

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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3:22 pm, Oct 08, 2014

In the Matter of:

Friedberg Mercantile Group, Inc.,

Respondent.

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) **CFTC Docket No. 15-01**
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**ORDER INSTITUTING PROCEEDINGS PURSUANT TO
SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, AS AMENDED,
MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission (“Commission”) has reason to believe that on February 5, 2013, Friedberg Mercantile Group, Inc. (“Friedberg” or “Respondent”) violated Commission Regulations (“Regulation”) 30.7(a), 30.7(e) and 1.12 (h), 17 C.F.R. §30.7(a), 30.7(e) and 1.12(h) (2013). 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.

II.

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

¹ Respondent consents to the entry of this Order and to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party; provided, however, that Respondent does not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than in a proceeding in bankruptcy or to enforce the terms of this Order. Nor does Respondent consent to the use of the Offer or this Order, or the findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

III.

The Commission finds the following:

A. SUMMARY

Friedberg's handling of a customer request to transfer \$300,000 of segregated funds to secured funds caused Friedberg to be under its secured amount requirement by approximately \$240,000 on February 5, 2013, and its subsequent movement of funds to its secured account in connection with the same customer request resulted in Friedberg improperly commingling customer funds with its proprietary funds on February 6, 2013. Friedberg also failed to timely notify the CFTC of the February 5, 2013 secured amount deficiency as required.

B. RESPONDENT(S)

Friedberg Mercantile Group, Inc. ("Friedberg") is a registered futures commission merchant ("FCM") located in Toronto, Canada. Friedberg is a subsidiary of Canadian broker-dealer Friedberg Mercantile Group, Ltd. also located in Toronto. The company maintains a futures business to accommodate its securities customers who wish to trade futures. As of February 2013, Friedberg had 17 active customers and is one of the smallest FCMs as measured by customer assets required in segregation (approximately \$2.5 million).

C. FACTS

On February 5, 2013, a Friedberg customer instructed Friedberg to transfer \$300,000 from the customer segregated account to the customer secured amount 30.7 account to cover a margin deficit. Instead of transferring funds from the firm's segregated funds account to its secured account, Friedberg directed its bank to transfer \$300,000 from its customer secured bank account to its customer secured account at its clearing firm. However, there were insufficient funds in the secured account to cover the transfer so the bank refused to transfer the funds.

As a result, Friedberg was under its secured requirement of \$693,454 by approximately \$240,000 as of close of business on February 5, 2013. When Friedberg originally filed its segregated and secured funds calculations for February 5th it stated that it had \$580,457 in excess funds in its segregated account and \$56,033 in excess funds in its secured account. The firm then backed out the \$300,000 transfer reflected in its equity system. This resulted in an overstatement of segregated funds required and an understatement of secured funds required. Had the firm not made this adjustment, its segregated and secured funds calculations would have revealed that the firm was under its secured funds requirement as of close of business on February 5, 2013.

On February 6, 2013, Friedberg attempted the transfer again, but this time from the firm's segregated funds account to its house bank account and then from its house bank account to its customer secured account at its clearing firm. The transfer was accomplished, but the customer segregated funds were commingled with the firm's proprietary funds in its house bank account.

In May 2013, the National Futures Association ("NFA") conducted a segregated and secured funds review of Friedberg. During this review, NFA examined Friedberg's February 5,

2013 secured amount 30.7 computation, noting the reversing adjustment that reduced the firm's requirement. On October 10, 2013, NFA informed Friedberg that the reversing adjustment was improper since the original transfer was done at the instruction of Friedberg's customer. Consequently, on October 14, 2013, Friedberg filed an amended secured amount 30.7 statement with the CFTC reflecting a deficiency of approximately \$240,000.

Friedberg stated that it transferred the funds through its house account because staff incorrectly believed that the NFA advised them that the CFTC's new Dodd Frank rules prohibited FCMs from transferring customer funds directly from a segregated account to a secured account. The firm has ceased that practice. Additionally, in October 2013, the firm implemented new procedures – now requiring its in-house accountant to check for sufficient funds at the relevant bank using intra-day bank balances prior to releasing any wires and sign-off on wire documentation recording the balance shown by the relevant bank intra-day. This procedure is included in Friedberg's revised policies and procedures manual, which was completed on December 6, 2013.

IV.

