

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2013039465901**

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

RE: Capital One Investing, LLC, Respondent
Member Firm
CRD No. 45744

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Capital One Investing, LLC ("Capital One" 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. Capital One 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

Capital One is headquartered in Seattle, Washington, and offers both self-directed and full service investing options to its customers. As part of the self-directed services, Capital One offers online brokerage tools. Capital One currently has approximately 300 branches and over 1,000 associated persons. A predecessor firm, Netstock Investment Corporation, was first registered with FINRA in 1998, and through multiple acquisitions, it has since operated under the names ShareBuilder Securities Corporation ("ShareBuilder"), ING Direct Investing, Inc. ("ING Direct"), Capital One ShareBuilder, Inc. ("Capital One ShareBuilder"), and now Capital One.¹

This AWC addresses two different online tools, both of which were called PortfolioBuilder. The first tool existed from 2004 to May 2014. The second tool, called PortfolioBuilder2 in this AWC, was launched in May 2014.

¹ As used in this AWC, Capital One includes its predecessors ShareBuilder, ING Direct and Capital One ShareBuilder.

RELEVANT DISCIPLINARY HISTORY

In September 2006, NASD issued an AWC (No. 2006003887001) against a Capital One predecessor, ShareBuilder, for making false and misleading statements within its website and certain Internet advertising and for failing to file certain advertisements with NASD Advertising Regulation in violation of NASD Rules 2210(d)(1)(A), 2210(d)(1)(B), 2210(d)(2)(B), and 2110. ShareBuilder was fined \$140,000 for these violations.

OVERVIEW

From 2004 through December 10, 2013, Capital One collected suitability information and made suitability determinations for approximately 730,000 customers who used PortfolioBuilder. During this period, Capital One failed to send and create a record that it sent certain account information to these customers within 30 days of opening the accounts ("30-day notice"), and to approximately 650,000 of these customers at 36-month intervals after the accounts were opened ("36-month notice"). As a result, Capital One violated Rule 17a-3(a)(17) under the Securities Exchange Act of 1934 ("SEC Rule"), NASD Rules 3110 and 2110, and FINRA Rules 4511 and 2010.²

In addition, in certain instances from May 2014 through approximately May 2016, Capital One provided inaccurate historical weighted-average performance results to customers who used PortfolioBuilder2, in violation of FINRA Rules 2210(d)(1)(A) and 2010. Finally, Capital One failed to establish and maintain a supervisory system that was reasonably designed to achieve compliance with SEC and FINRA recordkeeping rules and FINRA advertising rules. Capital One, therefore, violated NASD Rules 3010 and 2110 and FINRA Rules 3110 and 2010.³

FACTS AND VIOLATIVE CONDUCT

Capital One Made Suitability Determinations Without Sending Required Notices

SEC Rule 17a-3(a)(17)(i) requires broker-dealers who recommend securities to, among other things, create an account record that includes "the customer's or owner's name, tax identification number, address, telephone number, date of birth, employment status (including occupation and whether the customer is an associated person of a member, broker or dealer), annual income, net worth (excluding value of primary residence), and the account's investment objectives." The rule also obligates each broker-dealer to create a record that it has furnished to each customer for whom a suitability determination is made a copy of the account record or an alternate document that contains the same information. The account record or alternate document must be provided to the customer within 30 days of the account opening and every 36 months thereafter, provided a suitability determination is made within the 36-month period.

SEC Rule 17a-3(a)(17)'s purpose is twofold. It was designed to: 1) ensure that regulators have accurate information upon which to assess a firm's suitability determinations; and 2) "reduce the

² NASD Rule 2110 was replaced by FINRA Rule 2010 effective December 15, 2008 and NASD Rule 3110 was replaced by FINRA Rule 4511 effective December 5, 2011.

³ NASD Rule 3010 was replaced by FINRA Rule 3110 effective December 1, 2014.

number of misunderstandings between customers and broker-dealers regarding the customer's situation or investment objectives."⁴

From 2004 through December 10, 2013, PortfolioBuilder collected customer financial information of the sort specified in SEC Rule 17a-3(a)(17) from approximately 730,000 customers. Based on the information the customers provided, Capital One made suitability determinations and recommended portfolios of exchange traded funds ("ETFs") to the customers. Customers who used PortfolioBuilder often arranged, through the online tool, to automatically and regularly have funds withdrawn from bank accounts to make future investments, obviating the need to again access the online tool.

