

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of)	CFTC Docket No. 00-5
)	
DARRYL M. OSLER,)	ORDER MAKING FINDINGS AND
)	IMPOSING REMEDIAL SANCTIONS AS
Respondent.)	TO RESPONDENT DARRYL M. OSLER
)	
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_____)	

I.

On February 18, 2000, the Commodity Futures Trading Commission (“Commission”) issued a Complaint and Notice of Hearing against Darryl M. Osler (“Osler”). The Complaint charges that Osler violated Section 4c(b) of the Commodity Exchange Act, as amended, 7 U.S.C. §6c(b)(1994) (“Act”), and Sections 32.9 and 33.10 of the Commission’s Regulations, 17 C.F.R. §§ 32.9 and 33.10 (1999) (“Regulations”), and Regulation 166.3, 17 C.F.R. § 166.3 (1999).

II.

Osler has submitted an Offer of Settlement (“Offer”) which the Commission has determined to accept. Osler acknowledges service of this Order Making Findings and Imposing Remedial Sanctions (“Order”). Osler, without admitting or denying the findings of fact or conclusions of law herein, consents to the use of the findings contained in this Order in this

proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

III.

The Commission finds the following:

A. SUMMARY

Between January 1996 and May 1999, while registered as an associated person (“AP”) of a registered introducing broker (“IB”), Osler acted as the sales manager of the Delray Beach office of Ceres Trading Group, Inc. (“Ceres”). At various times during that period, Osler instructed the APs he supervised to make fraudulent and deceptive statements concerning, among other things, the likely profitability of heating oil call options and the movement of options prices with respect to underlying futures prices in the course of soliciting customers to trade commodity options. Accordingly, Osler cheated, defrauded and deceived customers in violation of Section 4c(b) of the Act and Regulations 32.9 and 33.10. Osler also failed to diligently exercise his supervisory duties by failing to monitor and supervise diligently the sales practices and solicitations of the APs he managed in violation of Regulation 166.3.

B. SETTLING RESPONDENT

Darryl McKennon Osler, age 39, resides at 924 Jasmine Drive, Delray Beach, Florida 33483. From January 1996 to May 1999, Osler was registered with the Commission as an associated person of Ceres, a registered IB. Between May 1999 and August 2000, he was registered as an associated person of Atlantic Capital Group, Inc. (“Atlantic Capital”), a

¹ Osler does not consent to the use of the Offer or this Order, or the findings consented to in the Offer or this Order, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. Nor does he consent to the use of the Offer or this Order, or the findings consented to in the

registered IB. In August 2000, Atlantic Capital ceased doing business and Osler's AP registration was terminated. Osler is not currently registered with the Commission in any capacity.

C. FACTS

Osler and a business partner owned, managed and operated the Delray Beach branch office of Ceres. Acting as sales manager, Osler developed and supervised misleading sales solicitations and instructed the Delray Beach APs to mislead customers when soliciting them to buy commodity options. Specifically, Osler provided instructions to APs through, among other things, sales scripts containing misrepresentations about the profit potential of trading options, including misrepresentations about the profitability of heating oil call options; deceptive statements that options prices move penny for penny with price changes in the underlying futures contracts; and misrepresentations about the need to trade quickly to achieve a profit.

Between the fall of 1997 and the early winter of 1998, Osler provided APs with a sales script containing a solicitation for heating oil options. Relying on the script, APs told customers that they would make money if they purchased heating oil call options with expiration dates in the winter, because the price of heating oil historically rises in the winter due to the demand for heating. This sales solicitation was false and misleading, because the change in seasons typically offers no advantage to purchasers of heating oil call options. The seasonal increase in demand for heating oil is well known and is already incorporated into the premium price of call options with winter expiration dates.

Offer or this Order, by any other party in any other proceeding. The findings made in this Order are not binding on any other person or entity named as a defendant or respondent in this or any other proceeding.

