

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2019063881901**

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

RE: Baker Tilly Capital, LLC (Respondent)
Member Firm
CRD No. 115333

Pursuant to FINRA Rule 9216, Respondent Baker Tilly Capital, 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

Baker Tilly Capital, LLC (BTC) has been a FINRA member since 2001. BTC is headquartered in Madison, Wisconsin. It has 8 branches and approximately 40 registered representatives. The firm is a limited purpose broker-dealer and offers private placement investment opportunities in real estate and other alternative investments to accredited investors.¹

OVERVIEW

In 2019, BTC permitted material changes to the terms of two related private placement offerings without terminating the offerings and returning funds to investors. Therefore, BTC willfully violated Exchange Act Rule 10b-9 and FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a cause examination by FINRA's Corporate Financing Department.

Exchange Act Rule 10b-9 requires, in connection with the sale of securities on an "all-or-none" or "part or none" basis, disclosure to investors that consideration paid for securities

¹ For more information about the firm, visit BrokerCheck® at www.finra.org/brokercheck.

will be promptly refunded unless the minimum number of securities are sold at a specified price within a specified time, and the total amount due to the seller is received by a specified date. The offering “may not be considered ‘sold’ . . . unless all the securities required to be placed are sold in bona fide transactions and are fully paid for.”² While not a guarantee, satisfaction of the minimum contingency indicates to investors that the offering was priced fairly.

Any change in a material term of an “all-or-none” or “part or none” offering requires the offering to be terminated and investor funds to be returned. Investors cannot waive this requirement by affirmatively consenting to the changes, except to extend the termination date of the offering. A broker-dealer that fails to terminate an offering following a material change to the terms of an offering—including changing the minimum contingency amount—violates Exchange Act Rule 10b-9.³

A violation of Exchange Act Rule 10b-9 is also a violation of FINRA Rule 2010, which requires a member, in the conduct of its business, to observe high standards of commercial honor and just and equitable principles of trade.

In 2019, BTC served as the private placement agent for two related private placements (the offering). The offering raised funds for a real estate development in a federally designated qualified opportunity zone. Investments in qualified opportunity zones may provide tax benefits to investors, so long as their investment occurs within a certain time period and satisfies other conditions.

In March 2019, the original private placement memorandum (PPM) for the offering stated that a closing would not occur until the offering met a minimum contingency of \$16 million in investor subscriptions.

However, the issuer amended the PPM in June 2019 to state that an initial closing of approximately \$6 million would take place later that month. The issuer conducted the June closing so that certain investors would not lose the tax benefits of their investment.⁴ Because the early closing was a material change to the terms of the offering, BTC was required to, but did not, terminate the offering and return investor funds at that time.

Additionally, amendments to the PPM in June and August 2019 provided for the first time that, in addition to investor subscriptions, alternative funding sources obtained by the manager of the offering could count toward the minimum contingency amount. The alternative funding could include deferred developer fees, a construction loan, and other sources not involving investor subscriptions. Again, because this was a material change

² SEC Rel. No. 33-11532, 1975 SEC LEXIS 1229 at *3 (July 11, 1975). *See also* FINRA Regulatory Notice 16-08 (Feb. 2016).

³ *See* FINRA Regulatory Notice 16-08 at p. 2 (Broker-dealers violate Rule 10b-9 “by failing to return subscriber funds after the issuer changed the contingency by reducing the offering minimum.”).

⁴ The closing in June 2019 resulted in securities being issued to investors, but their funds remained in escrow until a later closing in August 2019.

to the terms of the offering, BTC was required to, but did not, terminate the offering and return investor funds at that time.

Ultimately, the issuer conducted a closing in August 2019 with only \$10.925 million in investor subscriptions, including \$2.95 million raised for the June closing, below the required \$16 million minimum contingency.

Therefore, Respondent willfully violated Exchange Rule 10b-9 and FINRA Rule 2010.

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

- a censure and
- a \$90,000 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.

Respondent understands that this settlement includes a finding that it willfully violated Section 10(b) of the Securities Exchange Act of 1934 and that under Article III, Section 4 of FINRA's By-Laws, this makes Respondent subject to a statutory disqualification with respect to membership.

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.

3-10-23
Date

Tyler
Baker Tilly Capital, LLC
Respondent

Print Name: Tyler Inde
Title: President

Reviewed by:

Matthew C. Boba
Matthew C. Boba
Counsel for Respondent
Chapman and Cutler LLP
320 South Canal Street
Chicago, IL 60606

Accepted by FINRA:

March 29, 2023

Date

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

Katherine Florio

Katherine Florio
Counsel
FINRA
Department of Enforcement
Brookfield Place
200 Liberty Street
New York, NY 10281