Although it had made suitability determinations, Capital One failed to send and create a record that it sent the 30-day notice to any of the 730,000 customers to confirm its accuracy. Moreover, Capital One did not send the 36-month notice to 650,000 of those customers to advise those customers of the financial information that it maintained for their accounts or otherwise confirm that the information remained accurate.

Capital One's Online Tool Displayed Inaccurate Information

In May 2014, Capital One launched PortfolioBuilder2 to replace PortfolioBuilder. Among other things, PortfolioBuilder2 allowed customers to calculate an individual ETF's historical return, and the weighted-average historical performance of a selected ETF portfolio, over time periods ranging from three months to 10 years. If an ETF had not existed for the specified time period, the tool displayed a dash, "--", rather than a numeric value in the historical return field for that ETF. However, when calculating the weighted-average performance for an entire portfolio, the tool assumed a 0% return for those ETFs that had not existed for the totality of the specified period. In these cases, the use of the 0% return resulted in under- or over-reporting of actual performance for the whole portfolio. The use of the 0% assumption and the corresponding inaccurate results were not disclosed to investors.

Capital One Failed to Establish and Implement an Adequate Supervisory System

From 2004 through December 10, 2013, Capital One had no written supervisory policies and procedures relating to the 30-day notice and 36-month notice required under SEC Rule 17a-3(a)(17). Further, since May 2014, Capital One's written supervisory policies and procedures have not required regular reviews of its online system to ensure the accuracy of information displayed to customers, including information concerning the historical performance of portfolios.

⁴ *A Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, Sec. Exch. Act Rel. No. 34-44992, 2001 SEC LEXIS 2278 at *18 and *24. (October 26, 2001).

As a result of failing to send, and make a record of sending, the 30-day and 36-month notices, Capital One violated SEC Rule 17a-3(a)(17)(i), NASD Rules 3110 and 2110, and FINRA Rules 4511 and 2010. Its inaccurate displays of historical weighted portfolio performance violated FINRA Rules 2210(d)(1)(A) and 2010. Because it failed to establish, maintain, and enforce written procedures designed to achieve compliance with the recordkeeping and advertising rules, Capital One violated NASD Rules 3010 and 2110 and FINRA Rules 3110 and 2010.

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

- Censure;
- A \$500,000 fine; and
- An undertaking to review its supervisory systems and procedures regarding recordkeeping and the accuracy of information displayed to customers to ensure that current systems and procedures are reasonably designed to achieve compliance with all securities laws and regulations, including SEC Rule 17a-3(a)(17) and FINRA Rules 2210(d)(1)(A), 4511, and 2010. Within 30 days of Notice of Acceptance of this AWC, an officer of Capital One shall describe in a written statement the methodology used by the firm to conduct the referenced review and certify in writing to FINRA's Department of Enforcement that Capital One has adopted and implemented policies and procedures, including written procedures, reasonably designed to ensure compliance with the provisions of SEC Rule 17a-3(a)(17)(i) and FINRA Rules 2210(d)(1)(A), 4511, and 2010. For good cause shown and upon receipt of a timely application, FINRA staff may extend the review and certification deadline set forth above.

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. Respondent 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 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 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.

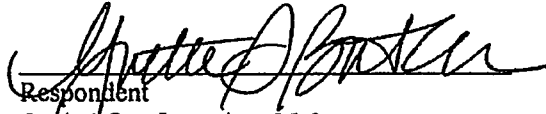
OTHER MATTERS

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 it; 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 Respondent;
 - 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 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.

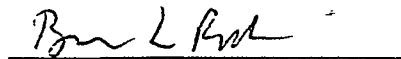
The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has agreed to its provisions voluntarily; and that no offer, 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 Respondent to submit it.

10/28/16
Date (mm/dd/yyyy)


Respondent
Capital One Investing, LLC

By: Yvette S. Butler

Reviewed by:


Brian L. Rubin, Esq.
Counsel for Respondent
Sutherland Asbill & Brennan LLP
700 6th St NW #700
Washington, DC 20001
202-383-0100

Accepted by FINRA:

11/28/16
Date

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


James E. Day
Vice President & Chief Counsel
FINRA Department of Enforcement
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