

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2017056432606**

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

RE: Donald J. Fowler (Respondent)
Former General Securities Representative
CRD No. 4989632

Pursuant to FINRA Rule 9216, Respondent Donald J. Fowler 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 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

Fowler first registered with FINRA as a General Securities Representative (GS) through a member firm in September 2005. From January 2007 through November 2014, Fowler was registered as a GS through another member firm. During this time, he became registered with FINRA as a General Securities Principal (GP) in May 2008 and as an Operations Professional (OS) in November 2011. From November 2014 to August 2019, Fowler was registered through Worden Capital Management LLC (CRD No. 148366) (WCM) as a GS, GP, and OS. On August 1, 2019, WCM filed a Uniform Termination Notice for Securities Industry Registration (Form U5) disclosing that Fowler was permitted to resign and adding the explanation that "RR was found liable for 10b-5 violations due to activity conducted while employed at another broker/dealer."

Although Fowler is not currently registered or associated with any member firm, he remains subject to FINRA's jurisdiction. On December 23, 2020, WCM filed an amendment to Fowler's Form U5 that disclosed a new customer complaint which alleged, among other things, churning and unsuitable trading. Pursuant to Article V, Section 4(a) of FINRA's By-Laws, the Form U5 amendment filed December 23, 2020, operates to recommence the running of the two-year jurisdiction period.

On June 20, 2019, a jury found Fowler, between January 2007 and November 2014, violated (i) Section 17(a) of the Securities Act of 1933, and (ii) Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder for recommending to 13 customers a high-cost, in-and-out trading strategy without a reasonable basis and making unauthorized trades. On February 25, 2020, the court entered a final judgment against Fowler and, among other things, permanently enjoined him from further violations of the securities laws.¹

OVERVIEW

Between December 2014 and December 2018, while registered through WCM, Fowler churned and excessively traded four customers' accounts.² Fowler's trading in his customers' accounts resulted in the customers being charged high commissions and fees and incurring significant realized losses. As a result of his churning and excessive trading, Fowler violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and violated FINRA Rules 2020, 2111, and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from FINRA exams of the Respondent.

Section 10(b) of the Exchange Act makes it unlawful for any person to employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." Rule 10b-5 makes it unlawful for any person, directly or indirectly, in connection with the sale or purchase of any security, to: (a) "employ any device, scheme, or artifice to defraud," (b) "make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made . . . not misleading," or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

FINRA Rule 2020 is similar to Rule 10b-5 and provides that a member may not "effect any transaction in, or induce the purchase or sale of, any security by any manipulative, deceptive or other fraudulent device or contrivance."

FINRA Rule 2111(a) provides in pertinent part that "[a] member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile." As explained in the Supplementary Material found at 2111.05(c):

¹ *SEC v. Fowler*, 440 F. Supp. 3d 284 (S.D.N.Y. 2020), *aff'd*, *SEC v. Fowler*, 2021 U.S. App. LEXIS 21688 (2d Cir. July 22, 2021). For more information about the respondent, including prior regulatory events, visit BrokerCheck® at www.finra.org/brokercheck.

² All four customers have either received restitution from WCM pursuant to a settlement with FINRA or settled arbitrations with WCM and Fowler. *See* AWC No. 2017056432601 (Dec. 31, 2020).

Quantitative suitability requires a member or associated person who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile, as delineated in Rule 2111(a). No single test defines excessive activity, but factors such as the turnover rate, the cost-equity ratio, and the use of in-and-out trading in a customer's account may provide a basis for a finding that a member or associated person has violated the quantitative suitability obligation.³

Turnover rate represents the number of times that a portfolio of securities is exchanged for another portfolio of securities. The cost-to-equity ratio measures the amount an account has to appreciate just to cover commissions and other expenses. In other words, it is the break-even point where a customer may begin to see a return. An annualized turnover rate of six or an annualized cost-to-equity ratio above 20 percent generally indicates that excessive trading has occurred.

Excessive trading becomes churning, which violates Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and Rule 2020, when the registered representative acts with intent to defraud or a reckless disregard of the customer's interests.

