

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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		CFTC Docket No. - 12-01
		ORDER INSTITUTING
In the Matter of:		PROCEEDINGS PURSUANT TO
Forex Capital Markets LLC,		SECTIONS 6(c) AND 6(d)
		OF THE COMMODITY EXCHANGE
		ACT, AS AMENDED, MAKING
		FINDINGS AND IMPOSING
Respondent.		REMEDIAL SANCTIONS

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Forex Capital Markets LLC ("FXCM"), a registered retail foreign exchange dealer ("RFED") and futures commission merchant ("FCM"), has violated Commission Regulation ("Regulation") 166.3, 17 C.F.R. § 166.3 (2011); Section 4g of the Commodity Exchange Act ("Act"), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 ("CRA")), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. § 6g; and Regulation 1.35, 17 C.F.R § 1.35 (2011). The Commission, therefore, deems it appropriate and in the public interest that a public administrative proceeding be, and hereby is, instituted to determine whether FXCM 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, FXCM has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Without admitting or denying any of the findings and conclusions herein, FXCM 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").<sup>1</sup>

<sup>1</sup> FXCM, without admitting or denying the findings and conclusions in this Order, consents 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 FXCM does not consent to the use of the Offer, or the findings in this Order consented to in the Offer, as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. In addition, FXCM does not 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.

### III.

The Commission finds the following:

#### A. Summary

From at least June 18, 2008 until December 17, 2010 (“relevant period”), FXCM failed to supervise diligently its officers’, employees’, and agents’ handling of customer accounts that traded on FXCM’s trading platforms with respect to slippage (*i.e.*, the change in price between order placement and execution) on market orders and margin liquidation orders, in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2011). As a result, on numerous occasions, FXCM’s customers did not receive the benefit of positive price slippage (*i.e.*, slippage in a customer’s favor); however, they did suffer from negative slippage (*i.e.*, slippage not in a customer’s favor) on market orders and margin liquidation orders. Due, in part, to the large volume of transactions on FXCM’s trading platforms, this conduct deprived more than 57,000 FXCM customers of (and, consequently, benefited FXCM by) approximately \$8,261,937. Further, during the Commission’s investigation of FXCM’s execution policies and practices, FXCM failed to produce certain books and records promptly, in violation of Section 4g of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6g, and Regulation 1.35, 17 C.F.R § 1.35 (2011).

#### B. Respondent

Forex Capital Markets LLC, headquartered in New York New York, is and was, at all times relevant hereto, a limited liability company that offered trading platforms for foreign currency contracts (“forex”). FXCM has been registered with the Commission as an FCM since June 2001 and as an RFED since October 2010.

#### C. Facts

During at least the relevant period, FXCM failed to supervise diligently its officers’, employees’, and agents’ handling of customer accounts that traded on FXCM’s trading platforms with respect to slippage on market orders and margin liquidation orders. During the relevant period, FXCM’s business model purportedly provided straight-through-processing of customer forex orders. As such, according to FXCM, for nearly all customer orders, FXCM’s trading platforms were designed to automatically offset customer orders with FXCM’s own counterparties to, among other things, mitigate FXCM’s currency and counterparty risk exposure and to eliminate the appearance of a conflict of interest between FXCM and its customers. Practically, this meant that FXCM sought to act as a middle man between the customer and FXCM’s liquidity providers.

The general mechanics of how market orders<sup>2</sup> and slippage on market orders worked during the relevant period on FXCM's trading platforms are as follows:

- i. FXCM received bid/ask prices from a number of liquidity providers and displayed the best bid/ask prices (plus a markup for FXCM) on the trading platforms to customers.
- ii. Customers decided to place a market order with the intent of receiving the displayed price, with the possibility that price slippage might occur during the execution of the order.
- iii. When FXCM received a customer's order, it made an offsetting trade with one of its liquidity providers.
- iv. If the price received by FXCM in its offsetting trade—
  - equaled the bid/ask price originally requested by the customer, then the customer received the order at the requested price;
  - was worse than the bid/ask price at the time that FXCM received the order from the customer—*i.e.*, the price slipped negatively against the customer while the trade was executed—then the customer received the order at the worse price; or
  - was better than the bid/ask price at the time that FXCM received the order from the customer—*i.e.*, the price slipped positively for the customer while the trade was executed—then the customer still received the order at the original requested price and FXCM kept the difference between the original requested price and the better price of its offsetting trade.

