FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2021072120401

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

RE: Apex Clearing Corporation (Respondent)
Member Firm
CRD No. 13071

Pursuant to FINRA Rule 9216, Respondent Apex Clearing Corporation 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

Apex Clearing Corporation (Apex) has been a FINRA member since March 1983. Apex conducts a full-service retail brokerage business and provides correspondent clearing services to, and carries customer accounts for, approximately 110 introducing broker-dealers on a fully disclosed basis. Apex is headquartered in Dallas, Texas, and has approximately 230 registered representatives in four branch offices.[1]

OVERVIEW

From January 2019 through June 2023, Apex entered into securities loans with certain introduced customers without having reasonable grounds to believe that the loans were appropriate for those customers because those customers did not receive a loan fee for lending their shares. In addition, from March 2021 through April 2023, the firm failed to provide many customers enrolled in its fully paid securities lending program (FPLP) with all of the written disclosures regarding the customers' rights with respect to the loaned securities and the risks and financial impacts associated with the customers' loans of securities required under FINRA Rule 4330.

Also from January 2019 through June 2023, Apex distributed to certain of its introducing broker-dealers documents that were sent to more than five million retail investors

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

containing misrepresentations about the compensation that those investors would receive for loans under the FPLP. Four of those introducing broker-dealers enrolled approximately five million investors, approximately 17 percent of which had securities borrowed by Apex. Finally, since at least January 2019, Apex has failed to establish, maintain, and enforce a supervisory system, including written supervisory procedures (WSPs), for its FPLP reasonably designed to achieve compliance with FINRA Rule 4330.

Therefore, Apex violated FINRA Rules 4330, 2210, 3110, and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a FINRA examination of firms offering fully paid securities lending to retail customers.

1. Fully paid securities lending in general

Fully paid securities lending is a practice through which a firm borrows a customer's fully paid or excess margin securities and uses them for purposes such as meeting the firm's delivery needs or lending them to a third party. When a firm lends shares to a third party, it typically does so in exchange for remuneration such as a loan fee. Should a customer wish to sell loaned securities, the firm will typically treat that as a request to terminate the loan and will recall the securities from the third-party borrower or obtain the securities from another lender or through other available means.

Once a customer is enrolled in fully paid lending, the borrowing firm determines which securities to borrow, when, and generally on what terms. When the firm identifies a security it wants to borrow in an enrolled customer's account, the firm transfers the security from the customer's account and provides the customer with collateral equal to or greater than the value of the security. The firm then uses the security for its delivery needs or lends the security to a third party and collects a fee.[2] The fee or rate generally is variable and reflects the market for the borrowed security. For example, a security for which there is high demand and limited supply typically will have a higher loan fee (or lower rebate rate on cash collateral received) than a security for which there is more availability or limited demand.

When a customer's shares are borrowed over a dividend payment date, the customer receives a cash payment in lieu of the dividend. Payments in lieu of dividends are taxed as regular income, which frequently is taxed at a higher rate than qualified dividends. Customers who lend their shares out also lose, for the duration of a securities loan, both SIPC protection on the securities while they are on loan (the collateral delivered to the lender may constitute the customer's only source of satisfaction in the event the borrower broker-dealer fails to return the loaned securities) and voting rights (voting rights for borrowed shares are transferred away from the lender).

[2] The third-party borrowing firm also posts collateral with the lending firm.

2. Apex's fully paid securities lending business

Apex provides correspondent clearing services to, and carries customer accounts for, introducing broker-dealer clients on a fully disclosed basis pursuant to a fully disclosed clearing agreement. Since at least 2019, Apex has made available to its introducing broker-dealer clients the opportunity to participate in Apex's FPLP by offering the program to customers introduced to Apex by its introducing broker-dealers. Introducing broker-dealers participating in Apex's FPLP agreed in their clearing agreements with Apex to, among other things: (i) set the criteria for determining which introduced customers were eligible to participate in the FPLP; (ii) determine which customers could participate in the FPLP; and (iii) determine what compensation would be shared with customers when their fully paid or excess margin securities were borrowed.

