

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Gain Capital UK Limited,

Respondent.

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) **CFTC Docket No. 20-16**
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9:56 am, Jun 08, 2020

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I. INTRODUCTION

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from on or about February 6, 2014 to March 8, 2019 (“Relevant Period”), Gain Capital UK Limited (“Gain UK” or “Respondent”), acting through Gain Capital Forex.com UK Limited until its business operations were integrated into Gain UK on October 6, 2017, violated Section 2(c)(2)(C)(iii)(I)(aa) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa) (2018), and Commission Regulations (“Regulations”) 5.3(a)(6)(i) and 166.3, 17 C.F.R. §§ 5.3(a)(6)(i), 166.3 (2019) promulgated thereunder. 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.

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 Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”) and acknowledges service of this Order.¹

¹ Respondent consents to the use of the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondent does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

II. FINDINGS

The Commission finds the following:

A. SUMMARY

From at least February 6, 2014 to March 8, 2019 (“Relevant Period”), Gain UK, without being registered with the Commission as a retail foreign exchange dealer (“RFED”), accepted a limited number of customers who were located in the United States and not Eligible Contract Participants (“ECPs”) to open retail forex accounts. Gain UK also failed to diligently supervise the handling of an account for one of the non-ECP customers (“Customer A”) that was managed by an unregistered commodity trading advisor (“Trading Advisor”). A Gain UK employee learned that Trading Advisor was required to be registered, and Gain UK failed to detect several warning signs that Trading Advisor was defrauding Customer A.

B. RESPONDENT

Gain Capital UK Limited is an unregistered RFED located in London, England. During the Relevant Period, Gain Capital Forex.com UK Limited was an unregistered RFED located in London, England until its business operations were integrated into Gain UK on October 6, 2017.

C. FACTS

1. **Gain UK Accepted Orders for Forex Transactions from Non-ECP Customers Located in the United States.**

During the Relevant Period, Gain UK acted as a counterparty to non-ECP customers who were located in the United States in connection with leveraged retail forex transactions while not being registered as an RFED. Gain UK had a policy to prevent non-ECP customers located in the United States from opening retail forex accounts. Despite that policy, however, a limited number of customers (who provided Gain UK with information that suggested the customers were located in the United States) succeeded in opening accounts with Gain UK. For example, some retail forex customers—after identifying U.S. mailing addresses on account applications—provided Gain UK with documents such as lease agreements, utility bills, and health-insurance enrollment letters further suggesting that the customers were located in the United States. Similarly, Customer A (who provided a copy of her foreign government issued identification that matched the primary non-U.S. address on her account application) listed a U.S. mailing address and telephone number on her account application, and when asked by a Gain UK employee, informed Gain UK that she was a student at a university in the United States. Gain UK, nonetheless, permitted her to open a retail forex account.

2. **Gain UK Failed To Diligently Supervise the Handling of a Retail Forex Account of a Non-ECP Customer Located in the United States.**

Gain UK failed to diligently supervise the handling of Customer A’s retail forex account. First, as relevant here, Trading Advisor—and acting through his company—solicited Customer A, to open an individually managed forex trading account with Gain UK. During the account opening process, Trading Advisor communicated with a Gain UK employee about

Customer A's account. Even though Customer A was located in the United States, Trading Advisor directed her to open a managed forex account with Gain UK—based in part on communications Trading Advisor had with the Gain UK employee, who advised Trading Advisor how Customer A could open a retail forex account with Gain UK. The employee was aware that Trading Advisor had been rejected from managing accounts with Gain UK, as well as its affiliates, because Trading Advisor may have been soliciting managed accounts through social media and a website while not being registered with the Commission. The employee, however, assisted Trading Advisor in establishing Trading Advisor's father as the nominal account manager and Trading Advisor's mother as the nominal introducing broker, even though Customer A listed Trading Advisor's entity as the account manager on her application. And, despite Trading Advisor not being named on any of the account documents, Trading Advisor had extensive communications with Gain UK's employee about Customer A's account, including about creating it, directing the trading in it, and refunding commissions to it to reimburse significant trading losses. Gain UK failed to promptly detect these discrepancies.

