

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2016048404601**

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

RE: Kestra Investment Services, LLC, Respondent  
Member Firm  
CRD No. 42046

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent Kestra Investment Services, LLC f/k/a NFP Advisor Services, LLC ("Kestra," the "Firm" or "Respondent") submits 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 Kestra alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

- A. Respondent hereby accepts and consents, 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**

Kestra has been a FINRA member firm since 1997. Kestra conducts a general securities business and is headquartered in Austin, Texas. Kestra currently has approximately 1874 registered representatives and 682 branch offices.

**RELEVANT DISCIPLINARY HISTORY**

In the Letter of Acceptance, Waiver, and Consent No 2014039418401 (November 1, 2016), FINRA found that, between October 2013 and June 2014, Kestra failed to reasonably supervise its registered representatives' recommendation and sale to its customers of \$52 million in L-share class variable annuities ("VAs"). Kestra also failed to provide training to its registered representatives and principals on the sale and supervision of L-share class VAs, which are designed for investors with short-term time horizons. Because of the lack of training and guidance, registered representatives did not have the tools to present potential purchasers with a side-by-side comparison of the fees and surrender charges applicable if L-share contracts were held by the customer for a long term. By engaging in this

conduct, Kestra violated NASD Rule 3010(a) and (b), and FINRA Rules 2010 and 2330(d) and (e). The firm was censured and fined \$475,000.

### **OVERVIEW**

Between July 1, 2009 and February 22, 2018 (the “Relevant Period”), Kestra disadvantaged certain retirement plan and charitable organization customers that were eligible to purchase Class A shares in certain mutual funds without a front-end sales charge (“Eligible Customers”). Instead of selling these customers Class A shares with no front-end sales charge, Kestra sold these Eligible Customers Class A shares with a front-end sales charge or Class B or C shares with back-end sales charges and higher ongoing fees and expenses. During this period, Kestra failed to establish and maintain a supervisory system and procedures reasonably designed to ensure that Eligible Customers who purchased mutual fund shares received the benefit of applicable sales charge waivers. As a result, Kestra violated NASD Conduct Rule 3010 (for misconduct before December 1, 2014), FINRA Rule 3110 (for misconduct on or after December 1, 2014), and FINRA Rule 2010.

### **FACTS AND VIOLATIVE CONDUCT**

#### ***Kestra Failed to Identify and Apply Available Sales Charge Waivers to Eligible Retirement Accounts and Charitable Organizations***

Kestra sells mutual funds with different classes of shares that represent interests in the same portfolio of securities, but differ in the structure and amount of both sales charges paid directly by shareholders and continuous, asset-based fees assessed on each shareholder’s investment. The prospectus and statement of additional information for each fund describe the share class features, including fees and expenses and available sales charge waivers applicable to each fund.

Class A shares typically are subject to a front-end sales charge when originally purchased, and have annual fund expenses, including ongoing distribution and service fees that are typically 0.25 percent. The selling broker-dealer typically receives the majority of the front-end charge as a sales concession paid by the customer. Investors purchase Class A shares at the applicable Net Asset Value (“NAV”), plus the initial sales charge or concession. Many funds, however, offer certain investors a waiver of the initial sales charge associated with Class A shares under certain circumstances.

Class B and C shares typically do not carry a front-end sales charge but have significantly higher distribution and service fees (typically 1.00 percent) and may be subject to a contingent deferred sales charge (“CDSC”).

Some mutual funds offer Class R shares for purchase by certain retirement plans. Class R shares typically are sold without a front-end sales charge. However, Class R shares typically have higher fees than Class A shares.

The different sales charges, breakpoints, waivers and fees associated with different share classes affect the return customers receive from mutual fund investments. If an investor qualifies for a Class A sales charge waiver and purchases Class A shares, the investor will not pay a front-end sales load. In contrast, a purchase of Class B or C shares of the same fund will be subject to higher ongoing fees, as well as potential application of a CDSC. Therefore, if an investor qualifies for a Class A sales charge waiver, there would be no reason for the investor to purchase any other class of shares that has a sales load and/or higher annual expenses.

Many mutual funds waive the up-front sales charges associated with Class A shares for Eligible Customers - retirement plans and/or charitable organizations. Some of the mutual funds available on the Firm's retail platform during the Relevant Period offered such waivers and disclosed those waivers in their prospectuses. Notwithstanding the availability of the waivers, Kestra failed to apply the waivers to mutual fund purchases made by Eligible Customers and instead sold them Class A shares with a front-end sales charge or Class B or C shares with back-end sales charges and higher ongoing fees and expenses. These sales disadvantaged Eligible Customers by causing such customers to pay higher fees than they were actually required to pay.

#### ***Kestra's Supervisory Failures***

NASD Rule 3010(a) and FINRA Rule 3110(a) provide that each member shall establish and maintain a system to supervise the activities of its registered representatives that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD and FINRA Rules. NASD Rule 3010(b) and FINRA Rule 3110(b) require each member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable NASD and FINRA Rules. FINRA Rule 2010 provides that a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

During the Relevant Period, Kestra failed to reasonably supervise the application of sales charge waivers and share class determinations for eligible mutual fund sales. The Firm relied on its financial advisors to determine the applicability of sales charge waivers, but failed to maintain reasonably designed written policies or procedures to assist financial advisors in making this determination. For instance, Kestra failed to establish and maintain written procedures to identify applicable sales charge waivers in fund prospectuses for Eligible Customers.

