

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**  
**LETTER OF ACCEPTANCE, WAIVER AND CONSENT**  
**NO. 20120353680-01**

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

**RE:** First New York Securities L.L.C., Respondent  
Broker-Dealer  
CRD No. 16362

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, First New York Securities L.L.C. (the "firm" or "Respondent") 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 Respondent 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**

The firm became a member of FINRA on June 5, 1985. Its registration remains in effect.

**RELEVANT DISCIPLINARY HISTORY**

On December 9, 2008, FINRA accepted an AWC, in which the firm stipulated to a finding that it violated Rule 105 of Regulation M ("Rule 105") of the Securities Exchange Act of 1934 in connection with five secondary offerings, as well as FINRA Rule 3010 and NASD Rule 2110 for books and records violations and for failing to establish, maintain and enforce a system of supervision and written supervisory procedures reasonably designed to achieve compliance with Rule 105. The firm consented to a disgorgement of unlawful profits in the amount of \$171,504.44 and a fine of \$170,000 (consisting of \$85,000 for violating Rule 105; \$75,000 for supervisory violations and \$10,000 for its books and records violations. In addition, the firm entered into an undertaking to revise its supervisory system and written procedures in connection with compliance with Rule 105.

## **SUMMARY**

In Matter No. 20100222948, Market Regulation's Offerings Surveillance Group ("OSG") reviewed the firm's compliance with Rule 105 during the period of January 2009 through December 2011.

In Matter No. 20120353680, the New York Equities Section ("NY Equities") conducted a review of the firm's compliance with Rule 105 related to follow-on offerings priced from September 2010 through April 2011 identified by its Offerings/Distributions Surveillance Review.

In Matter No. 20130359837, OSG reviewed the firm's compliance with Rule 105 related to follow-on offerings priced from November 2011 through March 2013 identified and reported by the firm to OSG, as well as by OSG's surveillance reviews.

## **FACTS AND VIOLATIVE CONDUCT**

### **Violations of Rule 105 of Regulation M**

1. From September 2010 through April 2013 (the "Review Period"), as set forth below, the firm sold certain securities short during the five business days leading up to pricing of 14 public offerings, and then purchased securities in those offerings in violation of Rule 105.<sup>1</sup> In addition, throughout the Review Period, the firm did not have a supervisory system reasonably designed to achieve compliance with the applicable securities laws and regulations concerning Rule 105.
2. The firm's profits and/or improper financial benefits from these violative transactions totaled \$516,131.54.

### **Transactions That Violated Rule 105**

#### ***Petroleo Basilerio Preferred A ("PBRA") Offering***

3. During the restricted period of the PBRA offering from September 17, 2010 through September 23, 2010, the firm sold short 36,000 shares of PBRA at an average price of \$31.87 per share. The firm's short selling in PBRA during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On September 23, 2010, the follow-on offering of PBRA common stock was priced at \$30.59 per share. The following day, the firm purchased 36,900 shares of PBRA in the offering from an underwriter and broker-dealer participating in the offering. The difference

---

<sup>1</sup> During the Review Period, Rule 105 made it unlawful, subject to certain exceptions not applicable here, "for any person to sell short . . . the security that is the subject of [an offering of equity securities for cash pursuant to a registration statement . . . filed under the Securities Act of 1933] and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period . . . that is the shorter of the period: (1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing [(the "restricted period")].” 17 C.F.R. § 242.105 (2011).

between FNYS' proceeds from the restricted period short sales of PBRA and the price paid for 36,000 shares received in the offering was \$46,080. The firm also improperly obtained a benefit of \$433.98 by purchasing the remaining 900 shares at a discount from PBRA's price. Thus, the firm's participation in the PBRA offering netted total profits and/or improper financial benefits of \$46,513.98.

