynch's forex trading was profitable in only 5 months and his combined profit in those months was less than \$900. Lynch's virtually non-existent trading gain was in stark contrast to the consistent and significant profits he reported to pool participants.

Lynch also spent approximately \$126,227 entrusted to him by pool participants on personal expenses, such as credit card and car payments, retail merchandise, and a cruise. Lynch used the remaining pool participants' funds to pay false profits or purported returns of capital to other pool participants in the manner of a Ponzi scheme. Throughout the Relevant Period, Lynch failed to disclose that he deposited only a portion of pool participants' funds into forex trading accounts, misappropriated pool participants' funds and operated a Ponzi scheme.

To conceal his trading losses and misappropriations, Lynch issued monthly account statements to pool participants during the Relevant Period. Lynch's account statements falsely showed that pool participants were earning consistent profits. For example, in an account statement Lynch sent to one pool participant, purportedly reflecting trading during August 2009, Lynch claimed that the pool participant had earned a profit of 13.04%. However, the trading in Lynch's forex account resulted in a \$625 loss during August 2009. In a June 2011 account statement, Lynch represented that a pool participant had earned a 2.830% profit of \$5,857. In reality, Lynch lost \$1,924 trading forex during June 2011. In fact, each account statement showing trading profits that Lynch sent to pool participants during the Relevant Period was false.

Lynch's false account statements lulled pool participants into believing that their investments were secure and profitable. Relying upon the false account statements they received from Lynch, pool participants maintained their investments in Lynch's forex pool and made further investments in the pool during the Relevant Period.

#### IV.

#### LEGAL DISCUSSION

Section 4b(a) of the Act prohibits all manner of fraud in, or in connection with forex transactions, including fraudulent solicitation, misappropriation and issuance of false statements.<sup>3</sup> Section 4b(a)(2)(A)-(C) of the Act provides that it is unlawful:

for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery . . . that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market -- (A) to cheat or defraud or attempt to cheat or defraud the other person; (B)

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<sup>2</sup> Trading losses and withdrawals slightly exceed total deposits into Lynch's trading accounts due to a small amount of trading activity just prior to the start of the Relevant Period.

<sup>3</sup> The Commission has jurisdiction over Lynch's fraud in connection with off-exchange forex pursuant to Sections 6(c) and 2(c)(2)(C) of the Act. Section 2(c)(2)(C)(iv) of the Act further provides that Section 4b (fraud in connection with futures) shall apply to any forex agreement, contract, or transaction over which the Commission has jurisdiction "as if the agreement, contract, or transaction were a contract of sale of a commodity for future delivery."

willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; [or] (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person . . . .

Commission Regulation 5.2(b) also prohibits fraud in or in connection with forex transactions. Commission Regulation 5.2(b) makes it unlawful:

for any person, in or in connection with any retail forex transaction: (1) To cheat or defraud or attempt to cheat or defraud any person; (2) Willfully to make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or (3) Willfully to deceive or attempt to deceive any person by any means whatsoever.

Lynch violated Section 4b(a)(2)(A)-(C) of the Act and Commission Regulation 5.2(b)(1)-(3) by fraudulently soliciting pool participants, misappropriating their assets and issuing false account statements.

#### **A. Fraudulent Solicitation**

Fraudulent solicitation of customers violates Section 4b(a) of the Act and Commission Regulation 5.2(b). To establish solicitation fraud, the Commission must prove that Respondent (1) made misrepresentations, misleading statements, and/or deceptive omissions; (2) with scienter; and (3) the misrepresentations, misleading statements and/or deceptive omissions were material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004); *CFTC v. PMC Strategy, LLC*, 2013 WL 1349177, \*5 (W.D.N.C. Apr. 3, 2013).

Falsely leading customers to believe that they would make large profits trading volatile and risky instruments such as forex, and false representations to investors concerning the profitability of trading done on their behalf are misrepresentations that violate Section 4b(a)(2) of the Act. *See, e.g., PMC Strategy, LLC*, 2013 WL 1349177 at \*6; *CFTC v. Noble Wealth Data Info. Svcs., Inc.*, 90 F. Supp. 2d 676, 685 (D. Md. 2000), *aff'd in part, vacated in part sub nom CFTC v. Baragosh*, 278 F.3d 319 (4th Cir.), *cert. denied*, 537 U.S. 950 (2002).

