



## II. FINDINGS

The Commission finds the following:

### A. SUMMARY

On April 23, 2018, Commission staff interviewed Novales. The interview was part of an ongoing Commission investigation and in connection with his employment at a company registered with the Commission as an introducing broker (“IB”). During that interview with Commission staff, Novales knowingly made false and misleading statements that he always spoke with and obtained specific authorization from the IB’s non-discretionary customers (that is, customers who had not granted powers of attorney to the IB) to execute orders on their behalf prior to order execution. Subsequently, however, on April 27, 2018 during sworn testimony before the Commission, Novales admitted that on at least some occasions he simply left voicemail messages for the non-discretionary customers informing them of the terms of the transactions and that, after leaving the voicemail messages, the IB would execute the orders on their behalf without obtaining the customers’ specific authorization.

By such acts, Novales violated the prohibition against making false and/or misleading statements of material fact to the Commission contained in Section 6(c)(2) of the Act, 7 U.S.C. § 9(c)(2) (2012).

### B. RESPONDENT

**Rafael Novales** is a California resident. Novales was formerly registered as an associated person (“AP”) of the IB from May 2001 until October 2017. Novales was registered as an AP of another IB from September 2017 until March 29, 2019.

### C. FACTS

In or about April 2016, the Commission began investigating the IB that employed Novales because of concerns that the IB may have been, among other things, executing trades without its customers’ specific authorizations and/or powers of attorney.

Part of Novales’s duties at the IB included speaking with and obtaining the specific authorization from the IB’s non-discretionary customers prior to order execution. Therefore, as part of the investigation into the IB, on April 23, 2018, Commission staff interviewed Novales about, among other things, obtaining customer authorizations prior to order execution. Prior to the interview, Commission staff provided Novales information that under Section 6(c)(2) of the Act, 7 U.S.C. § 9(c)(2) (2012), it was unlawful for any person to make a false or misleading statement of material fact to the Commission. Novales said that he understood that information and agreed to be truthful in his statements.

During that interview, Novales unequivocally stated that for non-discretionary accounts, he always obtained a customer’s authorization prior to the IB placing a trade on that customer’s behalf. Specifically, when Commission staff asked if Novales “would actually speak with customers” prior to the IB placing a trade, Novales stated, “Yes, we would agree to a range of

strike prices and premiums” for the transaction. Later in the interview, Commission staff presented Novales with a spreadsheet that he created which chronicled his contacts with customers that had non-discretionary accounts and asked him about notations that he made on the spreadsheet entitled “VM” and what those notations meant. Novales stated that it meant that he had “left a voicemail” for that customer informing the customer of the recommended trade. Commission staff then asked if he left a voicemail about a recommended trade and did not hear back from the customer, would the customer still get the trade. In response, Novales answered, “No” and that if “they [the customer] did not call back, the customer did not get a trade.”

Shortly after this exchange, Commission staff ended the interview due to concerns about the truthfulness of the responses, based upon other evidence in their possession.

Thereafter, on April 27, 2018, Commission staff took investigative testimony from Novales under oath and upon penalty of perjury. During his deposition, the following exchange occurred:

Q: Okay. So I’d like you, if you could, to walk me through the procedure of the creation of a trade ticket. So we’ll start with [the IB] has an order that [it’s] going to put in. What happens next?

A: So what would happen next, I would have a list of clients, starting from the East Coast to the West Coast for the time difference. And I would have a stack of blank tickets that I would start writing, starting with the account number, as I’d go from client to client. I would make the recommendations over the actual trade and what we’re looking -- what [the IB’s] looking to do. I would go over the time and price discretion [(“TPD”)] necessary. I would mention the cancel/replacing. There may be cancel/replacing to obtain the best possible trade. I would balance it with risk. I would discuss the risk. I’d ask for the authorization, and I would stamp the No. 1 position of the ticket and then go on to the -- and also write the ticket, the account number, TP[D] on the ticket, the quantity, the month, the market and put option, in this case for S&P. I would leave the strike blank and the premium and then go on to the next.

Q: And you did this every time you prepared a ticket?

A: Yes, sir.

Thereafter, Commission staff showed Novales an October 2014 email from the IB to a futures commission merchant (“FCM”) in which the IB tells the FCM, “When we call them with recommendations we specifically cover which markets, which range of strike prices and the minimum premium or price we are looking to buy or sell. We get their approval.” After showing Novales this email, Commission staff asked him the following:

Q: As [the IB] outlines the process for obtaining customer authorizations in this e-mail, is that the way that it was done at [the IB]?

A: Yes.

Q: Okay. So this is an accurate representation of your [Novales's] duties with respect to obtaining customer authorizations?

A: Yes.

Later, however, after Commission staff showed Novales the spreadsheet that it had shown to him during the earlier interview and that had the "VM" notations, the following exchange occurred:

Q: So when you communicate with them, would that indicate that you communicated personally with someone?

A: Yes.

Q: Okay. So the time stamp would be there, meaning that you spoke with that person?