Violations of Rules 2020 and 2111, as well as Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, also violate FINRA Rule 2010, which requires associated persons to act with high standards of commercial honor and just and equitable principles of trade in the conduct of their business.

During the relevant period, Fowler churned and excessively traded four customer accounts. While exercising de facto control over these customers' accounts, Fowler recommended excessive activity and his customers routinely followed his recommendations.

Fowler's trading in the four customers' accounts was excessive and, with reckless disregard for the customers' interests, conducted to maximize his commissions. Fowler employed an investment strategy that entailed short-term in-and-out trades and Fowler used margin as a means to increase the buying power in his customers' accounts.

Fowler's trading of the four accounts resulted in high turnover rates and cost-to-equity ratios, as set forth below.

1. From December 2014 to May 2016, Fowler effected 1,419 trades in Customer 1's account, resulting in an annualized turnover rate of 114.47 and an annualized cost-to-equity ratio of 77.75%. Fowler's trading in Customer 1's account

³ FINRA Rule 2111 was amended effective June 30, 2020. The quoted excerpt is from the pre-June 30, 2020 version which applies to the conduct at issue here.

generated total trading costs of \$766,256, including \$664,797 in commissions and \$74,488 in margin interest, and caused \$755,727 in realized losses.

2. From September 2015 to January 2017, Fowler effected 53 trades in Customer 2's account, resulting in an annualized turnover rate of 29.23 and an annualized cost-to-equity ratio of 71.19%. Fowler's trading in Customer 2's account generated total trading costs of \$60,824, including \$53,440 in commissions and \$5,898 in margin interest, and caused \$29,736 in realized losses.
3. From June 2016 to March 2017, Fowler effected 65 trades in Customer 3's account, resulting in a turnover rate of 27.25 (equivalent to an annualized turnover rate of 32.70) and a cost-to-equity ratio of 61.02% (equivalent to an annualized cost-to-equity ratio of 73.22%).⁴ Fowler's trading in Customer 3's account generated total trading costs of \$41,609, including \$35,365 in commissions and \$4,473 in margin interest, and caused \$118,137 in realized losses.
4. From April 2015 to December 2018, Fowler effected 193 trades in Customer 4's account, resulting in an annualized turnover rate of 16.68 and an annualized cost-to-equity ratio of 43.90%. Fowler's trading in Customer 4's account generated total trading costs of \$271,930, including \$195,754 in commissions and \$70,836 in margin interest, and caused \$192,178 in realized losses.

Fowler's trading in these customers' accounts was excessive and unsuitable. Moreover, Fowler effected short-term in-and-out trading with reckless disregard for these four customers' interests.

Therefore, Fowler willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and violated FINRA Rules 2111, 2020 and 2010.

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

- a bar from associating with any FINRA member in all capacities.

Respondent understands that if he is barred or 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 Exchange Act. Accordingly, he may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension. *See* FINRA Rules 8310 and 8311.

Respondent understands that this settlement includes a finding that he willfully violated Section 10(b) of the Exchange Act and that under Article III, Section 4 of FINRA's By-Laws, this makes him subject to a statutory disqualification with respect to association with a member.

⁴ Because Customer 3's account traded for less than one year, this AWC includes both the actual turnover rate and cost-to-equity ratio in addition to the annualized figures.

The sanctions imposed in this AWC shall be effective on a date set by FINRA. A bar or expulsion shall become effective upon approval or acceptance of this AWC.

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 him;
- 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 testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

Respondent certifies that he has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; Respondent understands and acknowledges that FINRA does not represent or advise him and Respondent cannot rely on FINRA for legal advice. Respondent has agreed to the AWC's provisions voluntarily; and 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 him to submit this AWC.

August 10, 2021

DONALD FOWLER

Date

Donald J. Fowler
Respondent

Accepted by FINRA:

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

August 25, 2021

Jackie Wells

Date

Jackie A. Wells
Senior Counsel
FINRA
Department of Enforcement
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