

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2014039173701**

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

RE: Maxwell Simon, Inc. ("Maxwell Simon"), Respondent
CRD No. 12667

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Maxwell Simon 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 Maxwell Simon alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

A. Maxwell Simon 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

Maxwell Simon has been a FINRA broker-dealer since 1983. It currently has nine registered representatives, all of whom are based in Minneapolis, Minnesota, which is the firm's principal place of business.

RELEVANT DISCIPLINARY HISTORY

None

OVERVIEW

Between January 1, 2013 and January 31, 2014, Maxwell Simon effected transactions involving restricted shares of microcap securities that should have raised red flags for unregistered distributions or other potentially suspicious activity. The firm, however, did not adequately investigate or analyze whether the transactions involved potentially suspicious activity or whether they were exempt from registration requirements.

Through this conduct, Maxwell Simon violated FINRA Rules 3310(a) and 2010, and NASD Rule 3010(a).

FACTS AND VIOLATIVE CONDUCT

Anti-Money Laundering Deficiencies

FINRA Rule 3310 requires every FINRA broker-dealer to develop and implement a written anti-money laundering ("AML") program that is tailored to fit the broker-dealer's business and that is "reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act (31 U.S.C. 5311, *et seq.*), and the implementing regulations promulgated thereunder by the Department of the Treasury."¹ This program must include procedures for monitoring transactions to identify potentially suspicious activity, investigating potentially suspicious activity, and reporting activity that the broker-dealer has reason to suspect is unlawful or lacks an apparent lawful purpose.²

Between January 1, 2013 and January 31, 2014, Maxwell Simon conducted a number of transactions involving restricted shares of unregistered microcap securities. At least seven of those transactions had characteristics of potentially suspicious activity, and, at a minimum, warranted further investigation. For example:

- On several occasions, customers deposited large amounts of microcap securities in the form of physical certificates, then sold the shares and wired out the proceeds. For example, one customer sold 740,779 shares of Dakota Plains Holdings, Inc., between January and August 2013 and wired more than \$3.5 million out of its Maxwell Simon account over roughly the same period.
- The customers depositing and liquidating restricted microcap securities often had limited or no other assets under management at Maxwell Simon.
- One customer was affiliated with several of the microcap issuers and was barred by the NASD in 2003 for insider trading. Another customer was the subject of news reports indicating possible connections to organized crime.
- Some of the issuers of the restricted microcap securities had undergone recent name changes.
- Four of the five microcap issuers lacked financial viability.

¹ FINRA Rule 3310.

² 31 C.F.R. § 1023.320(a).

- There was substantial overlap among the officers and other insiders of the five microcap issuers.

Although Maxwell Simon's written AML program required it to monitor for potentially suspicious activity and identified numerous situations that could be indicative of suspicious activity, the firm did not adequately investigate the concerns noted above to assess whether filing a suspicious activity report was warranted. Through this conduct, Maxwell Simon violated FINRA Rules 3310(a) and 2010.

Supervisory failures

NASD Rule 3010³ requires every FINRA broker-dealer to establish a supervisory system and corresponding written procedures to supervise its businesses and associated persons' activities. During the relevant time period, Maxwell Simon's business included the receipt and liquidation of restricted securities, as described above.

Section 5 of the Securities Act of 1933 prohibits the sale of securities unless the sale either is made pursuant to an effective registration statement or falls within an available exemption from registration. As stated in Regulatory Notice 09-05:

Before selling securities in reliance on an exemption, a firm must take reasonable steps to ensure that the transaction qualifies for the exemption. This includes taking whatever steps are necessary to ensure that the sale does not involve an issuer, a person in a control relationship with an issuer, or an underwriter with a view to offer or sell the securities in connection with an unregistered distribution.⁴

During the relevant time period, Maxwell Simon relied on Securities Act Rule 144 as the basis for executing sales of unregistered securities on behalf of its customers. When applicable, Rule 144 provides a safe harbor from being deemed an underwriter. Before acting in reliance on Rule 144, however, broker-dealers must take reasonable steps to ensure that the rule applies to the transaction.

Although the firm's written supervisory procedures stated that all Rule 144 transactions would be subject to principal review and approval, the firm routinely failed to take adequate steps to determine whether Rule 144 applied. For example, the firm failed to evaluate such factors as the consideration given for the securities, the relationship between a would-be seller and the issuer or its control persons, and how much of the outstanding stock the customer had sold. It lacked

³ NASD Conduct Rule 3010 was in effect until December 1, 2015, when it was superseded by FINRA Rule 3110.

⁴ FINRA Reg. Notice 09-05, "Unregistered Resales of Restricted Securities" (Jan. 2009).

an effective system for verifying the circumstances under which customers obtained microcap shares, and often relied on verbal representations from issuers. The firm also relied on opinion letters from sellers' counsel about whether shares could be traded, rather than conducting its own independent analysis.

Through this conduct, Maxwell Simon violated NASD Conduct Rule 3010(a) and FINRA Rule 2010.

B. Maxwell Simon also consents to the imposition of the following sanctions:

- Censure
- A fine in the amount of \$20,000.⁵

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

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 imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

The 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

⁵ Pursuant to the General Principles applicable to all Sanction Determinations contained in the Sanction Guidelines, FINRA imposed a lower fine in this case after considering, among other things, the firm's revenues and financial resources. *See* FINRA Notice to Members 06-55 (Sep. 2006).

- 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 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.

The 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

The 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 the 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 the Respondent's testimonial obligations or its right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

- D. The 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 the Respondent, certifies that a person duly authorized to act on its behalf has read and understood all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that the 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 the Respondent to submit it.

9/9/15
Date (mm/dd/yyyy)


Respondent
Maxwell Simon, Inc.

By: 

Reviewed by:


Terrence J. Fleming
Lindquist & Vennum LLP
42000 IDS Center
80 S 8th Street
Minneapolis, Minnesota 55402
(612) 371-3248

Accepted by FINRA:

10/22/15
Date

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



Adam B. Walker
Senior Regional Counsel
FINRA Department of Enforcement
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-5700
(816) 421-4519 (fax)