

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Kenley Brisard (CRD No. 2641960)

Respondent.

DISCIPLINARY PROCEEDING
No. 2010022046101

Hearing Officer: MAD

ORDER ACCEPTING OFFER OF SETTLEMENT

Date: October 27, 2016

INTRODUCTION

Disciplinary Proceeding No. 2010022046101 was filed on January 12, 2016, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Kenley Brisard submitted an Offer of Settlement (Offer) to Complainant dated October 24, 2016. 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, as amended by the Offer of Settlement, 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, as amended by the Offer of Settlement, 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 Kenley Brisard entered the securities industry in July 1995. Between 1995 and 2009, he was employed as a General Securities Representative with six FINRA-regulated broker-dealers.

In March 2009, K. Brisard became associated with the Firm as a General Securities Representative. He remained associated with the Firm until March 2016. He is licensed as a General Securities Representative (Series 7), Uniform Securities Agent (Series 63) and Corporate Securities Representative (Series 62). While K. Brisard is no longer associated with a FINRA regulated broker-dealer, he remains subject to FINRA jurisdiction pursuant to Article V, Section 4 of FINRA's By Laws.

At all relevant times hereto, K. Brisard and Philip Brisard (PB) transacted business through a separate entity known as Brisard & Brisard, Inc. They received commissions from the Respondent Firm through a joint representative number as well as through his individual representative numbers.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:¹

¹ The findings herein are pursuant to Respondent K. Brisard's Offer of Settlement and are not binding on any other person or entity named as a respondent in this or any other proceeding.

SUMMARY

From June through August 2010 (the Relevant Period), Respondent and another registered representative, PB, sold an unregistered security that consisted of interest-only strips from loans issued by the United States Small Business Association meant only for Qualified Institutional Buyers (QIBs) to individual retail investors using general solicitation emails that materially misrepresented the product and the Respondent's role in its development.

By inducing five customers to purchase the interest-only unregistered security with materially false representations, Respondent Kenley Brisard, a registered representative at the Firm, violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Rule 10b-5 promulgated thereunder, and FINRA Rules 2020 and 2010.

By sending materially false emails containing similar misrepresentations and omissions to more than approximately 115 additional customers and prospects, K. Brisard violated FINRA Rule 2010 by failing to comply with Section 17(a)(1) of the Securities Act of 1933 (Securities Act).

By marketing and selling the unregistered securities through general solicitation without an exemption, K. Brisard violated FINRA Rule 2010 by failing to comply with Section 5 of the Securities Act, which prohibits the offer or sale of unregistered securities through the instrumentalities of interstate commerce.

BACKGROUND

The Firm was registered as a regulated broker-dealer from October 2001 to July 2016 with the U.S. Securities and Exchange Commission and FINRA. The Firm terminated its registration through a Uniform Request for Broker-Dealer Withdrawal (Form BDW) in July

2016. During the Relevant Period, the Firm was a full-service, retail independent broker-dealer located in New Woodstock, New York.

The Former Supervisor served as President and Chief Executive Officer of the Firm during the Relevant Period.

The IOTA SBA COOF Trust Series 2010-A Pass-Through Certificates (the SBA Interest-Only Security) were a fixed income security that securitized a strip of interest payments owed on Small Business Administration (SBA) guaranteed loans that had been pooled into a different collateralized debt obligation. The underlying collateral for the SBA Interest-Only Security was interest from a pool of Confirmations of Originator Fee(s) (COOF) of Section 7(a) loans issued by the SBA's fiscal and transfer agent. The certificates were designed to provide a stream of income from the interest on the COOFs and did not provide for a return of an investor's principal at the end of the term. As a result, if the underlying loans were pre-paid, the investor stood to lose all or a substantial part of their investment.

Issuer 1 issued the SBA Interest-Only Security. Issuer 1's sole purpose was to issue private placement securities.

In early 2010, DS, another Firm representative, who was barred from association with any FINRA member firm in November 2014, learned about the SBA Interest-Only Security from a principal at Issuer 1 and brought it to the Firm's attention.

