

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 20070118300**

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

RE: Fagenson & Co., Inc., Respondent  
CRD No. 1781

Pursuant to Rule 9216 of FINRA’s Code of Procedure, Fagenson & Co., Inc. (“Respondent” or “Fagenson,” or the “Firm”), 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 the Respondent alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

The 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**

Respondent, a FINRA regulated broker-dealer since 1954, has its principal place of business in New York, New York. The Firm currently has one branch office and employs approximately 26 registered persons and seven non-registered persons. The majority of the Firm’s revenue is derived from institutional business, primarily trading in equities, options, municipal bonds and corporate and convertible bonds. The Firm’s FOCUS reports show operating losses for the 2008 and 2009 year-end.

**OVERVIEW**

From March 2007 through May 2008 (the “Relevant Period”), two registered representatives of the Firm executed customer sell orders for unregistered shares of at least ten issuers, including 1.3 billion unregistered shares of Universal Express, Inc. (“USXP”) stock, in violation of Section 5 of the 1933 Securities Act (“Section 5”) and NASD Rule 2110. No exemption applied to the sale of these shares. While the Firm was unaware that the shares were unregistered, the Firm violated NASD Rules 3010 and 2110 by failing to establish, maintain and enforce a system and procedures to supervise the activities of its registered and associated persons, that was reasonably designed to detect and prevent the sale of unregistered securities in the specific circumstances called for by the trading activity of certain of its customers. Specifically, certain Firm customers were permitted to deposit large blocks of shares in certificate form which were not legended as restricted, and to immediately or almost immediately liquidate the positions for total net proceeds

exceeding \$694,437 on the USXP shares, and over \$11,252,000 on the other unregistered securities. While these sales were not objected to by the transfer agent, these securities were not registered. Further, the Firm violated NASD Rules 3011 and 2110 because it failed to establish and implement policies and procedures that could reasonably be expected to detect and cause the reporting of suspicious activity and transactions, and did not adequately monitor for the “red flags” set forth in the Firm’s Anti-Money Laundering (“AML”) procedures.

### **FACTS AND VIOLATIVE CONDUCT**

#### *Universal Express, Inc. (USXP)*

USXP was a publicly traded Nevada corporation, with offices in New York and Florida, purportedly involved in the businesses of shipping and transportation. On March 24, 2004, the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) filed a complaint seeking a temporary restraining order and other emergency relief against USXP and others for their alleged involvement in the distribution of USXP common stock in violation of Section 5. The Commission’s allegations included that from April 2001 through January 2004, USXP issued more than 500 million shares of unregistered securities for distribution to the public, issued a series of false press releases regarding funding commitments for the company, and made other false and misleading statements. The shares were issued purportedly as compensation under consulting agreements to co-defendants named in the lawsuit who sold to the public over 470 million shares of USXP for \$17.9 million.

On February 21, 2007, a federal district court, in a decision later affirmed by the Second Circuit Court of Appeals, granted the SEC partial summary judgment in *SEC v. Universal Express, Inc. et al*, 415 F. Supp. 2d 417 (SDNY 2007), *aff’d in a summary order, SEC v. Altomare*, 2008 U.S. App. Lexis 23408 (2d. Cir. Nov. 13, 2008), *cert denied*, 129 S. Ct. 2745, 2009 U.S. Lexis 413 (June 1, 2009). The Court found that Universal Express violated Section 5 and that no exemption applied.

At no time was the Firm or any of its representatives or employees a party to these SEC proceedings.

#### *Customer Accounts Held at Fagenson Sold Unregistered Securities*

From March through July 2007, which was after the Court entered summary judgment in the SEC’s favor on the Section 5 issue, the Firm sold over 1.3 billion unregistered shares of USXP for the accounts of two customers. No exemption applied to the sale of these shares. The liquidation of these shares provided the account holders with over \$694,437 in proceeds. As discussed in more detail below, the Firm lacked adequate procedures for determining a security’s registration status, including whether it was registered, exempt from registration, and/or freely tradable. Specifically, each time a customer at the Firm received USXP or other unregistered shares, generally in certificate form, the Firm failed to conduct its own reasonable inquiry as to the security’s registration or exemption status. The Firm improperly relied entirely on third parties, such as the transfer agent, to determine if the USXP or other shares were registered, exempt, and/or freely tradable. While the Firm maintained and implemented a “lost or stolen”

securities check and a customer questionnaire regarding sources of the shares, such procedures were inadequate to detect the unregistered offering of USXP shares.