A: Yes. . . And also if it was a voicemail, I would stamp the ticket and then move that to the left-hand side. So I would end up with a stack of tickets on the left -- written out with their account number, the quantity, the market and the month.

Q: Why would you stamp the ticket if you left them a voicemail?

A: Because they knew they had to get back to me, and what would I -- this starts early in the morning after I meet with [the IB] regarding the trade. So when I would finish, I'd end up with two stacks, and I would then have an opportunity to call them again to -- or if they haven't already called me back, to get the authorization, from the voicemail. And -- but ultimately there was an instance where I ended up using the ticket where I voiced -- where I originally stamped it for the voicemail for a trading ticket.

Q: Just once?

A: I'm -- I'm not certain of the frequency necessarily or the instance, but it was more than once.

Q: So you would use a trade ticket when you stamped it pursuant to leaving them a voicemail?

A: Yes. So towards the end of the day, I would end up -- some would call back or I would speak to them again and then use that ticket. But I was, you know, left over with some tickets from people that hadn't returned the call.

Q: So if a person hadn't returned a call, would their trade be put through?

A: There were instances, yes, that that took place.

The last statement by Novales in this exchange, which is true, contradicts his earlier statement to Commission staff during his initial interview. As such, Novales knowingly made false and misleading statements to Commission staff during the interview that he always spoke with and obtained specific authorization from non-discretionary customers for transactions prior to order execution.

### **III. LEGAL DISCUSSION**

Regulation 166.2, 17 C.F.R. § 166.2 (2018), prohibits IBs from effecting a transaction on behalf of a customer without first obtaining from the customer, or the person designated to control the account, specific authorization from the customer to effect the transaction. Thus, if an IB executes an order for a customer without that customer's specific authorization (or a power of attorney), that order is improper.

Section 6(c)(2) of the Act, 7 U.S.C. § 9(2) (2012), makes it unlawful:

for any person to make any false or misleading statement of a material fact to the Commission ... or to omit to state in any such statement any material fact that is necessary to make any statement of material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

Novales violated Section 6(c)(2) through his knowingly false statements to Commission staff regarding whether he obtained specific customer authorization for placing transactions for non-discretionary customer accounts. Specifically, Novales knowingly misrepresented to Commission staff during the initial interview that he always spoke with and obtained customers' authorization for transactions prior to order execution. Subsequently, however, Novales admitted to Commission staff during testimony that on at least some occasions he would simply leave voicemail messages for the customers informing them of the terms of the transactions and that the IB would then execute the order without obtaining specific customer authorization. Further, Novales's false statements were material because they went to the heart of the Division's investigation into whether the IB engaged in unauthorized trading in violation of Regulation 166.2. Accordingly, Novales violated Section 6(c)(2).

### **IV. FINDINGS OF VIOLATIONS**

Based on the foregoing, the Commission finds that on April 23, 2018, Respondent violated Section 6(c)(2) of the Act, 7 U.S.C. § 9(c)(2) (2012).

### **V. OFFER OF SETTLEMENT**

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

- A. Acknowledges 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 it 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 Regulations, 17 C.F.R. pt. 148 (2018), relating to, or arising from, this proceeding;
  7. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201-53, 110 Stat. 847, 857-74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), 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, including this Order.
- 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 Section 6(c)(2) of the Act, 7 U.S.C. § 9(c)(2) (2012);
  2. Orders Respondent to cease and desist from violating Section 6(c)(2);
  3. Orders Respondent to pay a civil monetary penalty in the amount of fifty thousand dollars (\$50,000), plus post-judgment interest;
  4. Orders Respondent to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

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

## VI. ORDER

### Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating Section 6(c)(2) of the Act, 7 U.S.C. § 9(c)(2) (2012);
- B. Respondent shall pay a civil monetary penalty in the amount of fifty thousand dollars (\$50,000) (CMP Obligation), plus post-judgment interest. Post-judgment interest shall accrue on the CMP Obligation beginning ten calendar days after the date of the entry of the 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:

MMAC/ESC/AMK326  
Commodity Futures Trading Commission  
Division of Enforcement  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
(405) 954-6569 office  
(405) 954-1620 fax  
9-AMC-AR-CFTC@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact Marie Thorne 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.

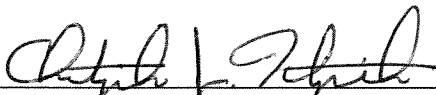
- C. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
  1. Public Statements: Respondent agrees that neither he nor any agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, 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 comply with this agreement, and 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. Registration: Respondent agrees that for a period of five years from the date of this Order he shall not, directly or indirectly:
  - a. 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) (2018); and/or
  - b. act as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2018)) or officer of any person (as that term is defined in Section 1a of the Act, 7 U.S.C. § 1a (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) (2018).
3. Cooperation with the Commission: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this action, and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action.
4. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's 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.
5. Change of Address/Phone: Until such time as Respondent satisfies in full his 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.**

By the Commission.



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Christopher J. Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: September 30, 2019