

**NASD REGULATION, INC.**  
**LETTER OF ACCEPTANCE, WAIVER AND CONSENT**  
**NO. CAF000044**

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**TO:** Department of Enforcement  
NASD Regulation, Inc.

**RE:** Asensio & Company, Inc. ("Asensio & Co." or "Firm"), Respondent  
Member (CRD No. 31742)

Manuel P. Asensio ("Manuel Asensio"), Respondent  
General Securities Principal (GRD No. 1148811)

Pursuant to Rule 9216 of the National Association of Securities Dealers, Inc. ("NASD") Code of Procedure, Respondents submit 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 on the condition that, if accepted, NASD Regulation, Inc. ("NASDR") will not bring any future actions against Respondents alleging violations based on the same factual findings.

We understand that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASDR's Department of Enforcement, Office of Disciplinary Affairs ("ODA"), and the National Adjudicatory Council ("NAC"). Executed AWCs will not be forwarded to the NAC until approval by the Department of Enforcement and ODA;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against us; and
3. If accepted:
  - a. this AWC will become part of our permanent disciplinary records and may be considered in any future actions brought by the NASDR against us;
  - b. this AWC will be made available through NASDR's public disclosure program in response to public inquiries about our disciplinary record;

ALL-STATE LEGAL

EXHIBIT

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- c. NASDR 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. Respondents 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 our testimonial obligations or right to take legal positions in litigation in which the NASD is not a party.

We also understand that our experiences in the securities industry and disciplinary histories may be factors which will be considered in deciding whether to accept this AWC. That experience and history are as follows:

- A. Asensio & Co. has been a member of the Association since about July 1993. The Firm is headquartered in New York, NY. The Firm's relevant disciplinary history is as follows: On March 24, 2000, an AWC was issued against Asensio & Co. in which the Firm was fined \$2,000 for not accepting or declining 24 trades within twenty minutes as required by Marketplace Rule 6130(b).
- B. Manuel Asensio has been associated with Asensio & Co. since its inception as president, chairman and chief executive officer. During all relevant times, he was the Firm's only registered principal and its compliance officer. He has no relevant disciplinary history.

#### I.

#### WAIVER OF PROCEDURAL RIGHTS

We specifically and voluntarily waive the following rights granted under the NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against us;
- 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 and a U.S. Court of Appeals.

Further, we specifically and voluntarily waive any right to claim bias or prejudice 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.

We further specifically and voluntarily waive 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. We hereby accept and consent, without admitting or denying the alleged violations, to the entry of the following findings by NASDR:

1. Short Selling Violations: Failure to Make and Note Affirmative Determinations

During the period from August 1, 1998 through July 31, 1999, Asensio & Co. failed to keep written records of affirmative determinations in connection with 306 transactions in which the firm sold securities short for its own account or the accounts of its customers. With respect to 117 transactions, Asensio & Co. failed to make affirmative determinations. In addition, 18 order tickets indicated that an affirmative determination had been made, but the Firm had no record of any person or entity allegedly contacted in connection with the determination. Based on the foregoing, Asensio & Co. violated Conduct Rule 3370.

2. Trade Reporting Violations: Failure to Report Sales to Nasdaq

During the period from August 1, 1998 and July 31, 1999, Asensio & Co. reported 331 sale transactions to Nasdaq's Automated Confirmation Transaction Service ("ACT") without indicating that they were short sales. Based on the foregoing, the Firm violated Conduct Rule 2110 and Marketplace Rule 6130(d).

### 3. Advertising Violations

#### a. Failure to File Advertisements with the Advertising Regulation Department

In May 1996, Manuel Asensio personally opened an e-mail account with America Online, Inc., which was used for both personal and business purposes. The mailing address for the account was Asensio & Co.'s office. On May 29, 1996, Asensio & Co., published its first advertisement, a bulletin board posting on a message board run by America Online. Over the next year, Asensio & Co. posted at least 71 additional bulletin board postings on message boards run by America Online and by The Motley Fool. On approximately, October 15, 1996, Asensio & Co. first posted advertisements on the Firm's Internet Web site. From that date through May 21, 1997, when it first filed with NASDR's Advertising Regulation Department, the Firm published on its Web site a brochure regarding the Firm and 43 research reports regarding 9 issuers. Manuel Asensio was responsible for approving all advertising.

Asensio & Co. did not file its first advertisement with NASDR's Advertising Regulation Department until May 21, 1997. At that time, the Firm filed pages from its Internet Web site, a general brochure about the Firm and 19 research reports. The Firm did not subsequently file any advertisements with NASDR's Advertising Regulation Department until August 19, 1999. Based on the foregoing, Asensio & Co. and Manuel Asensio violated Conduct Rules 2110 and 2210(c)(3)(A).

