

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2008014053102**

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

RE: Allen Michael Kay, Respondent
CRD No. 2011245

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

Kay entered the securities industry as a non-registered employee of a member firm in November 2001. He was employed by Wells Fargo Investments, LLC, where the conduct at issue took place, working in Wells Fargo Bank branch offices in the Los Angeles area, from November 15, 2001 until his voluntary resignation on May 16, 2008. He then joined another member firm. His employment was terminated on January 5, 2009, as a result of a merger between his employing firm and Wells Fargo Investments. He is currently employed as an Investment Advisor Representative with a non-member firm. Kay obtained his Series 7 and 66 licenses in 2002.

OVERVIEW

While employed as a registered representative, Respondent Allen Kay, a broker serving customers of a bank, misled his risk-averse customers into investing in mutual funds which failed to comply with their risk tolerances and investment

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objectives. He led them to believe that they were investing in safe products in which they could not lose principal. In some instances, he induced these conservative customers to invest in mutual funds comprised primarily of below-investment-grade corporate debt, or "junk investments." He also misled some of his customers into believing that they were investing in bonds, when they were actually investing in bond funds.

In addition, Kay recommended that his customers invest in mutual funds that were unsuitable, given their investment objectives and risk tolerances. He also failed to develop an adequate understanding of at least one of the funds he recommended to customers, failed to adequately assess his customers' objectives and risk tolerance, and failed to ensure that his customers understood the risks inherent in the products he was recommending.

By virtue of this conduct, Kay violated NASD Conduct Rules 2110 and 2310.

FACTS AND VIOLATIVE CONDUCT

The Bank Referral Process

From 2006 until May 2008, Kay worked as a registered representative servicing Wells Fargo Bank customers, primarily in the Temecula, Fontana, and Hemet, California bank branches. His title was Financial Consultant. He maintained an office in each branch.

Most of Kay's business was developed directly or indirectly through leads obtained through his bank branches. Bank employees were trained to identify customers with certificates of deposit coming due or large balances in bank accounts as potential referrals to Kay. Kay also conducted marketing activities and seminars for bank branch customers. Referrals by bank employees to individuals such as Kay were used as part of the bank's evaluations, through which certain bank employees could earn additional compensation above and beyond their base compensation.

Kay's Dealings with Customers

Between late 2006 and early 2008, at least nine individual customers or couples, all of whom were referred to Kay by Wells Fargo Bank employees, sought safe and secure investments which would not fluctuate in value and, in some instances, would pay fixed rates of returns. Kay led these customers into believing that they were purchasing investments that met those criteria. He misrepresented the nature of the investments to these customers, leading them, through affirmative statements or omissions, to believe that they were investing in safe products, such

as government bonds or bank instruments, the principal value of which would not fluctuate, when in fact they were investing in materially different investments with significantly higher risk. Kay also failed to tell each of the customers that they were investing in mutual funds. In particular:

- Kay misled three customers into believing that they were purchasing bonds with fixed rates and guaranteed principal, whereas he really sold them shares of mutual funds that were significantly invested in below investment grade corporate debt instruments, or "junk" securities. The investments actually purchased by the customers were materially different than what the customers wanted and had significantly higher risks. Kay failed to disclose this information to the customers.
- Kay misled another customer by telling her she would be investing in principal guaranteed government bonds paying a fixed return, whereas in reality she was investing in a mutual fund holding government debt securities, corporate debt securities, and mortgage-backed securities. This investment was materially different and contained significantly higher risks.
- Kay misled one of his customers by assuring her that the value of the municipal bond fund he was selling her was not tied to the stock market and by telling her that the principal value of the fund would not fluctuate. Kay thereby misled her into believing that the value of the fund was stable and secure, consistent with her stated risk tolerance. In fact, although the underlying securities held by the fund are insured, their value, and the net asset value of the funds, were subject to potential market fluctuation.
- Kay misled a couple by failing to tell them that they were investing in mutual funds when they only discussed rolling over their certificate of deposit into a new certificate of deposit. Rather than purchasing a new certificate of deposit, they were purchasing shares of a municipal bond fund, which was subject to fluctuations in value.
- Kay misled another customer by telling her that her investments were safe when in fact she was purchasing shares of two tax free bond funds, a materially different and riskier investment in which the value of the funds in which she invested could fluctuate significantly.
- Kay misled a customer into believing that she was investing in secured certificates of deposit, and failed to tell her that she was in fact investing in a fund that held below investment grade securities and other uninsured products as well as two U.S. government securities mutual funds.

- Kay misled another customer by telling him that the senior loan funds he was buying were loans to businesses and were not subject to risk of loss. In fact, those funds primarily held adjustable rate senior loans and other below investment grade instruments, and were subject to significant market fluctuation.

