

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT  
NO. 2017053847701**

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

RE: DriveWealth Institutional LLC (f/k/a Cuttone & Co., LLC) (Respondent)  
Member Firm  
CRD No. 33038

Pursuant to FINRA Rule 9216, Respondent DriveWealth Institutional LLC 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 in this AWC.

**I.**

**ACCEPTANCE AND CONSENT**

- A. Respondent accepts and consents to the following findings by FINRA without admitting or denying them:

**BACKGROUND**

DriveWealth, known as Cuttone & Co., LLC until February 17, 2021, became a FINRA member in February 2002. In February 2021, the firm was acquired by DriveWealth Holdings, Inc. and changed its name to DriveWealth Institutional LLC. Respondent specializes in execution services for institutional and broker-dealer clients. The firm, which maintains its headquarters in New York, New York, has four branch offices and employs approximately 30 registered representatives.<sup>1</sup>

**OVERVIEW**

Between April 2016 and September 2018, Respondent violated Regulation SHO of the Securities Exchange Act of 1934 and FINRA trade reporting rules in connection with its handling of net trades.<sup>2</sup> First, from April 2016 to April 2017, Respondent failed to obtain locates in connection with 179,778 short sale transactions, in violation of Rule 203(b)(1) of Regulation SHO and FINRA Rule 2010. Additionally, during this period, the firm

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<sup>1</sup> For more information about the firm, including prior regulatory events, visit BrokerCheck® at [www.finra.org/brokercheck](http://www.finra.org/brokercheck).

<sup>2</sup> As defined in FINRA Trade Reporting FAQ 304.1, a net trade is a principal trade in which a broker-dealer, after having received an order to buy (sell) an equity security, purchases (sells) the security at one price and satisfies the original order by selling (buying) the security at a different price. The difference between the price of the initial transaction and the price of the offsetting transaction generally is considered the broker-dealer's compensation.

reported those short sale transactions to the FINRA/NYSE Trade Reporting Facility (FNYTRF) without indicating the required short sale indicators, in violation of FINRA Rules 6182 and 2010. The firm further did not establish, maintain, and enforce written procedures reasonably designed to prevent the execution of 829 short sale transactions during a circuit breaker, in violation of Rule 201(b)(1) of Regulation SHO and FINRA Rules 3110 and 2010.

From February 2017 to September 2018, Respondent also incorrectly reported net trades with a W modifier to the FINRA/Nasdaq Trade Reporting Facility (FNTRF), FNYTRF and the OTC Trade Reporting Facility (OTCRF), in violation of FINRA Rules 6380A(a), 6380B(a), 6622(a), and 2010.

Finally, during the entire period, the firm did not establish a supervisory system, including written supervisory procedures (WSPs), reasonably designed to achieve compliance with the locate requirements of Regulation SHO and trade reporting of short sales, net trades, and trade modifiers, in violation of FINRA Rules 3110(a) and 2010.

### **FACTS AND VIOLATIVE CONDUCT**

#### ***Respondent failed to obtain locates for short sales as required by Rule 203(b)(1) of Regulation SHO.***

Rule 203(b)(1) of Regulation SHO prohibits a broker-dealer from accepting an equity short sale order from another person, or effecting an equity short sale for its own account, unless it has, in relevant part, (i) borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due. A broker-dealer must therefore locate securities available for borrowing before effecting short sales. A violation of the Exchange Act or another FINRA rule also constitutes a violation of FINRA Rule 2010.

From July 21, 2016, through April 27, 2017, upon receipt of a customer short sale order, Respondent effected a principal short sale in the same security on an exchange or other execution venue and then satisfied the customer order by buying the security as principal at a different price. This is known as trading on a net basis. Two short sales are effected in this scenario: (1) Respondent accepts a short sale order from its customer, for which the customer is required to obtain a locate; and (2) Respondent effects a short sale order for its own account, for which it is required to obtain a locate.

