

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 08-5984
)
DAVID A. TUCKER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 8, 2009, a duly-noticed hearing was held by means of video teleconferencing with sites in Daytona Beach and Tallahassee, Florida, before Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Douglas M. Holcomb, Esquire
Office of Financial Regulation
400 West Robinson Street, Suite D-225
Orlando, Florida 32801

For Respondent: Philip Snyderburn, Esquire
Snyderburn, Richoi & Swan, L.L.P.
258 Southall Lane, Suite 420
Maitland, Florida 32751

STATEMENT OF THE ISSUES

The issues to be resolved are whether Respondent committed the acts alleged in the Administrative Complaint and if so, what penalties should be imposed?

PRELIMINARY STATEMENT

On October 30, 2008, the Office of Financial Regulation (Petitioner) filed an Administrative Complaint charging Respondent with violating NASD Conduct Rule 2210(b)(1), (c)(7), (d)(1)(A) and (d)(2)(C)(1), thereby violating Section 517.161(1)(a) and (h), Florida Statutes, and Florida Administrative Code Rule 69W-600.013(2)(h). Respondent disputed the allegations in the Administrative Complaint and timely filed a Petition for Administrative Hearing, and the matter was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally scheduled for hearing to be held February 2, 2009. At the request of Respondent, the case was continued and rescheduled for April 8, 2009, and proceeded as scheduled. Prior to hearing, Petitioner moved for official recognition of the NASD (now known as FINRA) Conduct Rule 2210 and Florida Administrative Code Rule 69W-600.013. Respondent did not oppose the motion and it was granted at the commencement of the hearing. Petitioner presented the testimony of Michael Moore, David Tucker and William Reilly, Jr. Petitioner's Exhibits 1-9 were admitted into evidence. Respondent testified on his own behalf and Respondent's Exhibits 1-5 were also admitted. The proceedings were recorded and the Transcript was filed with the Division April 21, 2009.

Both parties submitted Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to the codification in effect during the time the conducted alleged occurred, i.e., 2006 and 2007, unless otherwise indicated.

FINDINGS OF FACT

1. From 1999 until his termination in December 2007, Respondent was registered with the Office of Financial Regulation as an associated person of ProEquities, Inc. (ProEquities).

2. At all times material hereto, Respondent engaged in both the sale of insurance and the sale of securities products from his Daytona Beach office. His activities with respect to the sale of securities were supervised from ProEquities' Orlando branch office.

3. In the fall of 2006, Respondent appeared as a guest in a short segment of a radio program. He did not obtain prior approval from ProEquities for this appearance.

4. ProEquities received an inquiry from the National Association of Securities Dealers (NASD) regarding the radio appearance, and asked Respondent to explain his participation. He responded by letter stating,

I was a guest on the radio show to provide educational information. The show is about a wide range of educational information for seniors, and since it wasn't my own show I didn't feel I needed to get approval. I was only on for about 6 minutes, and of course as we discussed this should have been approved.

In the future I will submit approval for any advertising or other appearances that I participate in.

4. As a result of the November 2006 radio appearance, ProEquities issued a Letter of Caution to Respondent for providing his contact information and offering his services to listeners without prior firm approval. Respondent signed the Letter of Caution on December 7, 2006, and agreed to comply with ProEquities' advertising policies.

5. Sometime after the Letter of Caution was issued, Respondent discussed with ProEquities' Compliance Officer, Michael Moore, the possibility of having his own radio show. Moore told him the firm would have to review and approve the scripts. Although initially Respondent forwarded the scripts to Moore, at some point he stopped doing so and Moore assumed that Respondent had stopped doing the show.^{1/}

6. ProEquities received a second inquiry from the Financial Industry Regulatory Authority (FINRA), formerly NASD, regarding Respondent's radio show and both print and radio ads that Respondent was using.

7. On November 2, 2007, Respondent submitted an e-mailed statement to the firm stating, "I thought the radio ads had been approved last November. As far as the print ad goes, it was so generic and didn't state any specific product information that I assumed it did not need to be approved."

8. In addition, Respondent submitted a copy of a print advertisement and the transcripts of two 30-second radio commercials.