*Molycorp, Inc. ("MCP") Offering*

4. During the restricted period of the MCP offering from February 4, 2011 through February 10, 2011, the firm sold short 5,700 shares of MCP at an average price of \$54.69 per share. The firm's short selling in MCP during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On February 10, 2011, the follow-on offering of MCP common stock was priced at \$50.00 per share. The following day, the firm purchased 350,000 shares of MCP in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of MCP and the price paid for 5,700 shares received in the offering was \$26,733.00. Thus, the firm's participation in the MCP offering netted total profits and/or improper financial benefits of \$26,733.00.

*Annaly Capital Management, Inc. ("NLY") Offering*

5. During the restricted period of the NLY offering from February 8, 2011 through February 14, 2011, the firm sold short 20,000 shares of NLY at an average price of \$17.93 per share. The firm's short selling in NLY during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. Prior to the open of trading on February 15, 2011, the follow-on offering of NLY common stock was priced at \$17.30 per share. The following day, the firm purchased 15,000 shares of NLY in the offering from an underwriter and broker-dealer participating in the offering. The difference between FNYS' proceeds from the restricted period short sales of NLY and the price paid for 15,000 shares received in the offering was \$9,450.00. Thus, the firm's participation in the NLY offering netted total profits and/or improper financial benefits of \$9,450.00.

*US Gold Corp. ("UXG") Offering*

6. During the restricted period of the UXG offering from February 11, 2011 through February 17, 2011, the firm sold short 2,000 shares of UXG at an average price of \$6.93 per share. The firm's short selling in UXG during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On February 17, 2011, the follow-on offering of UXG common stock was priced at \$6.50 per share. The following day, the firm purchased 3,000 shares of UXG in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of UXG and the price paid for 2,000 shares received in the offering was \$860.00. The firm also improperly obtained a benefit of \$346.83 by purchasing the remaining 1,000 shares at a discount

from UXG's price. Thus, the firm's participation in the UXG offering netted total profits and/or improper financial benefits of \$1,206.93.

*Transocean, Ltd. ("RIG") Offering*

7. During the restricted period of the RIG offering from November 21, 2011 through November 29, 2011, the firm sold short 27,000 shares of RIG at an average price of \$42.70 per share. The firm's short selling in RIG during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On November 29, 2011, the follow-on offering of RIG common stock was priced at \$40.50 per share. The following day, the firm purchased 75,600 shares of RIG in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of RIG and the price paid for 27,000 shares received in the offering was \$54,558.10. The firm also improperly obtained a benefit of \$112,884.86 by purchasing the remaining 48,600 shares at a discount from RIG's price. Thus, the firm's participation in the RIG offering netted total profits and/or improper financial benefits of \$167,442.96.

*Genco Shipping & Trading, Ltd. ("GNK") Offering*

8. During the restricted period of the GNK offering from February 16, 2012 through February 22, 2012, the firm sold short 13,000 shares of GNK at an average price of \$9.054 per share. The firm's short selling in GNK during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On February 22, 2012 the follow-on offering of GNK common stock was priced at \$7.10 per share. The following day, the firm purchased 15,000 shares of GNK in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of GNK and the price paid for 13,000 shares received in the offering was \$22,439.00. The firm also improperly obtained a benefit of \$139.00 by purchasing the remaining 2,000 shares at a discount from GNK's price. Thus, the firm's participation in the GNK offering netted total profits and/or improper financial benefits of \$22,578.00.

*Blackrock, Inc. ("BLK") Offering*

9. During the restricted period of the BLK offering from May 16, 2012 through May 22, 2012, the firm sold short 500 shares of BLK at an average price of \$171.00 per share. The firm's short selling in BLK during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On May 22, 2012, the follow-on offering of BLK common stock was priced at \$160.00 per share. The following day, the firm purchased 2,000 shares of BLK in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of BLK and the price paid for 500 shares received in the offering was \$5,500.00. The firm also improperly obtained a benefit of \$4,800.00 by purchasing the remaining 1,500 shares at a discount from BLK's price. Thus, the firm's participation in the BLK offering netted total profits

and/or improper financial benefits of \$10,300.00.