During the same period, Osler ordered APs to use a script containing a solicitation for corn options that contained a profit example stating that every penny increase in the price of a corn futures contract would result in a penny increase in the price of a corn option. This scripted statement was false and misleading, because if an option is out of the money, the price of the option does not change penny for penny with changes in the price of the underlying futures contract. Rather, the option price tends to move by only a fraction of the change in the futures price, a relationship that is known as "delta." The Osler corn script was used to solicit customers and, as a result, customers of the Delray Beach office were misled about the likelihood of favorable options price changes and about options' profit potential.

Osler also instructed the APs he supervised to convey a sense of urgency that was unwarranted and false, and to push customers to open accounts and make trades regardless of any market expectations. Following Osler's directives, APs urged their customers to take advantage of immediate market conditions by buying call options regardless of the actual market direction. APs routinely told customers that the market was moving while they were speaking, and that Ceres expected a major price move in the subject commodity to take place in the next 60 to 90 days. The statements urging action by the customer to gain a purported market advantage generally bore no factual correspondence to contemporaneous market conditions.

Finally, Osler failed to supervise the APs in the Delray Beach office diligently. In his supervisory capacity, Osler directed APs to call customers, follow the sales scripts and make trade recommendations. Under Ceres' introducing broker agreement with its futures commission merchant, the Iowa Grain Company ("Iowa Grain"), Ceres was obliged to comply with Iowa Grain's policy and procedures manual. The manual required supervisors to make sure that APs complied with NFA's rules prohibiting fraudulent, deceitful or high-pressure sales solicitations.

Osler failed to comply with Iowa Grain's policy and procedures when he provided the APs he supervised with sales scripts containing fraudulent statements and directed that those sales scripts be used when soliciting customers.

D. LEGAL DISCUSSION

1. Osler's Violations of Section 4c(b) of the Act and Regulations 32.9 and 33.10

Section 4c(b) of the Act and Regulations 32.9 and 33.10 together make it unlawful to cheat or defraud, or attempt to cheat or defraud, or to deceive or attempt to deceive, another by any means, whether "directly or indirectly," "in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity options transaction." Fraud occurs when a person or entity intentionally or recklessly makes a false or misleading statement, *In re R&W Technical Services, Ltd.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,740-41 (CFTC March 16, 1999), *aff'd in relevant part, sub nom. R&W Technical Services Ltd. v. CFTC*, 205 F.3d 165 (5th Cir. 2000), or fails to disclose information that is material. *Swickard v. A.G. Edwards & Sons*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,522 at 30,275 (CFTC March 7, 1985) ("half of the truth may obviously amount to a lie if it is understood to be the whole") (quotation omitted).

Osler violated Section 4c(b) and Regulations 32.9 and 33.10 by instructing the APs he supervised to commit fraud. Regulations 32.9 and 33.10 both assign liability to conduct that directly or indirectly defrauds another person. Thus, a violation occurs when a person acts indirectly and instructs another to make false or misleading statements.

The specific conduct giving rise to Osler's liability includes his instructions to APs to make false and misleading statements while soliciting customer to make heating oil trades. *In re*

Stryk, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,808-10 (CFTC Dec. 18, 1997) (leading customers to believe that they could take advantage of historical, seasonal, price changes in heating oil to trade options profitably was misleading); *see generally* *Bishop v. First Investors Group of the Palm Beaches, Inc., et al.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,004, 44,841-42 (CFTC March 26, 1997). Thus, Osler committed fraud when he instructed APs to mislead customers by telling them that heating oil options presented special opportunities for profit because of the seasonal nature of heating oil prices.

When Osler told APs to misrepresent the relationship between the movements of options and futures prices, he also committed fraud. Illustrations or statements representing that options prices move penny for penny with the price of the underlying futures are deceptive because “the movement of the cash price on the underlying futures contract seldom produces a directly proportional increase in the value of the option on the futures contract.” *Commodity Futures Trading Commission v. Commonwealth Financial Group*, 874 F. Supp. 1345, 1352 (S. D. Fla. 1994). Instead of moving one-for-one, options price changes often lag behind futures price changes, meaning that futures prices must change more than Ceres customers were led to believe before their options could yield a profit.

