

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2017053162101**

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

RE: Van Clemens & Co. Inc., Respondent
CRD No. 6914

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, 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

Van Clemens has been a FINRA member firm since 1975. It has a headquarters in Minneapolis, Minnesota, and one branch office. It employs approximately 20 registered representatives.

RELEVANT DISCIPLINARY HISTORY

Van Clemens has no relevant disciplinary history.

OVERVIEW

With regard to reviewing activity in customer accounts for potential excessive trading, Van Clemens failed, from June 2015 through June 2016, to establish and maintain a supervisory system, and to establish, maintain, and enforce written

supervisory procedures (“WSPs”), reasonably designed to achieve compliance with FINRA’s suitability rule.

Through this conduct, Van Clemens violated FINRA Rules 3110(a), 3110(b), and 2010.

FACTS AND VIOLATIVE CONDUCT

FINRA Rule 3110(a) requires member firms to establish and maintain a supervisory system, including written supervisory procedures, reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA Rules. FINRA Rule 3110(b) states, “Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.”

One such rule, FINRA Rule 2111, requires member firms and their associated persons to have a reasonable basis to believe that a recommended securities transaction is suitable for the customer to whom they recommend it. Whether a firm or associated person meets this obligation depends on the information obtained through reasonable diligence to ascertain the customer’s investment profile – information such as the customer’s age, financial situation and needs, investment objectives, investment experience, investment time horizon, liquidity needs, and risk tolerance.

The obligations imposed by Rule 2111 require member firms and their associated persons to consider both the qualitative and quantitative aspects of any investment recommendation when determining whether reasonable grounds exist for believing a recommendation suitable for a specific customer. Quantitative unsuitability, also called “excessive trading,” occurs when a registered representative, while exercising control over a customer’s account, recommends a level of trading activity that is inconsistent with the customer’s investment needs and objectives. A number of factors may indicate the presence of excessive trading, including the turnover rate and cost-to-equity ratio in an account, as well as the existence of “in-and-out” trading.

From June 1, 2015, through June 30, 2016, Van Clemens failed to establish and maintain a supervisory system, including WSPs, reasonably designed to ensure that the firm reviewed transactions in customer accounts for potentially unsuitable excessive trading in order to achieve compliance with FINRA’s suitability rule.

The firm’s WSPs did not directly address quantitative suitability and, as such, did not set forth a process or identify personnel responsible for reviewing customer accounts for potentially excessive trading. Moreover, although the WSPs contained a section entitled “churning,” which mentioned instances of high turnover in accounts controlled by a registered representative, this section and its supervisory

requirements only applied to transactions executed “solely for the purpose of generating commissions.” Thus, not only were the WSPs silent on the issue of quantitative unsuitability, they gave the added misimpression that evidence of quantitative unsuitability was not a supervisory concern unless the available evidence demonstrated churning, which is a distinct type of misconduct.¹

Thus, Van Clemens did not instruct its supervisors to review account activity for potential excessive trading. It also did not train its supervisors to do so. Further, even if any of the firm’s supervisors had sought to perform that type of review, they would have lacked the necessary tools, as none of the reports available to those individuals provided turnover rates or cost-to-equity ratios. Van Clemens did not calculate or obtain either statistic for any of its customer accounts between June 1, 2015, and June 30, 2016.

Due to its failure to establish and maintain a reasonable supervisory system and WSPs, the firm allowed quantitatively unsuitable activity to occur at the firm. Between June 1, 2015, and June 30, 2016, a registered representative of Van Clemens, PM, recommended transactions to a firm customer that resulted in the customer’s account having an annualized turnover rate above 9.0 and an annualized cost-equity ratio of 32.3%. This activity was excessive, given the customer’s investment objectives and financial situation, and coincided with losses in the account of more than \$100,000 during the 13-month period, which was roughly half the account’s value at the start of that period.²

Through the foregoing conduct, Van Clemens violated FINRA Rules 3110 and 2010.

B. Van Clemens also consents to the imposition of the following sanctions:

- A censure; and
- A \$50,000 fine.³

Certification. Van Clemens also agrees that, within 60 days of Notice of Acceptance of this AWC, it will certify to FINRA, in a submission by an officer and registered principal of the firm, that it has established and implemented

¹ As noted above, an excessive-trading violation requires two elements of proof: control of the account and trading that is excessive in light of the customer’s investment profile. Churning is a separate violation that requires scienter – i.e., fraudulent intent or reckless disregard of customer interests – in addition to the same two elements, control and excessiveness, required to prove excessive trading.

² Van Clemens has entered into a settlement agreement with the affected customer’s estate concerning losses in the account during the period at issue in this AWC.

³ Pursuant to the General Principles Applicable to all Sanction Determinations contained in the Sanction Guidelines, FINRA imposed a lower fine in this case after it considered, among other things, the firm’s revenues and financial resources. See Notice to Members 06-55.

policies, procedures, and internal controls reasonably designed to address and remediate the issues identified in this AWC. Van Clemens shall address this certification to Adam Walker, Senior Counsel, 120 W. 12th Street, Kansas City, Missouri 64105. Upon written request showing good cause, FINRA staff may extend the deadline for this certification.

Van Clemens agrees to pay the monetary sanctions upon notice that FINRA has accepted this AWC and that such payments are due and payable. Van Clemens has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

Van Clemens specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanctions 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

I 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 me; and
- C. If accepted:
 - 1. This AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
 - 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.

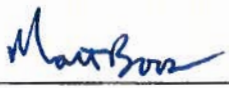
The undersigned, on behalf of the Respondent, certifies that a person duly authorized to act on its behalf has read and understood all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent agrees to its provisions voluntarily; and that no offer,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

Aug 6, 2019
Date (mm/dd/yyyy)

Respondent
Van Clemens and Co. Incorporated

By: 

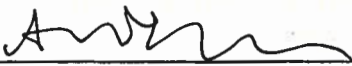
Reviewed by:


Matthew T. Boos
Counsel for Respondent
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 400
Minneapolis, Minnesota 55402
(612) 492-7180

Accepted by FINRA:

8/19/2019
Date

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


Adam B. Walker
Senior Counsel
FINRA Department of Enforcement
120 W. 12th Street
Kansas City, Missouri 64105
(816) 802-4751