

**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**

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**In the Matter of:**

**OANDA Corporation,**

**Respondent.**

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) **CFTC Docket No. 20-29**  
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**8:32 am, Aug 21, 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 at times in or around October 2018 and during the period April 2019 to August 2019, OANDA Corporation (“OANDA”) violated Regulations 1.17(e)(1), 5.6(a), (b), and (f), 5.7(a)(1)(i) and (a)(3), and 166.3, 17 C.F.R. §§ 1.17(e)(1), 5.6(a), (b), (f), 5.7(a)(1)(i), (a)(3), 166.3 (2019). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether OANDA 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, OANDA 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, OANDA 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.<sup>1</sup>

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<sup>1</sup> OANDA 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. OANDA 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. OANDA 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

As set forth below, in or around October 2018 and during the period April 2019 to August 2019, OANDA failed at times to meet certain financial requirements applicable to futures commission merchants (“FCMs”) offering or engaging in retail foreign currency transactions and/or retail foreign exchange dealers (“RFEDs”): (1) OANDA failed to meet minimum capital requirements from April 26, 2019 to August 21, 2019 and (2) OANDA made dividend payments on October 15, 2018, April 26, 2019, and May 28, 2019 in violation of the equity withdrawal restriction. In addition, OANDA violated certain reporting requirements related to its violations of these financial requirements. The Commission’s Division of Enforcement has found no indication that customers suffered any losses as a result of OANDA’s net capital and equity withdrawal restriction violations. OANDA did not maintain adequate internal controls with respect to these financial and reporting requirements; consequently, the firm failed to diligently supervise these matters related to its business as a Commission registrant.

In accepting OANDA’s offer of settlement, the Commission recognizes OANDA’s cooperation in the investigation of this matter.

### B. RESPONDENT

**OANDA Corporation** is a registered FCM and RFED headquartered in Toronto, Canada. OANDA acts as counterparty to customer accounts trading foreign currency (“forex”) and provides its customers an electronic trading platform through which its customers enter into forex trades. OANDA has been a registered with the Commission as an FCM since 2003 and as an RFED since October 2010.

### C. FACTS

#### 1. **Background**

As an FCM offering or engaging in retail forex transactions and RFED, OANDA is subject to Parts 1, 5, and 166 of the Regulations, 17 C.F.R. pts. 1, 5, 166 (2019). Pursuant to Part 5 of the Regulations, OANDA is required to maintain, at all times, adjusted net capital of the greater of \$20 million plus five percent of its total retail forex obligation in excess of \$10 million or any amount required by Regulation 1.17. Regulation 5.7(a)(1)(i)(B) and (a)(3), 17 C.F.R. § 5.7(a)(i)(B), (a)(3) (2019). OANDA is required to provide telephonic notice, to be confirmed in writing, immediately when it knows, or should know, of a capital deficiency and to provide written notice within 24 hours of the firm’s breach of early warning levels. Regulation 5.6(a) and (b), 17 C.F.R. § 5.6(a), (b) (2019).

In addition, Regulation 1.17(e)(1) requires OANDA to maintain 120% of required adjusted net capital immediately following any withdrawal of equity capital, and Regulation

5.6(f) requires OANDA to notify the Commission within two business days after an equity withdrawal that causes adjusted net capital to be reduced by 20% or more from the amount last reported in the firm's Form 1-FR filed with the Commission, and to notify the Commission two business days prior to any equity withdrawal that would cause excess net capital to be reduced by 30% or more from the previously reported amount. 17 C.F.R. §§ 1.17(e)(1), 5.6(f) (2019).

## **2. Violations of Capital Requirements, Equity Withdrawal Restriction, Notice Requirements, and Duty to Diligently Supervise**

From April 2019 to August 2019, OANDA improperly included in its capital computation unsecured receivables accruing from over-the-counter forex transactions from an entity that was not one of the following: (1) a bank or trust company regulated by a U.S. banking regulator; (2) a broker dealer registered with the Securities and Exchange Commission and a member of the Financial Industry Regulatory Authority; (3) a Commission-registered FCM or RFED and National Futures Association ("NFA") member; (4) an entity regulated as a foreign equivalent of any of the foregoing; or (5) an entity approved by OANDA's designated self-regulatory organization, i.e. NFA. Regulation 5.7(b)(2)(iii), 17 C.F.R. § 5.7(b)(2)(iii) (2019). Because the unsecured receivables at issue here were not with a qualifying entity enumerated in Regulation 5.7(b)(2)(iii), they should not have been included as current assets for purposes of OANDA's capital calculation.