When Osler directed APs to mislead customers about the urgency surrounding the need to trade, customers were misled into thinking that they could profit from immediate market conditions or events. The APs were told to, and did, convey urgency to customers regardless of the contemporaneous market events, activities or conditions. Thus, even though such representations of urgency coincidentally may at times have been appropriate to market conditions in a particular commodity, at other times they were not. As such, they were false, misleading and material.

A statement is material if there is “a substantial likelihood that a reasonable investor would consider it important in making an investment decision.” *CFTC v. AVCO Financial Corp.*, 28 F. Supp.2d 104, 115 (S.D.N.Y. 1998). The statements concerning purported heating oil profitability, movements of options prices, and false urgency were all material because they all misrepresented the profit potential of the trades the APs were soliciting. Misrepresentations about the profitability of an investment go to the heart of an investor’s decision to trade and are material as a matter of law. *Gordon v. Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,016 at 23,981-82 (CFTC April 10, 1980).

Osler acted with scienter. *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,206 at 45,810 (CFTC Dec. 18, 1997). A person acts with scienter if he acts intentionally, or with reckless disregard for his duties under the Act. *Hammond v. Smith Barney Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,617 at 36,659 (CFTC March 1, 1990). Osler was an experienced commodity professional and knew that seasonality offers no advantage when trading heating oil options. When he told APs to engage in sales solicitations involving seasonality representations, he engaged in intentionally or recklessly deceptive behavior. Likewise, Osler knew from his own experience in the options markets that out-of-the-money options do not move penny for penny with the underlying futures contract, again demonstrating that his actions were either intentionally or recklessly deceptive when he told APs to misrepresent this fact to customers. Finally, Osler acted recklessly when he told APs to convey a sense of urgency that was unwarranted and false to customers regardless of what the market was doing.

2. Osler failed to Diligently Supervise APs in Violations of Section 166.3 of the Regulations

Regulation 166.3 mandates that a registrant diligently supervise its partners, officers, employees and agents. When Osler instructed the Delray Beach office APs to engage in the fraudulent actions outlined above, he failed to comply with the policies and procedures set forth in the manual that were designed to deter and detect violations of the Act or Regulations. He therefore violated Regulation 166.3. In addition, by actively encouraging his APs to commit fraud, even in the absence of Iowa Grain's policies and procedures, Osler failed to fulfill his duty of diligent supervision under Regulation 166.3. *Grossfeld, supra* ¶26,921 at 44,468-69 (holding that manager who ordered APs under his supervision to make deceptive statements to customers violated Regulation 166.3).

IV.

OFFER OF SETTLEMENT

Osler has submitted an Offer of Settlement in which he, subject to the foregoing: acknowledges service of the Complaint and receipt of this Order; admits the jurisdiction of the Commission with respect to the matters set forth in the Complaint and Order; waives a hearing, all post-hearing procedures, judicial review by any court, any objection to the staff's participation in the Commission's consideration of the Offer, any claim 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, and all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63, and Part 148 of the Commission Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2000), relating to, or arising from this action.

Osler stipulates that the record basis on which this Order is entered consists solely of the Complaint and the findings consented to in the Offer which are incorporated in this Order, and consents to the Commission's issuance of this Order, which makes findings, as set forth above, and orders that Osler cease and desist from violating the provisions of the Act he has been found to have violated; Osler pay a contingent civil monetary penalty of up to \$50,000 pursuant to a ten year payment plan as provided below; and that Osler comply with his undertakings as set forth in his Offer and incorporated in this Order.

V.

FINDING OF VIOLATIONS

Solely on the basis of Osler's consent, as evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Osler violated Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (1994), and Sections 32.9, 33.10 and 166.3 of the Commission's Regulations, 17 C.F.R. §§ 32.9, 33.10 and 166.3 (2000).

