

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FREDERICK DAVID HOLLOWAY
(CRD No. 248814),

Respondent.

Disciplinary Proceeding
No. 2016050025401

Hearing Officer–DW

ORDER GRANTING IN PART ENFORCEMENT'S PRE-HEARING MOTION

I. Background

The Department of Enforcement alleges a number of violations in this proceeding against Respondent Frederick David Holloway (“Respondent” or “Holloway”), in connection with his variable annuity business. The most serious allegation is that between 2013 and 2016, Holloway recommended VA exchanges to customers without having a reasonable basis, in violation of FINRA Rules 2330 and 2010. Holloway denied the allegations and requested a hearing.

The hearing is scheduled for November 7, 2018. In advance of the hearing, Enforcement objects to certain proposed hearing exhibits disclosed by Holloway pursuant to the Scheduling Order. Holloway did not file any response to the objections by October 26, 2018, the deadline provided by the Scheduling Order. For the reasons explained below, the objections are sustained in part.

II. Discussion

FINRA Rule 9263 provides that the Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. “The Hearing Officer is granted broad discretion to accept or reject evidence under this rule.”¹

Enforcement objects to five proposed exhibits, RX-12, RX-13, RX-15, RX-16 and RX-17. RX-12 and RX-13 are a prospectus and a Statement of Additional Information, both dated May 2018. Enforcement objects that these materials, published two to five years after the relevant transactions, are irrelevant. Enforcement notes that Holloway supplemented his exhibits

¹ *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

with versions from the appropriate period, rendering RX-12 and RX-13 superfluous. I agree that RX-12 and RX-13 are irrelevant to the issues at hand, and sustain Enforcement's objection to the proposed exhibits.

Enforcement also objects to RX-15, Holloway's entire on-the-record testimony. As Enforcement notes, the Scheduling Order provided that "only the portions of the transcript that the party intends to offer as evidence" should be offered. That said, the evidence has not yet been offered, and only those portions of the exhibit that are relevant and properly offered will be admitted. I will not exclude the entire exhibit at this juncture.² I therefore overrule Enforcement's objection to this proposed exhibit at this time.

Enforcement objects to RX-16, a document that it describes as "a scattershot collection of unrelated documents or materials which Respondent seeks to introduce to try to cast aspersions on the character of his former employee."³ As a general matter, pre-hearing motions to exclude evidence are generally disfavored and should be granted "only if the evidence at issue is clearly inadmissible for any purpose."⁴ Although Holloway's failure to respond to the objection counsels in favor of granting the uncontested application, I note that Holloway did explain in his Amended Exhibit List that the documents in RX-16 will be "offered for impeachment and/or rebuttal purposes." Whether the materials might be pertinent to impeachment or rebuttal is particularly suited to determination at the time other evidence is presented at the hearing. I will therefore overrule Enforcement's objection to RX-16 without prejudice to Enforcement's ability to renew the objection as appropriate at the hearing.

Enforcement finally raises an objection to RX-17, a copy of a Securities and Exchange Commission decision. Enforcement maintains that if Holloway intends to use it as legal authority, it should be cited in a brief and not exhibited as evidence. I agree, and will sustain Enforcement's objection to RX-17.

III. Conclusion

Enforcement's objections are SUSTAINED IN PART and OVERRULED IN PART. Its objection to Respondent's proposed exhibits RX-12, RX-13 and RX-17 are SUSTAINED.

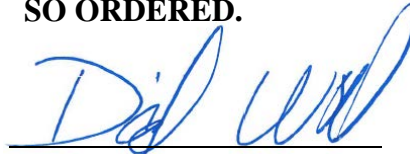
² I observe that a party is generally allowed to introduce excerpts of his own prior testimony only in limited circumstances: (1) under the "rule of completeness," in response to the adverse party's use of the prior testimony to show a prior inconsistent statement; or (2) in response to the adverse party's contention that a portion of the party's hearing testimony is a recent fabrication. *See U.S. v. Awon*, 135 F.3d 96, 99-101 (1st Cir. 1998). The expectation here is that Holloway will by and large present his evidence through his live testimony.

³ Enforcement's Objection to Respondent's Exhibits at 2.

⁴ OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, <http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf> (quotation omitted).

Its objections to Respondents' proposed exhibits RX-15 and RX-16 are **OVERRULED** at this time without prejudice to Enforcement's ability to renew its objections as appropriate at the hearing.

SO ORDERED.



David Williams
Hearing Officer

Dated: October 31, 2018

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