During the relevant time period OANDA used a prime broker, Entity A, that was a qualifying entity under Regulation 5.7(b)(2)(iii), to execute the over-the-counter forex transactions at issue here. These transactions were given up (pursuant to a give-up arrangement) from Entity A to Entity B, a provisionally registered swap dealer with the Commission, which was not a qualified entity under Regulation 5.7(b)(2)(iii). In addition, agreements between OANDA and Entity B required that the collateral in connection with these over-the-counter forex transactions be custodied by an affiliated FCM of Entity B (and therefore a qualified entity under Regulation 5.7(b)(2)(iii)). However, because the unsecured receivables at issue here were from Entity B—not from Entity A or Entity B's affiliate FCM—the unsecured receivables were not permitted to be included in OANDA's capital calculation.

After excluding funds and positions held with the non-qualifying entity from OANDA's capital calculation, OANDA was undercapitalized a total of 118 calendar days, from April 26 to August 21, 2019, with capital deficits ranging from approximately \$30 million to almost \$144 million. Moreover, OANDA did not notify the Commission of the deficiencies until August 22 and August 26, 2019, after the NFA brought the issue to the firm's attention.

On October 15, 2018, OANDA made a \$37.5 million dividend payment as part of a distribution of excess cash to shareholders related to the acquisition of OANDA. The October 15, 2018 dividend payment caused the firm's adjusted net capital to fall below the firm's equity withdrawal restriction level of 120% of its required adjusted net capital. In addition, the payment reduced the firm's adjusted net capital by more than 45% and the firm's excess net capital by more than 91% from the amounts previously reported in OANDA's September 30, 2018 Form 1-FR filed with the Commission. Regulation 5.6(f) requires notice to the Commission within two business days of a reduction in adjusted net capital of 20% or more and

two business days' notice prior to a reduction in excess net capital of 30% or more. OANDA did not, however, provide notice until November 9, 2018, after being prompted by the NFA. In addition, the October 15, 2018 dividend payment, along with two additional dividend payments in October, caused OANDA's adjusted net capital to fall below early warning levels as of October 31, 2018. However, the firm did not provide 24-hour notice as required under Regulation 5.7(b), but rather provided notice on November 28, 2018, after being notified by the CFTC about the early warning reporting requirement.

In addition, at the time OANDA was undercapitalized, it paid dividends to its parent company in the amount of \$11.25 million on April 26, 2019 and \$3.5 million on May 28, 2019. Because these payments increased the extent to which the firm was already undercapitalized, OANDA violated the equity withdrawal restriction, and consequently, the dividend payments should not have been permitted to occur.

The Commission's Division of Enforcement has found no indication that customers suffered any losses as a result of OANDA's net capital and equity withdrawal restriction violations.

As evidenced by the failures described above, OANDA failed to establish and maintain an adequate supervisory system. At the time of OANDA's equity withdrawal violation in October 2018, OANDA's procedures were not sufficient to prevent the firm's violation of the equity withdrawal restriction and related notice requirements. In addition, the procedures in place at the time of OANDA's 2019 net capital violations were not sufficient to prevent the violation of net capital and associated notice requirements. OANDA took steps to improve its policies and procedures after both the equity withdrawal violation of October 2018 and net capital violations from April to August 2019.

### **3. Remedial Actions**

After OANDA was notified that it could not count toward its capital calculation unsecured receivables accruing from over-the-counter forex transactions from an entity not qualified under Regulation 5.7(b)(2)(iii), OANDA took steps the next calendar day to correct the violation by transferring funds and positions to qualifying entities under that rule. In addition, as noted above, OANDA has taken steps to improve its relevant policies and procedures.

## **III. LEGAL DISCUSSION**

### **A. OANDA Failed to Comply with Financial and Related Reporting Requirements**

#### **1. Failure to Comply with Minimum Capital Requirements and Related Notice Requirement**

As noted above, FCMs offering or engaging in retail forex transactions and RFEDs are required to maintain at all times adjusted net capital of the greater of at least \$20 million plus five percent of their total retail forex obligations in excess of \$10 million or any amount required by Regulation 1.17. Regulations 5.7(a)(1)(i) and (a)(3), 17 C.F.R. §§ 5.7(a)(1)(i), (a)(3) (2019).

