

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

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Department of Enforcement,

Complainant,

v.

Malcolm Jay Berko,  
CRD No. 19483,

Respondent.

Disciplinary Proceeding  
No. 20090180035

Hearing Officer: Matthew Campbell

**ORDER ACCEPTING OFFER OF  
SETTLEMENT**

Date: July 8, 2009

**INTRODUCTION**

Disciplinary Proceeding No. 20090180035 was filed on June 1, 2009, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Malcolm Jay Berko submitted an Offer of Settlement (Offer) to Complainant on July 7, 2009. Pursuant to FINRA Rule 9270(e), the Complainant and the National Adjudicatory Council (NAC), a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (ODA) have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to FINRA Rule 9270(e)(3). The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Complainant and approved by the NAC.

Under the terms of the Offer, Respondent has consented, without admitting or denying the allegations of the Complaint, 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, to the entry of findings and violations consistent with the allegations of the Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of

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Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA.

### **BACKGROUND**

Berko was born in [REDACTED]. Berko was registered with the NASD<sup>1</sup> since approximately October 1964. Berko was a registered representative at Moors & Cabot, Inc. from November 22, 2005 through July 1, 2007, when he voluntarily terminated his association with the firm. Berko is not currently is no longer associated with a member in any capacity known to FINRA.

### **FINDINGS AND CONCLUSIONS**

It has been determined that the Offer be accepted and that findings be made as follows:

#### **I. Failure To Provide INFORMATION and TESTIMONY**

On December 10, 2008, Enforcement sent a letter to Berko requesting that, pursuant to NASD Procedural Rule 8210, Berko appear at FINRA's office in New York City, to provide testimony to Enforcement on January 8, 2009. This letter was sent by certified and first class mail to Berko at the two residential addresses reflected in the Central Registration Depository ("CRD"), in Boca Raton and Seminole, Florida. Enforcement received a signed return receipt indicating that the letter was delivered to Berko at the Boca Raton, Florida address reflected in CRD.

Enforcement's December 10, 2008 letter advised Berko that pursuant to NASD Procedural Rule 8210, his failure to appear and answer Enforcement's questions could subject him to sanctions, including a permanent bar from the securities industry.

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<sup>1</sup> In July 2007, the NASD and certain parts of NYSE Regulation, Inc. merged to form the Financial Industry Regulatory Authority ("FINRA").

On December 19, 2008, December 26, 2008, and January 6, 2009, Berko sent e-mails to Enforcement requesting, among other things, that the January 8, 2009 date for his testimony be changed and that the location of his testimony be changed to Florida. Berko also provided Enforcement with an alternate residential address.

On January 8, 2009, Enforcement sent a letter to Berko requesting that Berko choose a date between January 20, 2009 and January 29, 2009 for his testimony and contact Enforcement with the date. The letter notified Berko that his request for a change of location for his testimony would be discussed when he contacted Enforcement. This letter was sent by Federal Express and e-mail to Berko at the alternate address he provided to Enforcement and his e-mail address. Enforcement received a delivery report from Federal Express indicating that the letter was delivered to Berko and, an e-mail confirmation indicating that the letter was delivered to Berko at his e-mail address.

On January 9, 2009 and January 12, 2009, Berko sent e-mails to Enforcement in which he requested that Enforcement provide him with certain documents pertaining to him and conditioned his appearance for testimony on his receipt of the documents.

On January 23, 2009, Enforcement sent a letter to Berko requesting that pursuant to FINRA Procedural Rule 8210, Berko appear at FINRA's Boca Raton, Florida office to provide testimony to Enforcement on February 6, 2009. This letter was sent by certified and first class mail to Berko at the Boca Raton, Florida residential address reflected in CRD and the alternate address Berko provided to Enforcement. A copy of the letter was also sent to Berko at his e-mail address. Enforcement received an e-mail confirmation indicating that the letter was delivered to Berko at his e-mail address.

Enforcement's January 23, 2009 letter advised Berko that pursuant to FINRA Procedural Rule 8210, his failure to appear and answer Enforcement's questions could subject him to sanctions, including a permanent bar from the securities industry.

On January 23, 2009, Berko sent an e-mail message to Enforcement that conditioned his appearance for testimony on February 6, 2009, on his receipt of the documents that he previously requested from Enforcement.

On January 27, 2009, Enforcement sent a letter to Berko, notifying Berko that despite his assertion that he was unable to commit to the February 6, 2009 date for his testimony until he received the documents that he requested, unless an alternate date was granted by FINRA, the scheduled date of his on-the-record testimony remained unchanged.

Enforcement's January 27, 2009 letter repeated Enforcement's request that pursuant to FINRA Procedural Rule 8210, Berko appear at FINRA's office in Boca Raton, Florida to provide testimony to Enforcement on February 6, 2009 and that his failure to appear and testify could subject him to sanctions, including a permanent bar from the securities industry. This letter was sent by certified and first class mail to Berko at the Boca Raton, Florida residential address reflected in CRD and the alternate address Berko provided to Enforcement. A copy of the letter was also sent to Berko at his e-mail address. Enforcement received an e-mail confirmation indicating that the letter was delivered to Berko at his e-mail address.

On January 27, 2009, Berko sent an e-mail message to Enforcement in which he again stated, among other things, that he would not appear on February 6, 2009 unless he received the documents that he requested from Enforcement.

On January 30, 2009, Enforcement sent a letter to Berko notifying him that the February 6, 2009 date for his testimony remained unchanged, he was required to appear at FINRA's Boca Raton, Florida office for testimony, and pursuant to FINRA Procedural Rule 8210, his failure to appear and testify could subject him to sanctions, including a permanent bar from the securities industry. This letter was sent by certified and first class mail to Berko at the two residential addresses reflected in CRD and the alternate address Berko provided to Enforcement.

On February 6, 2009, Berko failed to appear and testify as required.

On February 19, 2009, Enforcement sent a letter to Berko that noted Berko's failure to appear and testify on February 6, 2009, required that pursuant to FINRA Procedural Rule 8210, Berko appear at FINRA's Boca Raton, Florida office to provide testimony to Enforcement on March 5, 2009, and advised Berko that his failure to appear and testify could subject him to sanctions, including a permanent bar from the securities industry. This letter was sent by certified and first class mail to Berko at the two residential addresses reflected in CRD and the alternate address Berko provided to Enforcement.

On February 24, 2009, Berko sent an e-mail message to Enforcement in which he conditioned his appearance for testimony on March 5, 2009, on his receipt of the documents that he previously requested from FINRA. The e-mail also requested that Enforcement provide the documents to an attorney that Berko identified in the e-mail.

On March 5, 2009, Berko failed to appear and testify as required.

On March 9, 2009, Enforcement received an e-mail from the attorney that Berko identified in his February 24, 2009 e-mail, who stated that she does not represent Berko.

Based on the foregoing, Respondent, Berko violated, and is continuing to violate, FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondent from any future misconduct, and represent a proper discharge by FINRA, of its regulatory responsibility under the Securities Exchange Act of 1934.

### **SANCTIONS**

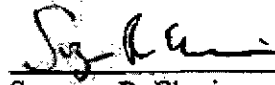
It is ordered that Respondent be barred from association with any member of FINRA in any capacity.

The sanctions imposed herein shall be effective on a date set by FINRA staff. Pursuant to FINRA Rule 8313(e), a bar or expulsion shall become effective upon approval or acceptance of this Order.

**SO ORDERED.**

**FINRA**

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



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