

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2018057162301**

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

RE: J.H. Darbie & Co., Inc., Respondent
Member Firm
CRD No. 43520

Pursuant to FINRA Rule 9216 of FINRA’s Code of Procedure, Respondent J.H. Darbie & Co., Inc. (the firm, or 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 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

The firm has been a member of FINRA since February 1998. The firm is headquartered in New York, New York, and it currently employs a total of 36 registered representatives at its headquarters and its one branch office. The firm provides retail brokerage services.

Respondent does not have any relevant disciplinary history.

OVERVIEW

During the period between the third quarter of 2011 and the third quarter of 2018 (the 606 Review Period), the firm made publicly available reports on its routing of non-directed orders in covered securities, required pursuant to Rule 606 of Regulation NMS (Rule 606) of the Securities Exchange Act of 1934, as amended, that were inaccurate and incomplete. This conduct violated Rule 606 and FINRA Rule 2010.

During the period between February 2013 and January 2019, the firm submitted Reportable Order Events (ROEs) to the Order Audit Trail System (OATS) that contained inaccurate, incomplete, or improperly formatted data. During the period between February 2016 and January 2019, the firm submitted approximately 17,375 ROEs to OATS that included inaccurate, incomplete, or improperly formatted data. This conduct violated FINRA Rules 7450 and 2010.

FACTS AND VIOLATIVE CONDUCT

Rule 606 of Regulation NMS

On June 9, 2005, the U.S. Securities and Exchange Commission (SEC) adopted Regulation NMS. Among the rules in Regulation NMS is Rule 606, which is designed to foster greater transparency in connection with a broker-dealer's best execution responsibilities.

Rule 606 of Regulation NMS requires every broker or dealer to make publicly available each calendar quarter a report containing information on its routing of non-directed orders in national market system (NMS) securities. Under Rule 606(a)(1)(i), the firm must report "[t]he percentage of total orders for the section that were non-directed orders, and the percentages of total non-directed orders for the section that were market orders, marketable limit orders, non-marketable limit orders, and other orders." The "Other" classification includes orders that are not limit or market orders, such as Not Held orders, market open and market close orders, and all-or-none orders.¹

In addition, Rule 606(a)(1)(iii) provided, in relevant part, that the firm's report must include "[a] discussion of the material aspects of the broker's or dealer's relationship with each venue identified pursuant to paragraph (a)(1)(ii) of this section, including a description of any arrangement for payment for order flow and any profit-sharing relationship."²

FINRA Rule 2010 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." A violation of an SEC rule or another FINRA rule constitutes a violation of FINRA Rule 2010.

For each calendar quarter beginning with the third quarter of 2011 and continuing through the third quarter of 2018, the firm made publicly available reports on its routing of non-directed orders in covered securities that were inaccurate and incomplete.

¹ *Division of Market Regulation: Staff Legal Bulletin No. 13, Frequently Asked Questions About Rule 11Ac1-6* (Oct. 16, 2001) (the "Rule 606 FAQs"), Question and Answer #9. Available at <https://www.sec.gov/interps/legal/mrslb13.htm#q9>. Exchange Act Rule 11Ac1-6 was the predecessor to Rule 606.

² Rule 606(a)(1)(iii) was amended and renumbered as Rule 606(a)(1)(iv) on November 19, 2018.

Specifically, these 29 quarterly reports failed to describe the material terms of the order routing arrangements, such as the amounts per share or per order that the firm received as payment for order flow.³

Additionally, for each calendar quarter beginning with the first quarter of 2013 and continuing through the second quarter of 2018, the firm made publicly available 22 quarterly reports on its routing of non-directed orders in covered securities that were inaccurate and incomplete, in that its “Not Held” orders were not included in the “Other” classification on the reports.

Therefore, the firm violated Rule 606 and FINRA Rule 2010.