During the Relevant Period, as outlined below, the Firm also sold unregistered shares of nine other issuers,<sup>1</sup> generating at least \$11,252,000 in proceeds for the account holders. No exemption applied to the sale of these shares. Two brokers, SB and SF, were the registered representatives (“RR”) for each Firm account where unregistered shares were sold.

#### *Accounts of RR SB: Sales of Universal and Four Other Unregistered Securities*

SB was employed at the Firm from approximately April 2006 until he resigned in May 2009. Two of SB’s customers were AG and WT, corporate entities, which both deposited and sold USXP and other unregistered securities. No exemption applied to the sale of these shares. The AG and WT accounts received the shares in certificate form, and the certificates were dated close in time to when they were deposited at the Firm. The Firm, on behalf of AG and WT, began liquidating the shares shortly after deposit and immediately or almost immediately transferred the proceeds from the sales to an account each customer separately held outside the Firm.

#### *Sales of USXP*

AG’s account was opened in March 2007. AG deposited its first certificate for USXP shares on March 23, 2007, and all 65,000,000 of the shares included on that certificate were sold by the Firm on behalf of AG by April 2, 2007. Between March and July 2007, the Firm sold on behalf of the AG account approximately 658,000,000 unregistered shares of USXP. The sale of these shares provided AG with net proceeds of approximately \$362,182.

The WT account was also opened at the Firm in March 2007. Between March and July 2007, the Firm sold to the public on behalf of the WT account 653,000,000 unregistered shares of USXP. The liquidation of these shares provided WT with net proceeds of approximately \$332,255.

#### *Sales of WWEM, MUME, RSHN, and IPEI*

The Firm sold on behalf of AG unregistered shares of W2 Energy (“WWEM”) between April and September 2007. For example, in April 2007, the Firm sold on behalf of AG 208,550 shares of WWEM. These sales resulted in net proceeds to AG of over \$9,000.

Similarly, between April and September 2007 the Firm sold on behalf of WT unregistered shares of Muller Media Inc (“MUME”), Rushnet Inc (“RSHN”), and Imperia Entertainment Inc. (“IPEI”). For example, at the end of May 2007, the WT account held approximately 4,000,000 shares of MUME, which it had received in certificate form. In June 2007, the WT account received another 16,000,000 shares of this stock, and the Firm sold, on behalf of WT, all 20,000,000 shares for proceeds of approximately \$9,000.

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<sup>1</sup> Imperia Entertainment, Inc. (“IMPE”); Muller Media, Inc. (“MUME”); Rushnet Inc. (“RSHN”); W2 Energy Inc (“WWEM”); My Vintage Baby, Inc. (“MVBY”); ConnectAJet.Com, Inc. (“CAJT”); Prom Resources, Inc (“PRMO”); Franklin Towers Enterprises (“FRTW”); and Alchemy Creative, Inc. (“ALMY”).

### *Accounts of RR SF: Sales of Five Unregistered Securities*

SF was employed at the Firm from July 2007 until he resigned in July 2008. His customers did not trade USXP, but sold several other unregistered stocks, including My Vintage Baby (“MVBY”); ConnectAJet.Com, Inc. (“CAJT”); Prom Resources, Inc (“PRMO”); Franklin Towers Enterprises (“FRTW”); and Alchemy Creative, Inc. (“ALMY”).

#### *Profile of SF Customers*

SF was the RR on at least 24 accounts which sold one or more unregistered security. The overwhelming majority of these customers were corporate entities. Two of the individuals who had ownership of these entities, CRR and DE, had earlier been barred from employment in the securities industry by the NASD for failure to appear for testimony. Pursuant to signed authorization forms, CRR, individually and/or operating through a corporate entity that he owned, controlled the trading in the accounts of at least nine SF customers, all of which engaged in the sale of unregistered securities.

The new account documents for SF’s customers disclosed interrelationships between and among these customers. For example, customers TP, CRR, and MC were referenced on corporate documents as being related to each other’s corporate entities. Moreover, CRR and TP were named as defendants in a September 2007 SEC complaint alleging the sale of unregistered securities at other broker-dealers in prior years, including the broker-dealer where SF had previously worked and acted in the capacity of RR for these customers and others who were also named by the SEC as defendants. In addition, the SEC complaint named as defendants three other corporate entities that were also SF customers at Fagenson. SF provided a copy of this complaint to the Firm at or about the time the complaint was issued, but the Firm did not contact or make any inquiry regarding these customers, or change any of its policies and procedures concerning the sale of penny stocks or anti-money laundering (“AML”).

