

NATIONAL FUTURES ASSOCIATION  
BEFORE THE  
BUSINESS CONDUCT COMMITTEE

FILED

MAY 19 2011

NATIONAL FUTURES ASSOCIATION  
LEGAL DOCKETING

In the Matter of:

CAPITAL MARKET SERVICES LLC  
(NFA ID #313199),

Respondent.

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NFA Case No. 11-BCC-010

**COMPLAINT**

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association ("NFA"), and having found reason to believe that NFA Requirements are being, have been or are about to be violated and that the matter should be adjudicated, this Committee issues this Complaint against Capital Market Services LLC ("CMS").

**ALLEGATIONS**

**JURISDICTION**

1. CMS was an NFA Forex Dealer Member ("FDM") from January 8, 2002 through December 15, 2010. In addition, CMS has been registered as an NFA Member futures commission merchant from January 8, 2002 through the present.

**BACKGROUND**

2. CMS operated three trading platforms for its customers during the time it was registered as an FDM: VT Trader ("VT"), MetaTrader4 ("MT4"), and Currenex. As of August 2010, when CMS was still registered as an NFA FDM, it had almost 40,000 customers using VT, 375 customers using MT4, and 227 customers using Currenex.

3. In early July 2010, in accordance with NFA's Interpretive Notice for Compliance Rule 2-36(e) entitled "Supervision of the Use of Electronic Trading Systems ("ETS Notice")," CMS notified NFA that it had encountered an operational problem with both its VT and MT4 trading platforms. In addition, later that same month, the Commodity Futures Trading Commission ("CFTC") informed NFA that a CMS customer had complained to it regarding the customer's inability to access CMS trading platforms in late July 2010. Based on this information, NFA commenced an examination of CMS on August 10, 2010.

#### **APPLICABLE RULES**

4. NFA Compliance Rule 2-36(e) provides, in pertinent part, that each FDM shall diligently supervise its employees and agents in the conduct of their forex activities for or on behalf of the FDM.
5. The ETS Notice provides, in pertinent part, that a Member should have contingency plans reasonably designed to service customers if either the system goes down or activity exceeds reasonably expected peak volume needs. The ETS Notice further provides that the Member should use redundant systems or be able to quickly convert to other systems if the need arises. These back-up systems can include facilities for accepting orders by telephone. When operational difficulties occur, the Member should provide prompt and effective notification to customers affected by the operational difficulties. Furthermore, according to the Interpretive Notice, an FDM must notify NFA as soon as reasonably possible, but no more than 24 hours, after operational difficulties occur.

6. NFA Compliance Rule 2-38(a) provides that each Member must establish and maintain a written business continuity and disaster recovery plan ("BCDR") that outlines the procedures to be followed in the event of an emergency or significant business disruption. The plan shall be reasonably designed to enable the Member to continue operating, to reestablish operations, or to transfer its business to another Member with minimal disruption to its customers, other Members, and the commodity futures markets.
7. The relevant portions of the Interpretive Notice for Compliance Rule 2-38(a), entitled "NFA Compliance Rule 2-38: Business Continuity and Disaster Recovery Plan" provide that each Member shall have a business continuity and disaster recovery plan designed to establishing back-up facilities, systems, and personnel that are located in one or more reasonably separate geographic areas from the Member's primary facilities, systems, and personnel (e.g., primary and back-up facilities should be located in different power grids and different telecommunication vendors should be used), which may include arrangements for the temporary use of facilities, systems, and personnel provided by third parties.

### COUNT I

#### **VIOLATION OF NFA COMPLIANCE RULE 2-38: FAILURE TO IMPLEMENT AN ADEQUATE BUSINESS CONTINUITY AND DISASTER RECOVERY PLAN.**

8. The allegations contained in paragraphs 1 through 3, 6 and 7 are realleged as paragraph 8.
9. As alleged above, NFA Compliance Rule 2-38 requires that Members establish and maintain a written BCDR plan to be followed in the event of an emergency or significant business disruption. The Interpretive Notice that accompanies NFA

Compliance Rule 2-38 further states that each "Member have back-up facilities, systems, and personnel that are located in one or more reasonably separate geographic areas from the Member's primary facilities, systems and personnel (e.g., primary and back-up facilities should be located in different power grids...)." .

10. As of November 2009, CMS had both a primary facility and a back-up facility. However, at that time, CMS terminated its relationship with its primary facility and, thereafter, used its former back-up facility (Galaxy Visions data centers) as its primary facility without securing a new back-up facility.
11. As a result, from November 2009 until December 2010, CMS had no back-up facility contrary to the clear directive provided by the Interpretive Notice to NFA Compliance Rule 2-38. Moreover, shortly after it stopped using a back-up facility, CMS started experiencing a series of successive operational outages which rendered customers unable to use the VT trading system.
12. NFA asked CMS why it terminated its relationship with its primary facility provider and failed to retain an additional provider which could serve as a back-up. CMS said that it decided to forego using a back-up facility because "changes in the economic market and regulatory environment required CMS to find a way to reduce costs." It further claimed that its use of Galaxy Visions data center as both its primary and back-up system was a "temporary solution."
13. CMS' decision to operate without a back-up facility had negative consequences as its trading platforms experienced eleven separate outages from November 2009 through October 2010. (These outages are described in detail below.)

