

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

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11:06 am, Nov 21, 2012

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In the Matter of: )  
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Cantor Fitzgerald & Co, Inc. )  
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Respondent. )  
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CFTC Docket No. 13-06  
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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 Cantor Fitzgerald & Co. (“Cantor”) or (“Respondent”), Inc., a registered futures commission merchant (“FCM”), violated Section 4d(a)(2) of the Commodity Exchange Act (the “Act”), 7 U.S.C. § 6d(a)(2) (2009), and Commission Regulations (“Regulations”) 1.12(h), 1.20, 1.23, 1.49 and 166.3, 17 C.F.R. §§ 1.12(h), 1.20, 1.23, 1.49 and 166.3 (2012). 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 acknowledge service of this Order.<sup>1</sup>

<sup>1</sup> 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

### III.

The Commission finds the following:

#### A. SUMMARY

Cantor, as a registered FCM, is required pursuant to the Act and Regulations to segregate customer funds from its own funds and on a daily basis compute the amount of customer funds required to be segregated. On three consecutive days, January 24 to January 26, 2012 (the “relevant period”), Cantor failed to maintain adequate segregated customer funds due to an inadvertent transfer of \$3,000,000 from its customer segregated funds account instead of from Cantor’s house account, as intended. On each of the three days, Cantor made the daily required computation to determine the amount of customer funds it needed to be on deposit to meet its segregation requirements. However, Cantor failed to realize it was under-segregated until January 27, 2012. At that point, Cantor corrected the under-segregation by transferring the \$3 million back into the customer segregated funds account and came into compliance with its segregation requirements.

Cantor staff failed to notify the appropriate senior management of the under-segregation as required by Cantor’s internal procedures. Cantor also failed to provide immediate notification to the Commission or Cantor’s Designated Self-Regulatory Organization (“DSRO”), the Chicago Mercantile Exchange (“CME”), as required by Regulations. Cantor’s senior management did not learn of the segregation deficiencies until the CME discovered it during a routine audit. At that point, on March 13, 2012, Cantor provided the required notification of the under-segregation to the Commission.

Cantor failed to diligently supervise its handling of customer funds and other business activities by not having an adequate system of internal controls and procedures to ensure that daily segregation calculations were reviewed and deficiencies noted, appropriately escalated, and addressed. Cantor also lacked sufficient procedures and training concerning the regulatory requirements relating to segregation of customer funds, including the requirement of notification to the Commission and DSRO, and failed to have adequate procedures and controls relating to the transfer of funds to and from customer segregated funds accounts.

#### RESPONDENT

Cantor Fitzgerald & Co., Inc. maintains its principal offices in New York, NY 10022. Cantor is a financial services firm and investment bank and has been registered as an FCM with the Commission since June 30, 1982. Among other business activities, Cantor executes and clears customer transactions in commodity futures and commodity options in the United States and worldwide.

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findings or conclusions in this Order consented to in the Offer, by any other party in any other proceeding.

## **B. FACTS**

During the relevant period, as required by the Act and Regulations, Cantor maintained a segregated account in which it kept customer funds, and a separate house account in which it kept its own funds. On a daily basis, Cantor's operations department calculated, via an electronic spreadsheet, the amount of customer funds Cantor needed to have on deposit and segregated to meet its daily segregation requirements.

On January 24, 2012, Cantor improperly transferred \$3,000,000 of customer funds from the Cantor customer segregated funds account to a Cantor house account, which caused Cantor to become under-segregated in its customer segregated funds account.<sup>2</sup> On January 25 and 26, 2012, Cantor's operations department calculated its customer funds segregation requirements but failed to review the calculations and therefore did not realize that it did not have sufficient funds in the customer segregated funds account.

Pursuant to Cantor's internal procedures, each day during the relevant period, the electronic spreadsheet containing the daily computation reflecting the under-segregation was distributed internally via email to several persons within Cantor. However, Cantor employees responsible for notifying the Commission and the CME, its DSRO, of the under-segregation failed to review the spreadsheet and, therefore, were unaware that the customer account was under-segregated for three consecutive days.

On January 27, 2012, the Cantor operations department employee who was primarily responsible for the calculation of Cantor's daily segregation requirements, and ensuring adequate funds were on deposit in the customer segregated funds account, returned to work after being out unexpectedly. The Cantor operations department immediately corrected the segregation deficiency and came back into compliance with its segregation requirements by transferring the \$3 million back into the customer segregated funds account.

However, while certain operational supervisors within Cantor were notified of the segregation deficiencies, senior management of Cantor was not explicitly made aware of the under-segregation. While Cantor's internal procedures required that an "escalation email" be sent to certain identified key personnel and other members of the operation and finance departments to alert them of the deficit, those key personnel went unaware.

