

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 20080123266-01**

RECEIVED

2009 AUG 24 A 11:09

FINRA
MARKET REGULATION

TO: Department of Market Regulation
Financial Industry Regulatory Authority ("FINRA")

RE: Fagenson & Co., Inc., Respondent
Broker/Dealer
CRD No. 1781

Pursuant to FINRA Rule 9216 of FINRA Code of Procedure, Fagenson & Co., Inc. ("the firm") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against the firm alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. The firm hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

The firm has been a member of FINRA since April 13, 1954, and its registration remains in effect. The firm has no relevant disciplinary history.

SUMMARY

In Review No. 20080123266, the staff of the FINRA Department of Market Regulation ("the staff") conducted a Trading and Market Making Surveillance Examination ("TMMS Examination"), which included the trading activities of the firm, as set forth on Exhibit 1, for the trade dates January 22, 2008 through February 1, 2008.

FACTS AND VIOLATIVE CONDUCT

1. The firm failed to report to the OTC Reporting Facility ("OTCRF") the correct symbol indicating whether the transaction was a buy, sell, sell short, or cross for 19 transactions in Reportable Securities. In addition, the firm failed to report to the OTCRF the correct symbol indicating whether the firm executed two transactions in Reportable Securities in a principal

20080123266 (GEI)

000011259 2009

or agency capacity. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 6130(d).

2. The firm failed to report to the FINRA/Nasdaq Trade Reporting Facility ("TRF") the correct symbol indicating whether the firm executed 10 transactions in Reportable Securities in a principal or agency capacity. In addition, the firm failed to report to the TRF the correct symbol indicating whether the transaction was a buy, sell, sell short, or cross for one transaction in Reportable Securities. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 6130(d).
3. The firm failed on 24 occasions to provide written notification disclosing to its customer that the transaction was executed at an average price. The conduct described in this paragraph constitutes separate and distinct violations of SEC Rule 10b-10.
4. During the review period, the firm failed to transmit five Reportable Order Events to OATS on four business days. In addition, the firm transmitted to OATS seven execution reports that contained inaccurate, incomplete, or improperly formatted data. Specifically, these seven reports contained inaccurate Account Type Codes, inaccurate order receipt times, and omitted Routed Order IDs. These inaccurate and/or incomplete reports represented 100 percent of the sample of reports reviewed in the TMMS examination. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 6955(a).
5. The firm, on seven occasions, accepted a short sale order in an equity security from another person, or effected a short sale in an equity security for its own account, without (1) borrowing the security, or entering into a bona-fide arrangement to borrow the security; or (2) having reasonable grounds to believe that the security could be borrowed so that it could be delivered on the date delivery is due; and (3) documenting compliance with SEC Rule 203(b)(1) of Regulation SHO. The conduct described in this paragraph constitutes separate and distinct violations of SEC Rule 203(b)(1) of Regulation SHO.
6. The firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of NASD, concerning short sale trade input, short sale borrowing and delivery, order handling, and best execution. Specifically, the firm's supervisory system did not include written supervisory procedures providing for: a statement of the supervisory step(s) to be taken by the identified person(s) responsible for supervision. The conduct described in this paragraph constitutes violations of NASD Rules 2110 and 3010.

B. The firm also consents to the imposition of the following sanctions:

A censure and a fine of \$22,500 (\$5,000 for the trade report input violations; \$5,000 for the OATS reporting violations; \$5,000 for the Regulation SHO violations; \$2,500 for the customer confirmation violations; and \$5,000 for the supervision violations).

In addition, within 30 business days of acceptance of this AWC by the National Adjudicatory Council ("NAC"), a registered principal of the Respondent shall submit to the COMPLIANCE ASSISTANT, LEGAL SECTION, MARKET REGULATION DEPARTMENT, 9509 KEY WEST AVENUE, ROCKVILLE, MD 20850, a signed, dated letter, or an e-mail from a work-related account of the registered principal to MarketRegulationComp@finra.org, providing the following information: (1) a reference to this matter; (2) a representation that the firm has revised its written supervisory procedures to address the deficiencies described in paragraph A.6. above; and (3) the date the revised procedures were implemented.

The firm agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. It has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

The firm specifically and voluntarily waives any right to claim that the firm is unable to pay, now or at any time hereafter, the monetary sanctions imposed in this matter.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

II.

WAIVER OF PROCEDURAL RIGHTS

The firm specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and

- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, the firm specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

The firm further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

The firm understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs, pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the firm; and
- C. If accepted:
 - 1. this AWC will become part of the firm's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against the firm;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about the firm's disciplinary record;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8310 and IM-8310-3; and
 - 4. the firm may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. The firm may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a

party, that is inconsistent with any part of this AWC. Nothing in this provision affects the firm's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

- D. The firm understands that it may attach a Corrective Action Statement to this AWC, which is a statement by the Respondent of demonstrable corrective steps taken to prevent future misconduct. Respondent may not deny the findings or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by FINRA nor does it reflect the views of FINRA or its staff.

The firm certifies that a duly authorized officer has read and understood all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that it has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the firm to submit it.

8/19/09
Date

Fagenson & Co., Inc.

By: [Signature]

Name: Philip B. Pignato

Title: SVP

~~Reviewed by:~~

~~Counsel for Respondent~~

Accepted by FINRA:

9/14/09
Date

[Signature]

Thomas R. Gira
Executive Vice President
Market Regulation

Signed on behalf of the Director of ODA,
by delegated authority