Second, Gain UK permitted Trading Advisor's mother to earn commissions based on the trading in Customer A's account—purportedly being managed by Trading Advisor's father—without regard to the trading profits earned for Customer A. When Customer A's account incurred over \$250,000 in losses within the first few weeks of opening, Trading Advisor requested that some of the commissions earned be refunded to Customer A's account to compensate the customer for some of the trading losses. Even though the reimbursement of commissions was escalated to Gain UK's compliance department, Gain UK did not perform an adequate investigation into the account activity and failed to detect the extensive communications between Trading Advisor and Gain UK's employee. Due to Trading Advisor's fraudulent conduct, Customer A suffered approximately \$280,000 in losses and Gain UK earned \$241,671.

III. LEGAL DISCUSSION

A. **Gain UK Failed To Register as an RFED in Violation of Section 2(c)(2)(C)(iii)(I)(aa) of the Act and Regulation 5.3(a)(6)(i).**

The Commission's registration requirements for commodity professionals are a cornerstone of the regulatory framework enacted by Congress to protect the public. *See CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 139-40 (2d Cir. 1977); *see also CFTC v. Savage*, 611 F.2d 270, 280 (9th Cir. 1979). Failure to register is a serious offense, and not a mere technical violation. *CFTC v. Heritage Capital Advisory Servs.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,627 at 26,387 (N.D. Ill. Nov. 8, 1982).

Section 2(c)(2)(C)(iii)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa) (2018), states that a person shall not “solicit or accept orders” for an agreement, contract, or transaction in foreign currency “from any person that is not an eligible contract participant” without being “registered in such capacity as the Commission” requires. Section 1a(18)(A)(xi) of the Act, 7 U.S.C. § 1a(18)(A)(xi) (2018), defines an ECP, in relevant part, as an individual who has amounts invested on a discretionary basis, the aggregate of which exceeds \$10 million, or \$5 million if the individual enters into the transaction to manage the risk

associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

Regulation 5.1, 17 C.F.R. § 5.1(h)(1) (2019), defines RFED as “any person that is, or that offers to be, the counterparty to a retail forex transaction” with someone that is not an ECP. Regulation 5.3(a)(6)(i), 17 C.F.R. § 5.3(a)(6)(i) (2019), requires any person that meets the definition of RFED to register with the Commission. *See, e.g., CFTC v. Interforex*, 11-cv-6203, 2012 WL 1190900, at *3 (N.D. Ill. Feb. 2, 2012) (consent order); *In re Forex Capital Markets Ltd.*, CFTC No. 11-18, 2011 WL 3418343, at *1 (Aug. 3, 2011) (consent order).

During the Relevant Period, Gain UK acted as an RFED without registering with the Commission. It was the counterparty to customers located in the United States, who were not ECPs, in connection with leveraged retail forex transactions.

B. Gain UK Failed To Diligently Supervise the Handling of a Customer’s Retail Forex Account in Violation of Regulation 166.3.

Regulation 166.3, 17 C.F.R. § 166.3 (2019), requires “[e]ach Commission registrant, except an associated person who has no supervisory duties,” to “diligently supervise the handling . . . of all commodity interest accounts carried, operated, advised or introduced by the registrant.” Under Regulation 166.3, a registrant has a “duty to develop procedures for the ‘detection and deterrence of possible wrongdoing by its agents.’” *Samson Refining Co. v. Drexel Burnham Lambert, Inc.*, CFTC No. 82-R448, 1990 WL 282783, at *11 (Feb. 16, 1990) (quoting *Lobb v. JT McKerr & Co.*, CFTC No. 85-R185, 1989 WL 242384, at *11 (Dec. 14, 1989)). Regulation 166.1 defines “Commission registrant” as used in Part 166 as “any person who is registered or required to be registered with the Commission.” Because Gain UK was “required to be registered” during the Relevant Period, it was also subject to Regulation 166.3’s supervision requirements.

A violation of Regulation 166.3 is established by showing either that: (1) the registrant’s supervisory system was generally inadequate, or (2) the registrant failed to perform its supervisory duties diligently. *In re FCStone, LLC*, CFTC No. 15-21, 2015 WL 2066891, at *3 (May 1, 2015) (consent order) (citing *In re Murlas Commodities*, CFTC No. 85-29, 1995 WL 523563 (Sept. 1, 1995)). So, even if proper procedures are in place, a supervisory violation may occur if a registrant fails to implement those procedures, or fails to ensure that its agents follow those procedures. *See, e.g., In re GNP Commodities*, CFTC No. 89-1, 1992 WL 201158, at *17 (Aug. 11, 1992) (providing that, even if an adequate supervisory system is in place, Regulation 166.3 can still be violated if the supervisory system is not diligently administered and stating that “a proper determination of a FCM’s supervisory diligence must remain sensitive to the particular facts and circumstances that influenced the design and execution of the system at issue”), *aff’d sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993).

