

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2015045347101**

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

RE: Houlihan Capital, LLC, Respondent
Member Firm
CRD No. 156028

Andrew Smith, Respondent
Registered Principal and Registered Representative
CRD No. 2433015

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondents Houlihan Capital, LLC and Andrew Smith submit 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 Respondents alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Respondents hereby accept and consent, 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

Houlihan Capital, LLC is a Chicago-based firm with ten registered employees. Its revenues are currently derived almost exclusively through securities brokerage commissions.

Smith is the President, Chief Compliance Officer, and part owner of Houlihan Capital. He entered the securities industry in 1993. He has been registered with Houlihan Capital since December 2010, and has been registered as a General Securities Representative, General Securities Principal, Financial and Operations Principal, Investment Banking Representative, Operations Professional, and Agent.

OVERVIEW

In early 2015, Respondents Houlihan Capital and Smith participated in a private placement of securities for a company seeking to raise \$5 million through the sale of subordinated convertible promissory notes. In the course of its participation in the offering, they created and disseminated written materials which failed to comply with the standards for communications with the public required under FINRA Rule 2210. As more fully described below, the materials failed to present a balanced view of the risks and benefits of the investment, included inaccurate or misleading statements, presented an overly positive portrayal of the issuer, failed to provide a sound basis for evaluating the facts in regard to an investment in the issuer, omitted material information, included out-of-date information, and contained false, exaggerated, unwarranted, promissory or misleading statements or claims.

FACTS AND VIOLATIVE CONDUCT

A. Summary of the Offering

In early 2015, Houlihan Capital and Smith participated in a private placement offering by a private company which helps customers scan, save, and share their photographs and slides in a digital format. The issuer sought to raise \$5,000,000 from the sale of subordinated convertible promissory notes in which the issuer promised to pay 10% annual interest for an 18-month investment on a quarterly basis, after which the investor would receive not just the initial principal but an additional 50% and equity shares in the company. This would yield a 42% internal rate of return, or IRR. In addition, Houlihan Capital and Smith offered institutional investors a "mezzanine investment" in the issuer.

According to the subscription agreement and marketing materials distributed by Houlihan Capital and Smith, the issuer and a national drug store chain entered into an agreement for a three-month pilot program at 95 stores, initially scheduled to begin in February 2015. However, in March 2015, the chain postponed the pilot program until April 2015 and reduced it to 12 or 13 stores. In late April 2015, Houlihan Capital terminated its selling agreement with the issuer.

There were very few note sales by Houlihan Capital. Smith personally invested in the notes, and two residents of China invested \$50,000 each on March 19, 2015. When they invested, they signed documents provided to them on March 15, 2015, acknowledging the change in the pilot program. The only payment made to date has been one interest payment of \$1,250 in July 2015. As of May 2016, there were only 13 issuer locations at the drug store chain.

B. Communications with the Public by Houlihan Capital and Smith

Houlihan Capital and Smith helped create and disseminate two principal pieces of written material derived from information provided by the issuer: a two-page investor summary and an investor presentation. The investor summary had a brief description of the offering terms and a description of the business, including a forecasted investor return of \$82,500 on a \$50,000 investment. It cited the 42% IRR noted above. The summary stated the company “has secured a contract with a national retail chain to provide in-store licensed services in a 3-month pilot program in a major southeastern US market.”

The investor presentation included a description of the business and its senior management, an overview of the financial projections for the first year, and a longer-term financial model. This material included sales projections for the pilot program, and sales projections based on expansion of the program to all of the chain’s locations throughout the country. It also projected a very rapid ramping-up of the program, reaching 245 stores after four months and 3,695 after a year, and assumed that at least one customer per day would scan 250-400 pictures per store. It included assumptions but no risk disclosure. Some or all of these materials were sent to approximately 20 potential investors between December 8, 2014 and April 23, 2015.

Smith learned on or by March 6, 2015 that the pilot program was being delayed and cut back to 12 or 13 stores. Of the 20 potential investors contacted, four were contacted after Houlihan Capital learned of the reduced scope of the pilot program.¹

Smith used inappropriate, inaccurate, or overblown language in some of his communications with potential investors made when transmitting the marketing materials or offering documents. In two emails relating to the mezzanine investment, dated March 4 and March 11, 2015, Smith inaccurately claimed that the issuer had no debt. In reality, the company had three loans (totaling more than \$425,000) and a convertible note for \$650,000 outstanding. In another email, dated March 4, 2015, Smith told potential debt investors, in reference to the pilot program and projections, “I am certain that the management team will blow away key metrics,” and that “A mezz[anine]... investment would be very safe and earn a terrific return.” In this March 4, 2015 email, Smith also stated “I expect to complete our Accredited Investor offering soon.” At that time, only one unit had been sold—to himself, that day. In four other cover emails, Smith stated that the issuer had a contract with the drug store chain, when it in fact only had a vendor agreement which did not obligate the drug store chain to implement the pilot program in 95 stores, to expand the pilot program nationally, or to adhere to any specific timetable. In at least four transmittal emails, Smith referenced the 42% forecasted IRR.