LEGAL DISCUSSION

A. Friedberg Failed to Maintain Sufficient Secured Funds and Commingled them with its Proprietary Funds

Regulation 30.7(a), 17 C.F.R. § 30.7(a) (2013), provides that an FCM “must maintain in a separate account or accounts, money, securities and property in an amount at least sufficient to cover or satisfy all of its current obligations to foreign futures or foreign options customers denominated as the foreign futures or foreign options secured amount. Such money, securities and property may not be commingled with the money, securities or property of such futures commission merchant, with any proprietary account of such futures commission merchant, or used to secure or guarantee the obligations of, or extend credit to, such futures commission merchant.”

Additionally, Regulation 30.7(e)(2), 17 C.F.R. § 30.7(e)(2)(2013), prohibits FCMs from commingling customer funds with their own.

On February 5, 2013, Friedberg failed to maintain sufficient funds in its secured amount account to satisfy all of its obligations to foreign futures customers and on February 6, 2013 commingled secured funds with its proprietary funds in Friedberg's house account, in violation of Regulations 30.7(a) and 30.7(e)(2).

B. Friedberg Did Not Provide Timely Notice to the Commission of Secured Fund Deficiencies in Violation of Regulation 1.12

Regulation 1.12(h), 17 C.F.R. § 1.12(h) (2012), provides in part that whenever an FCM “knows or should know that the total amount of its funds on deposit in segregated accounts on behalf of customers, or that the total amount set aside on behalf of customers trading on non-United States markets, is less than the total amount of such funds required by the Act and the

Commission's rules to be on deposit in segregated or secured amount accounts on behalf of such customers," it must "report such deficiency immediately by telephone notice, confirmed immediately in writing by facsimile notice" to the Commission and DSRO. *See also In re Szach*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,451 at 51,462 (CFTC Jan. 8, 2001) ("[P]ursuant to Commission Regulation 1.12(h), whenever an FCM is or should be aware of any instance of under-segregation, it is required to immediately report that deficiency to the Commission.").

Friedberg knew or should have known that the amount of secured funds on deposit on February 5, 2013 was less than the amount required. However, Friedberg did not provide notice to the Commission of the deficiency until October 14, 2013. Accordingly, Friedberg violated Regulation 1.12(h).

FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, on February 5, 2013, Friedberg violated Regulations 30.7(a), 30.7 (e)(2) and 1.12 (h), 17 C.F.R. §30.7(a), 30.7(e)(2) and 1.12(h).

V.

OFFER OF SETTLEMENT

Respondent has submitted the Offer in which it, without admitting or denying the findings and conclusions herein:

- A. Acknowledges receipt of 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 (2006) and 28 U.S.C. § 2412 (2006), and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Commission's

Regulations, 17 C.F.R. §§ 148.1-30 (2013), 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, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204-205 (2007), 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;
- D. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondents have 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 30.7(a), 30.7(e) and 1.12 (h), 17 C.F.R. § 30.7(a), 30.7(e)(2) and 1.12(h).
 2. orders Respondent to cease and desist from violating Regulation 30.7(a), 30.7(e)(2) and 1.12 (h), 17 C.F.R. § 30.7(a), 30.7(e)(2) and 1.12(h); and
 3. orders Respondent to pay a civil monetary penalty in the amount of seventy thousand dollars (\$70,000) plus post-judgment interest.

Upon consideration, the Commission has determined to accept the Offer.

VII.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Respondent shall cease and desist from violating 30.7(a), 30.7(e)(2) and 1.12 (h), 17 C.F.R. §30.7(a), 30.7(e)(2) and 1.12(h) (2013).
- B. Respondent shall pay a civil monetary penalty in the amount of seventy thousand dollars (\$70,000) within ten (10) days of the date of entry of this Order (the "CMP Obligation"). 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 (2006). Respondent shall pay the CMP Obligation 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:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Accounts Receivables --- AMZ 340
E-mail Box: 9-AMC-AMZ-AR-CFTC
DOT/FAA/MMAC
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169
Telephone: (405) 954-7262

If payment is to be made by electronic funds transfer, Respondent shall contact Nikki Gibson 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 paying Respondent and the name and docket number of this proceeding. The paying 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.

- C. Respondent and 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 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 with the Commission: Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, and any other governmental agency in this action, and in any investigation, civil litigation, or administrative matter related to the subject matter of this action or any current or future Commission investigation related thereto.
 4. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission of 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.

The provisions of this Order shall be effective as of this date.

By the Commission.



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

Dated: October 8, 2014