

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

JOHN R. STENBERG,

Respondent

CFTC Docket No. 03-01

**ORDER INSTITUTING PROCEEDINGS
PURSUANT TO SECTIONS 6(c) AND 6(d) OF
THE COMMODITY EXCHANGE ACT AND
MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS AS TO RESPONDENT
JOHN R. STENBERG**

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that John R. Stenberg ("Stenberg") has violated Sections 4q(1)(A) and (B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. §6q(1)(A) and (B), and Sections 4.41(a)(1)-(2) of the Regulations promulgated under the Act (hereafter the "Regulations"), 17 C.F.R. § 4.41(a)(1)-(2) (2001). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether Stenberg engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of these administrative proceedings, Stenberg has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Stenberg acknowledges service of this Order Instituting Proceedings Pursuant to Sections 6(c)

and 6(d) of the Act and Making Findings and Imposing Remedial Sanctions (“Order”). Stenberg, 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 the fall of 1998 and the summer of 2000, Stenberg marketed a commodity trading system software called MicroFlex ("MicroFlex"). In marketing Microflex, Stenberg made false claims to customers and prospective customers that he earned profits while trading commodity futures contracts according to that system. Stenberg made those false claims in oral and written communications with customers and prospective customers, and through promotional materials hyperlinked to his Internet website.

Stenberg’s misrepresentations of material fact concerning the profitability of his trading using the MicroFlex system violated Section 40(1)(A) of the Act and Section 4.41(a)(1) of the Regulations. Stenberg's website solicitations constituted a practice or course business that operated as a fraud or deceit upon prospective customers in violation of Section 40(1)(B) of the Act and Section 4.41(a)(2) of the Regulations.

¹ Stenberg 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 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.

B. SETTLING RESPONDENT

John R. Stenberg, an Idaho resident, is self-employed developing and marketing commodity trading systems. Stenberg was first registered with the Commission as an associated person (“AP”) in 1984 and was registered intermittently as an AP through 1992. Stenberg has not been registered in any capacity with the Commission since December 1992.

C. FACTS

A. Stenberg’s Misrepresentations

Over a period of approximately 21 months between autumn 1998 and summer 2000 (the “relevant period”), Stenberg made various intentional, material misrepresentations of fact to customers and prospective customers about his MicroFlex futures trading system. Stenberg successfully marketed the MicroFlex system to approximately 40 customers, charging fees of \$1,675 to lease, and \$3,500 to purchase, the system. He sold the system together with his MicroFlex trading course. In an effort to bolster the attractiveness of his trading system, Stenberg maintained orally to at least eight customers that he had profited personally from trading according to the MicroFlex system.

Stenberg also made similar written misleading profit claims, including a false promotional letter and faxes to customers or prospective customers. On at least one occasion, he provided a prospective customer with selected daily commodity account statements reflecting only winning trades, although the full record of account statements for the same period showed trades resulting in a net loss for the month.

Contrary to Stenberg's oral and written representations, however, his contemporaneous futures trading, while profitable for very short periods, overall yielded only net losses. During

the relevant period, Stenberg maintained only one futures account in his own name, which was inactive, and exercised trading authority over two other futures accounts. Each of the two futures accounts controlled by Stenberg closed after several months with net trading losses.

Stenberg made similar profit misrepresentations about his personal MicroFlex trading in a MicroFlex promotional document that was hyperlinked to a web page he controlled, www.stenbros.com, during a one-year period between 1999 and 2000. The promotional document, entitled “MicroFlex System, A Web Information Kit,” falsely maintained that Stenberg was actively trading the MicroFlex system and generating profits from the trading that enabled him to purchase and enjoy luxuries such as a 70-foot motor yacht. The promotional material prominently featured photographs of Stenberg on his yacht, where he was purportedly trading at a laptop computer. The material also falsely maintained that students of the MicroFlex system had made “thousands even tens of thousands of dollars on a daily basis” through their MicroFlex trading.

As noted above, Stenberg’s futures trading did not produce net profits during the relevant period, and his claims to the contrary were false. Stenberg admitted that his wife purchased the 70-foot yacht for him with her own funds. He further admitted that his claims about the success of his customers' trading had no adequate basis, as he neither solicited such information from customers nor maintained systematic records of customer trading results.

Stenberg maintains that the hyperlinked promotional materials were created for him by someone else, and that he reviewed and rejected those materials. Nevertheless, the prominent hyperlink to the materially misleading promotional information appeared on Stenberg's website for approximately a year, during which Stenberg continued to sell the MicroFlex system through

his website and otherwise, and thus he engaged in a course of business that operated as a fraud or deceit on customers and prospective customers.

IV.