By misleading his customers, through statements he made that he knew or should have known were false, and by omitting to state material facts in connection with the recommendations he was making to them, Kay failed to observe high standards of commercial honor and just and equitable principles of trade, thereby violating NASD Conduct Rule 2110 (now FINRA Rule 2010).

Suitability Violations

Kay recommended that all of the customers described above invest in mutual funds that were riskier, and in some instances far riskier, than the customers' risk tolerances, and which did not comply with their investment objectives. Each of these customers, who were referred to Kay by employees of Wells Fargo Bank, were seeking to place their money in risk-free, interest-generating products. None of them were seeking, or willing to accept, the risk of market fluctuation in the value of their principal. Kay nonetheless had each of these customers invest in products which bore significant risk of market fluctuation. In addition, in at least four instances, at Kay's recommendation, Kay's customers unknowingly invested in mutual funds that were comprised primarily of below investment grade corporate debt securities—"junk investments," in common parlance. These mutual funds were particularly ill-suited for investors seeking low risk, stable investments. By making these unsuitable recommendations, Kay failed to comply with his obligations under NASD Conduct Rule 2310.

Pursuant to the NASD suitability rule, NASD Conduct Rule 2310, registered representatives must have a reasonable basis for recommending a security to any customer. To fulfill that obligation, a registered representative must obtain adequate information regarding the security being recommended, in order to assess the risks and potential rewards of the investment. Kay failed to obtain an adequate understanding of the Van Kampen Senior Loan Fund. He mistakenly thought that the fund held "mainly government bonds," along with "some corporate bonds." In reality, as of July 2007, the fund invested more than 80% of its assets in below investment grade securities, or what its prospectus referred to as "junk investments." It was prohibited from investing more than 20% of its assets in any combination of five other specified types of securities, only one of which included government instruments. Thus, the fund could not hold "mainly government bonds," but was obligated to invest primarily in "junk" investments.

Kay nonetheless recommended that at least three of his customers invest in the fund.

In addition, under NASD Conduct Rule 2310(b), a registered representative must "make reasonable efforts to obtain information concerning...the customer's investment objectives." In at least six instances, Kay failed to ascertain his customers' risk tolerances and investment objectives, and instead recommended that each customer invest in mutual funds that were subject to market fluctuation and thus were materially different, and much riskier, than investments that were appropriate and suitable for those customers. All of the customers identified above had low risk tolerances and were seeking to invest in secure products which did not put their principal at risk. By failing to reasonably inquire into or understand his customers' risk tolerance and investment objectives, Kay failed to comply with his obligations under NASD Conduct Rule 2310.

Moreover, under NASD Conduct Rule 2310, registered representatives must make sure that their customers understand the risks associated with the recommendations being made, so that the customers are able to make informed decisions as to whether or not to accept the recommendations. In each of the instances described above, Kay failed to explain the risks of the investments to his customers, leading each of them to accept his recommendation without being able to assess the appropriateness of the proposed investment. In addition, Kay led the customers to believe that the product he was recommending was a safe and secure investment when in fact it involved significant risk.

But failing to ensure that his customers understood the risks of these investments, Kay failed to comply with his obligations under NASD Conduct Rule 2310. By violating NASD Conduct Rule 2310, Kay also violated NASD Conduct Rule 2110.

* * *

By engaging in the conduct set forth above, Kay violated NASD Conduct Rules 2110 and 2310.

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

1. a suspension from association with any FINRA member in any capacity for a period of one year; and
2. a fine in the amount of \$50,000.

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

The fine shall be due and payable either immediately upon reassociation with a member firm following the suspension noted above, or prior to any application or request for relief from any statutory disqualification resulting from this or any other event or proceeding, whichever is earlier. Respondent specifically and voluntarily waives any right to claim that he is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

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; and
- 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.
- 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.
- F. I understand that if I am suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Section

3(a)(39) of the Securities Exchange Act of 1934, as amended. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the suspension (see FINRA Rules 8310 and 8311).

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.

12/17/10
Date


Respondent

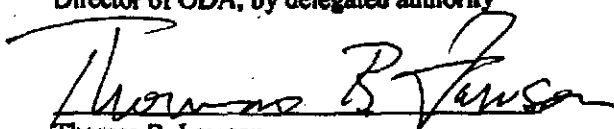
Reviewed by:


R. Craig Zafis, Esq.
Counsel for Respondent
13025 Danielson St.
Poway, California 92064
(858) 486-5905

Accepted by FINRA:

12/21/10
Date

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


Thomas B. Lawson
Vice President and Chief Counsel
FINRA Department of Enforcement
1801 K Street, N.W.
Washington, DC 20006