Cantor also failed to notify the Commission, or the CME, as required by the appropriate Regulations, until March 13, 2012. Several key Cantor employees were unaware of the requirement that the CFTC and its DSRO be immediately notified of any segregation deficiency. The Cantor senior management, who eventually provided notice to the CFTC of the under-

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<sup>2</sup> The transfer was supposed to sweep funds from Cantor house accounts, but because Cantor used an incorrect wire template, which included the account number for Cantor's customer segregated accounts, the funds were transferred out of the customer segregated account, thus causing the segregation deficiency.

segregation, learned of the under-segregation after the CME conducted a routine audit and identified the under-segregation.

#### IV.

### LEGAL DISCUSSION

#### *Under-segregation and Commingling of customer funds*

Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a) (2009), provides that it shall be unlawful for any person to engage as a FCM unless such person shall

treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant . . .

Regulation 1.20, 17 C.F.R. § 1.20 (2012), requires that all customer funds be separately accounted for, properly segregated and treated as belonging to such customers, and not commingled with the funds of any other person.

Regulation 1.23, 17 C.F.R. § 1.23 (2012), prohibits a FCM from drawing upon customer segregated funds beyond its actual interest therein.

Regulation 1.49(e)(i), 17 C.F.R. § 1.49(e)(i) (2012), requires that “[e]ach [FCM] . . . must, at the close of each business day, hold in segregated accounts on behalf of commodity or option customers [s]ufficient United States dollars held, in the United States, to meet all United States dollar obligations...”

By transferring \$3,000,000.00 from its customer segregated funds account to its house account, Cantor drew upon customer segregated funds beyond its actual interest therein, commingled customer funds with the funds of Cantor, and failed to hold in the customer segregated funds accounts sufficient funds to meet its obligations to its commodity or options customers. In so doing, Cantor violated Section 4d(a)(2) of the Act and Regulations 1.20, 1.23 and 1.49(e)(i).

#### *Untimely Notification of the Commission of Under-segregation*

Regulation 1.12(h), 17 C.F.R. § 1.12(h) (2012), requires, in relevant part, that:

[w]henver a [FCM] knows or should know that the total amount of its funds on deposit in segregated accounts on behalf of customers . . . 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, the [FCM] must report such

deficiency immediately by telephone notice, confirmed immediately in writing by facsimile notice, to the [FCM's] designated self-regulatory organization and the principal office of the Commission in Washington, DC, to the attention of the Director and the Chief Accountant of the [Division of Swap Dealer and Intermediary Oversight].

Because Cantor knew or should have known of its under-segregation deficiency in its customer segregated funds account during the relevant period, but did not report this deficiency until March 13, 2012, Cantor violated Regulation 1.12(h).

### ***Failure to Supervise***

Regulation 166.3, 17 C.F.R. § 166.3 (2012), requires that every Commission registrant (except associated persons who have no supervisory duties) diligently supervise the handling by its partners, employees and agents of all activities relating to its business as a registrant. Regulation 166.3 imposes on registrants an affirmative duty to supervise their employees and agents diligently by establishing, implementing, and executing an adequate supervisory structure and compliance programs. In order to prove a violation of Regulation 166.3, it must be demonstrated that either: (1) the registrant's supervisory system was generally inadequate; or (2) the registrant failed to perform its supervisory duties diligently. *In re Murlas Commodities*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485 at 43,161 (CFTC Sept. 1, 1995); *In re Paragon Futures Assoc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992); *Bunch v. First Commodity Corp. of Boston*, [1990-1992 Transfer binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352 at 39,168-69 (CFTC Aug. 5, 1992).

Under Regulation 166.3, a FCM has a "duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents." *Samson Refining Co. v. Drexel Burnham Lambert, Inc.* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,596 at 36,566 (CFTC Feb. 16, 1990) (quoting *Lobb v. J.T. McKerr & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,444 (CFTC Dec. 14, 1989)). 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. *Paragon Futures*, ¶ 25,266 at 38,850.

Cantor failed to have an adequate system of internal controls and procedures to ensure that daily segregation calculations were reviewed and deficiencies noted, appropriately escalated, and addressed; failed to follow its existing internal procedures concerning notification of senior management of segregation deficiencies; failed to have adequate procedures and training concerning the regulatory requirements relating to segregation of customer funds, including the requirement of notification to the Commission and Cantor's DSRO; and failed to have adequate procedures and controls relating to the transfer of funds to and from customer segregated funds accounts. By such acts, Cantor violated Regulation 166.3.

## V.

### FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that Cantor violated Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a)(2) (2009), and Regulations 1.12(h), 1.20, 1.23, 1.49 and 166.3, 17 C.F.R. §§ 1.12(h), 1.20, 1.23, 1.49 and 166.3 (2012).

