

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2012030742601**

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

RE: optionsXpress, Inc., Respondent
Registered Broker-Dealer
CRD No. 103849

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, optionsXpress, Inc. ("optionsXpress" 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 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

optionsXpress has been a FINRA-registered firm since August 2000. The Firm is an online broker-dealer that specializes in providing retail customers an online platform to trade options. It does not have any relevant disciplinary history.

OVERVIEW

Between March 2007 and March 2012, optionsXpress contracted with a third party service provider ("GBT") to provide options trading coaching services (the "coaching program") to the Firm's options customers. Under the terms of the Firm's contract with GBT, the Firm retained the right to exercise discretion and control over the hiring, training, and certification of GBT coaches and to have access to recordings of coaching sessions to monitor them for compliance, training and general quality control purposes. As set forth in further detail below, however, the Firm failed to adopt or implement policies and procedures to supervise its employees in their review and approval of marketing scripts used by

GBT and to require its employees to monitor coaching sessions. In addition, the Firm approved marketing scripts (used by GBT to sell the coaching program to optionsXpress customers) that failed to present a fair and balanced description of the risks and potential benefits of the coaching program. As a result of this conduct, the Firm violated NASD Rules 3010(a), 2210(d), and 2110 and FINRA Rule 2010. In addition, between April 2011 and July 2011, the Firm operated a retail forex business without having first received approval from FINRA to do so. As a result of this conduct, the Firm violated NASD Rule 1017(c) and FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

1. The Coaching Program

a. Supervision

Under NASD Rule 3010(a), FINRA-registered firms are required to establish and maintain a supervisory system that is reasonably designed to achieve compliance with the securities laws and regulations, and FINRA Rules. As detailed below, the Firm violated NASD Rule 3010(a) by failing to supervise its employees in their review and approval of GBT marketing scripts and to require its employees to monitor GBT coaching sessions.

In March 2007, optionsXpress executed a Coaching Product Services Agreement (as amended, the “Coaching Services Agreement”) with GBT. Under the terms of the Coaching Services Agreement, optionsXpress granted GBT “the right to develop, market, sell, fulfill, and manage educational coaching programs for existing and future customers” of the Firm. The Firm further granted GBT “a limited non-exclusive license” to use the Firm’s “trade names and trademarks solely” in connection with the coaching program.

In return, optionsXpress was to receive a certain percentage of the revenue generated by the coaching program. The percentage varied depending on the specific coaching product purchased by the customer and who made the sale (as between the Firm or GBT). Over the duration of the coaching program, more than 6,000 of the Firm’s customers signed up for it. In 2010, the Firm received \$461,697 of gross revenue from the coaching program. In 2011, the Firm’s coaching program gross revenue totaled \$417,841.

Under the terms of the Coaching Services Agreement, GBT coaches were prohibited from advising clients in live trading situations:

e. Coaching within Client’s Virtual Trading Platform.
[GBT] coaches are vigorously trained on the absolute prohibition of making buy/sell recommendations to students. Nevertheless, in the interest of providing an

additional layer of compliance, coaches instructing on Client Content will only conduct training within the confines of [optionsXpress's] Virtual Trading Platform or "paper trading" accounts to ensure that training does not occur within the context of live trading.

In implementing the coaching program, however, GBT's coaches did not uniformly adhere to this prohibition. In certain instances, coaches discussed live trades, specific transactions, or strategies that the customer was considering executing. Additionally, although coaching sessions were prefaced with the disclaimer that coaches were not permitted to make buy, sell, or hold recommendations, in certain sessions, the "coaching" surpassed mere discussions of specific securities transactions, and rose to the level of buy, sell, or hold recommendations. Thus, notwithstanding the prohibitions in the Coaching Service Agreement, in certain instances, the coaches discussed live trades (as opposed to virtual ones) and provided buy, sell, or hold recommendations to customers.

The Coaching Services Agreement required GBT to receive prior written approval from optionsXpress before using marketing scripts and coaching materials. The Firm also retained "discretion and control over the hiring, and termination of coaches and staff in connection with [the Coaching Services] Agreement." In addition, the Firm had the right to monitor the coaching calls with Firm customers. In this regard, the Coaching Services Agreement provided:

c. Monitoring and Compliance. Telephonic coaching sessions are randomly monitored for compliance, training and general quality control purposes. [optionsXpress] shall be given access to randomly monitor services for compliance, training and general quality control purposes. All coaching sessions are logged within a database, which entries include the details of each session, student questions, etc. Such logs shall be provided to [optionsXpress] upon request.

5. Recording, monitoring and compliance process.

Every telephone sale is finalized by [GBT's] Compliance Department. All compliance personnel are trained to follow a predetermined script with exactness. The compliance scripts are created, reviewed and is [sic] signed by the Vice-Presidents of Coaching Sales Content Development and Legal, respectively. Any revisions to the compliance scripts are reviewed and signed-off by the same process. Compliance calls are randomly monitored

for training and quality control purposes. All compliance conversations are recorded and archived. [optionsXpress] shall be granted access to monitor compliance calls. [optionsXpress] shall be provided with recordings upon request.

