

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

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**In the Matter of:**

**York Business Associates LLC**  
**d/b/a/ TransAct Futures,**

**Respondent.**

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CFTC Docket No. 12-33

**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 from in or about October 2007 to at least February 2008 (the “Relevant Period”), York Business Associates, LLC d/b/a/ TransAct Futures (“TransAct”) violated Commission Regulation (“Regulation”) 166.3, 17 C.F.R. § 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 TransAct 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, TransAct 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, TransAct 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.<sup>1</sup>

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<sup>1</sup> TransAct 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 TransAct 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 TransAct 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

During the Relevant Period, TransAct failed to diligently supervise its officers', employees', and agents' handling of an account held at TransAct in the name of Gordon Driver ("Driver"), in violation of Regulation 166.3, 17 C.F.R. § 166.3. In particular, TransAct's officers, employees, and agents failed to follow-up sufficiently on red flags concerning suspicious activity in the Driver Account. Additionally, TransAct's officers, employees, and agents failed to sufficiently follow TransAct's compliance procedures by accepting third-party deposits into Driver's account. During this period, the Driver account generated approximately \$69,000 in gross commissions and fees to TransAct.

#### B. RESPONDENT

**York Business Associates LLC d/b/a/ TransAct Futures** is a Delaware limited liability company with its principal place of business at 141 West Jackson Blvd., 24<sup>th</sup> Floor, Chicago, IL 60604. TransAct is, and was during the Relevant Period, registered with the Commission as a futures commission merchant ("FCM").

#### C. FACTS

##### 1. **The Commission Brought a Fraud Action Against Driver and His Access Entities**

On May 14, 2009, the Commission filed a fraud action against Driver, Axxess Automation, LLC and Axxess Fund Management, LLC.<sup>2</sup> The action alleged that Driver and his Axxess entities operated a Ponzi scheme which defrauded over 100 participants in the United States and Canada of more than \$13.5M. The Commission also obtained a Statutory Restraining Order which, among other things, froze the Defendants' assets and on August 17, 2009, the Court entered an Order of Preliminary Injunction against the Defendants which continued the asset freeze and preliminarily enjoined the Defendants from violating the anti-fraud provisions of the Act. On July 5, 2012, the Commission obtained summary judgment against all Defendants on all counts in the Complaint.

Also on May 14, 2009, the U.S. Securities and Exchange Commission ("SEC") filed a fraud action against Driver and Axxess Automation, LLC.<sup>3</sup> On December 14, 2009, Driver and Axxess Automation LLC consented to a permanent injunction and were permanently enjoined from violating, among other things, Section 10(b) of the Securities Exchange Act and ordered to pay disgorgement and civil monetary penalties, which are to be determined by the Court upon motion by the SEC.

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<sup>2</sup> *CFTC v. Driver, et al.*, 09-cv-0578 (Central District of California)

<sup>3</sup> *SEC v. Driver, et al.*, 09-cv-03410 (Central District of California)

**2. TransAct Failed to Supervise Diligently the Handling of the Driver Account by Its Officers, Employees, and Agents**

**a. Driver Made Significant Assertions to TransAct Regarding His Account in the Account Opening Documents**

When Driver opened his account at TransAct in February 2006, Driver executed and submitted to TransAct account opening documents which included a Customer Application. In this application, Driver indicated, among other things, that his annual income was over \$100,000, his estimated net worth was over \$500,000 and that his estimated liquid net worth (excluding his residence) was between \$250,001 and \$500,000. Driver also indicated that the account was an individual account and that no one else had a financial interest in, guarantee, or control of this account. Finally, Driver indicated that the financial statements he submitted in order to open this account were unaudited.

**b. TransAct's Compliance Procedures**

TransAct's compliance procedures set forth methods for it to detect suspicious account activity. Specifically, compliance procedures relating to individual accounts, which were effective during the Relevant Period, required TransAct to, among other things, ascertain:

1. The identity of the account owner and/or the beneficial owner;
2. The source of account funds, including the details regarding the business or activities from which such funds are generated;
3. The nature of the customer's business and the intended purpose of the customer's transactions; and
4. If a customer is investing on behalf of other individuals or entities, and if so TransAct must confirm the identities of the customer and such individuals or entities.

