

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2013037287401**

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

RE: Herbert Leonard Kaye, Respondent
Former Registered Representative
CRD No. 265572

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

Herbert Kaye was associated with twelve different member firms at various times between 1970 and May 2013. Most recently, Kaye was associated with First Allied Securities, Inc. from May 2008 to May 2013. While associated with First Allied, Kaye was registered as a General Securities Representative, a General Securities Principal, a Municipal Fund Securities Principal, and an Operations Professional. On a Form U5 filed June 3, 2013, First Allied reported that it terminated Kaye on May 31, 2013 for "failure to obtain written trading authorization from a client." Kaye has not been associated with a member firm since his termination from First Allied. However, FINRA retains jurisdiction over Kaye pursuant to Article V, Section 4 of the FINRA By-Laws.

OVERVIEW

Kaye entered over 2,000 discretionary trades in the account of a customer between June 2010 and April 2013 without the customer's prior written

authorization, in violation of NASD Rule 2510(b) and FINRA Rule 2010. Kaye also made an unsuitable recommendation that the customer invest \$1.1 million in a gold and precious minerals mutual fund, in violation of NASD Rule 2310 and FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

Kaye Violated NASD Rule 2510(b) and FINRA Rule 2010

In June 2010, Kaye's customer, GF, realized a significant loss on the unsolicited sale of equities that she had inherited from her deceased husband. Following that sale, GF requested that Kaye recommend investments or investment strategies that would limit her exposure to large market fluctuations. After Kaye began contacting GF with such investment recommendations, GF gave Kaye verbal authority to use his discretion to enter trades in her account without contacting her.

Kaye did not obtain GF's written authority to trade in her account. Moreover, First Allied's written policies and procedures prohibited registered representatives from exercising discretion in customer accounts except in certain, limited circumstances that did not apply to GF's account. Nonetheless, between June 2010 and April 2013, Kaye exercised discretion to enter over 2,000 trades in equities and exchange traded funds (ETFs) in GF's account. Those trades generated approximately \$173,000 in gross commissions and fees.¹

NASD Rule 2510(b) provides, "No member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member or the partner, office or manager, duly designated by the member, in accordance with Rule 3010." By entering over 2,000 trades in GF's account without obtaining her prior written authorization, Kaye violated NASD Rule 2510(b). By virtue of that violation, Kaye also violated FINRA Rule 2010.

Kaye violated NASD Rule 2310 and FINRA Rule 2010

In or about February 2011, GF contacted Kaye to discuss potentially investing in gold and silver. In response, Kaye recommended that GF purchase \$1.1 million of a mutual fund that primarily invested in two asset categories: 1) the equities of companies involved in the mining or processing of gold and other precious minerals, and 2) ETFs that invest in gold bullion. The prospectus for the fund stated that the fund's share price could fluctuate significantly.

¹ GF was generally aware of Kaye's trading in her account and periodically contacted him to discuss the trading. After accounting for commissions and fees, Kaye's trading was profitable.

Upon GF's recommendation, GF invested \$1.1 million in the gold and precious minerals fund on February 7, 2011, for which Kaye received \$11,000 in gross commissions. At the time, GF was 73 years old, had an investment objective of growth and income, and had a moderate risk tolerance. Furthermore, Kaye was aware that GF wished to avoid investments that would be exposed to large market fluctuations. The investment in the gold and precious minerals fund represented approximately 36 percent of GF's account value and 32 percent of her stated liquid net worth. In April 2013, acting upon Kaye's recommendation, GF sold the fund at a loss of approximately \$620,000.

NASD Rule 2310 provided that when recommending the purchase, sale, or exchange of any security to a customer, a registered representative "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."¹ Kaye's recommendation that GF invest \$1.1 million in the gold and precious minerals fund was not suitable for her in light of her moderate risk tolerance, investment objective of growth and income, desire to avoid market fluctuations, the concentrated nature of the investment, and her age. Therefore, Kaye violated NASD Rule 2310, and by virtue of that violation also violated FINRA Rule 2010.

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

- A four month suspension from associating with any FINRA member in any capacity; and
- A fine of \$25,000, which includes the disgorgement of \$11,000 of commissions received.

I understand that if I am barred or suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension (see FINRA Rules 8310 and 8311).

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.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

¹ NASD Rule 2310 was superseded by FINRA Rule 2111 effective July 9, 2012. NASD Rule 2310 applies to Kaye's recommendation in February 2011.

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

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 Chief Legal Officer, 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: (i) testimonial obligations; or (ii) 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.

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.

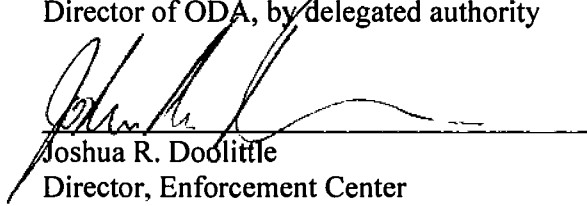
8/21/2014
Date (mm/dd/yyyy)

Herbert L. Kaye
Herbert L. Kaye
Respondent

Accepted by FINRA:

09/15/14
Date

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


Joshua R. Doolittle

Director, Enforcement Center
FINRA Department of Enforcement
15200 Omega Dr., 3rd Floor
Rockville, MD 20850
P: (301) 258-8523