9. The scripts for the radio commercials stated as follows:

1. Great news for those who are planning for retirement or already retired. David Tucker has been showing the people of Daytona Beach how to retire in comfort for 32 years. David will show you the tools needed to help meet your retirement goals. Call David Tucker of David Tucker & Associates at (386) 761-9401. Be sure to listen to Investment Strategies with David Tucker every Sunday from 12:00 to 12:30 PM on WNDB 1150 AM.

2. If you are unhappy with your investments call David Tucker at (386) 761-9401. He can show you how to benefit from any market gains, and safeguard 100% of your principal, and interest earned, regardless of market fluctuations. Be sure to listen to Investment Strategies with David Tucker every Sunday from 12:00 to 12:30 PM on WNDB 1150 AM.

10. The print advertisement submitted to ProEquities stated in part,

We offer stocks, bonds, annuities, mutual funds, life & health insurance, and long-term care. Ask Us How To Guarantee Income for Life.

11. The print advertisement submitted by Respondent also contained the required disclosure that Respondent sold securities through ProEquities, which stated:

Securities offered through ProEquities, Inc., A Registered Broker-Dealer. Member, NASD and SIPC. David A. Tucker & Associates is independent of ProEquities, Inc. Securities offered through ProEquities, Inc., like all investments, are subject to risks.

Past performance is not a guarantee of future returns.

12. In reliance upon Tucker's submission of the print advertisement described above, and believing that was the advertisement used, ProEquities submitted the print advertisement to FINRA in response to the November 2, 2007, inquiry.

13. On November 26, 2007, ProEquities issued a "Letter of Warning" to Respondent, based on the fact that prior approval had not been obtained for the print advertisement or the radio spots. The Letter of Warning reminded Respondent of the previously issued Letter of Caution, and stated in part:

By signing that Letter of Caution, you agreed that you would comply with all firm policies regarding advertising and sales literature, including but not limited to, print material, personal and business websites, radio broadcasts, television broadcasts, seminars and other advertising or promotional events.

The firm's policies, as well as FINRA Rule 2200, regarding communications with the public, are clear - any and all sales and promotional materials must be pre-approved by the firm's compliance department. The firm intends to maintain strict compliance with securities industry rules and regulations; and we expect our representatives to uphold the same standard. This particular area of communications with the public is the focus of heightened regulatory scrutiny; therefore violations of this rule hold the increased possibility of regulatory action against the firm, your OSJ and you.

14. The Letter of Warning imposed a \$500 fine; an immediate three-month suspension of all forms of advertising and/or promotional events, with the exception of certain identified,

previously scheduled events; and the option at the end of the three-month period to either pay another fine of \$1,500 or continue the suspension of advertising privileges for another three months.

15. Respondent acknowledged the Letter of Warning in writing and paid the \$500 fine on November 26, 2007.

16. Following the issuance and acknowledgment of the Letter of Warning, ProEquities conducted an unannounced audit of Respondent's Daytona Beach office. During the audit, Mr. Moore discovered that there was print advertisement that was used by Tucker that did not match the print advertisement submitted to ProEquities and in turn supplied to FINRA in response to its inquiry.

17. This additional print advertisement did not include the securities disclosure quoted in Finding of Fact 11. It simply states, "We Offer Stocks, Bonds, Annuities, Mutual Funds, Life and Health Ins. and Long-Term Care. Ask Us How to Guarantee Income for Life."

18. It is not clear whether both print ads were being used simultaneously, whether the disclosure language was added deliberately before submitting the advertisement to ProEquities, or whether failing to send it was, as Respondent contends, an oversight. What is clear is that Respondent used the advertisement without the disclosure language on numerous occasions and saw no problem with its use.

19. The advertisement which contains no disclosure statement was published 110 times. The radio commercials, which also failed to include any type of disclosure regarding the name of the member, ProEquities, aired 120 times.

20. The statement "ask us how to guarantee income for life" in the print advertisement required disclosures so that it was fair and balanced and not misleading to the public. It also needed to clarify what product it was advertising, and that any guarantee was subject to the claims paying ability of the issuing insurance company if the advertised product is an annuity.

