

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

Department of Enforcement,

Complainant,

v.

Carl M. Birkelbach  
(CRD No. 1177843),

Respondent.

Disciplinary Proceeding  
No. 2011025843301

Hearing Officer MAD

**ORDER ACCEPTING OFFER OF  
SETTLEMENT**

Date: July 8, 2013

**INTRODUCTION**

Disciplinary Proceeding No. 2011025843301 was filed on October 15, 2012, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Carl M. Birkelbach submitted an Offer of Settlement (Offer) to Complainant dated June 26, 2013. 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**

Birkelbach entered the securities industry on August 1, 1978, as owner of Birkelbach Investment Securities, Inc., a FINRA registered firm. Between July 1999 and November 10, 2011, he was a General Securities Principal, Financial & Operations Principal, and General Securities Representative for Birkelbach Investment Securities, Inc. ("BIS"). Birkelbach is not currently registered with any FINRA registered firm.

Although Birkelbach is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Birkelbach's registration with BIS, namely, November 10, 2011, and (2) the Complaint charges Birkelbach with misconduct committed while he was registered or associated with a FINRA member.

### **FINDINGS AND CONCLUSIONS**

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

1. In October 2009, Customer DZ opened an account with BIS that was serviced by Birkelbach. DZ was born in [REDACTED] and was retired. DZ reported an income of \$50,000-55,000 and a net worth of \$750,000-780,000. The account had a Primary Risk Tolerance of "Moderate," with "Speculation" as secondary. The Investment

Objectives were “Short-term Growth” and “Long-Term Growth.” DZ gave Birkelbach discretion to effect trades within his account.

2. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in DZ’s account. On January 1, 2010, DZ’s account value was approximately \$99,185. During calendar year 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 28.89% and an annualized Turnover Ratio of approximately 10.16 with the total monthly fees reaching approximately \$28,352. Accordingly, DZ’s account would have had to earn an annual return of 28.89% just to break even. The account value by December 31, 2010 was approximately \$83,905. In 2010, DZ withdrew a total of \$10 from this account.
3. In October 2008, Customer KW opened an account with BIS that was serviced by Birkelbach. KW was born in [REDACTED] and was unemployed. KW reported an income of \$10,000 and a net worth of \$200,000. The account had a Primary Risk Tolerance of “Moderate,” with “Speculation” as secondary. The Investment Objectives were “Short-Term Growth” and “Long-Term Growth.” KW gave Birkelbach discretion to effect trades within his account.
4. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in KW’s account. On January 1, 2010, KW’s account value was approximately \$127,964. During calendar year 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 24.40% and an annualized Turnover Ratio of approximately 7.17 with

the total monthly fees reaching approximately \$28,753. Accordingly, KW's account would have had to earn an annual return of 24.40% just to break even. The account value by December 31, 2010 was approximately \$97,811. In 2010, KW withdrew a total of \$30 from this account.

5. In September 2007, Customer JR opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of JR's son. The account had a Primary Risk Tolerance of "Moderate," with "Speculation" as secondary. The Investment Objectives were "Long-Term Growth" and "Short-Term Growth." JR gave Birkelbach discretion to effect trades within this account.
6. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of JR's son. On January 1, 2010, the account value was approximately \$672,646. During calendar year 2010, Birkelbach's trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 22.97% with the total monthly fees reaching approximately \$147,878. Accordingly, this account would have had to earn an annual return of 22.97% just to break even. The account value by December 31, 2010 was approximately \$526,133. In 2010, a total of \$69 was withdrawn from this account.
7. In September 2007, Customer JR opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of JR's wife who was born in 1925. The account had a Primary Risk Tolerance of "Moderate," with "Low" as secondary. The Investment Objectives were "Long-Term Growth" and

**“Short-Term Growth.” JR gave Birkelbach discretion to effect trades within this account.**

- 8. Between January 1, 2010 and December 31, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of JR’s wife. On January 1, 2010, the account value was approximately \$321,043. During calendar year 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 32.11% with the total monthly fees reaching approximately \$87,734. Accordingly, this account would have had to earn an annual return of 32.11% just to break even. The account value by December 31, 2010 was approximately \$160,200. In 2010, a total of \$75,034 was withdrawn from this account.**
- 9. In May 2008, Customer HL opened an account with BIS that was serviced by Birkelbach. This account was a trust account created for the benefit of HL’s family. The account had a Primary Risk Tolerance of “Moderate,” with “Low” as secondary. The Investment Objectives were “Long-Term Growth” and “Income.” HL gave Birkelbach discretion to effect trades within this account.**
- 10. Between January 1, 2010 and November 23, 2010, Birkelbach used his discretion to place all the trades in the account that was created for the benefit of HL’s family. On January 1, 2010, the account value was approximately \$70,153. Between January 1, 2010 and November 23, 2010, Birkelbach’s trading activity resulted in an annualized Cost-to-Equity Ratio (converted to a percentage) of approximately 43.67% with the total monthly fees reaching approximately \$14,929. Accordingly, this account would**

have had to earn an annual return of 43.67% just to break even. This account was closed on November 23, 2010. At the time the account was closed, its value was approximately \$2,003. In 2010, a total of \$60,000 was withdrawn from this account.

11. The transactions recommended and executed by Birkelbach were excessive and unsuitable for all the customers described above, based on their investment objectives, financial situation and needs, and lack of knowledge and experience necessary to understand the risks associated with the transactions recommended.
12. Based on the foregoing, Respondent Birkelbach, in connection with the purchase or sale of a security, directly or indirectly, by use of means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange, knowingly or recklessly, employed a device, scheme or artifice to defraud; made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon other persons, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder, and in violation of NASD Conduct Rule 2310, and FINRA Rules 2360 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 suspended in all capacities for two years.

Respondent has submitted a sworn financial statement and demonstrated an inability to pay. In light of the financial status of Respondent, no monetary sanctions have been imposed.

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

**SO ORDERED.**

**FINRA**

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

A handwritten signature in cursive script, reading "Kevin G. Kulling", is written over a horizontal line.

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