The scienter element is established when an individual's "conduct involves intentional omissions or misrepresentations that present a risk of misleading customers, either known to the defendant or sufficiently manifest that the defendant must have been aware of the risk." *CFTC v. King*, 2007 U.S. Dist. LEXIS 33338 at \*6 (N.D. Tex. May 7, 2007). In addition, a defendant acts with scienter even when his conduct is merely reckless. *See, e.g., Crowthers v. CFTC*, 33 F.3d 405, 411 (4th Cir. 1994); *Drexel Burnham Lambert, Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988); *Noble Wealth Data Info. Svcs.*, 90 F. Supp. 2d at 687 (Scienter "may be established in

two ways: (1) by demonstrating that a defendant knew his representations were false and calculated to cause harm; or (2) by showing that he made the representations with a reckless disregard for their truth or falsity.”).

“A statement is material if it is substantially likely that ‘a reasonable investor would consider it important in deciding whether to make an investment.’” *PMC Strategy*, 2013 WL 1349177 at \*5 (quoting *R.J. Fitzgerald & Co.*, 310 F.3d at 1328-29); accord *R & W Technical Serv. Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir.), cert. denied, 531 U.S. 817 (2000); *Noble Wealth Data Info. Svcs.*, 90 F. Supp. 2d at 687.

First, Lynch made misrepresentations and omissions to pool participants and prospective pool participants concerning, among other things, his track record trading forex, the risks of forex trading and the results of the pool’s trading accounts. Lynch also failed to disclose that he traded only a portion of pool participants’ funds, that he misappropriated a significant portion of pool funds and that he was operating a Ponzi scheme. Second, Lynch acted with scienter because he knowingly or recklessly made misrepresentations, misleading statements and/or deceptive omissions in connection with his solicitations and his handling of pool participants’ investments. Finally, Lynch’s misrepresentations, misleading statements and deceptive omissions were material because they concerned profitability and risk, which have been repeatedly held to be material. See, e.g., *R & W Technical Serv.*, 205 F.3d at 169; *Noble Wealth Data Info. Svcs.*, 90 F. Supp. 2d at 686. Therefore, Lynch committed solicitation fraud in violation of Section 4b(a)(2)(A) and (C) of the Act and Commission Regulation 5.2(b)(1) and (3).

#### **B. Fraud by Misappropriation**

Misappropriation of customers’ funds also violates Section 4b(a) of the Act and Commission Regulation 5.2(b). See, e.g., *Noble Wealth Data Info. Svcs.*, 90 F. Supp. 2d at 687 (defendants defrauded investors by diverting investors’ funds for operating expenses and personal use).

Lynch misappropriated approximately \$126,227 of pool participants’ funds to pay for personal expenses, such as a cruise and a car. Lynch also used pool participants’ funds to pay false profits and purported returns of capital to other pool participants. Therefore, Lynch committed additional violations of Section 4b(a)(2)(A) and (C) of the Act and Commission Regulation 5.2(b)(1) and (3).

#### **C. Fraud by Issuing False Statements to Pool Participants**

“Delivering, or causing the delivery of, false statements or reports to pool participants concerning profitability of trading constitutes a violation of section 4b of the Act.” *PMC Strategy*, 2013 WL 1349177 at \*5; *Noble Wealth Data Info. Svcs.*, 90 F. Supp. 2d at 685-87; *CFTC v. Sorkin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,855, at 27,585-86 (S.D.N.Y. Aug. 25, 1983).

Lynch’s account statements falsely reported that he had achieved trading profits for pool participants, and falsely indicated that payments he made to pool participants came from trading profits or were returns of pool participants’ capital when, in reality, the payments came from

money Lynch obtained from other pool participants. Thus, Lynch violated Section 4b(a)(2)(B) of the Act and Commission Regulation 5.2(b)(2) by willfully making, or causing the making of, false monthly account statements to pool participants.