20. Respondent asserted that the claim is meant only for annuities products, such as equity indexed annuities. However, nothing in the advertisement indicates that the guarantee is limited to this type of product, as opposed to the array of products mentioned in the advertisement, and Respondent indicated that the consumer would not receive that information until they came in for an appointment to discuss what type of investment the consumer might wish to purchase. Forcing a consumer to come in for an appointment in order to receive information that should have been disclosed in the advertisement is misleading and a waste of the consumer's time.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this

action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

22. The Office of Financial Regulation is the state agency charged with the administration and enforcement of Chapter 517, Florida Statutes, and the rules promulgated thereunder pursuant to Sections 20.121(3)(a)2. and 517.03(1), Florida Statutes.

23. Action against a licensee is considered a penal proceeding, and Petitioner must demonstrate by clear and convincing evidence that Respondent has committed the allegations charged in the Administrative Complaint. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

24. The Administrative Complaint alleges that Respondent violated NASD Conduct Rule 2210(b)(1), (c)(7), (d)(1)(A) and (d)(2)(C)(1), and thereby violated Section 517.161(1)(a) and (h), Florida Statutes, and Florida Administrative Code Rule 69W-600.013(2)(h).

25. Section 517.161(1)(a) and (h), Florida Statutes (2006 and 2007) provides:

(1) Registration under s. 517.12 may be denied or any registration granted may be revoked, restricted, or suspended by the office if the office determines that such applicant or registrant:

(a) Has violated any provision of this chapter or any rule or order made under this chapter;

* * *

(h) Has demonstrated unworthiness to transact the business of dealer, investment adviser, or associated person;

26. Florida Administrative Code Rule 69W-600.013(2)(h)

provides:

Prohibited Business Practices for Dealers and Their Associated Persons.

(2) The following are deemed demonstrations of unworthiness by an associated person of a dealer under Section 517.161(1)(h), F.S., without limiting that term to the practices specified herein:

* * *

(h) Engaging in any of the practices specified in paragraph (1)(a), (b), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n).

27. Florida Administrative Code Rule 69W-600.013(1)(h)

prohibits, with respect to any customer, transaction, or business in this state, violating any of the following:

1. Conduct Rules, Marketplace Rules, or the Uniform Practice Code of the National Association of Securities Dealers (NASD). . . .

28. The relevant portions of FINRA's Conduct Rules are as follows:

2210. Communications with the Public

(a) Definitions

For the purposes of this Rule and any interpretation thereof, "communications with the public" consist of:

(1) "Advertisement." Any material, other than an independently prepared reprint and institutional sales material, that is published, or used in any electronic or other

public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

(2) "Sales literature." Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member's products or services.

* * *

(5) "Public appearance." Participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity.

* * *

(b) Approval and Recordkeeping

(1) Registered Principal Approval for Advertisements, Sales Literature and Independently Prepared Reprints

(A) A registered principal of the member must approve by signature or initial and date each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with the NASD's Advertising Regulation Department ("Department").

* * *

(C) A registered principal qualified to supervise security futures activities must approve by signature or initial and date each advertisement or item of sales literature concerning security futures.

(D) The requirements of paragraph (A) shall not apply with regard to any advertisement, item of sales literature, or independently prepared reprint if, at the time that a member intends to publish or distribute it:

(i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and

(ii) the member using in reliance upon this paragraph has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

* * *

(c) Filing requirements and Review Procedures

* * *

(7) Spot-Check Procedures

In addition to the foregoing requirements, each member's written and electronic communications with the public may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

* * *

(d) Content Standards

(1) Standards Applicable to All
Communications with the Public

(A) All member communications with the public shall be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communication to be misleading.

* * *

(2) Standards Applicable to Advertisements
and Sales Literature

* * *

(C) All advertisements and sales literature must:

(i) prominently disclose the name of the member and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;

29. While the Administrative Complaint also refers to FINRA Rule of Conduct 2110, the Department's unopposed request for official recognition provided only Conduct Rule 2210, and the text of Conduct Rule 2110 was not provided. Therefore, no findings or conclusions have been made with respect to any violation of Conduct Rule 2110.