Some SF customers bought relatively small amounts of the securities identified below and/or received shares journaled to them by other SF customers. As with SB’s customers, however, SF’s customers primarily received shares in certificate form, where the certificates were dated close in time to when they were deposited at the Firm. While the certificates themselves had been processed by the transfer agent, the securities were not registered and no exemption applied to their sale. The Firm, on behalf of SF’s customers, began selling the shares shortly after deposit of the certificates. Shortly after each sale transaction, SF’s customers transferred the proceeds from the transactions to an account each customer separately held outside the Firm. Some of SF’s customers sold more than one of the following securities as described below:

#### *Sales of My Vintage Baby (“MVBY”)*

SF began employment at Fagenson in mid-July 2007 and, by late August 2007, three of his customers had received and deposited a combined total of almost 5,600,000 shares of MVBY. By the end of the month, the Firm had sold on behalf of these customers almost 2,300,000 shares, although these shares were not registered or exempt from registration, for combined gross proceeds to these customers of approximately \$882,000. The Firm, on behalf of its customers, then continued to sell MVBY until January 2008.

*Sales of ConnectAJet.Com, Inc. (“CAJT”)*

Four of SF’s customers received and deposited a total of 30,000,000 shares of CAJT in August 2007. These customers then journaled shares to additional SF customers and, as a result, eight SF customers held CAJT at the end of August 2007. By mid-September, the Firm, on behalf of these customers, sold a combined total of almost 5,000,000 shares, none of which were registered or exempt from registration, for gross proceeds to the Firm’s customers of over \$7,000,000. These eight accounts then wired approximately \$5,100,000 of these proceeds outside the Firm by mid-September. SF’s customers sold CAJT from August 2007 through March 2008.

*Sales of Prom Resources, Inc. (“PRMO”)*

On August 14, 2007, one of SF’s customers received 12,500,000 shares of PRMO, and immediately journaled a combined total of 3,500,000 shares to two other SF customers. One of those customers, in turn, journaled shares to an additional four SF customers. By September 5, the Firm, on behalf of these seven customers, sold a combined total of more than 1,200,000 shares of PRMO, none of which were registered or exempt from registration, for gross proceeds to these customers of over \$152,000. SF’s customers sold PRMO from August 2007 through December 2007.

*Sales of Franklin Towers Enterprises (“FRTW”)*

In October 2007 and November 2007, seven SF customers received and deposited over 10,000,000 shares of FRTW. The Firm, on behalf of these customers, sold by the end of November 2007 a combined total of almost 5,000,000 shares, none of which were registered or exempt from registration, for gross proceeds to the Firm’s customers of over \$2,000,000. SF’s customers sold FRTW from October 2007 through May 2008.

*Sales of Alchemy Creative, Inc. (“ALMY”)*

In early December 2007, three SF customers received and deposited 3,333,333 ALMY shares. By the end of December 2007, the Firm, on behalf of these customers, sold almost 1,000,000 shares, none of which were registered or exempt from registration, for gross proceeds of approximately \$1,200,000. Indeed, a review of trade tickets and account statements revealed that the Firm sold some of these shares of ALMY on behalf of its customers even before the shares were received into the customer accounts (and before the Firm had any opportunity to conduct due diligence on the certificates deposited and sold). SF’s customers sold ALMY from December 2007 through March 2008.

*Conclusion*

Notwithstanding red flags, including numerous stock certificates dated close in time to when they were deposited, that shares were sold very shortly after deposit, and that the proceeds of the sales were transferred (sometimes immediately) from the Firm, the Firm failed to undertake an adequate inquiry of its own to verify whether the USXP, WWEM, MUME, RSHN, IPEI, MVBV, CAJT, PRMO, FRTW and ALMY shares were registered or exempt from registration.

### *The Firm Violated NASD Rule 2110 by Selling Unregistered Securities in Violation of Section 5*

Brokers are responsible for performing a critical gatekeeping function to prevent unregistered securities from illegally entering the public trading markets. Brokers who delegate their duty to inquire to others, including transfer agents, “do so at their peril.”<sup>2</sup> Section 5 prohibits the offer or sale of any security unless there is a registration in effect as to that security or there is an exemption available for that securities transaction. To establish a *prima facie* case of a violation of Section 5, Enforcement must show that (1) no registration with the SEC was in effect; (2) the respondents sold or offered to sell the security; and (3) respondents used the means of interstate commerce in connection with the offer or sale.<sup>3</sup>

The SEC has imposed on brokers a duty, because of their responsibilities under certain circumstances to act as gatekeepers to the public markets, to conduct a “searching inquiry” to ensure they are not in violation of Section 5:

[A] dealer who offers to sell, or is asked to sell a substantial amount of securities must take whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter. . . . [W]here the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.<sup>4</sup>

During the Relevant Period, the Firm offered and sold through the means of interstate commerce more than 1,345,708,500 unregistered shares of ten securities. No exemption applied to the sale of any of these unregistered shares. The Firm thus participated in a distribution of unregistered shares in violation of Section 5 and NASD Rule 2110.