Regulation 5.7(b)(2)(iii) further requires, among other things, that for purposes of calculating adjusted net capital, current assets may not include unsecured receivables accruing from over-the-counter forex-related transactions, unless the unsecured receivables are from an eligible contract participant that is among the regulated entities enumerated in that subsection, i.e., a U.S.-regulated bank or trust company, a registered broker-dealer, a registered FCM, a registered RFED, a similar foreign-regulated entity, or an entity approved by the FCM/RFED's designated self-regulatory organization. 17 C.F.R. §5.7(b)(2)(iii) (2019).

Regulation 5.6(a) requires FCMs that offer or engage in retail forex transactions and RFEDs to provide immediate telephonic notice, to be confirmed in writing, when the firm knows, or should know, of a capital deficiency. 17 C.F.R. § 5.6(a) (2019). Regulation 5.6(b) further requires such firms to provide written notice within 24 hours of the firm's breach of early warning levels. 17 C.F.R. § 5.6(b) (2019).

From April 26, 2019 to August 21, 2019, OANDA failed to meet minimum capital requirements because it counted towards its adjusted net capital unsecured receivables, in connection with certain over-the-counter foreign currency transactions, from an entity that was not one of the qualifying entities enumerated in Regulation 5.7(b)(2)(iii). OANDA was undercapitalized a total of 118 calendar days, from April 26 to August 21, 2019, with capital deficits ranging from approximately \$30 million to almost \$144 million. Moreover, OANDA did not notify the Commission of the deficiencies immediately, as required by Regulation 5.6(a), but rather did not notify the Commission until August 22, 2019 and August 26, 2019, after the NFA brought the issue to the firm's attention.

## **2. Violation of Equity Withdrawal Restriction and Related Notice Requirements**

Regulation 1.17(e)(1) prohibits FCMs from withdrawing equity capital if, following the withdrawal, the FCM's adjusted net capital would be less than 120% of its required adjusted net capital (i.e., the equity withdrawal restriction level). 17 C.F.R. § 1.17(e)(1) (2019). Additionally, Regulation 5.6(f) requires FCMs offering or engaging in retail foreign currency and RFEDs to notify the Commission within two business days after an equity withdrawal causes the firm's adjusted net capital to be reduced by 20% or more from the amount last reported in the firm's Form 1-FR filed with the Commission, and to notify the Commission two business days prior to any equity withdrawal that would cause excess net capital to be reduced by 30% or more from the previously reported amount. 17 C.F.R. § 5.6(f) (2019).

The October 15, 2018 dividend payment caused OANDA's adjusted net capital to fall below 120% of its required adjusted net capital. Consequently the firm should not have made that dividend payment. In addition, the October 15, 2018 payment reduced OANDA's adjusted net capital by more than 20% from the amount previously reported on the firm's Form 1-FR, and reduced the firm's excess net capital by more than 30% from the amount previously reported. However, OANDA did not report the decline in excess net capital/adjusted net capital until November 9, 2018. In addition, the October 15, 2018 dividend payment, along with two other dividend payments in October 2018, caused the firm's adjusted net capital to fall below early warning levels, but the firm did not provide notice to the CFTC until November 28, 2018, after

being notified by the CFTC about this reporting requirement. Because notice was provided more than 24 hours after breaching the early warning level, OANDA violated Regulation 5.7(b).

Moreover, OANDA again violated the equity withdrawal restriction by paying dividends to its parent company in the amount of \$11.25 million and \$3.5 million on April 26, 2019 and May 28, 2019, respectively, while the firm was undercapitalized.

## **B. Failure to Supervise**

Regulation 166.3, 17 C.F.R. § 166.3 (2019), requires every Commission registrant to “diligently supervise the handling by its partners, officers, employees and agents . . . of all commodity interest accounts carried, operated, advised, or introduced by the registrant and all other activities of its partners, officers, employees and agents . . . relating to its business as a Commission registrant.” A violation under Regulation 166.3 is an independent violation for which no underlying violation is necessary. *See, e.g., In re Collins*, CFTC No. 94-13, 1997 WL 761927, at\* 10 (Dec. 10, 1997) (“It is well settled that a violation under Rule 166.3 is ‘an independent and primary violation for which no underlying violation is necessary.’” (citation omitted)); *In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158, at \*17 n.11 (Aug. 11, 1992), *aff’d sub nom. Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (“Rule 166.3 establishes failure to supervise as an independent and primary violation . . . .” (citation omitted)).