Further, a violation of Regulation 166.3 is an independent violation for which no underlying violation is necessary. *FCStone*, 2015 WL 2066891, at *3. Instead, evidence of underlying violations that “should be detected by a diligent system of supervision, either

because of the nature of the violations or because the violations have occurred repeatedly” is probative of a failure to diligently supervise. *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999) (defendant was liable for failure to diligently supervise because he “knew of specific instances of misconduct yet failed to take reasonable steps to correct the problems”).

Gain UK violated Regulation 166.3 by failing to follow its procedures when it did not promptly detect the warning signs of Trading Advisor’s fraudulent conduct toward Customer A. Among other things, Gain UK did not investigate when Customer A listed a different account manager on her account application than the account manager listed on the power of attorney form. Furthermore, Gain UK did not detect that Trading Advisor—who Gain UK previously rejected from serving as an account manager—was directly connected to the entity Customer A listed in her account application and that Trading Advisor had extensive communications with its employee about Customer A’s account. And when Trading Advisor requested that commissions be refunded to cover losses in Customer A’s account, Gain UK did not adequately investigate the account activity. Trading Advisor’s fraudulent conduct caused Customer A to lose approximately \$280,000 in less than two months of trading. Gain UK earned \$241,671 in connection with its failure to diligently supervise the handling of Customer A’s account.

IV. FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that, during the Relevant Period, Gain UK violated Section 2(c)(2)(C)(iii)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa) (2018), and Regulations 5.3(a)(6)(i) and 166.3, 17 C.F.R. §§ 5.3(a)(6)(i), 166.3 (2019).

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 (2018), and 28 U.S.C. § 2412 (2018), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2019), 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, §§ 201–253, 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; 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 2(c)(2)(C)(iii)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa) (2018), and Regulations 5.3(a)(6)(i) and 166.3, 17 C.F.R. §§ 5.3(a)(6)(i), 166.3 (2019);
 2. Orders Respondent to cease and desist from violating Section 2(c)(2)(C)(iii)(I)(aa) of the Act and Regulations 5.3(a)(6)(i) and 166.3;
 3. Orders Respondent to pay a civil monetary penalty in the amount of two hundred fifty thousand dollars (\$250,000), plus post-judgment interest; and
 4. Orders Respondent and its successors and assigns 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 and its successors and assigns shall cease and desist from violating Section 2(c)(2)(C)(iii)(I)(aa) of the Act, 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa) (2018), and Regulations 5.3(a)(6)(i) and 166.3, 17 C.F.R. §§ 5.3(a)(6)(i), 166.3 (2019).
- B. Respondent shall pay a civil monetary penalty in the amount of two hundred fifty thousand dollars (\$250,000) (“CMP Obligation”) within ten days of the date of the entry of the Order. If the CMP Obligation is not paid in full within ten days of the date of entry of the Order, then 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 (2018).

Respondent shall pay the CMP Obligation and any post-judgment interest 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.
HQ Room 181
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 Respondent and the name and docket number of this proceeding. The 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, and to Charles Marvine, Deputy Director, Commodity Futures Trading Commission, 4900 Main Street, Suite 500, Kansas City, MO 64112.

C. Respondent shall comply with the following conditions and undertakings set forth in the Offer:

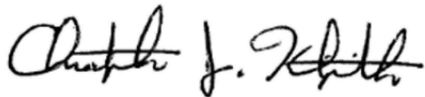
1. **Public Statements:** Respondent, and its successors and assigns, agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this 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 its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.
2. **Disgorgement:** Respondent agrees to pay disgorgement in the amount of two hundred forty-one thousand, six hundred seventy-one dollars (\$241,671) ("Disgorgement Obligation") to Respondent's customer, representing the gains

received in connection with such violations. The Disgorgement Obligation is deemed satisfied by payments already made to Respondent's customer.

3. Cooperation: 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 its 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 its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

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: June 8, 2020