Finally, TransAct's procedures required that its personnel be familiar with these compliance procedures.

**c. TransAct Failed to Sufficiently Pursue Red Flags Concerning Suspicious Activity in the Driver Account, Delayed Requesting Updated Financial Information and Failed to Sufficiently Follow Its Compliance Procedures**

Beginning in October 2007, Driver's deposits into his account surged to a minimum of least \$100,000 per deposit between October 2007 and February 2008. Specifically, in October 2007, Driver deposited \$100,000; in November 2007, on six different days, Driver deposited a total of \$880,000; on one day in December 2007, Driver deposited \$200,000; and on three days in February 2008, Driver deposited \$800,000. All of these deposits far exceeded Driver's estimated liquid net worth which he listed in his Customer Application as between \$250,001 and \$500,000.

TransAct failed to sufficiently pursue these red flags and failed to sufficiently follow its procedures. Indeed, its compliance procedures describe "frequent" or "large deposits" as "risk

indicators” relating to account activity. In November 2007, rather than ascertain the accurate source of account funds, including details regarding the business or activities from which funds in Driver’s account were generated pursuant to TransAct’s compliance procedures, TransAct took steps that did not reveal this information in an appropriately timely manner. Specifically, TransAct did not adequately investigate Driver’s claims that these funds were his own. TransAct then permitted Driver to continue trading and making large deposits into his account.

In February 2008, Driver deposited \$800,000 in three transactions over two days from an account in the name of Axxess Automation. In allowing these three deposits, TransAct failed to sufficiently follow its compliance procedures by permitting Driver to make deposits from this third party entity. On February 20, 2008, TransAct’s Compliance Manager asked Driver for the source of his funds due to his large deposits. Driver responded that the source of his funds was his company and that his net worth was approximately \$20 million. TransAct suspended Driver’s account on February 20, 2008 (after trading hours) until Driver provided documentation to prove his purported net worth. On February 29, 2008, Driver provided TransAct with an unaudited net worth statement provided by an outside accountant, showing approximately \$21 million in net worth. TransAct’s Compliance Manager again asked Driver to provide documents that proved his net worth statement but Driver never provided the back-up documentation. When TransAct suspended Driver’s account on February 20, 2008, Driver had lost nearly all of the \$800,000 he had deposited in February. Between October 2007 and February 2008, TransAct obtained at least \$69,000 in commissions from Driver’s trading account. TransAct failed to properly supervise its employees who handled Driver’s account in violation of Regulation 166.3.

#### IV.

### LEGAL DISCUSSION

#### **TransAct Failed to Supervise Diligently Its Officers, Employees, and Agents Responsible for Handling the Driver Account**

Regulation 166.3, 17 C.F.R. § 166.3 (2012) 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 other 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, employees and agents (or other persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

A violation of Regulation 166.3 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 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 Ass'n*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (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*, ¶ 25,266 at 38,850; *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999) (Defendant was liable for failure to supervise because he “knew of specific instances of misconduct, yet failed to take reasonable steps to correct the problems”).

During the Relevant Period, TransAct failed to perform its supervisory duties diligently, in violation of Regulation 166.3. Specifically, TransAct failed to perform its supervisory duties diligently by not sufficiently following its compliance procedures that were in place and failing to sufficiently pursue red flags. For example, the Driver account received 11 deposits in a four-month period of almost \$2 million, all of which were at least \$100,000. Although TransAct’s own compliance procedures described large deposits like these as “risk indicators,” TransAct responded by asking Driver whether the funds in the account belonged to him. After Driver falsely represented that they were his, TransAct allowed Driver to continue trading. Moreover, in violation of its policy of not accepting third-party deposits, as testified to by TransAct’s compliance manager, TransAct accepted these three deposits into Driver’s account in February 2008, from Axxess Automation, totaling \$800,000, relying on Driver’s assertion that he was the sole owner of these assets. Accordingly, TransAct failed to diligently supervise the Driver account.