On March 30, 2010, the Former Supervisor signed a letter to Placement Agent 1 certifying that the Firm would "only purchase Rule 144A securities in transactions in which it acts as a riskless principal (as defined in Rule 144A) on behalf of a qualified institutional buyer[.]"

The private placement memorandum (PPM) for the SBA Interest-Only Security provided that the security was restricted for sale only to QIBs as defined under Rule 144A under the Securities Act. The PPM warned that a secondary trading market for the SBA Interest-Only Security was unlikely to develop and thus purchasers of the security may be required to bear the risks of their investment in the SBA Interest-Only Security for an indefinite period of time.

The SBA Interest-Only Security was first issued and offered for sale via private placement on or about June 24, 2010. Placement Agent 1 acted as the sole placement agent for the SBA Interest-Only Security.

Between June 28, 2010, and August 4, 2010, K. Brisard sold the SBA Interest-Only Security to five individual retail customers in riskless principal trades, after having sent false general solicitation emails to existing and prospective customers.

On June 28, 2010, customer NT purchased 310 million shares of the SBA Interest-Only Security for approximately \$200,145. On June 30, 2010, customer CS purchased 318 million shares of the SBA Interest-Only Security for approximately \$199,417. On July 8, 2010, customers SJ and PC purchased 158 million and 99 million shares of the SBA Interest-Only Security for \$99,468 and \$62,325 respectively. On August 4, 2010, customer VH purchased 127.5 million shares of the SBA Interest-Only Security for approximately \$99,776.

**(Fraudulent Misrepresentations and Omissions of
Material Fact in Connection with Customer Purchases)**
(Willful Violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and FINRA
Rules 2020 and 2010)

Section 10(b) of the Exchange Act provides that “it shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:”

(b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules or regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 promulgated under the Exchange Act and which is entitled “Employment of Manipulative and Deceptive Practices” provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

FINRA Rule 2020 provides that “[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.”

A violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and FINRA Rule 2020 constitutes a violation of FINRA Rule 2010.

K. Brisard and PB used email to solicit both existing and prospective clients to buy the SBA Interest-Only Security using materially false and misleading information.

On June 24, 2010, K. Brisard sent separate emails to existing Firm customers NT, SJ, and CS making the following statements:

- a. "The cash flow is 20% on investment SBA loans which are backed by full faith credit [sic] of the United States Goverement [sic]."
- b. "Our portfolio selection of seasoned loans allows the purchaser to see this seasoning as though buying a secondary offering."
- c. "[W]e can conclude that our loan portfolio has passed with very high marks. I cannot stress enough the care with which we are purchasing collateral – we are looking at each loan with an eye for prepayment/default risk."
- d. "As we researched collateral before structuring the SBA Bond, we looked at all government agency options, avoiding other vehicles because of credit risk."
- e. "We have taken great care over a year of research and effort to package an attractive yield with the most safeguards for investor protection and satisfaction."

The statements in the June 24, 2010 email were false and misleading because neither the Firm nor either of the Brisards selected the portfolio of loans for the SBA Interest-Only Security or had any role with researching, analyzing, or purchasing the collateral for the product. The email also guaranteed a 20% return on the investment without any basis, and it misled readers into believing that the security's payments were guaranteed by the U.S. Government.

In a June 25, 2010 email to existing Firm customer PC, K. Brisard stated:

- a. "Hand selection of the collateral has given us a distinct advantage in structuring this large tranche, and cash flows are forecasted for a 10-year average life, an extraordinary long payment stream."
- b. "We have taken care to structure the bond with the least prepayment risk and the best stability possible. This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."
- c. "Should the bondholder desire to sell the tranche back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125, the selling price should be a slight discount from that issue price."