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Osler shall cease and desist from violating Section 4c(b) of the Act, 7 U.S.C. § 6c(b) Commodity Futures Modernization Act of 2000, Appendix ___ of PUB.L. No. 106-554, and Sections 32.9, 33.10 and 166.3 of the Commission's Regulations, 17 C.F.R. §§ 32.9, 33.10 and 166.3 (2000).
2. Osler shall pay a contingent civil monetary penalty in the amount of up to fifty thousand dollars (\$50,000) pursuant to a payment plan. Osler shall make an annual civil monetary penalty payment ("Annual CMP Payment") as directed by a monitor designated by the

Commission (“the Monitor”) on or before July 31 of each calendar year, starting in calendar year 2001 and continuing for ten years (or until the civil monetary penalty is paid in full, if that happens first).² Osler shall make each such Annual CMP Payment by U.S. postal money order, certified check, bank cashier’s check, or bank money order, made payable to the Commodity Futures Trading Commission, and addressed to Dennese Posey, or her successor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington D.C. 20581 under cover of a letter that identifies Osler and the name and docket number of the proceeding. A copy of the cover letter and the form of payment shall be simultaneously transmitted to Director, Division of Enforcement, Commodity Futures Trading Commission, at 1155 21st Street, N.W., Washington, D.C. 20581.

The amount of Osler’s Annual CMP Payment shall consist of a portion of (1) the adjusted gross income (as defined by the Internal Revenue Code) earned or received by Osler during the course of the preceding calendar year, plus (2) all other net cash receipts, net cash entitlements or net proceeds of non-cash assets received by Osler during the course of the preceding calendar year. The Annual CMP Payment will be determined as follows:

Where Adjusted Gross Income plus Net Cash Receipts Total:	Percent of Total to be paid by Osler is:
Up to \$25,000	0%
\$25,000 - \$50,000	20% of the amount above \$25,000
\$50,000- \$100,000	20% of the amount between \$25,000 and \$50,000 plus 30% of the amount between \$50,000 and \$100,000

² Osler’s ten-year CMP period shall run from January 1, 2001 through December 31, 2010. Annual CMP payments for a calendar year shall take place by July 31 of the following year. Therefore, the final Annual CMP payment for the year 2010 will occur on or before July 31, 2011.

Above-\$100,000	20% of the amount between \$25,000 and \$50,000 plus 30% of the amount between \$50,000 and \$100,000 plus 40% of the amount over \$100,000.
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3. In the event that Osler does not make payments as directed in paragraph 2, above, the Commission may bring a proceeding or an action to enforce compliance with this Order and at its option may seek payment of the unpaid Annual CMP payment(s) or immediate payment of the entire amount of the civil monetary penalty required by paragraph 2. The only issue Osler may raise in defense of such enforcement action is whether Osler has made the Annual CMP Payment(s) as directed by the Monitor. Any action or proceeding brought by the Commission compelling payment of the Annual CMP Payments, due and owing pursuant to paragraph 2, above, or any portion thereof, or any acceptance by the Commission of partial payment of the Annual CMP Payments made by Osler, shall not be deemed a waiver of Osler's obligation to make further payments pursuant to the payment plan, or a waiver of the Commission's right to seek to compel payments of the remaining balance of the civil monetary penalty assessed against Osler.

4. The Commission notes that an order requiring immediate payment of the civil monetary penalty against Osler would be appropriate in this case, but does not impose it based upon Osler's financial condition. Osler acknowledges that the Commission's acceptance of the Offer is conditioned upon the accuracy and completeness of the sworn Financial Statement and other evidence Osler has provided regarding his financial condition. Osler consents that if at any time following entry of this Order the Division of Enforcement ("Division") of the Commission obtains information indicating that Osler's representations concerning his financial condition were fraudulent, misleading, inaccurate or incomplete in any material respect at the time they

