

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

**RECEIVED CFTC**



Office of Proceedings  
Proceedings Clerk

**5:07 pm, Sep 29, 2020**

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**In the Matter of:** )

**Gain Capital Group, LLC,** )

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

**CFTC Docket No.: 20-70**

**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 1, 2014 to at least August 31, 2016 (“Relevant Period”), Gain Capital Group, LLC (“Respondent”) violated Regulation 166.3, 17 C.F.R. § 166.3 (2019) of the Commission Regulations (“Regulations”) promulgated under the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 1-26 (2018). 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.<sup>1</sup>

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<sup>1</sup> Respondent consents to the use of the findings and conclusions 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, 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**

Respondent failed to diligently supervise its customer accounts in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2019). Specifically, Respondent, through its officers, employees, and agents, failed to implement adequate policies and procedures relating to reviews of introduced customer accounts and failed to diligently follow the procedures in place. These accounts were introduced by Foremost, a registered independent introducing broker (“IB”) and independently traded by and through one of Foremost’s principals and associated persons (“AP”) Mark Miller (“Miller”), who used multiple trading schemes to defraud a Foremost customer (“Customer”).<sup>2</sup>

**B. RESPONDENT**

Respondent Gain Capital Group, LLC, is a registered futures commission merchant (“FCM”) located in Bedminster, New Jersey.

**C. FACTS**

**1. Foremost Defrauded Its Customer.**

During the Relevant Period, Foremost, by and through Miller, defrauded Customer through multiple fraudulent trading schemes in futures and options, to the benefit of Foremost, Miller, and Miller’s family members through proprietary and customer accounts held at Respondent. First, Foremost misappropriated Customer’s funds by making trade move requests to Respondent, based on purported trade errors in Customer’s accounts. Through the trade move requests, Foremost sought to mitigate losses in proprietary accounts that were owned in whole or in part by Miller and his family members, by requesting that Respondent move winning trades out of Customer’s accounts and into the proprietary accounts. Second, Foremost defrauded Customer by making unauthorized and fictitious trades in Customer’s accounts to establish positions in futures and options in the proprietary accounts, at favorable prices or quantities, without competitive execution. Third, Foremost misappropriated Customer’s funds by making round-turn unauthorized and fictitious trades that were designed to siphon funds from Customer’s accounts and into the proprietary accounts. This fraudulent activity was the subject of prior Commission Orders and caused a loss to Customer of over \$700,000.

**2. Respondent Failed to Identify Certain Red Flags in a Timely Manner.**

Since July 2012, when Respondent began carrying accounts introduced by Foremost, Respondent knew that Miller was trading proprietary accounts and had power of attorney over

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<sup>2</sup> See *In re Foremost Trading LLC*, CFTC No. 20-21, 2020 WL 3907376 (July 6, 2020); *In re Miller*, CFTC No. 20-22, 2020 WL 3907377 (July 6, 2020).

certain Foremost customer accounts, which increased the risk of wrongdoing in those accounts. Respondent also knew or should have known that Miller was trading both proprietary accounts and Customer's accounts simultaneously in the same markets. This arrangement posed a risk that Miller could trade the accounts in a manner that benefitted the proprietary accounts and harmed Customer—a practice in which Miller ultimately did engage.

During the Relevant Period, Foremost made requests to move trades between Respondent's and Miller's proprietary accounts and the Customer's accounts. These trade move requests numbered in the hundreds and were greater in volume than any other IB introducing accounts to Respondent. Some of these trade move requests were detrimental to Customer and beneficial to Foremost because they moved winning trades from Customer's accounts to a Foremost proprietary account. Additionally, Miller traded the proprietary accounts and Customer's accounts in the same markets, many of which were illiquid options markets that allowed Miller to get favorable fills at Customer's expense with ease.

In light of the high volume of trade move requests, some of which harmed Customer, Respondent questioned Foremost about its trade move requests. Foremost and Miller provided benign explanations that Miller got the proprietary and Customer's accounts confused when he was trading. To address this, Respondent provided Miller with separate trading identifiers for the proprietary accounts and Customer's accounts. Respondent also enhanced its trade move practices and policies and increased scrutiny on trade move requests from Foremost. Although Respondent's efforts significantly reduced the number of trade move requests submitted by Foremost, Respondent did not adequately investigate the trade moves' impact on Customer or if any other detrimental trading activity was occurring in Customer's accounts. Additionally, prior to 2016, Respondent did not inquire about Miller trading the proprietary accounts and Customer's accounts in the same markets, which should have raised questions for Respondent about potential wrongdoing.