Apex also provides to its introducing broker-dealer clients a Master Securities Lending Agreement (MSLA), which is a contract drafted by Apex, between the customer and Apex, that gives Apex the right to borrow the customers' fully paid and excess margin securities. Apex also provides to its introducing broker-dealers a stand-alone document, drafted by Apex and referenced in the MSLA, describing the features and risks of the FPLP (Risk Disclosure Document). Apex requires, through its clearing agreements, that its introducing broker-dealer clients provide the MSLA and the Risk Disclosure Document to customers at the time of their enrollment in the FPLP.

3. Apex failed to comply with FINRA Rule 4330(b)(2)(A) and (b)(2)(B)(ii).

FINRA Rule 4330(b) contains requirements for borrowing of customers' fully paid or excess margin securities. FINRA Rule 4330(b)(2)(A) requires a firm that borrows fully paid or excess margin securities from retail customers to "have reasonable grounds for believing that the customer's loan(s) of securities are appropriate for the customer." FINRA Rule 4330 Supplementary Material .04 (Rule 4330.04) further explains that "[t]he member borrowing a customer's fully paid or excess margin securities is responsible for making the determination regarding the appropriateness of such borrow from a customer . . . . However, in making that determination, when the member has entered into a carrying agreement with an introducing member, pursuant to Rule 4311, the member may rely on the representations of the introducing member that has a customer relationship with the lender."

FINRA Rule 4330(b)(2)(B) requires a firm that borrows fully paid or excess margin securities from customers to, "prior to first entering into securities borrows with a customer . . . provide the customer, in writing (which may be electronic)" certain information. This includes "(i) clear and prominent notice stating that the provisions of the Securities Investor Protection Act of 1970 may not protect the customer with respect to the customer's securities loan transaction and that the collateral delivered to the customer may constitute the only source of satisfaction of the member's obligation in the event the member fails to return the securities." This also includes "(ii) disclosures regarding the customer's rights with respect to the loaned securities, and the risks and financial impact associated with the customer's loan(s) of securities." Such disclosures must include, but are not limited to: "a. loss of voting rights; b. the customer's right to

sell the loaned securities and any limitations on the customer's ability to do so, if applicable; c. the factors that determine the amount of compensation received by the member and its associated persons in connection with the use of the securities borrowed from the customer; d. the factors that determine the amount of compensation (e.g., interest rate) to be paid to the customer and whether or not such compensation can be changed by the member under the terms of the borrowing agreement; e. the risks associated with each type of collateral provided to the customer; f. that the securities may be 'hard-to-borrow' because of short-selling or may be used to satisfy delivery requirements resulting from short sales; g. potential tax implications, including payments deemed cash-in-lieu of dividend paid on securities while on loan; and h. the member's right to liquidate the transaction because of the kind specified in Rule 4314(b)."

A violation of FINRA Rule 4330 also is a violation of FINRA Rule 2010, which requires member firms to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.

a. Apex borrowed fully paid and excess margin securities from certain customers without having reasonable grounds for believing that fully paid lending was appropriate for those customers.

From January 2019 through June 2023, Apex did not have reasonable grounds to believe that fully paid securities lending was appropriate for certain customers enrolled in its FPLP. This is because, during that period, certain of Apex's introducing broker-dealers enrolled customers into the Apex FPLP and those customers did not receive a loan fee for lending their shares in connection with the FPLP. However, those customers were exposed to the risks and financial consequences of the FPLP. In total, more than five million customers introduced to Apex by four of those introducing firms were enrolled in the FPLP.[3] Of those firms' customers who had shares borrowed over a dividend payment date, a portion received nearly $18,000,000 in cash payments in lieu of dividends, which potentially caused those customers to be subject to adverse tax consequences.[4] Apex failed to form reasonable grounds for believing that the FPLP was appropriate for customers in those circumstances.

