

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2021069368901**

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

RE: EarlyBirdCapital, Inc. (Respondent)
Member Firm
CRD No. 28629

Pursuant to FINRA Rule 9216, Respondent EarlyBirdCapital, Inc. 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

EarlyBirdCapital, Inc. (EarlyBird), a FINRA member since October 1992, is headquartered in Melville, New York, and engages in investment banking and securities trading. EarlyBird employs approximately 20 registered representatives in four branch offices, including its Melville headquarters.¹

OVERVIEW

From May 2017 to April 2021, EarlyBird filed inaccurate and untimely Financial and Operational Combined Uniform Single (FOCUS) reports and maintained inaccurate books and records regarding its aggregate indebtedness and net capital, in violation of Section 17(a) of the Securities Exchange Act of 1934, Exchange Act Rules 17a-3 and 17a-5, and FINRA Rules 4511 and 2010.

From May 2017 to September 2022, EarlyBird failed to establish and maintain a supervisory system, including written supervisory procedures (WSPs), reasonably designed to achieve compliance with the Exchange Act rules relating to net capital, FOCUS reports, and required books and records, in violation of FINRA Rules 3110 and 2010.

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

FACTS AND VIOLATIVE CONDUCT

This matter originated from an examination conducted by FINRA's Department of Member Supervision.

EarlyBird filed inaccurate and untimely FOCUS reports and maintained inaccurate books and records.

FINRA Rule 4511 requires each FINRA member firm to make and preserve books and records as required under Exchange Act § 17(a) and Exchange Act Rules 17a-3 and 17a-5.

Exchange Act Rule 17a-3(a)(11) requires broker-dealers to make and keep current a record of their "computation of aggregate indebtedness and net capital, as of the trial balance date..." Exchange Act Rule 17a-5 requires every broker-dealer to prepare and file monthly or quarterly FOCUS reports containing certain accounting and financial information, including the firm's minimum required net capital, net capital and excess net capital. Exchange Act Rule 17a-5(a)(ii) further requires every broker-dealer to file a FOCUS report no later than 17 business days after the end of each calendar month or quarter as applicable.

Inherent in the obligation to make and preserve books and records is the requirement that they be accurate.

A violation of Exchange Act § 17(a), Exchange Act Rules 17a-3 and 17a-5, and FINRA Rule 4511 is also a violation of FINRA Rule 2010, which requires members to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.

From May 2017 to April 2021, EarlyBird inaccurately calculated its aggregate indebtedness and net capital when participating in firm commitment securities offerings and preparing its FOCUS reports. For example, when participating in a firm commitment offering, EarlyBird was required to deduct 30% of the value of the securities that it committed to purchase (known as an open contractual commitment charge) from its net capital.² However, EarlyBird used the incorrect effective date or estimated size of the offering when calculating the value of the securities and, as a result, miscalculated the open contractual commitment charges associated with its firm commitment underwriting activities.

When calculating its aggregate indebtedness and net capital, EarlyBird also added revenues, fees and/or commissions received without taking the required offsetting deductions, and added unrealized profits. Similarly, the firm reduced the net capital charge associated with its firm commitment underwriting activity by multiples of \$150,000 when it was permitted only one offsetting deduction; and reduced the firm's net capital by an estimated minimum net capital requirement instead of the firm's actual minimum requirement.

² See Exchange Act Rule 15c3-1(c)(2)(viii).

As a result, during the period of May 2017 through April 2021, the firm's general ledger and record of its computation of its aggregate indebtedness and net capital, and 16 FOCUS reports filed by the firm based on those computations, over or understated the firm's actual excess net capital in amounts ranging from approximately \$5,600 to more than \$1 million.

Although EarlyBird incorrectly calculated its net capital, the firm maintained sufficient net capital to engage in a securities business and participate in the firm commitment underwritings for which it served as underwriter during the relevant period.

The firm also failed to timely file nine FOCUS reports during the relevant period.

Therefore, EarlyBird violated Exchange Act § 17(a), Exchange Act Rules 17a-3 and 17a-5, and FINRA Rules 4511 and 2010.

EarlyBird failed to establish and maintain a supervisory system, including WSPs, reasonably designed to achieve compliance with rules relating to net capital computation and reporting, and related books and records.

FINRA Rule 3110(a) requires member firms 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. FINRA Rule 3110(b) requires member firms to 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. A violation of FINRA Rule 3110 is also a violation of FINRA Rule 2010.

From May 2017 through September 2022, EarlyBird's supervisory systems and WSPs were not reasonably designed to achieve compliance with the rules requiring that the firm's net capital calculations and related reporting were accurate or timely filed, *i.e.*, Exchange Act §§ 15(c) and 17(a) and Exchange Act Rules 15c3-1, 17a-3, and 17a-5.

The firm's WSPs did not specify when FOCUS reports were required to be filed pursuant to Exchange Act rules or designate any individual to verify the accuracy of the firm's FOCUS reports. Similarly, the WSPs did not specify the frequency and manner in which net capital calculations should be performed, where and when to source the information needed to prepare the net capital calculations, or what to consider when assessing the firm's net capital at the time of a firm commitment underwriting. The firm's WSPs also did not describe the steps to be taken by firm personnel after receiving or sending notification of a prospective underwriting commitment.

In September 2022, the firm implemented new WSPs requiring a supervisor to review the firm's net capital calculation at the time of a firm commitment underwriting.

Therefore, EarlyBird violated FINRA Rules 3110 and 2010.

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

- a censure and
- a \$150,000 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:

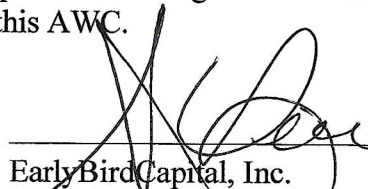
1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action brought by FINRA or any other regulator against Respondent;
2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
3. FINRA may 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 Respondents' 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.

3/27/24

Date



Early Bird Capital, Inc.
Respondent

Print Name: STEVEN LEVINE

Title: CEO

Reviewed by:



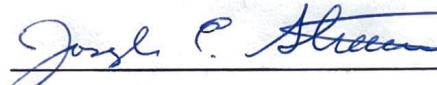
Ellen M. Wheeler, Esq.
Counsel for Respondent
Foley & Lardner LLP
321 North Clark St.
Suite 3000
Chicago, IL 60654

Accepted by FINRA:

4/22/2024

Date

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



Joseph E. Strauss
Senior Counsel, Enforcement
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New York, New York 10281-1003