

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. EAF 0401260002

TO: Department of Enforcement
NASD

RE: Bergen Capital, Inc., CRD No. 46348

Pursuant to Rule 9216 of the NASD Code of Procedure, Respondent Bergen Capital, Inc. ("Bergen" or "Firm") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II. below. This AWC is submitted upon the condition that, if accepted, NASD will not bring any future actions against Bergen alleging violations based upon the same factual findings.

Respondent understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Enforcement and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against Respondent; and
3. If accepted:
 - a. This AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against Respondent;
 - b. This AWC will be made available through NASD's public disclosure program in response to public inquiries about Respondent's disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and
 - d. 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 allegation in this AWC or create the impression that the AWC is without factual basis. 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 NASD is not a party.

Respondent also understands that its experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

Bergen Capital, Inc. (CRD # 46348) has been an NASD member firm since March 31, 1999. Bergen specializes in the underwriting and distribution of fixed-income products—mainly municipal, corporate, and government bonds. The Firm is headquartered in Hasbrouck Heights, New Jersey and conducts its business through five branch offices staffed with approximately 32 registered representatives.

I.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. to have a formal complaint issued specifying the allegations against Respondent;
- B. to be notified of the formal 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 NAC and then to the U.S. Securities and Exchange Commission ("SEC") and a U.S. Courts of Appeal.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, 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 acceptance or rejection of this AWC.

Respondent further specifically and voluntarily waives any right to claim that a person violated the *ex parte* prohibitions of Rule 9143 or the separation of functions prohibitions of 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.

II.

ACCEPTANCE AND CONSENT

- A. Respondent hereby accepts and consents, without admitting or denying the allegations or findings, and solely for the purposes of this proceeding and any other proceeding brought by or upon behalf of NASD, or to which NASD 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 NASD:

Between, July 15, 2003 and December 31, 2004 ("review period"), Bergen disseminated to the investing public 17 pieces of advertising and sales literature relating to municipal, corporate, and government bonds that failed to comply with NASD's content standards for sales and advertising material. During that time frame, Bergen ran 13 advertisements on three New York City metropolitan area radio stations. These 13 radio advertisements minimized the risks associated with bond investing and contained misleading and promissory language. Additionally, the Firm used two websites and two newsletters that were misleading and omitted necessary disclosures. As a result, the Firm violated NASD Conduct Rules 2210 and 2110.

NASD Conduct Rule 2210

NASD Conduct Rule 2210(d)(1)(A) requires, among other things, that all communications with the public be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. The Rule also prohibits the omission of any material fact or qualification if the omission, in light of the context of the material presented, would cause the communication to be misleading.

Similarly, NASD Conduct Rule 2210(d)(1)(B) requires that communications with the public not be false, exaggerated, unwarranted or misleading. Further, 2210(d)(1)(B) prohibits members from circulating or distributing public material that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

In addition to the above, NASD Conduct Rule 2210(e) provides that any violation of any rule of the Securities Investor Protection Corporation ("SIPC") or the Municipal Securities Rulemaking Board ("MSRB") applicable to communications with the public will be deemed a violation of NASD Conduct Rule 2210.

Bergen's Failure to Comply with NASD Conduct Rules 2210 and 2110

During the review period, Bergen used 17 pieces of advertising material relating to government, corporate, and municipal bonds that violated Rules 2210 and 2110. Thirteen of the pieces were radio advertisements that were broadcast throughout the New York metropolitan area.¹

¹ Of Bergen's radio advertisements, eight were general ads, which began to air on Bloomberg Radio on July 15, 2003 and ended on or about August 16, 2004. In addition, five radio advertisements which discussed the availability

Ten pieces of advertising or sales literature omitted material information, including:

- ❑ a radio advertisement touted health care revenue bonds by focusing only on the high yields but disclosed no associated risks;
- ❑ a website that failed to adequately disclose transaction costs for municipal and corporate bonds. Specifically, the “fees and commissions” section of the site stated that there would be “no transaction fee” for the purchase of 100 bonds or greater. While the website disclosed that the Firm “may act as principal” in the trade, such disclosure was insufficient to inform investors that dealer markups and markdowns may be included in the purchase price;
- ❑ a website report entitled “Get Into Bonds!” that was based upon the Firm’s outlook for stable interest rates, but failed to mention the significant risks associated with buying bonds during periods of historically low interest rates.