Since July 2023, all introducing broker-dealers whose retail customers participate in the FPLP now share a portion of the loan fee generated from the lending of their fully paid or excess margin securities.

Therefore, Apex violated FINRA Rules 4330(b)(2)(A) and 2010.

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[3] As noted above, Apex borrowed securities from approximately 17 percent of these customers.

[4] In December 2023, FINRA issued AWCs pursuant to which four of Apex's introducing broker-dealers agreed to pay more than $1 million in total restitution to approximately 15,000 customers. Those firms paid restitution to a portion of their retail customers who were enrolled in Apex's FPLP, had securities borrowed pursuant to the FPLP, and received a cash-in-lieu of dividend payment, which, as noted, may be subject to higher tax rates than qualified dividends.

b. Apex borrowed fully paid and excess margin securities from certain customers without providing all of the information required by FINRA Rule 4330(b)(2)(B)(ii).

From March 2021 through April 2023, Apex failed to provide its stand-alone Risk Disclosure Document to millions of customers who enrolled in the FPLP. As described above, Apex requires that its introducing broker-dealers provide to customers who enroll in Apex's FPLP an MSLA and the Risk Disclosure Document. Since at least 2019, Apex has generally provided both documents to its introducing broker-dealers as a single electronic document and has electronically tracked that customers received the document to evidence Apex's compliance with FINRA Rule 4330(b)(2)(B). In March 2021, Apex—in connection with updates to its MSLA—began providing to its introducing broker-dealers an electronic document that contained only the MSLA and omitted the Risk Disclosure Document, which includes all of the information described in FINRA Rule 4330(b)(2)(B). Apex's MSLA contains the majority of the disclosures concerning the risks of fully paid lending required under the rule, including disclosures concerning SIPC protection. Additionally, Apex began making the Risk Disclosure Document available electronically on its website beginning in January 2022 and some of Apex's introducing broker-dealers nevertheless continued to separately provide the Apex Risk Disclosure Document to their customers (or made it available to their customers electronically). However, because between March 2021 and April 2023, Apex did not provide the Risk Disclosure Document with the MSLA as a single electronic document, Apex did not provide, in writing, some of the disclosures mandated by FINRA Rule 4330(b)(2)(B)(ii).

In May 2023, Apex implemented another update to its MSLA and began again providing to its introducing broker-dealers an electronic document that included both the MSLA and the Risk Disclosure Document. In September 2024, Apex uncovered the omission of the Risk Disclosure Document in the electronic document provided to customers enrolling in the FPLP, described above, and disclosed this violation to FINRA.

Therefore, Apex violated FINRA Rules 4330(b)(2)(B)(ii) and 2010.

4. Apex created, and caused certain of its introducing broker-dealers to distribute to customers, documents that inaccurately stated to customers that they would receive a loan fee for loans under the FPLP.

Making a misrepresentation or omission of a material fact to customers violates FINRA Rule 2010, as doing so is inconsistent with just and equitable principles of trade. FINRA Rule 2210 includes certain content standards that apply to all member communications, including "retail communications," which are defined as "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period." FINRA Rule 2210(d)(1)(B) requires that members not make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. The rule further states that no member may publish, circulate or distribute any communication that the member knows or has reason

to know contains any untrue statement of a material fact or is otherwise false or misleading. A violation of FINRA Rule 2210 also is a violation of FINRA Rule 2010.

Apex drafted the MSLA and Risk Disclosure Document, which Apex required its introducing broker-dealer clients to provide to their customers when they enrolled them in the FPLP. For certain customers, these documents inaccurately described the compensation that the customers would receive for loans under the FPLP. In particular, the documents stated that customers would "receive a loan fee, which will be credited daily, and generally represents a certain percentage of the net loan fee received by Apex for relending [the customer's] shares." The documents further stated to customers that Apex "will pay you a loan fee for the shares that it borrows from you." These statements were not accurate for customers who did not receive a loan fee for lending their shares in connection with the FPLP. Further, certain versions of the MSLA stated that customers who enrolled in the FPLP would be compensated via reduced management fees charged by their introducing broker-dealer. That statement was misleading because none of the relevant introducing broker-dealers charged management fees to any customer, regardless of whether they opted out of the FPLP.