Thus, for market orders during the relevant period, FXCM's customers were denied the benefit of any positive price slippage, but forced to bear the consequences of any negative slippage.<sup>3</sup>

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<sup>2</sup> FXCM calls its market orders "At Best" orders. "At Best" orders represent the vast majority of orders executed on FXCM's proprietary trading platforms.

<sup>3</sup> FXCM's unequal slippage practices similarly affected the margin liquidation orders of FXCM's customers. FXCM's trading platforms automatically generated a margin liquidation order in a customer's account and an offsetting order with one of FXCM's liquidity providers when the customer's security deposit fell below the required level. If the fill price received from the liquidity provider for the offsetting trade was better than the price generated by FXCM's trading platforms, FXCM did not give the customer the better price and instead filled the customer's order at the price generated by FXCM's trading platforms at the time the margin liquidation order was generated. FXCM retained the difference between the better price received from its liquidity provider and the price generated by its trading platforms. On the other hand, *if the price*

FXCM had officers, employees, and agents that were tasked with establishing, monitoring, and maintaining its trading platforms. FXCM's officers, employees, and agents, however, failed to establish a system that prevented asymmetrical slippage on market orders and market liquidation orders. In addition, FXCM's officers, employees, and agents failed to detect the unequal treatment of price slippage that occurred thousands of times a day across thousands of customer accounts for more than two years. Had FXCM diligently supervised its officers, employees, and agents regarding these aspects of its business, FXCM would have discovered these problems with its trade integrity and had the opportunity to correct them before more than 57,000 of its customers were deprived of approximately \$8,261,937 in positive slippage (which amount FXCM retained) from June 18, 2008 until December 17, 2010.

Lastly, on February 24, 2011, the Commission's Division of Enforcement ("Division") sent FXCM a request for records pursuant to Section 4g of the Act. In response to the request, FXCM failed to produce certain requested records promptly. FXCM's failure to comply promptly necessitated the issuance of a subpoena to FXCM, which, as previously mentioned, was and is a registrant.

#### **D. Legal Discussion**

##### **1. FXCM Failed to Supervise Diligently Its Officers, Employees, and Agents Responsible for Monitoring and Maintaining Its Trading Platforms.**

Regulation 166.3, 17 C.F.R. § 166.3 (2011), requires,

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced 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 Commission registrant.

A violation under Regulation 166.3, 17 C.F.R. § 166.3 (2011), is an independent violation for which no underlying violation is necessary. *See In re Collins*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194 at 45,744 (CFTC Dec. 10, 1997).

A violation of Regulation 166.3, 17 C.F.R. § 166.3 (2011), 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*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485 at 43,161 (CFTC Sept. 1, 1995); *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,219 (CFTC 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); *In re Paragon Futures Assoc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep.

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received for the offsetting trade was worse than the price generated by FXCM's trading platforms, FXCM gave the customer the worse price.

(CCH) ¶ 25,266 at 38,850 (CFTC Apr. 1, 1992) (“The 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”); *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) (noting that, under Regulation 166.3, an FCM has a “duty to develop procedures for the detection and deterrence of possible wrongdoing by its agents”) (internal quotation omitted). 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. *In re Paragon Futures Assoc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,850.