In addition, Kestra failed to reasonably notify and train its financial advisors regarding the availability of mutual fund sales charge waivers for Eligible Customers until the fourth quarter of 2015. Finally, Kestra failed to establish reasonably designed controls to detect instances in which they did not provide sales charge waivers to Eligible Customers in connection with their mutual fund purchases.

By failing to establish and maintain written procedures and controls that were reasonably designed to supervise mutual fund sales so that Eligible Customers who purchased mutual fund shares received the benefit of applicable sales charge waivers, Kestra violated NASD Conduct Rule 3010(a) and (b) (for misconduct before December 1, 2014), FINRA Rule 3110(a) and (b) (for misconduct on or after December 1, 2014), and FINRA Rule 2010.

***Kestra Owes Approximately \$1.65 million plus interest to Eligible Customers***

In 2015, after FINRA initiated a cycle examination of the Firm, Kestra began a review of mutual fund transactions to determine whether it provided available sales charge waivers and/or the appropriate share class to Eligible Customers. Since July 1, 2009, approximately 3,205 Eligible Customer accounts purchased mutual fund shares for which the Firm did not apply an available sales charge waiver when it should have. As a result of the failure of Kestra to apply available sales charge waivers, the Firm overcharged Eligible Customers approximately \$1,648,984 for mutual fund purchases made between July 1, 2009 and February 22, 2018. As part of this settlement, Kestra agrees to pay restitution to Eligible Customers on the terms specified below, which is estimated to total \$1,947,704 (*i.e.*, the amount Eligible Customers were overcharged, inclusive of interest).<sup>1</sup> Consistent with FINRA Rule 3110(a) and (b), Kestra will maintain written procedures and controls reasonably designed to supervise mutual fund sales such that retirement and charitable waivers and determinations are appropriately reviewed and applied to applicable transactions.

**B. Kestra also consents to the imposition of the following sanctions:**

1. A censure;
2. A fine in the amount of \$225,000; and
3. Kestra will provide remediation to Eligible Customers who, from July 1, 2009 to February 22, 2018, qualified for, but did not receive, the applicable mutual fund sales charge waivers or appropriate share class as described in Section A of this document.

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<sup>1</sup> Kestra will make restitution to each customer plus interest from the date of purchase through the payment date. The projected restitution of \$1,947,704 is not a cap on the final amount to be paid, but a current estimate.

- a. Kestra has provided FINRA with a detailed plan (the "Written Plan") to remediate Eligible Customers based on specific criteria that was not unacceptable to FINRA.
- b. The Written Plan includes a schedule of customers identified as eligible for remediation and included the details of the qualifying purchases and total dollar amounts of restitution that will be provided to each customer. The Firm will make restitution to each such customer on or before March 31, 2019, as set forth in the schedule, plus interest, from the date of purchase through the payment date at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2) (the "IRS Rate").
- c. A registered principal on behalf of Kestra shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to Robert Floyd, Senior Counsel, FINRA Enforcement, 15200 Omega Drive, Suite 300, Rockville, Maryland 20850 either by letter that identifies Respondent and the case number and includes copies of the checks, money orders or other methods of payment or by e-mail, with .pdf copies of the payment documentation, from a work-related account of the registered principal(s) of Respondent to EnforcementNotice@FINRA.org. This proof shall be provided to the FINRA staff member listed above no later than April 30, 2019.
- e. If for any reason Kestra cannot locate any Eligible Customer after reasonable and documented efforts, Kestra shall move the money to an appropriate escheat account. Kestra shall follow the standard escheatment process, adhering with each state's required time frames based on the state in which an Eligible Customer is last known to have resided. Kestra shall provide satisfactory proof of such action to the FINRA staff member identified above and in the manner described above, within 14 days of moving the undistributed restitution and interest to the appropriate escheat account.
- f. Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

Kestra agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. Kestra has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

**Kestra specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the restitution and monetary sanctions imposed in this matter.**

**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.**

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

## **II.**

### **WAIVER OF PROCEDURAL RIGHTS**

**Kestra specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:**

- A. To have a Complaint issued specifying the allegations against it;**
- 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, Kestra specifically and voluntarily waives 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.**

**Kestra further specifically and voluntarily waives 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

**Kestra understands 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 it; and
- C. If accepted:
  - 1. this AWC will become part of Kestra’s permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it;
  - 2. this AWC will be made available through FINRA’s public disclosure program in accordance with FINRA Rule 8313;
  - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
  - 4. Kestra 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. Kestra 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 Kestra’s: (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. Kestra may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Kestra understands that it 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.

The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has 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 the Firm to submit it.

1/28/19  
Date (mm/dd/yyyy)

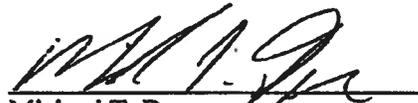
Kestra Investment Services, LLC

By: 

Name: R. Brett Norwood

Title: EVP, General Counsel, Secretary

Reviewed by:



Michael T. Dyson  
K&L Gates LLP  
1601 K Street, N.W.  
Washington D.C. 20006-1600  
(202) 778-9417  
Counsel for Respondent

Accepted by FINRA:

FEB. 13, 2019  
Date

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



Robert D. H. Floyd, Senior Counsel  
FINRA Department of Enforcement  
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