Therefore, Apex violated FINRA Rule 2210(d)(1)(B) and Rule 2010, both independently and by virtue of violating Rule 2210(d)(1)(B).

5. Apex failed to establish, maintain, and enforce a reasonable supervisory system or WSPs for its fully paid securities lending program.

FINRA Rule 3110(a) requires each member firm 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 also is a violation of FINRA Rule 2010.

Since at least January 2019, Apex has failed to establish and maintain a reasonably designed supervisory system, or WSPs, for its fully paid lending business. The firm's WSPs pertaining to the FPLP only reference the mechanics of the securities lending process and state that the introducing broker-dealer "determines which of their customers are suitable for the fully paid lending program." The firm had no procedures or system to assess whether participation in the FPLP was appropriate for retail customers or to comply with the disclosures mandated by FINRA Rule 4330(b)(2)(B). The firm's WSPs also lack any guidance as to how to obtain and reasonably rely on representations from introducing broker-dealers whose customers were enrolled in the FPLP.

Therefore, Apex violated FINRA Rules 3110 and 2010.

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

- a censure;
- a $3.2 million fine; and
- an undertaking that, within 180 days of the date of the notice of acceptance of this AWC, a member of Respondent's senior management who is a registered principal of the firm shall certify in writing that, as of the date of the certification, the firm has remediated the issues identified in this AWC and implemented a supervisory system, including written supervisory procedures, reasonably designed to achieve compliance with FINRA Rule 4330 regarding the issues identified in this AWC. The certification shall include a narrative description and supporting exhibits sufficient to demonstrate Respondent's remediation and implementation. FINRA staff may request further evidence of Respondent's remediation and implementation, and Respondent agrees to provide such evidence. Respondent shall submit the certification to Leah Milbauer, Counsel, at 99 High Street Suite 900, Boston, MA 02110 and Leah.Milbauer@finra.org, with a copy to EnforcementNotice@finra.org. Upon written request showing good cause, FINRA staff may extend this deadline.

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 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.

1/22/2025
Date

Signed by:
F38620C7C3D5499...
Apex Clearing Corporation
Respondent

Print Name: William Capuzzi

Title: Chief Executive Officer

Reviewed by:

Lara Thyagarajan
Counsel for Respondent
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019

Accepted by FINRA:

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

February 4, 2025
Date

Leah Milbauer

Leah Milbauer
Counsel
FINRA
Department of Enforcement
99 High Street, Suite 900
Boston, MA 02110

ELECTION OF PAYMENT FORM

Respondent intends to pay the fine set forth in the attached Letter of Acceptance, Waiver, and Consent by the following method (check one):

☐ A check for the full amount;

☒ Wire transfer for the full amount;

☐ Credit card authorization for the full amount;[1] or

☐ The installment payment plan (only if approved by the Department of Enforcement and the Office of Disciplinary Affairs).[2]

Respectfully submitted,

1/22/2025
Date

Signed by:
F38620C7C3D5499...
Apex Clearing Corporation
Respondent

Print Name: William Capuzzi

Title: Chief Executive Officer

[1] Credit card payment is only available for fines of $50,000 or less. Only Mastercard, Visa, and American Express are accepted. If this method is chosen, the appropriate forms will be mailed to Respondent by FINRA's Finance Department. Credit card information should not be included on this Election of Payment Form.

[2] The installment payment plan is only available for fines of $5,000 or more. Certain interest payments, minimum initial and monthly payments, and other requirements apply. Respondent must discuss these requirements with the Department of Enforcement prior to requesting this method of payment. If this method is chosen and approved, the appropriate forms will be mailed to Respondent by FINRA's Finance Department.