LEGAL DISCUSSION

A. **Violations of Section 4o(1)(A) of the Act and Regulation 4.41(a)(1)**

Stenberg, while acting as a CTA, violated Section 4o(1)(A) and Regulation 4.41(a)(1) by misrepresenting orally and in writing to customers and prospective customers that he had personally profited by trading commodity futures using his MicroFlex trading system.

To violate Section 4o(1) of the Act, Stenberg must have acted as a commodity trading advisor ("CTA"). Section 1a(6) of the Act requires that to be deemed a CTA, a person must have advised another about the value or advisability of trading in futures contracts, either directly or through publications, writings or electronic media, for compensation or profit. 7 U.S.C. § 1a(6). Stenberg's principal business is selling commodity futures trading systems for compensation. Further, Stenberg gave commodity futures trading advice for compensation or profit through the sale of the MicroFlex commodity trading system, which places him firmly within the statutory definition. Stenberg therefore acted as a CTA, whether or not he was registered, or required to be registered, as such. *See CFTC v. British American Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978) (a firm that "offer[ed] opinions and advice, and issued analyses and reports concerning the value of commodities" to customers, was a CTA under the Act); *Gaudette v. Panos*, 644 F. Supp. 826, 839 (D. Mass. 1986) (defendants who represented their advisory skills to be exemplary, suggested that plaintiffs open a commodity account and then recommended certain futures contracts for investment were CTAs).

Section 4o(1)(A) prohibits both registered and unregistered CTAs from misleading their clients.² *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 (CFTC March 16, 1999), *aff'd in relevant part, R&W Technical Services, Ltd. v. Commodity Futures Trading Commission*, 205 F.3d 165, 170 (5th Cir. 2000) (prohibiting fraud by an unregistered CTA who sold trading systems to the public). Similarly, Commission Regulation 4.41(a)(1) prohibits a CTA, whether registered or unregistered, from advertising in a misleading manner.³ Stenberg violated both Section 4o(1)(A) and Regulation 4.41(a)(1) by misrepresenting orally and in writing to customers that he was earning futures profits by trading his MicroFlex trading system. Stenberg made these misrepresentations notwithstanding the fact that he suffered net trading losses in the active trading accounts he controlled during the relevant period. *See CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994), *citing, inter alia, Reed v. Sage Group*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 23,942 at 34,299 (CFTC Oct. 14, 1987) (misrepresentations regarding a firm or broker's trading record and experience are fraudulent because past success and experience are material facts to reasonable investors). Representations that the purveyors of a trading system use their own trading system are material. *In re R & W Technical Services, Ltd.*, [1998-1999

² Section 4o(1) of the Act provides, in pertinent part:

It shall be unlawful for a [CTA] . . . by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (A) to employ any device, scheme or artifice to defraud any client . . . or prospective client . . . or (B) to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client . . . or prospective client.

³ Commission Regulation 4.41(a) provides, in pertinent part:

No . . . commodity trading advisor, or any principal thereof, may advertise in a manner which (1) [e]mploys any device, scheme or artifice to defraud any . . . client or prospective client; or (2) [i]nvolves any transaction, practice or course of business which operates as a fraud or deceit upon any . . . client or any prospective . . . client.

Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,582 at 47,742 (CFTC Mar. 16, 1999), *aff'd in relevant part, R&W Technical Svcs., Inc. v. CFTC*, 2000 WL 217498 (5th Cir.

Feb. 24, 2000) ("The use of a trading system by its developers is important to reasonable consumers because it reflects a meaningful vote of self-confidence and a sign of authenticity").

Finally, to establish a violation of Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) it must be shown that Stenberg acted with scienter. Stenberg violated Section 4o(1)(A) of the Act and Regulation 4.41(a)(1) with scienter because he knew that he had not traded profitably on a net basis when he told his customers that he was making profits by trading the MicroFlex system.

B. Violations of Section 4o(1)(B) of the Act and Regulation 4.41(a)(2)

Section 4o(1)(B) makes it a violation of the Act for a commodity trading advisor “to engage in any ... practice or course of business which operates as a fraud or deceit upon any client or prospective client....” Similarly, Regulation 4.41(a)(2) prohibits advertising by a commodity trading advisor that operates as a fraud or deceit on clients or prospective clients. Section 4o(1)(B) applies to persons who fit the definition of a commodity trading advisor, whether such persons are required to be registered but are not, are registered, or are exempt from registration. *CFTC ex rel. Kelley v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich. 1985); *see* Section 4.15 of the Commission’s Regulations, 17 CFR §4.15 (2001). As noted above, Stenberg, as the vendor of the MicroFlex trading system, falls within the statutory definition of a commodity trading advisor. Section 1a(6)(A)(i) of the Act.

