

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

Department of Enforcement,

Complainant,

v.

**Harry Derrick Winters
CRD No. 1844323,**

Respondent.

**Disciplinary Proceeding
No. 20090190424-01**

Hearing Officer Lawrence B. Bernard

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: June 5, 2012

INTRODUCTION

Disciplinary Proceeding No. 20090190424-01 was filed on March 2, 2011, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Harry Derrick Winters submitted an Offer of Settlement (Offer) to Complainant dated May 23, 2012. 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 Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA.

BACKGROUND

Respondent entered the securities industry in 1988 as a registered representative ("RR") with a FINRA-registered broker dealer. He has since been associated with six different FINRA-registered broker dealers. From April 2006 until the present, Respondent has been employed by Fox Financial Management Corp. ("FOX" or the "Firm"). Beginning in 1988 until the present, Respondent held Series 7 and Series 63 securities licenses. Respondent remains employed by FOX to date and FINRA retains jurisdiction over him.

On or about May 23, 2012, an Offer was executed by Respondent, pursuant to which, Respondent consented, without admitting or denying the allegations, to findings that he violated NASD Rule 3040, 2310, 2110 and 2210 by engaging in the sale of securities related to private securities transactions with three customers without first conducting an adequate due diligence inquiry regarding the product sold and, in one instance, without first providing written notice to and receiving written approval from his FINRA-registered broker dealer employer. Respondent's violations were also based on his having negligently represented to three customers that they were entitled to receive a tax deduction/benefit in connection with their respective investments, which was not true, and on having presented to those customers sales materials that contained misleading and oversimplified descriptions of the product sold and lacked disclosure of market risk. In one instance, Respondent presented to a customer sales materials that had not first been approved by a registered principal of the Firm.

FINDINGS AND CONCLUSIONS

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

In or about January 2007, Respondent sold an installment plan contract offered by National Foundation of America to an elderly customer without first providing written notice to and receiving written approval from his FINRA-registered broker dealer employer. In or about late January or early February 2007, Respondent provided to FOX oral notification of his participation in the sale of NFOA installment plan contracts. Thereafter, Respondent sold NFOA installment plan contracts to two additional customers. The installment plan contracts were securities and Respondent received commissions in connection with their sale.

NFOA represented itself to the public as a charitable organization. In or about January 2006, NFOA submitted its application for Recognition of Exemption under § 501(c)(3) of the Internal Revenue Code (the "Application") to the Internal Revenue Service. The Application remained pending until in or about December 2007, when it was denied by the Internal Revenue Service.

Respondent sold the above-referenced NFOA installment plan contracts without first conducting an adequate due diligence inquiry concerning the NFOA product and the risks and benefits associated with it. Respondent also negligently misrepresented to his customers that they were entitled to receive a tax deduction in connection with their respective NFOA investments, which was not true.

In connection with the above-referenced NFOA installment plan contracts, Respondent presented sales materials to the three customers that contained misleading and oversimplified descriptions of the NFOA product and lacked any disclosure of market risk. In one instance,

Respondent presented sales materials to a customer without first obtaining the approval of a registered principal.

Private Securities Transactions

From January through May 2007, Respondent sold to three customers NFOA installment plan contracts with a combined total value of approximately \$322,500.

NASD Rule 3040 requires an associated person to provide written notice to his FINRA-registered broker-dealer employer prior to participating in any private securities transaction. The notice must describe in detail the proposed transaction and the associated person's proposed role therein and state whether he has received or may receive selling compensation in connection with the transaction. In instances in which the associated person may receive or will receive compensation in connection with the private securities transaction, NASD Rule 3040(c) requires members to provide associated persons with written approval or disapproval of the associated person's participation in the private securities transaction.

NASD Rule 2110 requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade.

Customer HB

In or about January 2007, Respondent solicited and sold an installment plan contract issued by NFOA to his customer HB who was approximately 87 years old at that time. Customer HB was not a customer of Respondent's FINRA registered broker- dealer.

Pursuant to the terms of the NFOA Installment Plan Contract signed by Customer HB on or about January 31, 2007, he exchanged an existing annuity with a total accumulated value of approximately \$250,744.25 for a \$50,000 lump sum payment from NFOA and a NFOA installment plan contract which promised, after a five-year deferral period, to make 120 monthly

installment payments of \$2,687.46 over a ten-year term and to create a tax deduction of \$73,376. The total payout over the term of the contract was represented to be approximately \$322,494.80. Respondent discussed these terms with Customer HB.

In or about January 31, 2007, Respondent signed the Customer HB NFOA Installment Plan Contract and Agreement as the “Financial Advisor.”

NFOA is placed In Receivership

On or about June 21, 2007, the State of Tennessee placed NFOA in receivership. In September 2007, NFOA was placed into liquidation.