During the relevant period, with respect to market orders and margin liquidation orders executed on its trading platforms, FXCM both employed an inadequate supervisory system and failed to perform its supervisory duties diligently, in violation of Regulation 166.3, 17 C.F.R. § 166.3 (2011). Specifically, FXCM was required to ensure the integrity of all trades on its trading platforms.<sup>4</sup> As such, FXCM had officers, employees, and agents that were responsible for establishing its trading platforms. These individuals, however, failed to establish a system that prevented asymmetrical slippage on market orders and margin liquidation orders. Additionally, FXCM’s officers, employees, and agents charged with monitoring and maintaining its trading platforms failed to detect the unequal treatment of price slippage that occurred constantly for more than two years. Because trade execution is such a critical function, FXCM should have monitored more closely its officers, employees, and agents responsible for establishing an adequate system to ensure trade integrity and for policing its platforms to detect inequities with its execution practices. Had FXCM diligently supervised its officers, employees, and agents regarding these aspects of its business, FXCM would have discovered and had the opportunity to address these trade integrity problems before so many of its customers were harmed so significantly.

## 2. FXCM Failed to Produce Records.

Section 4g(a) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6g(a), of the Act requires FCMs, among other registrants, to “make such reports as are required by the Commission regarding the . . . transactions and positions of the customer thereof . . .; . . . keep books and records pertaining to such transactions and positions in such form and manner and for such period as may be required by the Commission; and . . . keep such books and records open to inspection by any representative of the Commission . . .” Section 4g(b)-(d) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6g(b)-(d), further elaborates on the types, as well as the form of records, that registrants must maintain. Additionally, FCMs, among other registrants, must keep and furnish certain records to the Commission upon request. Regulation

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<sup>4</sup> National Futures Association (“NFA”) Interpretive Notice 9060, regarding NFA Compliance Rule 2-36(e), concerns the supervision of the use of electronic trading systems. Among other things, this Interpretive Notice provides that entities such as FXCM “must adopt and enforce written procedures reasonably designed to ensure the integrity of trades placed on their trading platforms.”

1.35, 17 C.F.R. § 1.35 (2011). A violation of these record-keeping regulations does not require scienter. *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,217-18 (CFTC Aug. 11, 1992); *see also In re Buckwalter*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,995 at 37,687 (CFTC Jan. 25, 1991); *In re DiPlacido*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. ¶ 29,866 at 56,590 (CFTC Sept. 14, 2004).

FXCM violated Section 4g of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6g, and Regulation 1.35, 17 C.F.R. § 1.35 (2011), by failing to produce promptly certain records sought in the Division's February 24, 2011 request pursuant to section 4g of the Act; as a result, the Commission needed to issue a subpoena to attempt to obtain these records promptly.

#### IV.

### FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that FXCM violated Regulation 166.3, 17 C.F.R. §§ 166.3 (2011); Section 4g of Act, to be codified at 7 U.S.C. 6g; and Regulation 1.35, 17 C.F.R. § 1.35 (2011).

#### V.

### OFFER OF SETTLEMENT

FXCM has submitted the Offer in which it, without admitting or denying the findings 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;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer; 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 Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2011), relating to, or arising from, this proceeding; 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 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.
- D. Stipulates that the record upon which this Order is entered shall consist solely of the findings contained in this Order, to which FXCM has consented; and

- E. Consents, solely on the basis of the Offer, to entry of this Order that:
1. Makes findings by the Commission that FXCM violated Regulation 166.3, 17 C.F.R. § 166.3 (2011);
  2. Makes findings by the Commission that FXCM violated Section 4g of the Act, to be codified at 7 U.S.C. § 6g; and Regulation 1.35, 17 C.F.R. § 1.35 (2011);
  3. Orders FXCM to cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2011); Section 4g of the Act, as amended by the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII, §§701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. § 6g; and Regulation 1.35, 17 C.F.R. § 135.1 (2011);
  4. Orders FXCM to pay restitution in the amount of \$8,261,937 (“Restitution Obligation”);
  5. Orders FXCM to pay a civil monetary penalty of \$6,000,000 within ten days of the entry of this Order; and
  6. Orders FXCM and its successors and assigns to comply with the undertakings consented to in the Offer and set forth below in Part VI of this Order.