### **3. Respondent Did Not Consistently Follow Its Trade Moves Policy.**

Respondent supplemented its policies, in response to the trade move activity of Foremost, to require approval from the Compliance Department and, when appropriate, request additional information. However, Respondent's employees did not consistently obtain additional documentation for requests to move trades between the proprietary accounts and Customer's accounts where the move resulted in a loss to Customer. Instead, Foremost sometimes only provided, and Respondent accepted without complaint, Foremost's explanation that the trade was in error in order to support the trade move request. In some instances, Respondent's employees approved Foremost's trade move requests within minutes and without seeking additional documentation or explanations about the trade move requests.

### **4. Respondent Had Inadequate Policies and Procedures for Reviewing Customer Account Activity.**

Given the red flags—Foremost's trade move requests and its trading of both Customer and proprietary accounts in the same markets—Respondent was on notice that these particular accounts needed to be surveilled more closely. During the Relevant Period, Respondent had a general policy entitled "Reviewing and Analyzing Customer Account Activity," which stated

that Respondent would monitor activity in customer accounts and raise with its chief compliance officer or chief executive officer any observed trading irregularities or concerns. However, the policy did not define what was meant by trading irregularities or concerns, nor did it provide examples of trading irregularities or concerns. Also, prior to 2016, Respondent had no follow-on policies or procedures in place for how account reviews would be done, when or how often account reviews would be done, who would review the accounts, or what types of activities would be reviewed.

Ultimately, if Respondent's policies and procedures had enabled Respondent to identify indicators of possible wrongdoing and required Respondent to review account activity in the proprietary accounts and Customer's accounts, Respondent may have discovered Miller's unlawful trading, which resulted in significant harm to Customer while obtaining a financial benefit to Foremost and Miller.

### III.

#### LEGAL DISCUSSION

##### **A. Respondent Failed To Diligently Supervise Its Employees' Handling of Accounts in Violation of Regulation 166.3.**

Regulation 166.3, 17 C.F.R. § 166.3 (2019), provides that all registrants, including FCMs, must "diligently supervise" the handling by their partners, officers, employees, and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried or operated by the registrant, and all other activities of its partners, officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to its business as a registrant.

A violation of Regulation 166.3 is demonstrated 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 Murlas Commodities*, CFTC No. 85-29, 1995 WL 523563, at \*9 (Sept. 1, 1995); *see also In re GNP Commodities, Inc.*, CFTC No. 89-1, 1992 WL 201158, at \*18 (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), *aff'd as modified sub nom Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993); *In re Paragon Futures Assoc.*, 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 [a] review [has] occurred and, if it did, whether it was 'diligent.'"); *In re Rosenthal Collins Group, LLC*, CFTC No. 12-18, 2012 WL 1242406, at \*5 (Apr. 12, 2012) (consent order) (determining that an FCM violated Regulation 166.3 when it did not document or follow up on numerous red flags relating to an account that was used in connection with fraud, despite the FCM's policies and procedures requiring its employees to review customer accounts). Further, a violation of Regulation 166.3 is an independent violation for which no underlying violation is necessary. *In re FCStone, LLC*, CFTC No. 15-21, 2015 WL 2066891, at \*3 (May 1, 2015) (consent order) (citing *Murlas Commodities*, 1995 WL 523563).

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. Matrix Trading Grp., Inc.*, No. 00-8880-CIV, 2002 WL 31936799, at \*10-11 (S.D. Fla. Oct. 3, 2002). Additionally, the failure to create and maintain sufficiently detailed “follow-on procedures” can also be a violation of Regulation 166.3. *See In re BGC Financial, LP*, CFTC No. 20-09, 2019 WL 6358480, at \*9 (Nov. 22, 2019) (consent order) (finding a failure to supervise where the FCM had some compliance policies in place, but nevertheless did not have appropriate “follow-on procedures for monitoring improper trade practices”).