#### b. Failure to Maintain Advertisement Files

During the period from May 29, 1996 through June 11, 1997, Asensio & Co. posted at least 73 bulletin board postings on message boards run by America Online and The Motley Fool. The Firm failed to retain copies of those bulletin board postings. Manuel Asensio was responsible for maintaining files of advertisements. Based on the foregoing, Asensio & Co. and Manuel Asensio violated Conduct Rules 2110 and 2210(b)(2).

#### c. Failure to Disclose Member Name on Bulletin Board Postings

Through Manuel Asensio's America Online account, during the time period from September 21, 1996 through March 14, 1997, associated persons of Asensio & Co. posted at least 14 bulletin board messages which did not disclose any connection with the Firm but, instead, used the following screen names: Xuanya1, Cruve66509, Flyrow and Twofour150. One posting, written by a person who is no longer associated with Asensio & Co., stated, in part: "Asensio & Company's research is precise. . . . I have no affiliation with, and have no interest in Asensio or [the issuer]." Another posting was entitled: "Asensio stands for the truth."

Conduct Rule 2210(d)(2)(A) mandates that all advertisements contain the name of the member. Based on the foregoing, Asensio & Co. violated Conduct Rules 2110 and 2210(d)(2)(A).

d. Failure to Provide Price

During the period from October 15, 1996 through April 19, 2000, Asensio & Co. published on the Firm's Web site approximately 218 research reports regarding specific securities. Of those, 203 did not provide the price of the security at the time of the recommendation.

Rule 2210(d)(2)(B)(ii) provides that recommendations must provide the price of the security which is the subject of the recommendation at the time the recommendation is made. Based on the foregoing, Asensio & Co. and Manuel Asensio violated Conduct Rules 2110 and 2210(d)(2)(B)(ii).

e. Failure to Disclose the Risks of Short Selling

During the period from February 1997 through September 1999, Asensio & Co. published seven research reports on the Firm's Web site which recommended short sales of seven different securities. None of the reports disclosed risks associated with short selling. Manuel Asensio drafted all of the Firm's research reports and approved all materials included on the Firm's Web site. Based on the foregoing, Asensio & Co. and Manuel Asensio violated Conduct Rules 2110 and 2210(d)(1)(A).

f. Violative "Selected Performance" Graphs

During the period from approximately October 15, 1996 through March 6, 2000, the Firm's Web site contained sections entitled "Complete Strong Sell Record," "Research Reports" and "Selected Performances," as well as other information.

The section entitled "Complete Strong Sell Record" contained references and links to research reports for 20 different companies. Asensio & Co. often issued more than one report on each company. The "Research Reports" section contained references and links to research reports for 9 different companies and one industry.

The "Selected Performances" section initially contained seven mountain chart graphs showing the price performance over time of seven different securities. Graphs of nine other securities were subsequently added. (A copy of the "Selected Performances" section is attached as Exhibit 1.) Each Selected Performance graph contained a downward facing arrow pointing to part of the mountain chart graph, but the Web site contained no explanation of the significance of the arrow. Based on the context and the placement of the arrows, and references elsewhere on the site to research reports, each arrow appeared to show the date and the corresponding price when Asensio & Co. issued its initial recommendation regarding the particular security. Indeed, certain of the arrows

did point to the dates and the corresponding prices when Asensio & Co. issued initial research reports. Each graph also showed the security's performance before and after the placement of the arrow. Next to each graph were several sentences about the security, but the Web site contained no explanation of the source of the sentences. Based on the context and the placement of the sentences, it appears that the sentences were taken from Asensio & Co.'s research report on the company. Certain of the sentences were, in fact, contained in research reports.

As set forth below, certain graphs in the Selected Performance section failed to provide a sound basis for evaluation, omitted material facts or made misleading statements or claims. In addition, Asensio & Co. failed to include all relevant past recommendations.

First, the Selected Performances section contained one graph of a security on which Asensio & Co. did not issue a research report. The graph for Bally Gaming International, Inc. purports to show that Asensio & Co. recommended buying the security on approximately May 10, 1996. Next to the graph are two sentences explaining why Bally's price would likely rise. In fact, Asensio & Co. never issued a written recommendation on Bally. Moreover, with respect to three other securities, Asensio & Co.'s research reports did not contain the statements which appeared next to their respective graphs.<sup>1</sup> For example, the Cellular Technical graph shows the price dropping from approximately \$20 in December 1996 to less than \$5 during November 1997. Next to the graph is the sentence, "We believe the shares are worth less than \$5." Asensio & Co.'s Cellular Technical reports did not make that statement. Rather, when the shares were trading at approximately \$17 per share, the Firm's report stated, "We believe the shares would be overvalued at half their current price."