Notwithstanding these contractual provisions and the Firm's supervisory obligations under NASD Rule 3010(a), the Firm neither adopted nor implemented any policies or procedures to supervise its employees in their review and approval of the marketing scripts used by GBT or to ensure that its employees monitored GBT personnel's interactions with Firm customers. As a result of the foregoing conduct, the Firm violated NASD Rules 3010(a) and 2110 (prior to December 15, 2008) and FINRA Rule 2010 (on and after December 15, 2008).

b. Sales Literature

During the relevant period, NASD Rule 2210(d)(1)(A) required, among other things, that communications made by FINRA-registered firms to the public were fair and balanced.¹ The Firm violated NASD Rule 2210(d)(1)(A) by approving certain marketing scripts for use by GBT to promote the coaching program to the Firm's customers.

For example, the Firm approved marketing materials that unfairly suggested to optionsXpress customers that the coaching program was run by optionsXpress, when in fact, it was run by GBT. For instance, one script provided:

- "Hi, (*client*), this is (*ED*) from optionsXpress personal coaching. I've been asked to follow-up with a few people who have accounts with us, and you've been assigned to me."

In addition, marketing scripts approved by the Firm failed to provide a fair and balanced treatment of the risks inherent in options trading notwithstanding participation in the coaching program. Overall, the marketing scripts approved by the Firm (and used by GBT to sell the coaching program to optionsXpress customers) portrayed the coaching program as a proven way to become a profitable options trader, but failed to adequately discuss either the inherent risk in options trading or the risk that, notwithstanding successful completion of the coaching program, the customer still may never become a "profitable" options trader. In this regard, the scripts contained statements such as:

- "So we are going to follow a proven, step-by-step process."
- "Do you believe you have the ability to adapt to the market as it changes direction? Or in other words, are you making money when the market goes up, down, and sideways?"

¹ NASD Rule 2210 has been superseded by FINRA Rule 2210, which became effective on February 4, 2013.

- “We’ll need to discuss whether or not you’re open to having our coaches literally take you by the hand and move you through this project successfully, at whatever level that is for you.”

These statements and questions implied that completion of the coaching program would transform the participant into a successful options trader who could make money “when the market goes up, down, and sideways,” and were not balanced by statements disclosing that, notwithstanding the completion of the coaching program, a participant may never become a successful options trader and may not be able to make money “when the market goes up, down, and sideways.” As a result of the foregoing conduct, the Firm violated NASD Rule 2210(d)(1)(A) and FINRA Rule 2010.

2. Forex Trading – Violation of Membership Rules

NASD Rule 1017(a) requires firms to file an application with FINRA for approval of any material change in business operations. NASD Rule 1017(c) prohibits a firm from implementing a material change in business operations until such change is approved by FINRA.

In Regulatory Notice 08-66, FINRA addressed registered firms’ retail foreign currency exchange activities. More specifically, in that notice, FINRA notified registered firms that “expansion into retail forex constitutes a material change in business operations under NASD Rule 1010(i). Therefore, before engaging in over-the-counter forex business, a firm must first file for and receive approval of change in business operations under NASD Rule 1017.”

In February 2011, the Firm filed a Rule 1017 application seeking approval to engage in an over-the-counter retail foreign exchange trading business on its online trading platform. Prior to the approval of the Firm’s Rule 1017 application, however, the Firm engaged in a retail over-the-counter foreign exchange business. Between April 26, 2011 and July 15, 2011 (on which date the Firm ceased engaging in a forex business), the Firm effected 6,422 forex transactions for retail customers. By engaging in a retail forex business prior to approval of its Rule 1017 application to do so, the Firm violated NASD Rule 1017(c) and FINRA Rule 2010.

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

a censure; and
a fine of \$275,000.

The Firm agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. The Firm has submitted an Election of Payment form showing the method by which the Firm 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 sanction imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

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

- A. To have a Complaint issued specifying the allegations against the Firm;
- 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, 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:

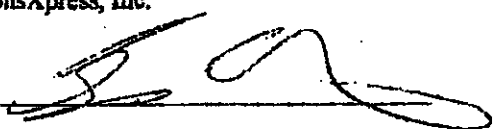
- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against 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 8313; 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: (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. The Firm may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. The Firm 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 the Firm, 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 the Firm 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 the Firm to submit it.

optionsXpress, Inc.

4/26/14
Date

By: 

Barry Meryer COO - OY
Name, Title

Reviewed by:

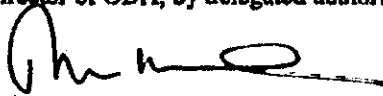


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312-558-6062

Accepted by FINRA:

5/21/14
Date

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



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