were made, the Division may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Osler provided accurate and complete financial information at the time such representations were made; (2) require immediate payment of the full amount of the civil monetary penalty required in paragraph 2 above; and (3) seek any additional remedies that the Commission would be authorized to impose in this proceeding if Osler's Offer had not been accepted. No other issues shall be considered in connection with this petition other than whether the financial information provided by Osler was fraudulent, misleading, inaccurate or incomplete in any material respect, and whether any additional remedies should be imposed. Osler may not, by way of defense to any such petition, contest the validity of or, or the findings in, this Order, assert that payment of a civil monetary penalty should not be ordered, or contest the amount of the civil monetary penalty to be paid. If in such proceeding, the Division petitions for, and the Commission orders, payment of less than the full amount of the civil monetary penalty, such petition shall not be deemed a waiver of Osler's obligation to pay the remaining balance of the civil monetary penalty assessed against him, pursuant to the payment plan; and

5. Osler shall comply with the following undertakings as set forth in his Offer:

A. Reporting/Disclosure Requirements to be Reviewed by Monitor. Osler shall provide his sworn financial statement, CFTC Form 177, to the Monitor on June 30 and December 31 of each calendar year, starting on December 31, 2001, and continuing through and including June 30, 2011. The financial statement shall provide:

- i. a true and complete itemization of all of Osler's rights, title and interest in (or claimed in) any asset, wherever, however and by whomever held;

- ii. an itemization, description and explanation of all transfers of assets with a value of \$1,000 or more made by or on behalf of Osler over the preceding six-month interval; and
- iii. a detailed description of the source and amount of all of Osler' income or earnings, however generated.

Osler shall also provide the Monitor with complete copies of his signed federal income tax return, including all schedules and attachments thereto (e.g., IRS Forms W-2 and Forms 1099), as well as any filings he is required to submit to any state tax or revenue authority, on or before June 30 of each calendar year or as soon thereafter as the same are filed. In the event Osler moves his residence at any time, he shall provide written notice of his new address to the Monitor and the Commission within ten (10) calendar days thereof.

B. Cooperation. Osler shall cooperate fully and expeditiously with the Monitor and the Commission in carrying out all aspects of his Annual Payment. He shall cooperate fully with the Monitor and the Commission, including providing sworn testimony, in explaining his financial income and earnings, status of assets, financial statements, asset transfers, tax returns, and shall provide any information concerning himself as may be required by the Commission. Furthermore, Osler shall provide such additional information and documents with respect thereto as may be requested by the Monitor or the Commission.

C. Fraudulent Transfers. Osler shall not transfer or cause others to transfer funds or other property to the custody, possession, or control of any member of the Osler family or any other person for the purpose of concealing such funds or property from the Monitor or the Commission.

D. Registration With The Commission. Osler shall never apply for registration or claim exemption from registration with the Commission in any capacity, and shall never engage

in any activity requiring registration or exemption from registration, or act as a principal, agent or officer of any person registered, exempted from registration or required to be registered with the Commission; this includes, but is not limited to, soliciting, accepting or receiving any funds, revenue, or other property from any person, giving advice for compensation, or soliciting prospective customers, related to the purchase or sale of any commodity futures or options on commodity futures contracts; and

E. Osler shall not, beginning on the date of the Order:

1. directly or indirectly act as a principal, partner, officer, or branch office manager of any entity registered or required to be registered with the Commission; and
2. directly or indirectly act in any supervisory capacity over anyone registered or required to be registered with the Commission.

F. Osler agrees that neither Osler nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegations in the Complaint or findings or conclusions in the Order or creating, or tending to create, the impression that the Complaint or the Order is without a factual basis; provided, however, that nothing in this provision affects Osler's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Osler will undertake all steps necessary to assure that all of his agents and employees under his authority or control understand and comply with this agreement.

Unless otherwise specified, the provisions of this Order shall be effective on this date.

By the Commission.

Jean A. Webb
Secretary to the Commodity
Futures Trading Commission

Date: February 15, 2001