Ten communications included misleading, unwarranted or exaggerated statements or claims, including:

- ❑ “whether the economy is expanding or contracting, whether interest rates are going up or down, Bergen offers above-market rate bonds to protect and grow your wealth”;
- ❑ “Bergen Capital offers tax-free municipal bonds—as well as corporate and government bonds—that preserve and grow your wealth”;
- ❑ “Bergen’s focus on preservation of capital, asset appreciation and high current income builds successful portfolios...and wealth”;
- ❑ a reference to the Firm’s newsletters as “money-making”;
- ❑ one radio advertisement that suggested an investor could “safely invest” in investment grade corporate bonds but failed to mention that investors could lose money investing in such bonds.

In addition, seven of Bergen’s radio advertisements and one of its websites violated SIPC rules applicable to communications with the public. Specifically, the eight advertisements referred to the Firm’s accounts as being “insured” by SIPC. This is contrary to Article 11 § 4(g)(2)(C) of SIPC’s Advertising Bylaws, which deems advertisements that suggest SIPC’s protection or insurance of an investment or service to be misleading. By using pieces that violated SIPC rules applicable to communications with the public, Bergen violated NASD Conduct Rule 2210(e).

of specific bond issues, aired on WCBS or WQXR Radio in New York in March of 2004. All three stations reach listeners throughout the New York City metropolitan area, including portions of Connecticut and New Jersey.

The aforementioned content contained in the 17 pieces of publicly disseminated sales literature and advertising material violated NASD Conduct Rules 2210 and 2110.²

B. Sanctions:

Respondent also consents to the imposition, at a maximum, of the following sanctions:

1. A censure;
2. A fine of \$115,000; and
3. An undertaking to file with NASD's Advertising Regulation Department all sales literature and advertisements at least 15 days prior to their first use for the earlier of six months from the date of acceptance by the NAC of this AWC or such time as Bergen Capital, Inc.'s form BDW becomes effective. The 15-day period shall commence on the date of transmission with respect to advertisements or sales literature that Bergen sends by facsimile and on the day following shipment with respect to advertisements or sales literature that Bergen sends by overnight delivery. After 15 days, these advertisements or sales literature may be used in the absence of comments from NASD. However, at any time, upon receipt of comments from NASD on the advertisements or sales literature filed prior to use, unless notified otherwise by NASD, Bergen shall take all reasonable steps to withhold or cause to be withheld the material from further publication until the changes specified by NASD have been made, and such material will be revised and re-filed 15 days prior to any use, unless otherwise agreed to by NASD Staff at its sole discretion.

The sanctions imposed herein shall be effective on a date set by NASD Staff.

III.

OTHER MATTERS

- A. Respondent understands that it 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 NASD, nor does it reflect the views of NASD or its Staff.
- B. Respondent agrees to pay any monetary sanctions imposed within ten days of notice that this AWC has been accepted and has attached an Election of Payment

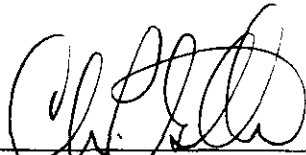
² Conduct Rule 2110 requires members to adhere to just and equitable principles of trade. A violation of NASD's advertising rules is also a violation of Conduct Rule 2110. *Pacific On-Line Trading & Sec., Inc.* Exchange Act Rel. No. 48473, 2003 SEC LEXIS 2164, at *13 (Sept. 10, 2003).

form showing the method by which it proposes to pay any fine imposed.

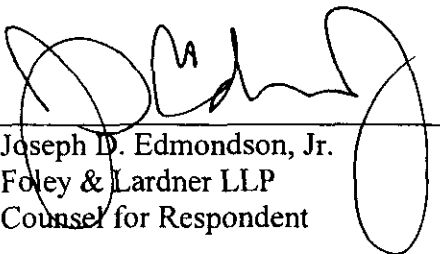
- C. Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

Respondent certifies that it has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce respondent to submit it.

11/10/05
Date


Bergen Capital, Inc., Respondent
By Charles Gilbride, President

Reviewed by:


Joseph D. Edmondson, Jr.
Foley & Lardner LLP
Counsel for Respondent

Accepted by NASD:

11/23/05
Date


Roger B. Sherman
Senior Vice-President
Enforcement
Signed on behalf of the Director of ODA, by
delegated authority