Upon consideration, the Commission has determined to accept FXCM’s Offer.

## VI.

**Accordingly, IT IS HEREBY ORDERED THAT:**

- A. FXCM shall cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2011);
- B. FXCM shall cease and desist from violating Section 4g of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6g, and Regulation 1.35, 17 C.F.R. § 1.35 (2011);
- C. FXCM shall pay restitution in the amount of \$8,261,937. FXCM shall pay or otherwise credit its Restitution Obligation directly to the customers and former customers harmed by FXCM’s violation of Regulation 166.3, 17 C.F.R. § 166.3 (2011).<sup>5</sup> All customers and former customers shall be afforded at least one

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<sup>5</sup> In its Offer, FXCM represented that it already had credited the accounts of its customers and former customers the amount of \$8,261,937, as required under this Order.

alternative that allows them to receive or withdraw these funds without any fees or restrictions.

For its customers due more than \$1.00 under this Order, with open accounts at FXCM or its affiliates ("FXCM Accounts"), by no later than ten days of the entry of this Order, FXCM shall confirm to a monitor (as referenced below) that FXCM has credited to these customers' accounts the amount of positive slippage that FXCM failed to pass on to each customer or former customer for their trades from and after June 18, 2008.

For its customers or former customers due more than \$1.00 under this Order, without open FXCM Accounts, FXCM shall: (a) confirm to a monitor (as referenced below) that FXCM has credited to their closed accounts the amount of positive slippage that FXCM failed to pass on to each customer or former customer for their trades from and after June 18, 2008 no later than ten days of the entry of this Order; (b) have immediately "locked" those accounts (*i.e.*, prevent those accounts from any trading until and unless those accounts are re-opened as set forth in "(c)" below); provided, however, any such customer or former customer may withdraw such funds as may be due that customer while the customer's account is "locked"; and (c) if the customer or former customer chooses to re-open an account at FXCM, re-open the account in conformity with all applicable Commission and NFA rules and regulations.

If eighteen months after the entry of this Order, any closed accounts contain any remaining funds and have never been re-opened in accordance with "(c)" above—despite FXCM's best efforts to credit the customers or former customers as required by this Order and to inform these customers or former customers of their options as set forth above—FXCM shall immediately remit the portion of its Restitution Obligation to a segregated, interest-bearing (at a fair market rate) account. Upon expiration of that eighteen months, the funds shall, pursuant to this Order, no longer be considered restitution due and payable to the customers and former customers of FXCM with closed accounts, and FXCM shall remit the balance of the segregated, interest-bearing account to the Commission, which will designate such payment to the "Commodity Futures Trading Commission Customer Protection Fund." FXCM shall make such payment 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 by other than an electronic funds transfer, 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: Linda Zurhorst  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.

Oklahoma City, OK 73169  
Telephone: 405-954-5644

If payment by electronic transfer is chosen, FXCM shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. FXCM shall accompany the remittance of the balance of the segregated, interest-bearing account with a cover letter that identifies FXCM, and the name and docket number of this proceeding. FXCM shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address; and (3) Charles Marvine, Chief Trial Attorney, Division of Enforcement, Commodity Futures Trading Commission, 4900 Main Street, Suite 500, Kansas City, MO 64112;

- D. FXCM shall pay a civil monetary penalty of \$6,000,000 within ten days of the entry of this Order. Should FXCM not satisfy its civil monetary penalty within ten days of the date of entry of this Order, post-judgment interest shall accrue on its civil monetary penalty 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). FXCM shall pay this civil monetary penalty by making an electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than an electronic funds transfer, 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: Linda Zurhorst  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone (405) 954-5644

If payment by electronic transfer is chosen, FXCM shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. FXCM shall accompany payment of the penalty with a cover letter that identifies FXCM, and the name and docket number of this proceeding. FXCM shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581; (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address; and (3) Charles Marvine, Chief Trial Attorney, Division of Enforcement, Commodity