The statements in the June 25, 2010 email were false and misleading because neither the Firm nor either of the Brisards engaged in any "hand selection of the collateral" or "structured" the SBA Interest-Only Security to achieve particular cash flows. Additionally, neither the Firm

nor the Brisards were planning to bring similar issues to the market as they were neither issuers nor placement agents and none of them had control over whether there would be a future offering and what the pricing would be in the event the issuer engaged in a similar offering. Therefore, the promise of additional liquidity or a healthy market was false. These statements gave the false impression that the SBA Interest-Only Security was a liquid investment, which was false and misleading and directly contradicted the private placement memorandum.

On July 8, 2010, K. Brisard sent emails to existing Firm customer PC stating:

- a. "The SBA issue I have shown you was structured well after the collateral was purchased, and since the market has[]moved up in price substantially since that time, the bond was priced very cheaply relative to new underwritings, dictating that our next SBA issue in late July will be a more expensive bond. This creates an unusual opportunity for the owners of the issue you see now – bondholders will have the option to sell bonds back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125."
- b. "As I mentioned earlier, the price difference between issues is usually not accessible to buyers, so you should give this opportunity serious consideration. Remember that the next issue will be priced by month-end, so time is of essence."
- c. "You would certainly have the opportunity to reinvest in subsequent SBA issues after the sale. I would recommend that we make bonds for you that are customized to your program parameters. A structure designed to keep the offering price low would be a good re-entry point – the lower price limits down-side risk and creates more leverage."
- d. "This is a short term deal so let me know today as these bonds are first come first serve basis."

The statements in the July 8, 2010 email were false and misleading because neither the Firm nor either of the Brisards had any knowledge or insight into how the SBA Interest-Only Security was priced. None had any control over whether there would be a future underwriting of a similar private placement; how such a future underwriting would be priced; or whether any such future underwriting would create any opportunity for an investor to sell their interest in the SBA Interest-Only Security to the Firm. These emails gave the false and misleading impression that an investor of the SBA Interest-Only Security would be able to sell its investment back to

the Firm at a favorable price on a short-term basis when in reality, an investment in the SBA Interest-Only Security was highly illiquid and carried no guarantee that an investor would be able to sell the investment on a secondary market at any price.

On July 13, 2010, PB and K. Brisard sent an email to prospective customer VH and her husband stating:

- a. "I have attached the following SBA Bond offering this 20% cash flow"
- b. "Hand selection of the collateral has given us a distinct advantage in structuring this large tranche, and cash flows are forecasted for a 10-year average life, an extraordinary long payment stream."
- c. "We have taken care to structure the bond with the least prepayment risk and the best stability possible. This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."
- d. "Should the bondholder desire to sell the tranche back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125, the selling price should be a slight discount from that issue price."
- e. "Our portfolio selection of seasoned loans allows the purchaser to see this seasoning as though buying a secondary offering – there is tremendous safety in seeing this performance history."
- f. "[W]e can conclude that our loan portfolio has passed with very high marks. I cannot stress enough the care with which we are purchasing collateral – we are looking at each loan with an eye for prepayment/default risk."
- g. "As we researched collateral before structuring the SBA Bond, we looked at all government agency options, avoiding other vehicles because of credit risk."
- h. "We have taken great care over a year of research and effort to package an attractive yield with the most safeguards for investor protection and satisfaction."

The statements in the July 13, 2010 email were false and misleading because neither the Firm nor the Brisards had any involvement in researching, analyzing or selecting the collateral or structuring the security. Moreover, neither the Firm nor the Brisards had any control over whether there would be a future, similar underwriting, what the pricing would be if there was such an underwriting or what impact such a future underwriting would have on the liquidity of the SBA Interest-Only Security. Additionally, the Brisards did not have any basis to promise a 20% return on the investment.