¹ Two of these four individuals invested in the offering. They were informed of the change in the pilot program and given the opportunity to rescind their investments.

C. Violations of FINRA Rule 2210

FINRA Rule 2210 governs communications with the public. This includes correspondence, which is defined as any written communication, including email, made available to 25 or fewer investors within any 30-day period. Subsection (d)(1) of the rule establishes certain content standards for correspondence which the Respondents violated.

FINRA Rule 2210(d)(1)(A) requires that member communications be fair and balanced and provide a sound basis for evaluating the facts therein, and must not omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading. The material utilized by the Respondents presented an overly positive portrayal of the issuer, including the aggressive revenue forecasts and the assumption of expansion to all of the chain's locations. These communications did not provide a sound basis for evaluating the facts in regard to an investment in the issuer by omitting material information regarding the risks of the investment, such as repayment risk, limited operating history, lack of diversification, and illiquidity. Moreover, the materials used financial projections which included revenue projections based on the far larger number of stores in the pilot program. These forecasted projections were material to the ability to meet the expected payment of the 150% bonus at the end of the 18-month investment period.

FINRA Rule 2210(d)(1)(B) precludes the making of any false, exaggerated, unwarranted, promissory or misleading statement or claim, or distributing any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading. The Respondents violated this provision by making the unwarranted and promissory claim in emails that the investment would "earn a terrific return." Smith's assertion in two emails that the issuer had no debt violated the prohibition against false or misleading statements, and his assertion that "a[n]...investment would be very safe" was exaggerated and unwarranted. Moreover, by distributing information as to the pilot program which contained what had become an untrue statement of a material fact to four potential investors without providing written updated information, Houlihan Capital and Smith violated this provision.

Contrary to the representation in the investment summary and four emails, there was no contract *per se* between the issuer and the drug store chain setting out the terms of the pilot program, but only a vendor agreement. By making this false, unwarranted, and misleading assertion, Houlihan Capital and Smith violated FINRA Rule 2210(d)(1)(B). In addition, Smith's statement that he was "certain that the management team will blow away key metrics" was an exaggeration, and his statement that he expected to complete the accredited investor offering (the private placement discussed above) soon was misleading in violation of the same

rule provision, since it implied that a significant portion of the investment had been placed, when in fact only one unit had been sold, to Smith himself.

FINRA Rule 2210(d)(1)(D) requires that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. The investor summary and certain of Smith's emails did not present a balanced view of the risks and benefits because they failed to provide a reasonable basis for the projected cash flows or discussion of any risks that may have impeded the achievement of the required revenues.

Lastly, FINRA Rule 2210(d)(1)(F) prohibits the use of exaggerated or unwarranted claims, opinions, or forecasts. The investor summary and four of Smith's emails included the 42% IRR projection, which was an unwarranted forecast because the ability to pay such a high return was dependent on the success of the pilot program.

* * *

By virtue of the foregoing conduct, Respondents Houlihan Capital and Smith violated FINRA Rule 2210(d). By violating that provision, they also failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.

B. Respondents also consent to the imposition of the following sanctions:

1. Houlihan Capital, LLC

- a. a censure, and
- b. a \$25,000 fine, \$5,000 of which is joint and several with Smith.

2. Andrew Smith

- a. a suspension from association with a member firm in any capacity for ten business days, and
- b. a \$5,000 fine, all of which is joint and several with Houlihan Capital, LLC.

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

Respondents agree to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. Respondents have submitted Election of Payment forms showing the methods by which they propose to pay the fines imposed.

Respondents specifically and voluntarily waive any right to claim that they are unable to pay, now or at any time hereafter, the monetary sanctions imposed in this matter.

Respondent Andrew Smith understands that if he is suspended from associating with any FINRA member, he becomes subject to a statutory disqualification as that term is defined in Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, he may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the suspension (see FINRA Rules 8310 and 8311).

II.

WAIVER OF PROCEDURAL RIGHTS

Respondents specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against them;
- 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, Respondents specifically and voluntarily waive 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.

Respondents further specifically and voluntarily waive 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

Respondents understand 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 them; and
- C. If accepted:
 - 1. this AWC will become part of Respondents' permanent disciplinary records and may be considered in any future actions brought by FINRA or any other regulator against them;
 - 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. Respondents 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. Respondents 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 Respondents': (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. Respondents may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondents understand that they 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 Houlihan Capital and himself, certifies that he is authorized to act on the firm's behalf and has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; 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 Respondents to submit it.

10/10/2016
Date

Respondent Houlihan Capital, LLC

By: Andrew D. Smith
Andrew Smith, President

Respondent Andrew Smith

Andrew D. Smith
Andrew Smith

Reviewed by:

Howard J. Stein
Howard J. Stein
Counsel for Respondent
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Accepted by FINRA:

Oct. 19, 2016
Date

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

Jonathan Golomb
Jonathan Golomb
Senior Special Counsel
FINRA Department of Enforcement
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