During the relevant period, Respondent effected 179,778 short sale orders for its own account to facilitate customer short sale orders on a net basis without borrowing the securities, entering into a bona fide arrangement to borrow the securities, or having reasonable grounds to believe the securities could be borrowed so that they could be delivered on the date delivery was due.

Therefore, Respondent violated Rule 203(b)(1) of Regulation SHO and FINRA Rule 2010.

***Respondent failed to report short sales with the short sale indicator required by FINRA Rule 6182.***

FINRA Rule 6182 requires a member to indicate on trade reports submitted to FINRA whether a transaction is a short sale or a short sale exempt transaction.

FINRA Trade Reporting Facilities (TRFs) provide member firms with a mechanism by which to report transactions effected other than on an exchange. The data members report to TRFs has a direct impact on the accuracy of public information FINRA disseminates. Additionally, the inaccurate reporting of required trade information may negatively impact FINRA's surveillance patterns. FINRA relies on the accuracy of trade reporting to reconstruct and review the activities of market participants in order to safeguard the integrity of the securities markets and protect investors. Accurate recordkeeping also enables member firms to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws and regulations.

From July 21, 2016, through April 27, 2017, Respondent executed 179,778 short sale transactions and failed to report each of the transactions to the FNYTRF with a short sale indicator. Respondent failed to report these transactions as short sales because its front-end order management system (OMS) was not programmed to include a short sale indicator for the customer when submitting the second leg of a net trade. The programming issue resulted in 179,778 trade reports incorrectly reflecting that the contra-party sold long. The firm did not discover this problem until FINRA staff first approached Respondent about the practice. Respondent corrected the issue in April 2017.

Therefore, Respondent violated FINRA Rules 6182 and 2010.

***Respondent failed to establish, maintain, and enforce written policies and procedures reasonably designed to prevent short sales during a circuit breaker as required by Rule 201(b)(1) of Regulation SHO.***

Rule 201 of Regulation SHO requires that trading centers<sup>3</sup> establish, maintain, and enforce written policies and procedures reasonably designed to "prevent the execution or display of a short sale order . . . at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from [its] closing price" as of the prior day (the short sale circuit breaker). The purpose of Rule 201(b) is to restrict short selling where a stock is experiencing substantial downward price pressure, enabling long sellers to sell ahead of short sellers when a short sale circuit breaker is in effect.

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<sup>3</sup> As defined in Regulation NMS Rule 600(b)(82), a trading center is a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, and OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

FINRA Rule 3110(a) requires members to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. The supervisory system must provide for the establishment and maintenance of written procedures.

From July 21, 2016, through April 27, 2017, Respondent had no reasonable supervisory process to identify whether short sale transactions were executed at or below the National Best Bid (NBB) when a circuit breaker was in effect. Respondent relied on automated pre-trade controls within its front-end OMS, in part, to achieve compliance with Rule 201(b)(1). Here, because the firm's front-end OMS was not programmed to include a short sale indicator for the customer when submitting the second leg of a net trade, the OMS also did not subject the transactions to automated pre-trade controls designed to achieve compliance with Rule 201. Respondent executed 829 short sale orders at prices at or below the NBB when a circuit breaker was in effect from July 21, 2016, through April 27, 2017.

Additionally, the firm's WSPs provided for a review of "a reasonable sampling of orders and trade records and trade reports for compliance with . . . short sale circuit breaker requirements. . . ." Reviewing order records and trade reports, however, did not allow the firm to assess whether it complied with Rule 201(b), as these records do not contain information about the NBB or whether a circuit breaker was in effect at the time of execution. As a result, the firm was unable to identify that its controls were not preventing short sales during short sale circuit breakers in relation to the second leg of the net trades until FINRA staff inquired about it in April 2017.

Therefore, Respondent violated Rule 201(b)(1) of Regulation SHO and FINRA Rules 3110 and 2010.

***Respondent improperly reported trades using the wrong modifier under FINRA Rules 6380A(a), 6380B(a), and 6622(a).***

FINRA Rules 6380A(a), 6380B(a), and 6622(a) set forth the requirements for when and how transactions are reported to the FNTRF, the FNYTRF, and the OTCRF, respectively. Subsection (5)(E) of each rule requires members to append a trade report modifier to trades that occur at a price based on an average weighting or another special pricing formula.