On July 29, 2010, PB sent an email to prospective customer VH stating:

- a. **"We have taken care to structure the bond with the least prepayment risk and best stability possible."**
- b. **"This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."**
- c. **"Since the interest-only sector has been extremely quiet over the past two years, these issues should easily retain their market value and enjoy trading opportunities. Ridgeway & Conger has keen interest in secondary trading and has a client base of interested bondholders."**

The statements in the July 29, 2010 email were false and misleading because neither the Firm nor the Brisards conducted any "research[]" or engaged in any "effort" to package the loans underlying the SBA Interest-Only Security. Additionally, neither the Firm nor either of the Brisards had any control over whether there would be any future offerings or whether such future offerings would provide "a healthy market and good liquidity." This statement gave the false impression that the SBA Interest-Only Security was a liquid investment, which was not true. The email also misleads the reader into believing that there would be a secondary market in the SBA Interest-Only Security.

In addition, the email solicitations omitted material information necessary to make them not misleading, such as the illiquid nature of the security, the risks associated with the security, including the possibility of prepayment on the underlying loans which would result in an end of the payment stream and a potential full or partial loss of the investment, and the fact that the SBA Interest-Only Security was unregistered with the SEC and restricted to QIBs. The emails were also false in that they gave the misleading impression that the Firm was going to be issuing another offering similar to the SBA Interest-Only Security and that next issue would increase the value and likelihood of success of the SBA Interest-Only Security.

As set forth above, five of the customers to whom the Brisards sent emails purchased the SBA Interest-Only Security, specifically NT, CS, SJ, PC and VH.

As described above, the emails that K. Brisard sent to five customers and PB sent to one customer were false and misleading in that they touted that the Brisards and the Firm had significant and unique knowledge, expertise and involvement in the analysis, structuring and creation of the SBA Interest-Only Security, creating an entirely false impression to potential investors that the SBA Interest-Only Security was a product into which the Firm and its personnel had a high degree of interaction, lending the Firm's and the Brisards' recommendation of the product an unwarranted legitimacy. In fact, the SBA Interest-Only Security was structured and created solely by Issuer 1 and neither the Brisards nor the Firm played any role in the security's analysis, structuring or creation. Nor was the Firm the placement agent for this product. The emails further misled the customers by promising a 20% return on their investment and that there would be a secondary market that would allow them to sell out of the security at will.

During the Relevant Period, in connection with the offer and sales of these securities, K. Brisard and PB, directly or indirectly, by the use of means or instrumentalities of interstate commerce, or of the mails, knowingly, willfully and/or recklessly: (i) employed devices, schemes, or artifices to defraud, (ii) made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, concerning investments in the SBA Interest-Only Security, or (iii) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon investors.

K. Brisard acted with scienter because he made the above-described statements to customers with no regard for their truth or falsity and for whether the statements omitted material facts. He knowingly, willfully and/or recklessly ignored and/or contradicted the PPM for the

SBA Interest-Only Security to which he had ready access, and he made statements that had no underlying factual basis.

The misrepresentations and omissions in the Brisards' statements to customers were material because a reasonable investor would consider them important in making investment decisions, because they significantly altered the total mix of information made available to the solicited customers, and because they denied the investors the opportunity to make an informed decision about whether to invest in the SBA Interest-Only Security.

By engaging in the foregoing conduct with respect to the emails that K. Brisard sent to five customers, K. Brisard willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and violated FINRA Rules 2020 and 2010.

(Fraudulent Misrepresentations and Omissions of Material Fact
in Connection with Offers of the SBA Interest-Only Security)
(FINRA Rule 2010)

Section 17(a)(1) of the Securities Act, entitled "Fraudulent Interstate Transactions," provides that

- (a) It shall be unlawful for any person in the offer or sale of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly-
- (1) to employ any device, scheme, or artifice to defraud.

A violation of Section 17(a)(1) of the Securities Act constitutes a violation of FINRA Rule 2010.

In June, July and October 2010, K. Brisard sent separate emails to more than 100 customers or prospective customers making the same statements in the emails outlined above. Similarly, in June and July 2010, PB and K. Brisard sent separate emails to more than 15 customers or prospective customers making the same statements in the emails that the Brisards sent to purchasers set out above.