The Selected Performances section also contained graphs covering the time period from January 1994 to August 1998, but excluded one sell and four buy recommendations made by Asensio & Co. during that same time period.<sup>2</sup> Those five recommendations were not included anywhere on the Web site.<sup>3</sup>

On six of the graphs, the arrow did not point to the actual date when Asensio & Co. made the initial recommendation.<sup>4</sup> For example, on the Solv-Ex graph, which began

<sup>1</sup> Those three securities are: Cellular Technical Services Company, Inc.; McKesson HBOC, Inc.; and SyQuest Technology Inc.

<sup>2</sup> The sell recommendation was for Lyondell Chemical Company, while the buy recommendations were for CellularVision USA, Inc.; HMG Worldwide Corporation; Motorola, Inc.; and Slocan Forest Product, Ltd.

<sup>3</sup> The Selected Performances section also failed to list six recommendations which were contained elsewhere on the Asensio & Co. Web site.

<sup>4</sup> Those graphs were for the following securities: Avant! Corporation; BioTime, Inc.; Chromatics Color Sciences International, Inc.; Kemper Corp.; McKesson; and Solv-Ex Corp.

in January 1997, the arrow pointed to approximately January 31, 1997, when the closing price was \$19.50. Asensio & Co., however, issued its initial Solv-Ex report with a "very strong sell recommendation" on October 7, 1996, when the closing price was \$15.50. On six of the graphs containing strong sell or short sell recommendations, the arrow pointed to a price which was higher than the price of the security on the date of Asensio & Co.'s actual recommendation.<sup>5</sup>

Finally, on two of the graphs, after the time period illustrated on the charts, the price of the securities reversed direction.<sup>6</sup> The ending time period shown on the graphs did not correspond to Asensio & Co.'s recommendations because the Firm did not issue specific recommendations stating when securities sold short should be covered, or when securities purchased long should be sold. Where the price reversed direction within a short time after the ending period on the graph, Asensio & Co. should have updated the graph to reflect the change in price, or taken action to ensure that the graph as originally posted was a fair depiction of the price performance of the stock. For three of the securities, Asensio & Co. issued reports after the time period shown on the charts.<sup>7</sup>

Based on the foregoing, Asensio & Co. and Manuel Asensio violated Conduct Rules 2110, 2210(d)(1)(A) and (B) and 2210(d)(2)(B)(iii).

#### 4. Supervision Violations

Asensio & Co. and Manuel Asensio failed to establish, maintain and enforce procedures reasonably designed to achieve compliance with the advertising rules, the rules relating to short selling, and the rules relating to trade reporting. For example, the Firm's procedures contained no provisions regarding the application of the advertising rules to the Web site, did not address affirmative determinations or borrowing of stock, and failed to address ACT rules and procedures. During the period relevant to this action, Asensio was responsible for all supervisory functions and supervisory systems at the Firm.

Based on the foregoing, Manuel Asensio and Asensio & Co. violated Conduct Rules 2110 and 3010.

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<sup>5</sup> Those recommendations were for the following securities: Avant!, BioTime, Cellular Technical, Chromatics, Kemper, and Solv-Ex.

<sup>6</sup> Those graphs were for the following securities: BioTime and General Nutrition Companies.

<sup>7</sup> Those graphs were for the following securities: BioTime; Diana; and Turbodyne Technologies, Inc.

**B. Manuel Asensio consents to the imposition, at a maximum, of the following sanctions:**

- 1. A censure;**
- 2. A fine of \$75,000, to be paid jointly and severally with the fine imposed in paragraph C.2 below as to Asensio & Co. The fine shall be paid within 10 days of notice of acceptance by the NAC of this AWC;**
- 3. Requalification by examination as a registered general securities principal (Series 24) within 60 days of notice of acceptance by the NAC of this AWC; and**
- 4. To remove all advertisements which are the subject of this AWC from the Firm's Internet Web site and any other Websites under the control of Manuel Asensio. Before any such advertisement can be used in the future, it must be pre-filed with the Advertising Regulation Department of NASDR 15 days prior to use. The 15 day period shall commence on the date of transmission with respect to advertisements sent by facsimile and on the day following shipment with respect to advertisements sent by overnight delivery. After 15 days, these pre-filed advertisements may be used only in the absence of comments from NASDR.**

**C. Asensio & Co. consents to the imposition, at a maximum, of the following sanctions:**

- 1. A censure;**
- 2. A fine of \$75,000, to be paid jointly and severally with the fine imposed in paragraph B.2 above as to Manuel Asensio. The fine shall be paid within 10 days of notice of acceptance by the NAC of this AWC;**
- 3. Asensio & Co. agrees to retain, within 30 days of the acceptance of this AWC, an outside consultant not unacceptable to NASDR to review and make recommendations concerning the adequacy of the Firm's current policies and procedures as they relate to the matters described in this AWC.**