Futures Trading Commission, 4900 Main Street, Suite 500, Kansas City, MO 64112. In accordance with Section 6(e)(2) of the Commodity Exchange Act, 7 U.S.C. § 9a(2) (2006), if this amount is not paid in full within fifteen days of the due date, FXCM shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

E. FXCM is directed to comply with the following undertakings set forth in the Offer:

1. Monitor

Within thirty days of entry of this Order, FXCM shall retain a monitor (“the Monitor”), at its own expense and in consultation with and approval of the Division, to review (1) FXCM’s compliance with Part VI.C. of this Order; and (2) FXCM’s trade execution practices and policies as they relate to slippage for a period of three years.

Subject to the express limitations set forth below, the Monitor’s authority and duties are to be broadly construed. In order to carry out the Monitor’s duties, the Monitor shall inspect FXCM’s documents and meet with and interview FXCM’s employees, officers, and directors, as reasonably necessary to carry out its duties. Further, with respect to its review of FXCM’s trade execution practices and policies, the Monitor shall prepare and submit to the Division and FXCM a report<sup>6</sup> at least every six months, for a period of three years, which will include the Monitor’s methodology, information relied upon, and bases for the Monitor’s findings.

FXCM shall cooperate fully with the Monitor, including providing the Monitor:

- a. within five days of the Monitor’s engagement, a complete list of all customers (including all available contact information) harmed by FXCM’s violation of Regulation 166.3, 17 C.F.R. § 166.3 (2011), and the amount by which each was harmed;
- b. access to all files, books, records, personnel, and facilities that fall within the scope of the responsibilities of the Monitor, subject to a legitimate claim of any legally recognized privilege;
- c. the right to interview any director, officer, employee, agent, or consultant of FXCM and to participate in any meeting concerning any matter within or relating to the Monitor’s duties, subject to a legitimate claim of any legally recognized privilege; and

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<sup>6</sup> Pursuant to Regulation 145.9, 17 C.F.R. § 145.9 (2011), FXCM requests confidentiality with respect to each report to be generated by the Monitor.

- d. the right to observe FXCM's business operations that fall within the scope of the Monitor's responsibilities, subject to a legitimate claim of any legally recognized privilege.

If FXCM agrees, in its sole discretion, to provide the Monitor with access to privileged materials, the Monitor shall agree not to assert that this constitutes a waiver of any legally recognized privilege and shall further agree to maintain the confidentiality of the privileged materials (except to the extent that disclosure is required by law or may be necessary in furtherance of the Monitor's discharge of its official duties and responsibilities).<sup>7</sup> In the event FXCM seeks to withhold access to privileged materials from the Monitor, then FXCM shall provide written notice to the Monitor and the Division, including a general description of the nature of the information, documents, records, facilities, and/or employees that are being withheld, as well as the bases of the claim(s).

2. Actions or Public Statements

FXCM agrees that neither it nor any of its 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 FXCM's: (1) testimonial obligations; or (2) right to take positions in other proceedings to which the Commission is not a party. FXCM shall undertake all steps necessary to ensure that all of its agents and employees under its authority and/or control understand and comply with this agreement; and

3. Future Cooperation with the Commission

FXCM agrees that it will cooperate fully and expeditiously with the Commission and its staff, including the Division, with regard to this Order, and in any investigation, civil litigation, or administrative matter brought by the Commission related to the subject matter of this proceeding or any current or future investigation related thereto. As part of such cooperation with the Commission, FXCM agrees to:

- a. comply fully, promptly, completely, and truthfully, subject to any legally recognized privilege, with any inquiries or requests for information and documents;
- b. provide authentication of documents and other evidentiary material; and
- c. use its best efforts to produce any current (as of the time of the request) officer, director, employee, or agent of FXCM, regardless of

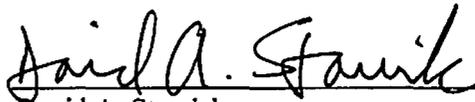
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<sup>7</sup> If the Monitor believes that disclosure is necessary in furtherance of the Monitor's discharge of its official duties and responsibilities, the Monitor shall provide FXCM reasonable notice in advance of such disclosure, including the basis for such disclosure.

the individual's location and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and /or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation.