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); *see also In re Open E Cry LLC*, CFTC No. 12-24, 2012 WL 10259805, at \*7-8 (Jun. 7, 2012) (consent order) (finding the FCM failed in its supervisory duties for its lack of a diligent supervisory system, which did not detect problematic and highly unusual trading activity); *In re Refco, Inc.*, CFTC No. 99-12, 1999 WL 325332, at \*4 (May 4, 1999) (consent order) (finding FCM violated Regulation 166.3 by, among other things, failing to investigate or inadequately investigating questionable activity after it had been brought to its attention regarding an IB’s trade allocation scheme).

1. Respondent Failed To Follow Diligently Its Trade Moves Policy and Procedures.

Respondent’s trade move policies and procedures stated its employees should obtain further explanation or additional documentation for trade move requests between proprietary and customer accounts when the trade move would cause a loss to a customer. In some instances, Respondent’s employees did not follow this procedure, and “Regulation 166.3 can still be violated if the supervisory system is not diligently administered.” *Rosenthal Collins Group, LLC*, 2012 WL 1242406, at \*5. As a result of its employees’ failures to request additional information for some of Foremost’s trade move requests, which moved profitable trades out of Customer’s accounts and into proprietary accounts, Respondent failed to diligently administer its trade move policies in violation of Regulation 166.3.

2. Respondent’s Account Review Policies and Procedures Were Inadequate.

Respondent’s duty to supervise required it to “establish[], implement[], and execut[e] an adequate supervisory structure and compliance programs.” *Id.*; *see also BGC Financial, LP*, 2019 WL 6358480, at \*9 (“For a registrant to fulfill its duties under Regulation 166.3, it must both design an adequate program of supervision and ensure that the program is followed.”). Respondent’s policies and procedures regarding review and analysis of customer account activity were inadequate. First, Respondent’s “Reviewing and Analyzing Customer Account Activity” policy did not explain what constitutes irregular or concerning account activity, and there was no guidance or procedures regarding how that policy should be administered.

Second, Respondent’s policies or procedures that required review of unusual account activity were inadequate, despite Respondent’s obligations to “develop proper procedures for the detection of wrongdoing.” *Open E Cry LLC*, 2012 WL 10259805, at \*6. Respondent was aware

or should have been aware of several red flags with regard to the proprietary and Customer accounts. Specifically, it knew or should have known that (1) Foremost made trade move requests in a volume that was greater than trade move requests submitted by Respondent's other intermediaries, and that in some cases those trade move requests were detrimental to Customer; and (2) Miller was trading both proprietary accounts and Customer's accounts in the same markets. In spite of this questionable trading activity, Respondent's policies and procedures did not require Respondent to investigate trading in the proprietary and Customer accounts. *See Refco*, 1999 WL 325332, at \*4 (Regulation 166.3 is violated when a respondent's employees "either failed to investigate or inadequately investigated questionable activity after" seeing such "questionable activity"). Had Respondent's supervisory system been adequate, Respondent may have identified suspicious trades that if investigated further could have revealed unauthorized, fictitious trades between the proprietary accounts and Customer's accounts, and that Miller was participating on both sides of these trades in a manner that violated the Act, various Regulations, and CME rules.

#### **IV.**

### **FINDINGS OF VIOLATIONS**

Based on the foregoing, the Commission finds that, during the Relevant Period, Respondent violated Regulation 166.3, 17 C.F.R. § 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;
- 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 Regulation 166.3, 17 C.F.R. § 166.3 (2019);
  2. Orders Respondent to cease and desist from violating Regulation 166.3;
  3. Orders Respondent to pay a civil monetary penalty in the amount of three hundred thousand dollars (\$300,000) (“CMP Obligation”), plus post-judgment interest; and,
  4. Orders Respondent, 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, its successors and assigns, shall cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2019).
- B. Respondent shall pay a civil monetary penalty in the amount of three hundred thousand dollars (\$300,000). If the CMP Obligation is not paid in full within ten days of the date of entry of this Order, then post-judgment interest shall accrue on any unpaid 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).

- C. Respondent shall pay its 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.

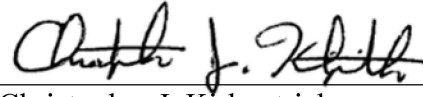
- D. Additionally, Respondent, its successors and assigns, shall comply with the following conditions and undertakings set forth in the Offer:
1. Public Statements: Respondent agrees that neither it nor any of its successors and assigns, agents or employees under its authority or control shall take any 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.
- E. 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.



- F. 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 on this date.**

By the Commission,



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

Dated: September 29, 2020