**Three months after the date of acceptance of this AWC, the consultant will provide an initial report to Asensio & Co. and to NASD containing recommendations, if appropriate, for the adoption of policies and procedures by the Firm with respect to the matters described in this AWC.**

Within three months after the report is delivered, Asensio & Co. shall either adopt all recommendations made by the consultant or, as to any recommendation that Asensio & Co. determines is unduly burdensome or impractical, Asensio & Co. shall propose an alternative procedure designed to achieve the same objective, and submit it in writing to the consultant and to the staff of NASDR. Within thirty days, the consultant shall reasonably evaluate any alternative procedure proposed by Asensio & Co. and determine whether it will achieve the same objective as the consultant's original recommendation. The consultant will provide Asensio & Co. with a written decision reflecting his or her determination. Asensio & Co. will abide by the consultant's ultimate determination with respect to any recommendation and shall adopt all recommendations deemed appropriate by the consultant. Asensio & Co. shall, within three months after the issuance of the later of the consultant's initial report or written determination regarding alternative procedures (if any), provide the staff of NASDR with a report attesting to, containing documentation of, and setting forth the details of, Asensio & Co. implementation of the consultant's recommendations.

Asensio & Co. shall cooperate fully with the consultant, including obtaining the cooperation of Asensio & Co.'s employees. Asensio & Co. shall not place restrictions on the consultant's communications with the staff of NASDR. Asensio & Co. will make available to NASDR, upon request, any and all communications between the consultant and Asensio & Co., and any documents that the consultant reviewed or relied upon in connection with the engagement. For a period of two years following the date of the conclusion of the consultant's work as described herein, neither Asensio & Co., nor any of its principals, agents, officers, directors or employees acting in their capacities as such, may employ or otherwise hire the consultant in any capacity. Any Firm with which the consultant is affiliated or of which he or she is a member, and any person or Firm engaged to assist the consultant in the performance of his or her duties shall not, without prior written consent of NASDR staff, enter into any employment, consulting or other professional relationship with Asensio & Co., or any of its directors, officers, employees, or agents in their capacity as such for the period of the engagement and for a period of two years after the engagement; and

4. To remove all advertisements which are the subject of this AWC from the Firm's Internet Web site and any other Websites under the control of Asensio & Co. Before any such advertisement can be used, it must

be pre-filed with the Advertising Regulation Department of NASDR 15 days prior to use. The 15 day period shall commence on the date of transmission with respect to advertisements sent by facsimile and on the day following shipment with respect to advertisements sent by overnight delivery. After 15 days, these pre-filed advertisements may be used only in the absence of comments from NASDR.

### III.

#### OTHER MATTERS

- A. We understand that we may attach a Corrective Action Statement to this AWC which is a statement of demonstrable corrective steps taken to prevent future misconduct. We understand that we 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 NASDR, nor does it reflect the views of NASDR or its staff.
- B. We agree to pay any monetary sanctions imposed on us upon notice that this AWC has been accepted and that such payments are due and payable, and have attached an Election of Payment form showing the method by which we propose to pay any fine imposed.
- C. We specifically and voluntarily waive any right to claim that we are unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

We certify that we have read and understand all of the provisions of this AWC and have 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 us to submit it.

Respondent, Asensio & Company, Inc.

Oct. 20, 2000  
Date

  
By: Manuel P. Asensio

Respondent, Manuel P. Asensio

Oct. 20, 2000  
Date

  
Manuel P. Asensio

Accepted by NASD Regulation, Inc.:

11/15/00  
Date  
Attachment

  
Department of Enforcement

## ELECTION OF PAYMENT FORM


We intend to pay the fine proposed in Section II of the Letter of Acceptance, Waiver and Consent by the following method (check one):

- A personal check or bank check for the full amount;
- Credit card authorization for the full amount;<sup>8</sup>
- The installment payment plan (only if approved by NASD Regulation, Inc. staff and the National Adjudicatory Council).<sup>9</sup>

Respectfully submitted,

Oct. 20, 2000


Date

  
By: Manuel P. Asensio

Respondent, Manuel P. Asensio

Oct. 20, 2000

Date

  
Manuel P. Asensio

<sup>8</sup> Only Mastercard and Visa are accepted for payment by credit card. If this option is chosen, the appropriate forms will be mailed to you, with an invoice, by the NASD Regulation, Inc.'s Finance Department. Do not include your credit card number on this form.

<sup>9</sup> 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. You must discuss these terms with the NASD Regulation, Inc. staff prior to requesting this method of payment.