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

By the Commission.

  
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David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: October 3, 2011

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Concurring Statement of Commissioner Scott D. O'Malia  
In the Matter of Forex Capital Markets LLC

Office of

Proceedings with the Commission's acceptance of this offer of settlement and entry of the Order in this matter because I believe that the substantial sanctions levied against Forex Capital Markets LLC ("FXCM") are commensurate with the gravity of the offenses. The Order, through its substantial remedial sanctions and civil monetary penalty, sends an appropriate message about what is acceptable behavior by registered entities, especially when they rely on technology to run their most critical operations. The Commission is accepting FXCM's offer of a \$6 million civil monetary penalty, which is in addition to separate a \$2 million monetary sanction levied by the National Futures Association ("NFA") based on the same underlying facts, \$8,261,937 in restitution to victims and the retention, at its own expense, of a monitor to review and ensure its compliance with the restitution order and review its trade execution practices and policies as they relate to the conduct at issue for a period of three years to settle the Commission's inquiry resulting from their activity spanning from June 18, 2008 until December 17, 2010 depriving 57,000 FXCM customers of approximately \$8,261,937. While the charges do not sound in fraud or misappropriation, the failures of a registered entity to ensure that it is fully apprised at all levels as to the functioning of its core operations and to ensure the integrity of trades executed on its platforms, especially when it offers its products and services to the retail public, is equally repugnant.

As stated in the Order, the violations of the Commodity Exchange Act (the "CEA") and the regulations thereunder are rooted in FXCM's failure to supervise and a failure to produce records in response to Commission requests under the CEA. FXCM's trading platforms were designed in a manner that effectively denied FXCM's retail customers the benefit of any positive price slippage, and forced them to bear the consequences of any negative slippage. FXCM's unequal slippage practices similarly affected the margin liquidation orders of its customers. Of course, FXCM profited from the platforms' operation throughout the almost thirty-month time period to its clients' detriment.

The platforms and their protocols should not be immune for the imputation of scienter. The FXCM officers, employees and agents tasked with establishing, monitoring and maintaining those platforms failed to establish a system that would prevent what amounted to a systematic deprivation of the best execution available. Had FXCM diligently supervised its employees, it would have discovered not only that there were no systems in place to prevent the problem of asymmetrical slippage on market orders and market liquidation orders, but it would have had the opportunity to correct them before the accumulation of several million dollars in misdirected funds through positive slippage.

Trade execution is critical, and FXCM's apparent reliance on its trade platforms' programming in lieu of robust supervision and monitoring highlights the need for the Commission to adopt heightened standards for the supervision of electronic trading platforms and other systems. I agree with NFA's Board of Directors that while supervisory standards do not change with the medium used, the use of technology may certainly affect how those standards are applied.<sup>1</sup> This matter ought to serve as warning to those who seek to circumvent their obligations under the CEA and regulations as well as their duties to their customers in reliance on the fiction that technology is infallible and

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<sup>1</sup> See National Futures Association Interpretive Notice 9060 – Compliance Rule 2-36(e): Supervision of the Use of Electronic Trading Systems, available at <http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9060&Section=9>.

provides a defense for conduct which would clearly attract higher scrutiny when directly engaged in by a person. The Commission needs to take a harder look at the role that technology is playing in all of the markets under its authority. The Commission needs to develop further expertise to look past the black box at those who design, operate, maintain, monitor and supervise the technology that has largely taken the place of traditional trading venues and trade execution functions to identify and prosecute misconduct. We can no longer assume that there can be no violations absent a person holding the smoking gun; that time has passed.