## VI.

### 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 (2011), 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 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 Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a)(2) (2009), and Regulations 1.12(h), 1.20, 1.23, 1.49(e)(i) and 166.3, 17 C.F.R. §§ 1.12(h), 1.20, 1.23, 1.49(e)(i) and 166.3 (2012);
  2. orders Respondent to cease and desist from Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a)(2) (2009), and Regulations 1.12(h), 1.20, 1.23, 1.49(e)(i) and 166.3, 17 C.F.R. §§ 1.12(h), 1.20, 1.21, 1.49(e)(i) and 166.3 (2012);
  3. orders Respondent to pay a civil monetary penalty in the amount of \$700,000, plus post-judgment interest; and
  4. orders Respondent to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VII of this Order.

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 Section 4d(a)(2) of the Act, 7 U.S.C. § 6d(a)(2) (2009), and Regulations 1.12(h), 1.20, 1.23, 1.49(e)(i) and 166.3, 17 C.F.R. §§ 1.12(h), 1.20, 1.23, 1.49(e)(i) and 166.3 (2012).
- B. Respondent shall pay a civil monetary penalty in the amount of \$700,000.00 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) 954-5644

If payment is to be made by electronic funds transfer, Respondent shall contact Linda Zurhorst 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.
2. Cantor shall take the necessary steps to monitor compliance with and enforce its internal controls and procedures concerning customer segregation and secured computation requirements, including but not limited to those relating to segregation and secured computation preparation and review, identification, review and escalation of segregation or capitalization deficiencies, cash and asset distributions or transfers from segregated and secured accounts, and compliance with the Act and CFTC regulations and applicable regulations of its DSRO and the National Futures Association; such steps will include but not be limited to conducting periodic reviews on at least a bi-annual basis to ensure compliance with its internal controls and procedures and to evaluate the adequacy of its internal controls and procedures with any identified inadequacies being documented and corrected;
3. To ensure that the daily segregation calculation is calculated, reviewed and any segregation deficiencies identified and corrected, the daily segregation calculation will be subject to the following review and authorizations: the Cantor staff responsible for making the daily segregation calculation will represent that the calculation has been made and reviewed for any segregation deficiencies by



signing it and forwarding it for review by a Cantor operations department manager, who will review and sign the daily segregation calculation. The Cantor operations department manager responsible for the review will forward the daily segregation calculation to Cantor's Financial and Operations Principal ("FINOP"), who will review and sign the daily segregation calculation representing the final authorization and finalization of the daily segregation calculation. In the absence of the FINOP, the segregation calculation will be signed by another senior member of the finance management team, up to and including the Chief Financial Officer ("CFO") of Cantor.

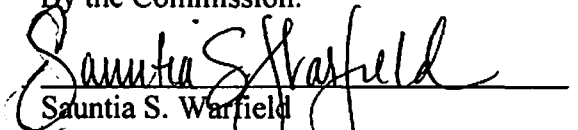
4. Cantor will maintain a list of individuals authorized to perform, review and/or authorize the daily segregation calculation to ensure that Cantor's segregation responsibilities will be met. Cantor will maintain a list of the persons responsible for immediately notifying the Commission and Cantor's DSRO of any segregation deficiencies, in accordance with the requirements of the Act and Commission Regulations.
  5. In the event of a segregation deficiency, Cantor's operations department will send an email notifying senior management of the segregation deficiency to a pre-defined and approved distribution list of Cantor managers and employees, including but not limited to the heads of Cantor's operations department, Chief Compliance Officer, FINOP, and CFO, with the subject line marked as "URGENT – SEG DEFICIT." The escalation email will be followed up with a phone call to members of senior management, including the FINOP, and to the Chief Compliance Officer, or another senior person in Compliance at Cantor. Cantor operations department will also notify by telephone the senior manager(s) responsible for immediately notifying the Commission and Cantor's DSRO of any segregation deficiencies and will document that such telephonic notification was made.
  6. Cantor shall establish an annual training program of all relevant personnel, including all Futures Operations, FINOP, and Cash Management personnel, regarding the customer segregation, net capital computation and notification requirements of the Act and Commission Regulations, as well as Cantor's related internal procedures and controls, with immediate training being provided for any new or current employees at the time they are given responsibilities related to customer segregation, net capital computation or notification requirements of the Act and Commission Regulations.
  7. Cantor will institute, review and, modify procedures relating to the transfers of funds to and from customer segregated funds accounts to ensure that transfers occur properly.
- D. Partial Satisfaction: Respondent understands and agrees that any acceptance by the Commission or the Monitor 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.

- E. **Change of Address/Phone:** Until such time as Cantor satisfies in full its CMP Obligation as set forth in this Consent Order, Cantor shall provide written notice to the Commission by certified mail of any change to his telephone number and mailing address within ten (10) calendar days of the change.

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

By the Commission.

  
Sauntia S. Warfield  
Assistant Secretary of the Commission  
Commodity Futures Trading Commission

Dated: November 21, 2012