14. By reason of the foregoing acts and omissions, CMS is charged with violations of NFA Compliance Rule 2-38 for its failure to establish an adequate BCDR plan.

## COUNT II

### VIOLATION OF NFA COMPLIANCE RULE 2-36(e): FAILURE TO SUPERVISE ELECTRONIC TRADING SYSTEMS.

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15. The allegations contained in paragraphs 1 through 5 are realleged as paragraph 15.
16. The relevant portions of NFA's ETS Notice provide that in the event an FDM's trading systems experience operational difficulties, the FDM must notify its affected customers promptly and notify NFA "as soon as possible, but no more than 24 hours after the operational difficulties occur."
17. During its examination of CMS, NFA learned that CMS' trading platforms experienced eleven operational difficulties. CMS notified customers and NFA about some of these operational difficulties but in the following five instances, it failed to give any notice to its customers or NFA:
- June 20, 2010: The VT platform was unavailable for seven hours and all customers who utilized the VT platform were either unable to log on or were kicked out of the VT system. (CMS never ran a query to determine the exact number of affected customers.)
  - November 26, 2009: The VT platform was unavailable for just over two hours and approximately 200 customers were either unable to log on or were kicked out of the VT system.
  - January 24, 2010: The VT platform was unavailable for just under two hours and 700 customers were either unable to log on or were kicked out of the VT system.
  - April 18, 2010: The VT platform was unavailable for 34 minutes and 550 customers were either unable to log on or were kicked out of the VT system.

- April 23, 2010: The VT platform was unavailable for eighteen minutes and 280 customers were either unable to log on or were kicked out of the VT system.
18. NFA asked CMS why it failed to provide notice to its customers or NFA of the above five outages. CMS said it did not notify its customers or NFA of these occurrences because, in its view, they were not "significant" enough.
  19. Contrary to CMS' characterization, the above outages were, indeed, significant as they left hundreds of customers unable to enter new orders or manage existing orders. In any event, NFA's ETS Notice makes no exceptions as to which outages a Member must report to customers and NFA – they must all be reported, significant as well as those regarded as insignificant by the Member.
  20. Based on the foregoing acts and omissions, CMS is charged with violations of NFA Compliance Rule 2-36(e) for its failure to comply with the ETS Notice and adequately supervise its use of its electronic trading platforms

### **PROCEDURAL REQUIREMENTS**

#### **ANSWER**

You must file a written Answer to the Complaint with NFA within thirty days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or information may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

The place for filing an Answer shall be:

National Futures Association  
300 South Riverside Plaza  
Suite 1800  
Chicago, Illinois 60606  
Attn: Legal Department-Docketing

E-Mail: [Docketing@nfa.futures.org](mailto:Docketing@nfa.futures.org)  
Facsimile: 312-781-1672

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

**POTENTIAL PENALTIES, DISQUALIFICATION AND INELIGIBILITY**

At the conclusion of the proceedings conducted as a result of or in connection with the issuance of this Complaint, NFA may impose one or more of the following penalties:

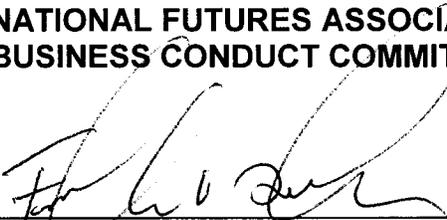
- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member;
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$250,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act. Respondents in this matter who apply for registration in any new capacity, including as an associated person with a new sponsor, may be denied registration based on the pendency of this proceeding.

Pursuant to the provisions of CFTC Regulation 1.63 penalties imposed in connection with this Complaint may temporarily or permanently render Respondents who are individuals ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

**NATIONAL FUTURES ASSOCIATION  
BUSINESS CONDUCT COMMITTEE**

Dated: 05/19/2011

By:   
Chairperson

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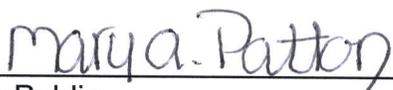
**AFFIDAVIT OF SERVICE**

I, Nancy Miskovich-Paschen, on oath state that on May 19, 2011, I served a copy of the attached Complaint, by sending such copy in the United States mail, first-class delivery, and by overnight mail, in envelopes addressed as follows:

Capital Market Services LLC  
350 Fifth Avenue  
Suite 6400  
New York, NY 10118  
Attn: Felix Shipkevich

  
Nancy Miskovich-Paschen

Subscribed and sworn to before me  
on this 19th day of May 2011.

  
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Notary Public