Unlike Section 4o(1)(A) of the Act, scienter is not required to prove a violation of Section 4o(1)(B), *In re Slusser*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701 at 48,315 (CFTC July 19, 1999), *aff'd in relevant part, Slusser v. CFTC*, 210 F.3d 783 (7th Cir.

2000), or a violation of Section 4.41(a)(2), *Commodity Trend Serv. v. Commodity Futures Trading Commission*, 233 F.3d 981, 993 (7th Cir. 2000). As noted above, Stenberg's misrepresentations about his profitable trading were material in his oral and written statements, and the same kinds of statements were material in the hyperlinked promotional materials as well.

Thus, Stenberg, acting as a commodity trading advisor, violated Section 4o(1)(B) of the Act and Regulation 4.41(a)(2) by engaging in a transaction, practice or course of business which operated as a fraud or deceit upon customers and prospective customers by allowing materially misleading promotional materials to be linked to his website for approximately one year.

V.

OFFER OF SETTLEMENT

Stenberg has submitted an Offer of Settlement in which he, subject to the foregoing: acknowledges service 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. (2002), relating to, or arising from this action.

Stenberg stipulates that the record basis on which this Order is entered consists solely of the Order 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 Stenberg cease and desist from violating the provisions of the Act and Regulations he has been found to have violated; Stenberg pay a civil monetary penalty of \$25,000; and that Stenberg comply with his undertakings as set forth in his Offer and incorporated in this Order.

VI.

FINDING OF VIOLATIONS

Solely on the basis of Stenberg's consent, as evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Stenberg violated Sections 4o(1)(A) and 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6o(1)(B), 6o(1)(B) (2000) and Sections 4.41(a)(1) and (2) of the Commission's Regulations, 17 C.F.R. § 4.41 (a)(1) and (2) (2002).

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Stenberg shall cease and desist from violating Section 4o(1)(A) and 4o(1)(B) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. § 6o(1)(A), 6o(1)(B) (2000), and Sections 4.41(a)(1) and (2) of the Commission's Regulations, 17 C.F.R. § 4.41(a)(1) and (2) (2002).

2. Stenberg shall pay a civil monetary penalty in the amount of twenty-five thousand dollars (\$25,000)⁴; and

3. Stenberg shall comply with the following undertakings as set forth in his Offer:

A. Stenberg shall not misrepresent, expressly or by implication:

1. the performance, profits or results achieved by, or the results that can be achieved by, users, including himself, of any commodity futures or options trading system or advisory service; and
2. the risks associated with trading pursuant to any commodity futures or options trading system or advisory service.

B. Stenberg shall not present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest unless such performance is accompanied by the following statement, as required by 17 C.F.R. § 4.41(b):

Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown.

In doing so, Stenberg shall clearly identify those hypothetical or simulated performance results which were based, in whole or in part, on hypothetical trading results.

⁴ Stenberg shall pay the total amount within ten days of the date of the Order by electronic funds transfer, or 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 sent to Dennese Posey, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of letter that display Stenberg's name and the docket number of the proceeding; Stenberg shall simultaneously transmit a copies of his cover letter and the form of payment to Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. 9(a)(2), if Stenberg fails to make payment of his penalty within 15 days of the due date, he shall be automatically prohibited from trading on or subject to the rules of any registered entity until he shows to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of payment has been made.

C. Stenberg shall not make any representation of financial benefits associated with any commodity futures or options trading system or advisory service without first disclosing, prominently and conspicuously, that futures trading involves high risks with the potential for substantial losses.

D. Stenberg not shall represent, expressly or by implication:

1. the performance, profits or results achieved by, or the results that can be achieved by, users, including himself, of any commodity futures or options trading system or advisory service;
2. the risks associated with trading using any commodity futures or options trading system or advisory service;
3. that the experience represented by any user, testimonial or endorsement of the commodity futures or options trading system or advisory service represents the typical or ordinary experience of members of the public who use the system or advisory service;

unless: (i) Stenberg possesses and relies upon a reasonable basis substantiating the representation at the time it is made; and (ii) for two (2) years after the last date of the dissemination of any such representation, Stenberg maintains all advertisements and promotional materials containing such representation and all materials that were relied upon or that otherwise substantiated such representation at the time it was made, and makes such materials immediately available to the Division of Enforcement for inspection and copying upon request.

E. Public Statements. By neither admitting nor denying the findings of fact or conclusions of law, Stenberg agrees that neither Stenberg 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 findings or conclusions in the Order, or creating, or tending to create, the impression that the Order is without a factual basis; provided, however, that nothing in this provision shall affect Stenberg's (i) testimonial obligations, or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Stenberg will undertake all steps necessary to assure that all of his agents and employees under his authority and 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: November 7, 2002