In order to prove a violation of Regulation 166.3, the Commission must demonstrate that either: (1) the registrant’s supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *GNP Commodities, Inc.*, 1992 WL 201158, at \*19. The lack of an adequate supervisory system can be established by showing that the registrant failed to develop proper procedures for the detection of wrongdoing. *CFTC v. Trinity Fin. Grp, Inc.*, No. 92-cv-6832, 1997 WL 820970, at \*29 (S.D. Fla. Sept. 29, 1997), *aff’d in part, vacated in part, and remanded sub nom. CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999). Where a supervisory system was in place, the issue is whether it was diligently administered. *In re Paragon Futures Ass’n*, CFTC No. 88-18, 1992 WL 74261, at \*14 (Apr. 1, 1992) (“[T]he focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether such review occurred and, if it did, whether it was ‘diligent.’”); *Collins*, 1997 WL 761927, at \*10. Evidence of 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 supervise. *In re Paragon Futures*, 1992 WL 74261, at \*14.

With respect to compliance with minimum financial requirements and related reporting requirements, OANDA employed an inadequate supervisory system and failed to perform its supervisory duties diligently, in violation of Regulation 166.3. These supervisory failures prevented OANDA from complying with the equity withdrawal restriction and minimum capital requirements, and also prevented OANDA from providing required notice to the Commission regarding capital.

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

Based on the foregoing, the Commission finds that OANDA violated Regulations 1.17(e)(1), 5.6(a), (b), and (f), 5.7(a)(1)(i) and (a)(3), and 166.3, 17 C.F.R. §§ 1.17(e)(1), 5.6(a), (b), (f), 5.7(a)(1)(i), (a)(3), 166.3 (2019).

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

OANDA 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 OANDA 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 OANDA violated Regulations 1.17(e)(1), 5.6(a), (b), and (f), 5.7(a)(1)(i) and (a)(3), and 166.3, 17 C.F.R. §§ 1.17(e)(1), 5.6(a), (b), (f), 5.7(a)(1)(i), (a)(3), 166.3 (2019);
  2. Orders OANDA to cease and desist from violating Regulations 1.17(e)(1), 5.6(a), (b), and (f), 5.7(a)(1)(i) and (a)(3), and 166.3;
  3. Orders OANDA to pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000), plus post-judgment interest; and
  4. Orders OANDA 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:**

1. OANDA shall cease and desist from violating Regulations 1.17(e)(1), 5.6(a), (b), and (f), 5.7(a)(1)(i) and (a)(3), and 166.3, 17 C.F.R. §§ 1.17(e)(1), 5.6(a), (b), (f), 5.7(a)(1)(i), (a)(3), 166.3 (2019).
2. OANDA shall pay a civil monetary penalty in the amount of five hundred thousand dollars (\$500,000) ("CMP Obligation"). If the CMP Obligation is not paid immediately, 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).

OANDA 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



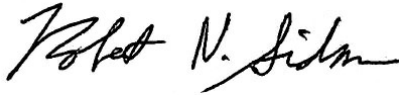
If payment is to be made by electronic funds transfer, OANDA shall contact Marie Thorne or her successor at the above address to receive payment instructions and shall fully comply with those instructions. OANDA shall accompany payment of the CMP Obligation with a cover letter that identifies the paying OANDA and the name and docket number of this proceeding. The paying OANDA 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 Manal Sultan, Deputy Director, Division of Enforcement, Commodity Futures Trading Commission, 140 Broadway, 19<sup>th</sup> Floor, New York, NY 10005.

3. OANDA and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:
  1. Representations and Undertakings: In its Offer, OANDA represents to the Commission that it has adopted enhanced written compliance procedures regarding future compliance with Regulations 1.17(e)(1), 5.6(a), (b), and (f), and 5.7(a)(1)(i) and (a)(3), 17 C.F.R. §§ 1.17(e)(1), 5.6(a), (b), (f), 5.7(a)(1)(i), (a)(3) (2019). OANDA undertakes to adopt internal controls that are reasonably designed to ensure that its agents and employees under its authority and control comply fully with those enhanced compliance procedures.
  2. Public Statements: OANDA 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 OANDA's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. OANDA 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.
  3. Cooperation: OANDA 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. OANDA shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action.
  4. Partial Satisfaction: OANDA understands and agrees that any acceptance by the Commission of any partial payment of OANDA's Restitution Obligation, Disgorgement Obligation, or 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 OANDA satisfies in full its CMP Obligation as set forth in this Order, OANDA 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.



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Robert N. Sidman  
Deputy Secretary of the Commission  
Commodity Futures Trading Commission

Dated: August 21, 2020