## V.

### FINDINGS OF VIOLATION

Based on the foregoing, the Commission finds that, during the Relevant Period, TransAct violated Regulation 166.3, 17 C.F.R. § 166.3 (2012).

## VI.

### OFFER OF SETTLEMENT

TransAct 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 (2012), 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 TransAct 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 TransAct violated Regulation 166.3, 17 C.F.R. § 166.3 (2012);**
- 2. orders TransAct to cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2012);**
- 3. orders TransAct to pay a civil monetary penalty of one hundred thirty thousand dollars (\$130,000), plus post-judgment interest;**
- 4. orders TransAct and its successors and assigns 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. TransAct shall cease and desist from violating Regulation 166.3, 17 C.F.R. § 166.3 (2012).
- B. TransAct shall pay a civil monetary penalty in the amount of one hundred thirty thousand dollars (\$130,000) (the "CMP Obligation") within 10 days of the date of this Order. If the CMP Obligation is not paid in full within ten (10) days of the date of entry of this Order, then 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). TransAct 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, TransAct shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. TransAct shall accompany payment of the CMP Obligation with a cover letter that identifies TransAct and the name and docket number of this proceeding. TransAct 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 and to Stephen J. Obie, Regional Counsel, Commodity Futures Trading Commission, Division of Enforcement, 140 Broadway, New York, N.Y., 10005.

- C. TransAct and its successors and assigns shall comply with the following conditions and undertakings set forth in the Offer:

1. Disgorgement

TransAct agrees to pay disgorgement in the amount of sixty-nine thousand dollars (\$69,000) within ten (10) days of the date of entry of this Order (“Disgorgement Obligation”). TransAct shall pay the Disgorgement 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, TransAct shall contact Linda Zurhorst or her successor at the above address to receive payment instructions and shall fully comply with those instructions. TransAct shall accompany payment of the Disgorgement Obligation with a cover letter that identifies TransAct and the name and docket number of this proceeding. TransAct 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, and to Stephen J. Obie, Regional Counsel, Commodity Futures Trading Commission, Division of Enforcement, 140 Broadway, New York, N.Y. 10005.

2. Compliance Procedures

TransAct will immediately undertake to implement strengthened compliance procedures designed to detect and prevent fraudulent activity and other violations of the Act and Regulations. Within thirty (30) days of the effective date of this Order, TransAct will hire an outside compliance consulting firm (“Compliance Consultant”), that is acceptable to Commission staff, who shall review and assess its operations and make recommendations regarding “best practices” in its supervision and compliance programs to prevent future violations of the Act and Regulations, and assist TransAct in reviewing and updating its current compliance procedures as necessary in order to fully comply with the Act and the Commission’s Regulations. Within ninety (90) days thereafter, the Compliance Consultant will submit to Commission staff the compliance procedures they have recommended at that time and TransAct will submit an affidavit that the compliance procedures have been implemented. The Compliance Consultant shall conduct an audit of TransAct six months after the effective date of this Order to ensure that it is following the newly implemented compliance procedures, and the Compliance Consultant shall provide a copy of its audit report to Commission staff. The compliance procedures referenced in this undertaking shall include, without limitation, annual training for



associated persons regarding how to identify suspicious activity in customer accounts, and the appropriate steps to take when suspicious activity is detected.


3. Public Statements

TransAct 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 TransAct's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. TransAct 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.

- D. **Partial Satisfaction:** TransAct understands and agrees that any acceptance by the Commission of partial payment of TransAct's Disgorgement Obligation, or 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 TransAct satisfies in full its Disgorgement Obligation, and CMP Obligation as set forth in this Order, TransAct shall provide written notice to the Commission by certified mail of any change to its 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



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

Dated: September 21, 2012