OATS Reporting

FINRA Rule 7450(a) states, in relevant part, that “[a]ll applicable order information required to be recorded under Rule 7440 shall be transmitted to the Order Audit Trail System by each Reporting Member⁴ or by a Reporting Agent....”

FINRA Rule 7450(b)(2) states, in relevant part, that “[e]ach Reporting Member shall transmit to the Order Audit Trail System a report containing each applicable item of order information ... whenever an order is originated, received, transmitted to another department within the member or to another member, modified, canceled, or executed.”

FINRA Rule 7440 sets forth the information that is required to be in its ROEs. Among the information required, FINRA Rule 7440(b)(18) requires inclusion of “the type of account, i.e., retail, wholesale, employee, proprietary, or any other type of account designated by FINRA, for which the order is submitted...” FINRA Rule 7440(b)(11) requires the inclusion of any limit price in the order. FINRA Rule 7440(d) sets forth the requirement to report information when an order is modified or canceled.

Review of OATS data is an integral part of FINRA’s automated market surveillance program designed to detect potentially manipulative activity and other significant violations of FINRA rules and the federal securities laws. The transmission of inaccurate or incomplete OATS data can impede FINRA’s ability to detect potentially violative conduct and/or create false positive alerts.

The staff sampled 50 orders for OATS compliance during its examination of the firm and identified 19 instances during the period between August 28, 2017 and February 27, 2018 in which the firm transmitted ROEs to OATS that included inaccurate, incomplete, or improperly formatted data. Specifically: (i) in 15 instances, the firm reported an account type of “A,” the designation for an institutional account, in its order records submitted to

³ Rule 606 FAQs, Question and Answer # 13 requires that these be reported. Available at <https://www.sec.gov/interps/legal/mrslb13.htm#q13>.

⁴ A Reporting Member is a member that receives or originates an order and has an obligation to record and report the order to OATS.

OATS for retail account orders; (ii) in two instances, the firm reported an account type of “A” in its order records submitted to OATS for firm account orders; (iii) in one instance, the firm failed to submit a required “CR” cancel/replace event in its order record submitted to OATS and reported an account type of “A” in that order record for a retail account order; and (iv) in one instance, the firm reported an account type of “A” in its order record submitted to OATS for a retail account order and reported an incorrect price to OATS in that order record.

The default setting in the firm’s order management system was “A,” and the inaccurate reporting resulted from the firm’s failure to enter the correct account type code. Its failures to submit the required “CR” cancel/replace event and its reporting of an incorrect price were caused by human error.

Because the firm’s order management system had utilized the default setting account type code as “A” since February 2013, further review was conducted to broaden the scope of the firm’s OATS reporting violations. During the period between February 1, 2016 and January 31, 2019, the firm mistakenly reported an account type code of “A” in its submissions to OATS for approximately 17,375 orders. The firm learned about the issue through the staff’s examination, and took corrective action in February 2019.

Therefore, the firm violated FINRA Rules 7450 and 2010.

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

- A censure; and
- A fine of \$25,000 (consisting of \$12,500 for Rule 606 violations, and \$12,500 for OATS violations).

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:

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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.
- 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.

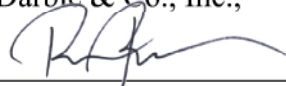
The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has agreed to the AWC's provisions voluntarily; and 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.

12/15/2020

Date

Respondent

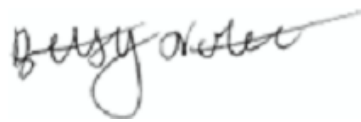
J.H. Darbie & Co., Inc.,

By: 

Name: Robert Rabinowitz

Title: CEO

Reviewed by:



Betsy T. Voter
Counsel for Respondent
Michael Best & Friedrich LLP
170 S. Main Street, Suite 1000
Salt Lake City, UT 84101

Accepted by FINRA:

February 8, 2021

Date

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



Steven M. Tanner
Senior Counsel
FINRA Department of Enforcement