

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2016050129701**

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

RE: Kenneth Daley, Respondent
General Securities Representative
CRD No. 2352143

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent Kenneth Daley ("Daley" 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 Respondent 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

Respondent joined the securities industry in 1992 and first become registered as a General Securities Representative ("GSR") in 1994. Between 1994 and October, 2007 Respondent worked for five member firms where he was registered as a GSR. In October, 2007, he joined Merrill Lynch, Pierce, Fenner & Smith Incorporated (BD No. 7691) ("Merrill" or the "Firm") as a GSR. On June 16, 2016, Merrill Lynch filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") disclosing that his registrations had been terminated as of that date. The Firm also disclosed that at the time of his termination Respondent was under internal review "for improperly receiving money from a client via checks written from an outside account."

Respondent is not currently associated with a FINRA member firm but remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of FINRA's By-Laws.

RELEVANT DISCIPLINARY HISTORY

Respondent has no disciplinary history.

OVERVIEW

This matter principally concerns Daley's concealment of his improper receipt of funds from a customer, ER, that were paid in connection with purported profits in a Merrill account. Daley also recommended at least one unsuitable transaction to ER for which she experienced losses. Additionally, Daley routinely used text messaging to communicate with ER and other customers, circumventing the Firm's ability to retain and review his business communications. Finally, Daley attested to the Firm that he did not use text messaging with customers. That attestation was false.

FACTS AND VIOLATIVE CONDUCT

Between 2007 and 2012, while working at Merrill, Daley was the broker of record for husband and wife CR and ER. After CR died in late 2012, his widow became the sole point of contact on their account held at Merrill with Daley. ER, an unsophisticated investor who had not held a job in almost twenty years, also opened two additional accounts with Daley.

On July 1, 2014 ER contacted Daley about providing him with money to allow him to benefit by sharing in the profits in her Merrill account. On the same date, ER wrote Daley a check for \$2,500 drawn from her Merrill cash management account. Daley immediately contacted ER because he was concerned that Merrill would learn of the deposit, which he knew to be prohibited. In order to avoid detection by Merrill, Daley instead provided ER with his personal banking account details for an account he held at another financial institution. He informed ER that she could directly deposit funds related to purported profits in her Merrill account to his personal checking account. As a result, between July and November 2014, ER deposited to Daley's personal bank account a total of eight additional checks each of which was drawn off of her non-Merrill bank account. In total, ER gave Daley \$29,000 in connection with purported profits in ER's account, all of which Daley used for personal expenses. Throughout this time period Daley knew he was prohibited from accepting such payments. By sharing in the profits of a customer account, Daley violated FINRA Rules 2150 and 2010.

From at least around 2012 until his resignation from Merrill in 2016, Daley used his personal cell phone to text message ER as well as other customers. Daley was prohibited from text messaging with customers unless done through an approved Merrill platform. Additionally, Daley submitted an annual attestation to Merrill during the first quarter of 2015 that in the prior 12 months he had not used text messaging with any customer. This attestation was false. As a result, Daley

prevented Merrill from discharging its supervisory responsibilities with respect to the review of Daley's electronic communications and caused the Firm to fail to maintain such communications as required under FINRA and SEC Rules. As a result, Daley violated FINRA Rule 2010 by causing Merrill to violate FINRA Rule 4511 and SEC Rules 17a-3 and 17a-4. Daley also violated FINRA Rule 2010 by falsifying an annual compliance attestation.

On January 14, 2015 Daley recommended that ER purchase units of a non-traditional, leveraged crude oil exchange traded fund without having a reasonable basis to do so. More specifically, Daley did not receive training on non-traditional ETFs and failed to account for the compounding of risk associated with holding nontraditional ETFs overnight, and the fact that they are designed to achieve their stated objectives within a single trading day. Moreover, Daley did not understand that holding such products long-term could cause a customer to experience significant losses. On Daley's recommendation, ER purchased 5,000 units on January 14, 2015 for a principal amount of \$41,850. Daley did not liquidate the position until August 5, 2015, by which time ER had experienced losses. As a result, Daley violated FINRA Rule 2111 and 2010.

B. Respondent also consents to the imposition of the following sanctions:

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

Respondent understands that if he is barred or suspended from associating with any FINRA member, he becomes 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, Respondent 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 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 AWC.

II.

WAIVER OF PROCEDURAL RIGHTS

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

- A. To have a Complaint issued specifying the allegations against him;
- 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, Respondent specifically and voluntarily waives any right to claim bias or prejudice 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.

Respondent 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

Respondent 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 him; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against him;
 - 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. Respondent 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. Respondent 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 Respondent'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.

Respondent certifies that he has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that he 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 him to submit it.

6/23/16
Date (mm/dd/yyyy)


Respondent Kenneth Daley

