

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 20130383714-01**

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

RE: Instinet, LLC, Respondent  
Broker-Dealer  
CRD No. 7897

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Instinet, LLC ("INCA" 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**

INCA became a member of the Securities and Exchange Commission ("SEC") on April 25, 1979 and FINRA on January 14, 1980, and its registrations remain in effect.

During all times relevant to this matter, INCA operated two Alternative Trading Systems ("ATSs"): (1) the Continuous Block Crossing System ("CBX"); and (2) the Instinet Crossing ATS ("Instinet Crossing"). The CBX ATS allowed for continuous crossing throughout the day on a real-time basis and Instinet Crossing provided multiple types of crossing sessions. Activity on each was anonymous and orders were not displayed to other subscribers. Both ATSs were established on November 14, 2003.

**RELEVANT DISCIPLINARY HISTORY**

The Firm does not have any relevant disciplinary history.

## **OVERVIEW**

This matter stems from a review of the Firm conducted by the staff of the Trading and Examinations Unit of the Department of Market Regulation. This matter involves the Firm's failure to properly disclose that on certain occasions it acted in a principal trading capacity in its ATSs when processing errors, and its issuance of related trade confirmations that did not reflect its principal capacity as well as supervisory deficiencies during the period of at least January 5, 2008 through January 31, 2014 (the "Review Period").

## **FACTS AND VIOLATIVE CONDUCT**

### ***Failure to Properly Disclose it Acted as Principal***

1. During the Review Period, INCA would, on occasion, process errors, using the Firm's error account, in a principal capacity through one of its ATSs. The Firm correctly defined an "error" trade as one in which Firm sales or trading personnel executed an order in the wrong security, side, class, limit price, or size, or did not otherwise properly follow customer instructions. The Firm on occasion, traded within one of its ATSs in order to flatten the short or long positions it acquired as a result of correcting its errors.<sup>1</sup>
2. The Firm failed during the Review Period to generally disclose on new account documentation provided to entities that traded in the INCA ATSs (*i.e.*, INCA "members"), the Firm website, and other marketing materials that it, on occasion, may trade within its ATSs in a principal capacity when processing errors. Instead, as was indicated on its website and marketing materials, INCA described itself as trading "agency only liquidity." The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 2110 (for conduct prior to December 15, 2008), and FINRA Rule 2010 (for conduct on or after December 15, 2008).

### ***Failure to Issue Accurate Trade Confirmations***

3. When issuing trade confirmations to customers for whom the Firm corrected errors, and to those customers with whom it subsequently traded within one of its ATSs to flatten out any such position acquired pursuant to its handling of errors, INCA was required to indicate that it acted in a principal capacity. On at least 1,561 occasions during the Review Period, the Firm issued trade confirmations that incorrectly reflected its trading capacity as agent rather than as principal. The conduct described in this paragraph constitutes separate and distinct violations of Securities and Exchange Act of 1934 ("SEA") Rule 10b-10.

### ***Failure to Supervise***

4. During the Review Period, the Firm's supervisory system did not provide for supervision

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<sup>1</sup> There is no evidence that orders executed by INCA in this scenario received any preferential treatment or trading advantage over any other order in the system. Moreover, the Firm's principal trading activity, all of which involved error correction, constituted less than 0.1% of the overall ATS volume (*i.e.*, approximately .008%).

reasonably designed to achieve compliance with respect to securities laws and regulations and the rules of FINRA applicable to the conduct described above, including those related to the requirement that the Firm properly disclose to its customers that it acted in a principal capacity while executing trades within the Firm's ATSs, and those related to ensuring the accuracy of trade confirmations that reflected its principal trading capacity.

5. In addition, with regard to the accuracy of trade capacity on trade confirmations under SEA Rule 10b-10, the Firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations because the Firm's supervisory system did not include: (a) the identification of the person(s) responsible for supervision with respect to these rules; (b) a statement of the supervisory step(s) to be taken by the identified person(s); (c) a statement as to how often such person(s) should take such step(s); and (d) a statement as to how the completion of the step(s) included in the WSPs should be documented.
6. The conduct described in the above paragraphs constitute separate and distinct violations of NASD Rule 3010, NASD Rule 2110 (for conduct prior to December 15, 2008), and FINRA Rule 2010 (for conduct on or after December 15, 2008).

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

1. a censure;
2. a fine in the amount of \$115,000; and
3. an undertaking requiring the Firm to revise its policies and procedures, including its written supervisory procedures, to establish and maintain adequate supervisory procedures and controls reasonably designed to ensure that its trade confirmations reflect its accurate capacity. Within 60 days of the issuance of the acceptance of this AWC, a registered principal of the firm shall submit to the COMPLIANCE ASSISTANT, LEGAL SECTION, MARKET REGULATION DEPARTMENT, 9509 KEY WEST AVENUE, ROCKVILLE, MD 20850, signed, dated letter, or an e-mail from a work-related account of the registered principal to [MarketRegulationComp@finra.org](mailto:MarketRegulationComp@finra.org) providing the following information (1) a reference to this matter; (2) a representation that the firm has revised its policies and procedures, including its written supervisory procedures, to address the deficiencies described above; and (3) the date the revised procedures were implemented.

The Firm 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.

The Firm 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.

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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 prejudice 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.

3/15/16

Date

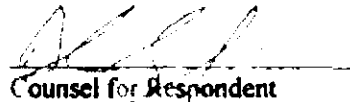
Respondent  
Inst net LLC

By Jonathan Kellner

Name: Jonathan Kellner

Title CEO

Reviewed by.



Counsel for Respondent

David Sieradzki, Esq.

Special Counsel

Schulte Roth & Zabel LLP

1152 Fifteenth Street, NW, Suite 850

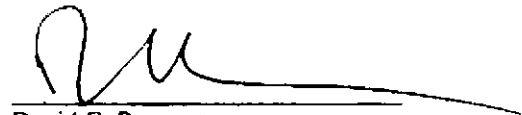
Washington, DC 20005

202.729.7473

Accepted by FINRA:

4-5-16  
Date

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



David E. Rosenstein  
Senior Vice President, Legal Section  
Department of Market Regulation