### *The Firm Violated NASD Rules 3010 and 2110*

NASD Notice to Members (“NTM”) 99-45 explained that each regulated broker-dealer is required to specifically tailor its supervisory systems to address all of the types of business that it conducts. Under NASD Rule 3010(a), a regulated broker-dealer is obligated to “establish and maintain a system to supervise the activities of each registered representative ... that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the

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<sup>2</sup> *John A. Carley*, Initial Decision Release No. 292, 2005 SEC LEXIS 1745 at \*110-111 (July 18, 2005); *see also Wonsover v. SEC*, 205 F.3d 408, 411-412 (D.C. Cu. 2000); *Stead v. SEC*, 444 F.2d 713, 716 (10th Cir. 1971); *DOE v. Midas Securities, LLC*, No. 2005000075703, 2009 FINRA Discip. LEXIS 32 (O.H.O. May 12, 2009) (Hearing Panel held that brokers could not rely on clearing firms to determine if the shares they received for liquidation could be sold without violating the registration requirements of the Securities Act).

<sup>3</sup> *SEC v. Ralston Purina*, 346 U.S. 119 (1953); *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980).

<sup>4</sup> *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 4445, 1962 SEC LEXIS 74 (Feb. 2, 1962) (quoting *SEC v. Culpepper*, 270 F.2d 241, 251 (2d Cir. 1959)).

[broker-dealer].”<sup>5</sup> Moreover, NASD Rule 3010(b)(1) requires each regulated broker-dealer to “establish, maintain, and enforce written procedures to supervise the types of business in which it engages. Failure to adopt supervisory procedures tailored to a broker-dealer’s business is itself a violation of the rule.”<sup>6</sup>

The Firm failed to establish, maintain, and enforce a supervisory system reasonably designed to achieve compliance with Section 5 under the specific circumstances herein. NASD Rule 3010 requires that regulated broker-dealers establish and maintain procedures and controls that are tailored to their activities and are effective given their size, structure, and operations. Broker-dealers that accept delivery of shares in certificate form, and effect sales in those securities, cannot solely rely upon third parties, as the Firm did, and instead themselves must have systems and procedures in place that are reasonably designed to prevent participation in illegal distributions of unregistered securities. Here, the Firm maintained and implemented procedures that were designed to determine the source of the customers’ shares, including the use of a questionnaire to be completed by Firm customers. However, the Firm’s procedures did not contain sufficiently detailed requirements that an inquiry be conducted adequate to ensure that deposited stock certificates be either registered or exempt from registration. Further, the Firm failed to adequately instruct its personnel to follow up on written responses in the customer questionnaire regarding how, when, and under what circumstances shares had been obtained. The Firm’s written supervisory procedures gave inadequate guidance to the Firm’s personnel about how to determine whether a security was either registered or exempt from registration.

In practice, the Firm relied on third parties to discharge any duties the Firm had regarding the deposit of certificates, and it assumed those parties would take whatever action was necessary to determine whether shares were freely tradable. This reliance on others to discharge the Firm’s obligations was misplaced and inappropriate.

By virtue of the foregoing, the Firm violated NASD Rules 3010 and 2110.

#### *The Firm Violated NASD Rules 3011 and 2110*

NASD Conduct Rule 3011 requires FINRA-regulated broker-dealers to develop and implement a written AML program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act, 31 U.S.C. §5311, et seq., and implementing regulations. Section (a) of Rule 3011 mandates broker-dealers to “[e]stablish and implement policies and procedures that can be reasonably expected to detect and cause the reporting” of suspicious transactions. Section (b) requires firms to establish and implement policies, procedures and internal controls “reasonably designed to achieve compliance with the . . . BSA and [its] implementing regulations.” Section (e) of the Rule requires firms to “[p]rovide ongoing training for appropriate personnel.”