## V.

### FINDING OF VIOLATIONS

Based upon the foregoing, the Commission finds that, during the Relevant Period, Respondent Lynch violated Section 4b(a)(2)(A)-(C) of the Act and Commission Regulation 5.2(b)(1)-(3).

## 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*;
- 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 (2006) and 28 U.S.C. § 2412 (2006), 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 (2012), 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, 857-68 (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 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 Respondent has consented in the *Offer*; and
- 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 Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), and Commission Regulation 5.2(b)(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (2012);
  2. orders Respondent to cease and desist from violating Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), and Commission Regulation 5.2(b)(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (2012);
  3. orders Respondent to pay restitution in the amount of \$171,297, plus post-judgment interest;
  4. orders Respondent to pay a civil monetary penalty in the amount of \$300,000, 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(29) of the Act, as amended, to be codified at 7 U.S.C. § 1a(29)), and all registered entities shall refuse him trading privileges; and
  7. orders Respondent and any successor or assignee of 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 Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), and Commission Regulation 5.2(b)(1)-(3), 17 C.F.R. § 5.2(b)(1)-(3) (2012).
- B. Respondent shall pay restitution in the amount of \$171,297 within ten (10) days of the date of entry of this Order (“Restitution Obligation”). 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 (2006).

The NFA as Monitor shall collect payments of the Restitution Obligation from Respondent and make distributions as set forth below. Because the Monitor is not being 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 “David R. Lynch’s Settlement Fund” and shall send such payments by electronic funds transfer, or by 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, with a cover letter that identifies Respondent and the name and docket number of this proceeding. 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 Respondent’s customers or may defer distribution until such time as it may deem appropriate. In the event that the amount of restitution 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.

- C. Respondent shall pay a civil monetary penalty in the amount of \$300,000 within ten (10) days of the date of entry of this *Order* (“CMP Obligation”). 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 (2006). Respondent shall pay the CMP Obligation by electronic funds transfer, or by 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 payments 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 Receivable -- AMZ-300  
Email Box: 9-AMC-AMZ-AR-CFTC  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone: (405) 954-5644

If payment is to be made by electronic transfer, Respondent shall contact Linda Zurhorst 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 name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, 1155 21<sup>st</sup> Street, N.W., 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(29) of the Act, as amended, to be codified at 7 U.S.C. § 1a(29)), and all registered entities shall refuse him privileges thereon.
- E. Respondent and his successors and assigns 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 successors, assigns, 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 and his successors and assigns shall undertake all steps necessary to ensure that all of his agents and employees under his authority or control understand and comply with this undertaking;
  2. Respondent agrees that he shall never, directly or indirectly:
    - a. enter into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Commission Regulation 1.3(hh), 17 C.F.R. § 1.3(hh) (2012)) ("commodity

options”), swaps (as that term is defined in Section 1a(47) of the Act, to be codified at 7 U.S.C. § 1a(47) and as further defined in Regulation 1.3(xxx), 17 C.F.R. § 1.3(xxx) (2012)) (“swaps”), security futures products and foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”), for his own personal account or for any account in which he has a direct or indirect interest;

- b. have any commodity futures, options on commodity futures, commodity options, swaps, security futures products and/or forex contracts traded on his 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 futures, options on commodity futures, commodity options, swaps, security futures products and/or forex contracts;
- d. solicit, receive, or accept any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, swaps, security futures products and/or forex contracts;
- e. apply for registration or claim exemption from registration with the Commission in any capacity, or engage in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012);
- f. act as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2012)), agent or any other officer or employee of any person (as that term is defined in Section 1a(38) of the Act, as amended, to be codified at 7 U.S.C. § 1a(38)) registered, required to be registered or exempted from registration with the Commission except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2012).

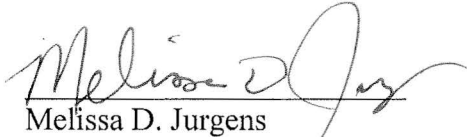
F. Cooperation with Monitor: Respondent shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify Respondent’s customers, whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any 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.

G. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor of 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.

- H. Change of Address/Phone: Until such time as Respondent satisfies in full his Restitution Obligation and CMP Obligation as set forth in this *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.

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



Melissa D. Jurgens  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: December 12, 2013