In or about June 2007, Customer HB was notified by the State of Tennessee that NFOA had been placed in receivership and that the appointed receiver had custody of its assets and would wind-down NFOA’s operations. Customer HB submitted a claim to the Tennessee receiver, seeking the return of principal of his NFOA investment.

The claim of Customer HB was approved in the amount of \$223,740.08, and to date he has received disbursements from the Tennessee receiver totaling 83.4% of the approved amount. No additional distributions are anticipated.

Commissions

Respondent received directly from NFOA approximately \$20,130.99 in commissions in connection with his sale of a NFOA installment plan contract to Customer HB.

Pursuant to a June 2007 request from the NFOA receiver, Respondent returned that sum to the NFOA receivership on or about October 10, 2007.

The NFOA installment plan contract solicited and sold by Respondent to Customer HB was a security.

Respondent participated in the solicitation and sale of the NFOA installment plan contract to Customer HB without providing prior written notice to and obtaining written approval from FOX, his FINRA-registered broker-dealer employer. The foregoing conduct violated NASD Rules 3040 and 2110.

Reasonable Basis Suitability

NASD Rule 2310 requires that in recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

NASD Rule 2310 also encompasses “reasonable basis” suitability which requires a broker to have an adequate and reasonable basis for any recommendation that he makes. This “reasonable basis” test relates only to the particular recommendation, rather than to the particular customer.

Respondent's Additional NFOA Sales

In or about late January or early February 2007, Respondent provided to FOX oral notification of his participation in the sale of NFOA installment plan contracts. Thereafter, Respondent sold NFOA installment plan contracts to two additional customers – Customer OJH and Customers FK and EK, a married couple.

Customer OJH

From in or about January through March 2007, Respondent solicited and sold an installment plan contract issued by NFOA to his customer OJH who was then approximately 73 years old. Customer OJH was not a customer of Respondent's FINRA-registered broker-dealer.

In the course of soliciting and selling to Customer OJH a NFOA installment plan contract, Respondent presented to Customer OJH a NFOA-prepared illustration. The illustration consisted of a series of documents including a dated cover page identifying Respondent as the presenter, an Installment Plan Flow Chart (the “Flow Chart”), and a NFOA Installment Plan 1099 Statement (the “1099 Statement”) (collectively, the “Solicitation Documents”).

Pursuant to the terms set forth in the Solicitation Documents and the NFOA Installment Plan Contract signed by Customer OJH on or about March 6, 2007, he exchanged an existing annuity with an accumulated value of approximately \$12,608 for a \$12,000 lump sum payment from NFOA and a NFOA installment plan contract which promised to make 60 payments of \$200 during a five-year, non-deferred period and to create a tax deduction of \$3,568. The total payout over the term of the contract was represented to be approximately \$12,000. Respondent discussed these terms with Customer OJH.

In or about March 6, 2007, Respondent signed the Customer OJH NFOA Installment Plan Contract and Agreement as the “Financial Advisor.”

In or about March 2007, Respondent submitted the Customer OJH NFOA installment Plan Contract and Agreement as well as transfer of ownership documents for the exchanged annuity executed by Customer OJH to NFOA.

On or about March 8, 2007, NFOA forwarded a letter to the insurance company that held Customer OJH’s existing annuity attaching the executed transfer of ownership documents and requesting that ownership of the annuity be transferred to NFOA.

On or about April 11, 2007, NFOA and/or Respondent delivered to Customer OJH a second set of Solicitation Documents which indicated that Customer OJH could exchange an existing annuity with an accumulated value of approximately \$11,977 for a NFOA installment

plan contract which promised to make 60 payments of \$203.41 during a five-year, non-deferred period and to create a tax deduction of \$2,783. The total payout over the life of the contract was represented to be approximately \$12,204.72.

Ownership of Customer OJH's existing annuity never transferred to NFOA and Respondent did not receive a commission payment in connection with his sale of a NFOA Installment Plan Contract and Agreement to Customer OJH.

Customers FK and EK

From in or about January through April 2007, Respondent solicited and sold an installment plan contract issued by NFOA to Customers FK and EK, a married couple, who were each approximately 71 years old. Customers FK and EK were not customers of Respondent's FINRA-registered broker-dealer.

In the course of soliciting and selling a NFOA installment plan contract to Customers FK and EK, Respondent presented the customers with a set of Solicitation Documents identifying Respondent as the presenter.

Pursuant to the terms set forth in the Solicitation Documents and the NFOA Installment Plan Contract signed by Customers FK and EK on or about April 26, 2007, they exchanged their existing annuity with an accumulated value of approximately \$59,136.46 for a NFOA installment plan contract which promised, after a seven-year deferral period, to make 36 payments of \$2,222.94 during a three-year term and to create a tax deduction of \$11,716. The total payout over the life of the contract was represented to be approximately \$80,025.76. Respondent discussed these terms with Customer FK and EK.