30. The Office has demonstrated by clear and convincing evidence that Respondent violated FINRA Conduct Rule 2210(b)(1) by failing to submit to ProEquities print and radio

advertisements for review and approval prior to first use. Respondent did so with respect to the original radio appearance in December 2006; his radio show in 2007 and his radio commercials and printed ads in 2007.

31. Respondent's claim that Michael Moore told him he did not need to continue to submit scripts of the show but simply needed to keep tapes is specifically rejected. Such a procedure was expressly denied by Michael Moore, and is inconsistent with the plain language of the requirements of Conduct Rule 2210.

32. Moreover, even assuming that assertion with respect to the radio show was true, there was no approval of his radio commercials or his written advertisements. All required prior, written approval.

33. The Office proved by clear and convincing evidence that Respondent violated Conduct Rule 2210(c)(7) by failing to submit all of the print advertisements actually used in response to the November 2007 FINRA inquiry. While Respondent claims that the advertisement without the disclosure was not provided through oversight by his secretary, it is his responsibility to make sure that all information requested was provided. It is not a responsibility that can be delegated to his staff. Moreover, this explanation is consistent with the cavalier attitude displayed by Respondent with respect to his responsibilities to have advertising approved. He apparently did not feel it was important so did not make it a priority.

34. The Office demonstrated by clear and convincing evidence that Respondent violated Conduct Rule 2210(d)(1)(A) by failing to provide a sound basis for the statement "Ask Us How to Guarantee Income for Life" in print advertisements. As stated in the Findings of Fact, Respondent's claim that no disclosure is required because the statement is referring to products that are not securities is without merit. The advertisement refers to a variety of products, including securities. Nothing in the advertisement identifies a particular type of product to which the statement is meant to apply. Where, as here, there is no differentiation in the advertisement itself, disclosure is necessary to alert the consumer which product is at issue.

35. Finally, the Office demonstrated by clear and convincing evidence that Respondent violated Conduct Rule 2210(d)(2)(C)(i) by using radio advertisements that failed to disclose the name of the member, ProEquities.

36. By Respondent's violation of the provisions of Conduct Rule 2210 listed above, Respondent also violated Section 517.161(1)(a) and (h), Florida Statutes, and Florida Administrative Code Rule 69W-600.013(2)(h).

37. Section 517.221(1), Florida Statutes, authorizes Petitioner to issue and serve an order to cease and desist and to take corrective action whenever it has reason to believe the person is violating, has violated, or is about to violate any provision of Chapter 517, Florida Statutes, or any rule of the

Office issued pursuant to Chapter 517, Florida Statutes. Subsection 517.221(3) authorizes fines not to exceed \$5,000 per violation when a person is found to have violated any provision of Chapter 517, Florida Statutes, or any rule of the Office promulgated pursuant to Chapter 517, Florida Statutes.

38. Pursuant to the authority in Section 517.221(1) and (3), Petitioner asserts that Respondent should receive an order to cease and desist and be fined \$15,000. Petitioner's suggested penalty is appropriate.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

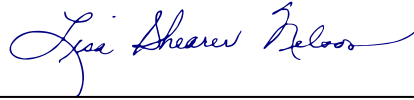
RECOMMENDED:

That a final order be entered finding that Respondent violated the provisions of Conduct Rule 2210(b)(1), (c)(7), (d)(1)(A), and (d)(2)(C)(i), and thereby violated Section 517.161(1)(a) and (h), Florida Statutes, and Florida Administrative Code Rule 69W-600.013(2)(h);

That Respondent be ordered to cease and desist from any further violations of Chapter 517, Florida Statutes; and

That Respondent be ordered to pay an administrative fine of \$15,000.00.

DONE AND ENTERED this 22nd day of May, 2009, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of May, 2009.

ENDNOTE

^{1/} Respondent testified that Moore told him he did not need to send the scripts any longer as long as he saved the tapes from the radio show. Moore denied this assertion and Moore's testimony is credited.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.