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<sup>5</sup> See *DOE v. Stonegate Partners, LLC.*, Disciplinary Proceeding No. E112005002003, 2008 FINRA Discip. LEXIS 26 (OHO May 15, 2008); see also *DOE v. Kirlin Securities, Inc.*, Disciplinary proceeding No. EAF0400300001, 2007 FINRA Discip. LEXIS 15 (OHO Nov. 28, 2007).

<sup>6</sup> *Id.*; see *DOE v. J. Alexander Securities, Inc.*, Complaint No. CAF010011, 205 NASD Discip. LEXIS 42 (OHO June 14, 2005).

Applicable regulations from the Department of the Treasury (“Treasury”), codified at 31 C.F.R. § 103.19(a)(1), further require broker-dealers to report any suspicious transaction to Treasury’s Financial Crimes Enforcement Network (“FinCEN”) if: (a) the transaction is conducted or attempted by, at, or through a broker-dealer, (b) it involves or aggregates funds or other assets of at least \$5,000, and (c) the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

- i. involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity;
- ii. is designed, whether through structuring or other means, to evade the requirements of the BSA;
- iii. appears to serve no business or apparent lawful purpose or is not the sort of transaction in which the particular customer would be expected to engage and the broker/dealer knows of no reasonable explanation after examining the available facts, including the background and possible purpose of the transaction; or
- iv. involves use of the broker/dealer to facilitate criminal activity.

*See* NTM 02-47. In its release discussing this requirement, Treasury stated that broker-dealers should determine whether activities and transactions raise suspicions by looking for “red flags.” NTM 02-47 discussed Treasury’s release, the final AML Rule, and provided examples of “red flags.” This NTM further advised broker-dealers of their duty to file a Suspicious Activity Report (“SAR”) to report certain suspicious transactions.<sup>7</sup>

During the Relevant Period, Fagenson offered and sold on behalf of its customers unregistered securities in a pattern that, at a minimum, necessitated further investigation by Fagenson. The customer accounts in question engaged in activity that constituted one or more of the AML red flags set forth in the Firm’s AML compliance procedures. For example, the primary activity in these accounts was the deposit or journal of penny stock into the accounts, followed by the liquidation of those stocks, with the proceeds from the sales then wired out of the accounts. Further, in several instances, unregistered penny stocks were transferred by one Firm corporate customer to other Firm customers. Although the transferring customer on some of these occasions controlled the trading in the other customers’ accounts, and the shares in each account were liquidated shortly thereafter, the Firm never filed a SAR in connection with this activity, nor did the Firm document why a SAR was not necessary. As discussed in more detail below, Fagenson did not properly implement an AML compliance program, insofar as it did not monitor customer accounts for red flags and did not identify potentially suspicious activity. The Firm

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<sup>7</sup> Pursuant to the final Rule, a broker-dealer must report a transaction on Form SAR-SF if “the transaction involves \$5,000 or more, is conducted or attempted to be conducted through the broker/dealer and appears to serve no business or apparent lawful purpose.” NTM 02-47, at 2. The obligation to file a SAR may arise from a single transaction or from a series of transactions that form a suspicious pattern of activity. *Id.* NTM 02-47 quoted FinCEN’s release on the final rule relating to SARs, stating, “[i]n its release adopting the final rule, FinCEN explicitly clarifies that ‘if a broker/dealer determines that a series of transactions that would not independently trigger the suspicion of the broker/dealer, but that taken together, form a suspicious pattern of activity, the broker/dealer must file a suspicious transaction report.’” *Id.*, at 3.

failed to establish and maintain adequate AML procedures and even failed to follow its own inadequate written AML procedures.

#### *Red Flags Set Forth in the Firm's AML Procedures*

While the Firm's written AML procedures enumerated red flags that could be indicative of potential money laundering, those red flags were missed or ignored. The red flags or "risk indicators" set forth in the Firm's written procedures, included:

- The customer (or a person publicly associated with the customer) has a questionable background or is the subject of news reports indicating possible criminal, civil, or regulatory violations.
- For no apparent reason, the customer has multiple accounts under a single name or multiple names, with a large number of inter-account or third-party transfers.
- The customer's account has unexplained or sudden extensive wire activity, especially in accounts that had little or no previous activity.
- The customer, for no apparent reason or in conjunction with other "red flags," engages in transactions involving certain types of securities, such as penny stocks, Regulation "S" (Reg S) stocks, and bearer bonds, which although legitimate, have been used in connection with fraudulent schemes and money laundering activity. (Such transactions may warrant further due diligence to ensure the legitimacy of the customer's activity.)

