

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE WAIVER AND CONSENT
NO. 2011025436101**

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

RE: Infinex Investments, Inc. (BD No. 35371),
Respondent

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Infinex Investments, Inc. ("Respondent," "Infinex," or 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 it alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Respondent 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

Infinex has been a FINRA member firm since March 10, 1994. Infinex is a full-service broker-dealer with its primary business being the retail sale of mutual funds and variable annuities. It employs approximately 400 registered representatives located in approximately 500 branches. Many of the Firm's registered representatives work out of more than one office. Most of which are located within a bank branch.

RELEVANT DISCIPLINARY HISTORY

Infinex has no relevant formal disciplinary history with the Securities and Exchange Commission, any self-regulatory organization, or any state securities regulator.

OVERVIEW

During the period from April 2009 through March 2011 (the "Relevant Period"), Infinex sold inverse and inverse-leveraged Exchange-Traded Funds ("Non-Traditional ETFs"). Leveraged ETFs seek to deliver multiples of the performance of the index or benchmark they track. Some Non-Traditional ETFs are "inverse" or "short," meaning they seek to deliver the opposite of the performance of the index or benchmark they track. Some funds are both inverse and leveraged, meaning that they seek to achieve a return that is a multiple of the inverse performance of the underlying index or benchmark.

During the Relevant Period, Infinex permitted 35 registered representatives (including JT and JO) who received minimal training on Non-Traditional ETFs and who failed to perform reasonable diligence to understand the risks and features of the product, to recommend to 229 customers approximately 835 transactions in Non-Traditional ETFs. Accordingly, these recommendations lacked a "reasonable basis" and were unsuitable.

In addition, some of the recommendations were also unsuitable on a customer-specific basis. Moreover, the prospectuses for the Non-Traditional ETFs at issue generally advised that they should not be held for more than one trading session or as long-term investments. Notwithstanding that general statement in the prospectus, some of the recommended purchases were held in customer accounts for longer than seven business days.

During the Relevant Period, Infinex also failed to establish and maintain a supervisory system, including written procedures, reasonably designed to achieve compliance with applicable NASD and FINRA rules relating to the sale of Non-Traditional ETFs.

FACTS AND VIOLATIVE CONDUCT

Non-Traditional ETFs

As described in a FINRA Regulatory Notice issued in June 2009, ETFs are typically registered unit investment trusts or open-end investment companies whose shares represent an interest in a portfolio of securities that track an underlying benchmark or index.¹ Shares of ETFs are usually listed on national securities exchanges and trade throughout the day at prices established by the market.

¹ See, *FINRA Regulatory Notice 09-31, Non-Traditional ETFs (June 2009) (the "Reg. Notice")*.

To accomplish their objectives, Non-Traditional ETFs use swaps, futures contracts and other derivative instruments. Most Non-Traditional ETFs “reset” daily, meaning that they are designed to achieve their stated objectives only on a daily basis.

The Reg. Notice noted that “[d]ue to the effect of compounding, their performance over longer periods of time can differ significantly from the performance . . . of their underlying index or benchmark during the same period of time.”¹ This effect can be magnified in volatile markets.

Certain Infinex customers who invested in Non-Traditional ETFs were subjected to the risk that the performance of their investments could differ significantly from the performance of the underlying index or benchmark when held for longer periods of time, particularly during the volatile markets that existed during the Relevant Period.

The two primary Non-Traditional ETFs that Infinex sold during the Relevant Period were inverse-leveraged funds that sought returns for a single day. One of the funds sought returns inverse to the performance of the 20+ Year Treasury Fund; while the other sought returns inverse to the performance of the S&P 500 Index Fund.

The prospectuses for both of these funds highlighted the significant risks associated with each investment and their short-term nature, including the fact that they were leveraged and inverse, greatly increasing risk, and would lose money if their relative benchmark indices stayed flat or rose.

