

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2006005132304**

RECEIVED

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REGISTRATION & DISCLOSURE

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

RE: Ira Stevens Miller, Respondent  
General Securities Principal  
CRD No. 334923

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, I submit 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 me alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

- A. I hereby accept and consent, 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**

In 1966, Ira Stevens Miller ("Miller") first became registered as a General Securities Representative with FINRA through a predecessor of member firm Morgan Stanley & Co. Incorporated ("Morgan Stanley" or the "firm"). On January 9, 1970, Miller became registered with FINRA through Morgan Stanley as a General Securities Principal. Miller continues to be registered through Morgan Stanley. He does not have any disciplinary history.

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## **OVERVIEW**

From 1998 to 2003 (the "relevant time period"), Miller, the manager of Morgan Stanley's Rochester, New York branch, failed to take appropriate action to reasonably supervise registered representatives MK and DI to prevent their unsuitable investment recommendations and failures to disclose certain risks to many clients. MK and DI solicited brokerage business from retirees and potential retirees of certain large companies in the Rochester, New York area, such as Eastman Kodak Company ("Kodak") and Xerox Corporation ("Xerox"), by promoting unrealistic investment returns and without disclosing certain risks. Miller failed to follow up on indications of potential misconduct that should have alerted him to their violations. This conduct violated NASD Conduct Rules 3010 and 2110.

## **FACTS AND VIOLATIVE CONDUCT**

### **Misconduct by Representatives under Miller's Supervision**

During the relevant period, MK and DI solicited brokerage business from retirees and potential retirees of certain large companies in the Rochester, New York area, such as Kodak and Xerox. For example, like other large corporations in upstate New York, Xerox was downsizing and offering retirement or early retirement packages to its employees. As part of their presentations, MK and DI promoted unrealistic investment returns and failed to disclose certain risks in connection with such investments. For example, MK and DI each represented to potential clients that, if they invested their retirement money with them, they would earn at least 10% returns each year and therefore would be able to take distributions in a similar amount for living expenses without tax penalty and without reducing their principal. MK told potential clients in their 50s that, even though they were not yet 59-1/2 years old, they could begin to take systematic distributions from their retirement accounts, without penalty, pursuant to Section 72(t) of the Internal Revenue Code.<sup>1</sup> This is a method recognized by the Internal Revenue Service through which retiring clients could receive cash flow without incurring a penalty due to early retirement.

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<sup>1</sup> Under the Section 72(t) provision, individuals under 59-1/2 years old could make systematic withdrawals of funds from their qualified retirement plans without incurring the 10% early withdrawal penalty. In order to qualify for this exception, withdrawals had to be taken as "substantially equal periodic payments" and had to be taken for five years or until the individual reached 59-1/2 years old, whichever was longer. The amount of the payments had to be calculated according to one of three methods, two of which resulted in amounts that were fixed for the term of the withdrawals. If the customer subsequently sought to change the withdrawal amount, all of the withdrawal payments would then be subject to the tax penalty. The rules were revised in 2002, toward the end of the relevant period, to permit customers a one-time change in their distribution amount and to effectively cap the withdrawal rate that could be used without incurring a penalty. For example, pursuant to the revised rules, the maximum permissible withdrawal rate for 2003 was 4.39%.

MK and DI failed to disclose to clients the following risks, among others, associated with their recommended investment strategies:

- while a 10% average annual return was potentially achievable over the long term, client accounts were not likely to realize those returns each and every year;
- if client accounts did not achieve the 10% annual rate of return, their annual withdrawals in the general range of 8% to 10% would deplete their principal; and
- adverse market conditions could significantly impact the viability of their early retirement.

Once MK began servicing the retirement accounts, which were generally the only sources of income for these clients, he implemented unsuitable investment strategies (e.g., over-concentration in equity mutual fund shares and unsuitable variable annuity transactions) that depleted the principal in these accounts due to adverse market conditions and fees. MK generally recommended the same or similar investment strategies for these clients.

DI recommended that many of his clients open Access accounts, fee-based managed accounts in which equity trading was handled by a variety of money managers. DI's clients paid an annual fee of approximately 2.5%.

MK's and DI's statements encouraged several individuals to move their retirement accounts to Morgan Stanley. Some of them also decided to retire sooner than they may have otherwise done. These individuals were relying on income from their retirement accounts in order to pay living expenses.

As a result of MK's and DI's misconduct, many of these clients sustained market losses and were unable to maintain represented withdrawal rates. Consequently, a significant portion of their annual withdrawals were funded by a distribution of principal, not income. Some clients needed to return to work in order to pay living expenses.