One or more of these "risk indicators" were present with respect to each of the customers who traded the unregistered securities at the Firm. Customer CRR and DE had regulatory disciplinary histories, and several of SF's customers had been named as defendants in a pending SEC complaint alleging the sale of unregistered securities. Moreover, SF customers had multiple accounts and engaged in inter-account transfers of securities which either lacked any apparent business justification and/or were not adequately inquired into by the Firm. Several customers of SB and SF engaged in extensive wire activity immediately or almost immediately after receiving the proceeds of their sales of unregistered securities, engaged in penny stock transactions, and were new customers with the Firm when they undertook these activities.

#### *Deficiencies in the AML Procedures*

The Firm's written supervisory AML procedures set forth requirements necessary to comply with the Bank Secrecy Act, and outline procedures relating to education, prohibited transactions, reporting requirements, a customer identification program and the filing of a SAR. The Firm, however, did not tailor the provisions to match its own business. The Firm's AML procedures were vague with respect to the methods by which the Firm would monitor for the detection of suspicious activities. Nowhere in its written procedures did the Firm provide for specific steps that supervisors should follow to be in a position to monitor for and detect suspicious activity.

### *Failure to File SARs*

Customers of SB and SF typically wired their securities sale proceeds out of the Firm shortly after the sale of the unregistered penny stocks. Despite the suspicious patterns and the level of customer involvement in unregistered penny stocks, Fagenson never filed a SAR or documented the rationale for not filing one in connection with the activities or transactions that were occurring at the Firm, during the Relevant Period.

### *Other Considerations*

The Firm reviewed the disciplinary records of registered representatives SB and SF before hiring them, and noted that their records showed no regulatory history involving penny stock trading. Thereafter, the Firm, on its own initiative: 1) ceased self-clearing; 2) allowed SF and SB to resign; 3) significantly curtailed SF's and SB's penny stock business before their resignations; and 4) stopped participating in penny stock transactions. Subsequent to the events discussed in this AWC, the Firm rewrote its procedures to require more thorough background checks on prospective customers and hired a consultant to audit its AML procedures.

## **VIOLATIONS**

As a result of the conduct described above, the Firm violated the following rules:

1. Fagenson violated NASD Rule 2110 by selling unregistered securities in violation of Section 5 of the Securities Act of 1933;
2. Fagenson violated NASD Rules 3010 and 2110 by failing to establish, maintain and enforce a system, including written supervisory procedures, to supervise the activities of its registered and associated persons that was reasonably designed to detect and prevent the sale of unregistered securities; and
3. Fagenson violated NASD Rules 3011 and 2110 because it failed to establish and implement policies and procedures that could reasonably be expected to detect and cause the reporting of suspicious activity and transactions, and did not properly monitor for the "red flags" set forth in the Firm's Anti-Money Laundering procedures.

## **SANCTIONS**

The Firm consents to the imposition of the following sanctions:

1. A censure; and
2. A fine of \$165,000.

Fagenson specifically and voluntarily waives any right to claim that it is unable to pay, now or at

any time hereafter, the monetary sanction(s) imposed in this matter.

The sanctions imposed herein shall be effective on a date set by FINRA staff. The Firm will pay the fine in three installments, on the following schedule: \$55,000 plus interest as determined by FINRA per month for each of the first three months following notification by FINRA that the fine is due and payable.

## **II.**

### **WAIVER OF PROCEDURAL RIGHTS**

Fagenson specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against it;
- 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 National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Fagenson 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.

The Firm 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

The Firm understands that:

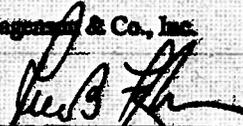
- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (“ODA”), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the Member; and
- C. If accepted:
  - 1. This AWC will become part of the Member’s permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against the Member;
  - 2. This AWC will be made available through FINRA's public disclosure program in response to public inquiries about my disciplinary record;
  - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8310 and IM-8310-3; and
  - 4. The Firm 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. The Firm 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 my right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, has agreed to its provisions voluntarily, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

Fagenbaum & Co., Inc.

March 25, 2010

Date

  
Robert Fagenbaum  
President & Treasurer

Reviewed by:



Counsel for Respondent  
David Richan  
Baritz & Colman LLP  
233 Broadway  
22<sup>nd</sup> Floor  
New York, New York 10279-0001  
(646) 435-9565

Accepted by FINRA:

4-9-10

Date

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

  
Suzanne Elovic  
Chief Counsel  
FINRA Department of Enforcement  
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