In or about April 26, 2007, Respondent signed the Customer EK and FK NFOA Installment Plan Contract and Agreement as the "Financial Advisor."

In or about April 26, 2007, Respondent submitted the Customer FK and EK Installment Plan Contract and Agreement as well as transfer of ownership documents for the exchanged annuity executed by Customers FK and EK to NFOA.

On or about April 30, 2007, NFOA forwarded a letter to the insurance company that held Customer FK and EK's existing annuity attaching the executed transfer of ownership documents and requesting that ownership of the annuity be transferred to NFOA.

Ownership of the Customer FK and EK existing annuity never transferred to NFOA and Respondent did not receive a commission payment in connection with his sale of a NFOA Installment Plan Contract and Agreement to Customers FK and EK.

The NFOA installment plan contracts that Respondent sold to Customer OJH and to Customers FK and EK were securities.

Lack of Due Diligence

Under the United States Internal Revenue Code, individuals who invest in products issued by purportedly charitable organizations whose application for tax exempt status is pending before the IRS are not guaranteed receipt of the related tax benefits during the pendency of such application.

Prior to soliciting and selling the NFOA installment plan contracts as described above, Respondent failed to inquire or otherwise obtain information concerning the availability of a tax deduction to investors during the pendency of NFOA's application for tax exempt status as a charitable organization under §501(c)(3) of the Internal Revenue Code. Had he done so, Respondent would have learned that the touted tax deduction was not guaranteed to his customers unless and until NFOA's application for tax exempt status under §501(c)(3) of the Internal Revenue Code was approved, which it was not at the time of his referenced sales.

NFOA investor funds were typically deposited in custodial accounts held by SEI Private Trust Company in the name of NFOA. The investments made in these accounts were subject to market risk.

Prior to soliciting and selling the NFOA installment plan contracts as described above, Respondent failed to determine the manner in which the funds of his NFOA customers would be invested and the identity of the person(s) or entities responsible for the management of such funds. Had he done so, Respondent would have learned that funds invested in NFOA were subject to market risk.

On or about September 18, 2006 the State of Washington issued a Cease & Desist Order against NFOA and two of its officers directing NFOA and its officers to cease engaging in or transacting the unauthorized business of insurance and to cease advertising purportedly charitable contracts and annuities, among other things. The State of Washington posted this Cease & Desist Order on its website on or about September 18, 2006.

Prior to soliciting and selling the NFOA installment plan contracts as described above, Respondent failed to learn of the Cease & Desist Order issued by the State of Washington. Had he conducted reasonable due diligence concerning NFOA, Respondent would have learned the facts as set forth in the Washington State Cease & Desist Order.

Based on the foregoing, Respondent lacked an adequate and reasonable basis for making the NFOA recommendation to his customers in violation of NASD Rules 2310 and 2110.

Negligent Misrepresentations

In soliciting the sales of NFOA installment plan contracts to Customer HB, Customer OJH and Customers FK and EK, Respondent misrepresented to each customer that NFOA was a tax exempt charitable organization under §501(c)(3) of the Internal Revenue Code, and thus they

were each entitled to receive a tax deduction/benefit in connection with their respective investments.

The above-referenced misrepresentations and omissions are material as the tax-exempt status of NFOA and the resulting tax benefits would be considered significant by a reasonable investor considering the NFOA product.

Respondent lacked an adequate basis to make the above-referenced representations, which were not true given the pendency of NFOA's application for tax exempt status. By virtue of the foregoing conduct, Respondent violated NASD Rule 2110.

Misleading Advertising and Sales Materials

Pursuant to NASD Rule 2210(d)(1)(A), all member communications with the public must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating facts in regard to any particular security or type of security.

NASD Rule 2210(d)(1)(B) prohibits members from making any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public.

The NFOA Brochure and Flyer

In the course of soliciting the NFOA investments of Customer HB, Customer OJH and Customers FK and MK, Respondent presented each customer with a NFOA Brochure and a NFOA Flyer. The NFOA Brochure and Flyer are Advertisements under NASD Rule 2210(a)(1).

The NFOA Brochure represented that its asset exchange programs provided a "generous income tax deduction" and "guaranteed income that grows each year." The NFOA Brochure further represented that the "safety and security" of its assets was paramount to NFOA. The NFOA Brochure lacked any disclosure that investor assets were subject to market risk.

The NFOA Flyer provided examples of the NFOA investments relative to the transfer of different assets, including real estate, annuity and securities exchanges. The NFOA Flyer contains repeated references to the “guaranteed income” and “income tax deductions” associated with the NFOA investment.