Infinex Made Unsuitable Recommendations Involving Non-Traditional ETFs

Reasonable-Basis Suitability

The reasonable-basis suitability obligation under NASD Conduct Rule 2301(a) requires a broker-dealer and its registered representatives to, *inter alia*, perform reasonable diligence to understand the nature of the recommended security, as well as the potential risks and reward.

As FINRA stated in the Reg. Notice, “[w]ith respect to leveraged and inverse ETFs, this means that a firm must understand the terms and features of the funds, including how they are designed to perform, how they achieve that objective and the impact that market volatility, the ETF’s use of leverage, and the customer’s intended holding period will have on their performance.”³

¹ Reg. Notice 09-31, at 2.

³ See Reg. Notice 09-31, at 3.

Nonetheless, Infinex failed to subject Non-Traditional ETFs to the same level of review as other new products offered for sale to retail brokerage customers. Instead, it allowed its registered representatives to recommend to customers Non-Traditional ETFs without performing reasonable diligence to understand the risks and features associated with it.

During the Relevant Period, Infinex permitted 35 representatives (including JT and JO) who received minimal training on Non-Traditional ETFs and who failed to perform reasonable diligence to understand the risks and features of the product, to recommend to 229 customers approximately 835 transactions in Non-Traditional ETFs. By failing to employ reasonable diligence regarding Non-Traditional ETFs, Infinex missed the opportunity to evaluate critical aspects of these products including the implications of the daily reset and leverage components and to establish appropriate training and supervision protocols.

Accordingly, these recommendations lacked a reasonable basis.

Based on the foregoing, Infinex violated NASD Conduct Rule 2310 and IM-2310-2 and FINRA Rule 2010.

Customer-Specific Suitability

Furthermore, 165 of the 835 (19%) Non-Traditional ETF purchases that Infinex recommended, acting through several brokers, including JT and JO, were also unsuitable under a customer-specific suitability theory as the recommendations were made to 87 customers with conservative investment objectives and/or risk tolerances.

In addition to having conservative investment objectives and/or risk tolerances, several of the accounts that invested in the Non-Traditional ETFs were owned by elderly, retired customers and/or customers who maintained IRA retirement accounts. One of JO's customers was 87 at the time of her investment, while four of JT's customers were in their seventies.

Moreover, the prospectuses for the Non-Traditional ETFs that Infinex sold generally advised that they should not be held for more than one trading session or as long-term investments. Notwithstanding that statement in the prospectuses, 143 purchased Non-Traditional ETFs were maintained in customer accounts for longer than seven business days including:

- 111 of the Non-Traditional ETFs that JT recommended were purchases maintained in customer accounts for longer than seven business days, with the average holding period being 302 days; and
- 23 of the Non-Traditional ETFs JO recommended were purchases maintained in customer accounts for longer than seven business days, with the average holding period being 353 days.

70 customers who had conservative investment objectives and/or risk tolerances and whose ETFs were held for 7 or more days, lost money on their investments. These unsuitable Non-Traditional ETF recommendations resulted in customer losses of \$287,171.75.

Based on the foregoing, Infinex violated NASD Conduct Rule 2310 and IM-2310-2 and FINRA Rule 2010.

Infinex Failed to Establish and Maintain a Reasonable Supervisory System and Procedures Concerning the Sale of Non-Traditional ETFs

Infinex failed to establish and maintain an adequate supervisory system, including written supervisory procedures, to monitor and review the sale of Non-Traditional ETFs to its retail customers. The Firm's deficiencies in this regard included the following:

Failure to Implement Written Supervisory Procedures

Infinex failed to establish and maintain specific written supervisory procedures for the review of Non-Traditional ETF transactions until August 2009.

Inadequate Supervisory Reviews for Suitability

The supervisory reviews that Infinex's principals performed of transactions involving Non-Traditional ETFs were inadequate. They failed to incorporate the complexities and unique risks associated with these securities, such as their daily reset and leverage features. Instead, Infinex's principals reviewed Non-Traditional ETF transactions for suitability in the same manner they reviewed trades involving the Firm's other securities products.