From February 13, 2017, to September 11, 2018, Respondent submitted 569,797 trade reports to the FNTRF, FNYTRF, and OTCRF with W trade modifiers. The W modifier is used to indicate that the price of a reported trade may bear no relation to the current market and is required to be reported if a trade occurs at a price based on an average weighting or another special pricing formula.<sup>4</sup> Respondent incorrectly reported the W modifier on the trade reports for its net trades, even though none were priced at an

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<sup>4</sup> See NASD Notice to Members 00-43.

average weighted price or with a special pricing formula.<sup>5</sup> The 567,797 trade reports constitute approximately 92.05% of Respondent's total trade reporting obligation during this period (619,009).

Therefore, Respondent violated FINRA Rules 6380A(a), 6380B(a), 6622(a), and 2010.

***Respondent failed to establish and maintain a supervisory system reasonably designed to achieve compliance with the locate requirement in Regulation SHO and FINRA's trade reporting rules.***

From July 21, 2016, to April 27, 2017, Respondent's supervisory system was not reasonably designed to achieve compliance with the locate requirement in Rule 203(b)(1) of Regulation SHO. Respondent relied on an automated process in its OMS to block the transmission or execution of transactions that were marked as short but for which locate information was not included. Respondent, however, programmed the system to not require locates for the principal short sale orders sent to facilitate customer short sale orders on a net basis. Respondent also had no reasonable process to identify whether a trade was properly marked as short or whether a locate was obtained. Although Respondent's WSPs summarized short sale requirements and provided for a weekly review of a "reasonable" sample of orders, trade records, and trade reports, the WSPs failed to describe what constituted a reasonable sample size, and also did not explain for what the supervisor should be reviewing, how the supervisory review was to be conducted, or how the locate requirements applied to net trades.

From July 21, 2016, to September 11, 2018, Respondent's supervisory system was also not reasonably designed to achieve compliance with trade reporting requirements. Respondent relied on a daily review of trade reports to ensure "proper reporting of transactions," and a monthly review of Nasdaq Report Cards to ascertain its rate of compliance for trade reporting requirements, including whether the firm was reporting the correct indicators and trade modifiers. The firm's WSPs, however, failed to describe for what the supervisor should be reviewing the daily trade reports or explain how the supervisory review was to be conducted. Further, a review of Nasdaq Report Cards would not identify whether trades were reported with accurate indicators or modifiers, as the Report Cards reflect only statistical information regarding a firm's trading activity. Finally, Respondent's WSPs related to net trading did not include any review to verify that net trades were accurately reported to TRFs.

Therefore, Respondent violated FINRA Rules 3110(a) and 2010.

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

- a censure; and

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<sup>5</sup> See FINRA Trade Reporting FAQ 404.2 ("The mark-up of a trade does not in itself qualify a trade to be marked with a weighted average price modifier.").

- a \$100,000 fine.

Respondent agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is 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 an inability to pay, now or at any time after the execution of this AWC, the monetary sanction imposed in this matter.

The sanctions imposed in this AWC shall be effective on a date set by FINRA.

## 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 its acceptance or rejection.

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 Respondent's permanent disciplinary record and may be considered in any future action 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 its subject matter 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 right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party. Nothing in this provision affects Respondent's testimonial obligations in any litigation or other legal proceedings.
- 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.

The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's 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 the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce Respondent to submit this AWC.

January 21, 2022

Date

*Sean Gilmartin*

DriveWealth Institutional LLC  
Respondent

Print Name: Sean Gilmartin

Title: CCO

Reviewed by:

*Paul McCurdy*

Paul McCurdy  
Counsel for Respondent  
Katten Muchin Rosenman LLP  
575 Madison Avenue  
New York, NY 10022-2585

Accepted by FINRA:

January 26, 2022

Date

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

*Carly M. Kostakos*

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