Customers who invested in NFOA were not entitled to a tax deduction unless the IRS approved NFOA’s request for tax exempt status. The IRS denied this request. All references in the NFOA Brochure and the NFOA Flyer to the availability of a tax deduction related to a NFOA investment were false and misleading and failed to present a fair and balanced view of the NFOA product.

References in the NFOA Brochure and the NFOA Flyer to “guaranteed income” were oversimplified and misleading without clear disclosure of the basis and criteria of the guarantee.

Investor funds received by NFOA were subjected to financial abuse. References in the NFOA Brochure to the “safety and security” of assets were false and misleading and failed to present a fair and balanced view of the NFOA product.

The Solicitation Documents

Respondent presented Solicitation Documents, which were NFOA-prepared illustrations, to Customer HB, Customer OJH and Customers FK and EK in the course of soliciting the sales of NFOA installment plan contracts.

The Solicitation Documents consisted of a cover page identifying Respondent as the presenter, the Flow Chart and the 1099 Statement. The Solicitation Documents are Sales Literature under NASD Rule 2210(a)(2).

The Flow Chart Respondent presented to Customer HB, Customer OJH and Customer FK graphically depicted the terms of each customer’s proposed NFOA installment plan contract.

Specifically, the Flow Charts Respondent presented to Customer HB, Customer OJH and Customers FK and EK provided the total payout amount each customer would receive over the life of the contract and estimated the allowable tax deduction and tax savings each customer would be entitled to in connection with their respective investments.

The Flow Charts Respondent showed to Customer HB, Customer OJH and Customers FK and EK also represented that each would receive a total payout equal to or in excess of their initial proposed investment over the payment term.

The Flow Charts Respondent presented to Customer HB, Customer OJH and Customers FK and EK failed to reflect that the total payout amount included a return of principal, did not specify a rate of return and failed to explain the basis for any of its calculations. These omissions provided an oversimplified and exaggerated description of the investment returns and failed to present a fair and balanced view of the NFOA product.

Respondent also presented a 1099 Statement to Customer HB, Customer OJH and Customers FK and EK which was specific to each customer's proposed investment. The 1099 Statements detailed the number and amount of scheduled payments that each customer would receive in exchange for the transferred asset and listed that portion of the annual payment which was to be "reported as tax free" and that portion which was to be reported as "ordinary income."

The 1099 Statement column entitled "reported as tax free" created the false impression that the column represented tax-free income.

The acts, practices and conduct described above violated NASD Rules 2210(d)1(A), 2210(d)1(B) and 2110.

Distributed Unapproved Advertising and Sales Materials

NASD Rule 2210(b)(1) requires each item of advertising and sales material to be approved by a registered principal prior to its use.

Respondent did not present the NFOA Brochure to a registered principal of his FINRA-registered broker-dealer employer for review and approval prior to showing them to Customer HB in connection with the sale of the NFOA installment plan contract.

Respondent did not present the Solicitation Documents he showed to Customer HB, Customer OJH and Customers FK and EK to a registered principal of his FINRA-registered broker-dealer employer for review and approval prior to showing them to Customer HB, Customer OJH and Customers FK and EK respectively in connection with his sales of NFOA installment plan contracts.

By the foregoing conduct, Respondent violated NASD Rule 2210(b)(1) and 2110.

SUMMARY OF VIOLATIONS

Based on the foregoing, Respondent engaged in separate and distinct violations of: (1) NASD Rules 3040 and 2110; (2) NASD Rule 2310 and 2110; (3) NASD Rule 2110; (4) NASD Rules 2210(d)(1)(A), 2210(d)(1)(B) and 2110; and (5) NASD Rules 2210(b)(1) and 2110.

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 suspended in all capacities for four months from associating with any FINRA member, pay restitution in the amount of \$37,060.49 and pay a fine of \$15,000.

The fine shall be due and payable either immediately upon reassociation with a member firm following the four-month 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.

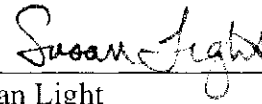
An order to pay restitution to Customers HB listed on Attachment A hereto in the total amount of \$37,060.49, plus interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), from the date of Customer HB's NFOA installment plan contract until the date of payment. Restitution amounts ordered, pursuant to this disciplinary action, are due and payable 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. The imposition of a restitution order or any other monetary sanction herein, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies. If for any reason Respondent cannot locate any customer identified in Attachment A after reasonable and documented efforts within such period, or such additional period agreed to by the staff, Respondent shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property, or abandoned property fund for the state in which the customer is last known to have resided.

The sanctions imposed herein shall be effective on a date set by FINRA staff. Pursuant to FINRA Rule 8313(c), 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

A handwritten signature in cursive script, reading "Susan Light", is written over a horizontal line.

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