*Keryx Biopharmaceuticals ("KERX") Offering*

10. During the restricted period of the KERX offering from January 24, 2012 through January 30, 2012, the firm sold short 14,000 shares of KERX at an average price of \$8.8321 per share. The firm's short selling in KERX during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On January 30, 2012, the follow-on offering of KERX common stock was priced at \$8.49 per share. The firm purchased 1,500 shares of KERX in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of KERX and the price paid for 1,500 shares received in the offering was \$513.15. Thus, the firm's participation in the KERX offering netted total profits and/or improper financial benefits of \$513.15.

*Cobalt International Energy, Inc. ("CIE") Offering*

11. During the restricted period of the CIE offering from February 16, 2012 through February 23, 2012, the firm sold short 4,000 shares of CIE at an average price of \$28.85 per share. The firm's short selling in CIE during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On February 23, 2012, the follow-on offering of CIE common stock was priced at \$28.00 per share. The following day, the firm purchased 130,000 shares of CIE in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of CIE and the price paid for 4,000 shares received in the offering was \$3,400.00. The firm also improperly obtained a benefit of \$205,997.40 by purchasing the remaining 126,000 shares at a discount from CIE's price. Thus, the firm's participation in the CIE offering netted total profits and/or improper financial benefits of \$209,397.40.

*Kinder Morgan, Inc. ("KMI") Offering*

12. During the restricted period of the KMI offering from May 30, 2012 through June 5, 2012, the firm sold short 20,000 shares of KMI at an average price of \$34.19 per share. The firm's short selling in KMI during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On June 5, 2012, the follow-on offering of KMI common stock was priced at \$31.88 per share. The following day, the firm purchased 5,000 shares of KMI in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of KMI and the price paid for 5,000 shares received in the offering was \$11,550.00. Thus, the firm's participation in the KMI offering netted total profits and/or improper financial benefits of \$11,550.00.

*Navistar International Corp. ("NAV") Offering*

13. During the restricted period of the NAV offering of October 24, 2012, the firm sold short 1,000 shares of NAV at an average price of \$19.00 per share.<sup>1</sup> The firm's short selling in NAV during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On October 24, 2012, the follow-on offering of NAV common stock was priced at \$18.75 per share. The following day, the firm purchased 5,000 shares of NAV in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of NAV and the price paid for 1,000 shares received in the offering was \$250.00. Thus, the firm's participation in the NAV offering netted total profits and/or improper financial benefits of \$250.00.

*Regal-Beloit Corporation ("RBC") Offering*

14. During the restricted period of the RBC offering from December 6, 2012 through December 12, 2012, the firm sold short 160 shares of RBC at an average price of \$67.75 per share. The firm's short selling in RBC during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On December 12, 2012, the follow-on offering of RBC common stock was priced at \$67.00 per share. The following day, the firm purchased 1,000 shares of RBC in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of RBC and the price paid for 160 shares received in the offering was \$120.00. The firm also improperly obtained a benefit of \$1,676.22 by purchasing the remaining 840 shares at a discount from RBC's price. Thus, the firm's participation in the RBC offering netted total profits and/or improper financial benefits of \$1,796.22.

*MGIC Investment Corp. ("MTG") Offering*

15. During the restricted period of the MTG offering from February 28, 2013 through March 6, 2013, the firm sold short 12,000 shares of MTG at an average price of \$5.85 per share. The firm's short selling in MTG during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On March 6, 2013, the follow-on offering of MTG common stock was priced at \$5.15 per share. The following day, the firm purchased 15,000 shares of MTG in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of MTG and the price paid for 12,000 shares received in the offering was \$8,400.00. Thus, the firm's participation in the MTG offering netted total profits and/or improper financial benefits of \$8,400.00.