#### **Miller Failed to Reasonably Supervise MK and DI**

During the relevant time period, Miller was responsible for supervising MK and DI. Miller, however, failed to take appropriate action to reasonably supervise MK and DI to detect and prevent their violations and achieve compliance with the applicable rules. As indicated below, Miller, among other things, failed to take reasonable steps to follow up on certain indications of potential misconduct that

should have alerted him to their violations:

- Miller knew that MK and DI were providing investment services to retirees who had certain income needs. He also knew or should have known that MK and DI made sales presentations to potential clients who were contemplating retirement that included representations that they would earn returns of 10% each year and that those returns would enable them to take distributions in the same or a similar amount annually without depleting their principal. Nevertheless, Miller failed to take reasonable steps to ensure the accuracy and reasonableness of those presentations.
- Miller knew or should have known that many of MK's and DI's clients were relying on annual withdrawal rates generally in the 8% to 10% range and that those distributions represented an important source of retirement income for many of these clients. Miller should have questioned whether those withdrawal rates could have been sustained, particularly without reducing the clients' principal balance. Indeed, over time, Miller knew or should have known that client withdrawal rates were exceeding the rates of return that they were achieving in their underlying investments. Nevertheless, Miller did not make sufficient inquiry to ascertain that the clients understood the risks associated with the investment strategies being recommended by MK and DI.
- Miller knew that a 10% annual rate of return could be achieved in any given year only through a significant allocation of clients' funds in equity based investments. Miller knew or should have known that client accounts were not likely to achieve the 10% return each year. In addition, he was aware of the risks associated with such equity based allocations given potential market volatility. Miller failed to assess whether such allocations were suitable for the individual clients given their financial circumstances and income needs.
- MK made unsuitable recommendations to some of his clients concerning variable annuities which carried fees and surrender charges. Miller was aware of these circumstances, but failed to conduct a reasonable suitability review of those recommendations.
- Miller knew that DI obtained lists of Xerox employees who were retired, or planning on retiring. He also knew that DI then used those lists to solicit clients. This should have alerted Miller to DI's concentrated efforts to solicit business from potential retirees.

By failing to reasonably supervise MK and DI, Miller violated NASD Conduct Rules 3010 and 2110.

B. I also consent to the imposition of the following sanctions:

- a one-year suspension from association with any FINRA member firm in any principal capacity;
- a fine in the amount of \$50,000; and
- an order to re-qualify as a principal and/or supervisor by passing the required examination(s) before serving in any such capacity in the future.

I agree to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. I have submitted an Election of Payment form showing the method by which I propose to pay the fine imposed.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

## II.

### WAIVER OF PROCEDURAL RIGHTS

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- 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, I specifically and voluntarily waive 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.

I further specifically and voluntarily waive 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**

I understand 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 me;
- C. If accepted:
  - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
  - 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 8313; and
  - 4. I 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. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is

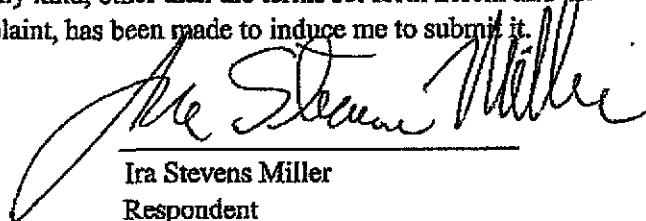
inconsistent with any part of this AWC. Nothing in this provision affects my right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party; and

- D. I may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. I understand that I 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 or its staff.

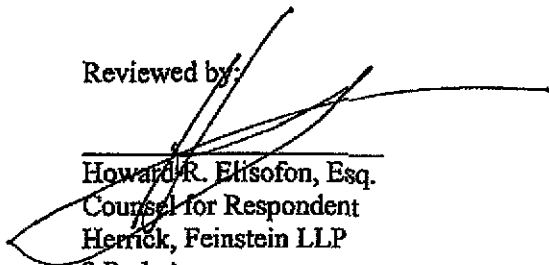
I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

Feb 27, 2009

Date

  
Ira Stevens Miller  
Respondent

Reviewed by:

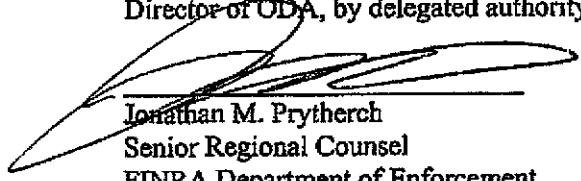
  
Howard R. Elisofon, Esq.  
Counsel for Respondent  
Herrick, Feinstein LLP  
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New York, New York 10016  
(212) 592-1400

Accepted by FINRA:

3/25/09

Date

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

  
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