Each of these emails constituted an offer for the SBA Interest-Only Security and each contained statements that were false and misleading as described above and in that, among other things, they touted that the Brisards and the Firm had significant and unique knowledge, expertise and involvement in the analysis, structuring and creation of the SBA Interest-Only Security, which was not true.

In addition, the solicitations that K. Brisard and PB separately sent to the customers and prospective investors listed above omitted material information necessary to make the emails not misleading. In particular, the email solicitations omitted the illiquid nature of the security, the risks associated with the security, including the possibility of prepayment on the underlying loans which would result in a diminution or end of the payment stream and partial or complete loss of the investment, and the fact that the SBA Interest-Only Security was unregistered with the SEC and restricted to QIBs. The emails were false in that they gave the misleading impression that the Firm was going to be issuing another offering similar to the SBA Interest-Only Security and that the next issue would increase the value and likelihood of success of the SBA Interest-Only Security.

K. Brisard and PB used interstate commerce (including email) to offer unregistered securities to more than 115 customers or prospective customers using untrue statements of material fact and omissions of material fact, as described above.

K. Brisard acted with scienter because he made his statements to potential investors with no regard for their truth or falsity and for whether the statements omitted material facts. He knowingly, willfully and/or recklessly ignored and/or contradicted the PPM for the SBA Interest-Only Security to which he had ready access, and he made statements that had no underlying factual basis.

Accordingly, K. Brisard failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010 by failing to comply with Section 17(a)(1) of the Securities Act.

(Selling Unregistered Securities in Violation of Section 5 of the Securities Act)
(FINRA Rule 2010)

Section 5 of the Securities Act prohibits the sale of unregistered securities. It provides:

- (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
 - (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise

Rule 144A under the Securities Act is a safe harbor exemption from the registration requirements of Section 5 that allows for the sale of unregistered securities, such as the SBA Interest-Only Security, to QIBs.

A Section 5 violation constitutes a violation of FINRA Rule 2010.

The PPM for the SBA Interest-Only Security states on the first page that “The Offered Certificates described herein may only be offered in the United States to ‘qualified institutional buyers’ as defined under Rule 144A[] under the Securities Act[.]” Only institutions, not individual retail investors regardless of their net worth or financial sophistication, can qualify as a QIB.

There was no registration statement filed with the SEC for the SBA Interest-Only Security.

On March 30, 2010, the Former Supervisor signed a letter in which she certified to Placement Agent 1 that the Firm would “only purchase Rule 144A securities for its own account or for the accounts of others that independently qualify” as QIBs.

During the Relevant Period, K. Brisard and PB, on behalf of the Firm, sent emails soliciting an investment in the SBA Interest-Only Security to more than 115 potential investors.

Because, among other reasons, the email solicitations offering the SBA Interest-Only Security were not limited to persons and institutions with which the Firm had a pre-existing relationship and instead targeted members of the general public, these emails constituted a general solicitation of potential purchasers of the SBA Interest-Only Security.

At no time did K. Brisard and PB attempt to determine whether any of the investors to whom they sold the SBA Interest-Only Security were QIBs.

The five customers (NT, CS, SJ, PC and VH) who purchased the SBA Interest-Only Security were not QIBs and therefore the transactions were not exempt from Section 5 requirements under the safe harbor of Rule 144A.

The offers and the sales by K. Brisard and PB to customers and prospects used interstate facilities. The offers to sell were by email and telephone, and the sales were communicated interstate through email, telephone and fax communications.

No other exemption from the registration requirements of Section 5 was available to K. Brisard or PB.

By engaging in these unregistered securities transactions not subject to an exemption from the registration requirements, K. Brisard acted in contravention of Section 5 of the Securities Act, and thus violated FINRA Rule 2010.

Based on the foregoing, Respondent willfully violated Section 10(b) of the Securities Exchange Act, Rule 10b-5 promulgated thereunder, and FINRA Rules 2020 and 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 sanctioned with

- A bar from association with any FINRA member in any capacity

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