In the Reg. Notice, FINRA reminded member firms of their sales practice obligations relating to Non-Traditional ETFs, including the importance of understanding the risks and features of these products, such as how they can be impacted by market volatility, before offering them to the public. Notwithstanding this warning, the Firm made no changes to its supervisory system to incorporate this guidance in reviewing ETF activity until August 2009, when it implemented written supervisory procedures for the review of Non-Traditional ETFs.

Infinex failed to employ a system to identify which of the ETFs being sold by the Firm's registered representatives were Non-Traditional and therefore subject to greater scrutiny. Neither the Firm's trade blotters nor its general supervisory reports were coded to alert supervisors regarding the length of time customers had been holding Non-Traditional ETFs. Consequently, Infinex's supervisory system was inadequate to detect and monitor the holding periods of Non-Traditional ETFs in customer accounts.

Infinex also did not utilize exception reports or other surveillance reports to monitor ETF activity specifically; including the classification of ETFs as leveraged or inverse.

Failure to Conduct Training

Infinex failed to conduct any training or provide any written guidance for its registered personnel regarding the sale and supervision of Non-Traditional ETFs.

Based on the foregoing, Infinex violated NASD Conduct Rule 3010 and FINRA Rule 2010.

B. Respondent also consents to the imposition of the following sanctions:

- A Censure,
- A Fine of \$75,000, and
- A requirement that it pay restitution to customers, as detailed below, in the amount of \$287,171.75

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

Restitution is ordered to be paid to the customers listed on Attachment A hereto in the total amount of \$287,171.75. A registered principal, on behalf of the Respondent, shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to Senior Regional Counsel, Michael J. Newman, at the Department of Enforcement, FINRA, 581 Main Street, 7th Floor, and Suite 710. Woodbridge, New Jersey 07095, either by letter that identifies Infinex (Matter No. 2011025436101), or by e-mail from a work-related account of the registered principal of Respondent firm to EnforcementNotice@FINRA.org.

This proof shall be provided to the FINRA staff member listed above no later than 120 days after acceptance of the AWC.

If for any reason Infinex cannot locate any customer identified in Attachment A after reasonable and documented efforts within 120 days from the date the AWC is accepted, or such additional period agreed to by a FINRA staff member in writing, Infinex shall forward any undistributed restitution to the appropriate escheat, unclaimed property or abandoned property fund for the state in which the customer is last known to have resided.

Infinex shall provide satisfactory proof of such action to the FINRA staff member identified above and in the manner described above, within 14 days of forwarding the undistributed restitution to the appropriate state authority.

Infinex has specifically and voluntarily waived any right to claim an inability to pay at any time hereafter the Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

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

- A. To have a Complaint issued specifying the allegations against it;
- B. To be notified of the 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 National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Respondent 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.

Respondent 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

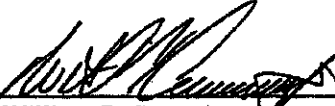
Respondent understands that:

- 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 ("ODA"), 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 Respondent; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about Respondent's disciplinary record;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 - 4. Respondent 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. Respondent 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 Respondent's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. Respondent may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges 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 undersigned, on behalf of Infinex, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Infinex has agreed to its 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 Infinex to submit it.

Infinex Investments, Inc.

03/20/2014
Date (mm/dd/yyyy)

By: 
William F. Cummings
Senior Executive Vice President,
COO and General Counsel

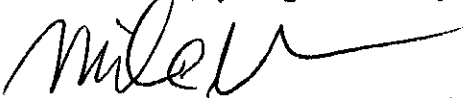
Reviewed by:


Paul M. Tyrell, Esq.
Counsel For Respondent
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Accepted by FINRA:

4/11/2014
Date

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


Michael J. Newman
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