---

<sup>1</sup> The offering in NAV was an automatic shelf registration in which the issuer need not wait for the Securities and Exchange Commission to grant approval for the registration to become effective. The NAV registration statement was filed on October 24, 2012.

*Realogy Holdings Corp. ("RLGY")*

16. During the restricted period of the RLGY offering from April 9, 2013 through April 10, 2013, the firm sold short 31,700 shares of RLGY at an average price of \$43.8149 per share.<sup>1</sup> The firm's short selling in RLGY during the restricted period did not qualify for an exception from the trading restrictions of Rule 105. On April 10, 2013, the follow-on offering of RLGY common stock was priced at \$44.00 per share. The following day, the firm purchased 18,000 shares of RLGY in the offering from an underwriter and broker-dealer participating in the offering. The difference between the firm's proceeds from the restricted period short sales of RLGY and the price paid for 18,000 shares received in the offering was -\$3,331.80. Thus, the firm's participation in the RLGY offering netted a total loss of \$3,331.80.
17. The conduct described in paragraphs 3 through 16 constitutes separate and distinct violations of Rule 105 of Regulation M.

**Supervisory Findings**

18. During the Review Period, the firm's supervisory system failed to provide for adequate and reasonable supervision designed to comply with and prevent violations of Rule 105. Among other things, the firm's supervisory system did not sufficiently address the qualifications for exceptions from the trading restrictions of Rule 105. The conduct described in this paragraph constitutes a violation of NASD Rule 3010 and FINRA Rule 2010.

**OTHER FACTORS**

19. In entering into this AWC, Market Regulation took into consideration the fact that the firm had self-reported six of the violative instances noted herein and voluntarily ceased participating in secondary or follow on offerings in March 2014.
- B. Respondent also consents to the imposition of the following sanctions:
- Censure;
  - Disgorgement of unlawful profits of \$516,131.54 with prejudgment interest at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2) calculated from the pricing date of each offering until final disposition;
  - A fine of \$400,000 (consisting of \$250,000 for the Rule 105 violations and \$150,000 for the supervisory violations); and
  - a prohibition from participating in secondary or follow-on offerings for a period of six months.

---

<sup>1</sup> The offering in RLGY was an automatic shelf registration in which the registration statement was filed on April 9, 2013.

Respondent agrees to pay the monetary sanction(s) upon notice that this AWC has been accepted and that such payment(s) are due and payable. It has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

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 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, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Legal Officer, 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:

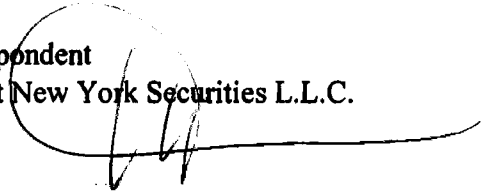
- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;

- 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 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 accordance with FINRA Rule 8313;
  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 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. Respondent 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 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.

MARCH 13, 2015  
Date

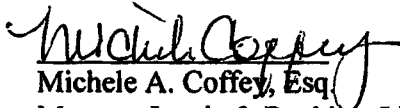
Respondent  
First New York Securities L.L.C.

By: 

Name: Donald Motschmiller

Title: CEO

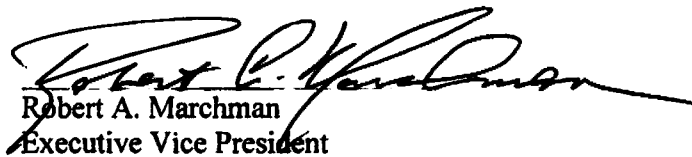
Reviewed by:

  
Michele A. Coffey, Esq.  
Morgan, Lewis & Bockius, LLP  
101 Park Avenue  
New York, NY 10178-0060  
(212) 309-6917

Accepted by FINRA:

3/19/15  
Date

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

  
Robert A. Marchman  
Executive Vice President  
FINRA Department of Market Regulation