

STATE OF ILLINOIS  
SECRETARY OF STATE  
SECURITIES DEPARTMENT

IN THE MATTER OF: MICHAEL C. KIZMAN )  
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 )

FILE NO. 0900379

**CONSENT ORDER OF DISMISSAL**

TO THE RESPONDENT: Michael C. Kizman  
(CRD #: 2298944)

  
St. Charles, Illinois 60175

Michael C. Kizman  
(CRD #: 2298944)  
C/o Merrill Lynch, Pierce, Fenner & Smith, Inc.  
901 W. Trade Street NC 1-003-04-26  
Charlotte, North Carolina 28255

Michael C. Kizman  
C/o Daniel C. Zinman Attorney At Law  
Richards Kibbe & Orbe LLP  
One World Financial Center  
New York, New York 10281-1003

WHEREAS, Respondent on the 31<sup>st</sup> day of March, 2010 executed a certain Stipulation to Enter Consent Order of Dismissal (the "Stipulation"), which hereby is in corporate by reference herein.

WHEREAS, by means of the Stipulation, Respondent has admitted to the jurisdiction of the Secretary of State and service of the Notice of Hearing of the Secretary of State, Securities Department, dated December 1, 2009, in this proceeding (the "Notice") and Respondent has consented to the entry of this Consent Order of Dismissal ("Consent Order").

WHEREAS, by means of the Stipulation, the Respondent acknowledged, without admitting or denying the truth thereof, that the following allegations contained in the Notice of Hearing shall be adopted as the Secretary of State's Findings of Fact:

WHEREAS, by means of the Stipulation Respondent has acknowledged, without admitting or denying the averments, that the following shall be adopted as the Secretary of State's Conclusion of Law:

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1. That at all relevant times, the Respondent was registered with the Secretary of State as a salesperson and investment adviser representative in the State of Illinois pursuant to Section 8 of the Act.
2. That on July 14, 2009 FINRA entered a Letter of Acceptance, Waiver And Consent (AWC) submitted by the Respondent regarding File No. 2005002254704 Which sanctioned the Respondent as follows:
  - a. 15 business day suspension from association with any FINRA member firm in any capacity; and
  - b. fine in the amount of \$10,000.
3. That the AWC found:

### **FACTS AND VIOLATIVE CONDUCT** **Merrill's CEF Program**

Between March 2003 and August 2006 (the "relevant period"), Merrill underwrote 114 initial public offerings ("IPO") of closed end funds ("CEFs"). CEFs are investment companies that sell a fixed number of shares in an initial public offering, after which the shares typically trade on a secondary market. The sales charges to the customer are built into the offering price of the CEF purchased at the initial public offering. During the relevant period, the CEFs at issue included a sales load of 4.5%, from which the underwriters' fee and sales concession were paid. The proceeds, after the expenses, were then invested by the CEF based on the investment objectives of the CEF.

The CEFs had a "stabilization period," which was the period of time immediately following the IPO in which the lead underwriter (at least in theory) generally supported the price of the fund. The CEFs' prospectuses generally noted that the underwriter may purchase common shares to stabilize the fund's price or to reduce short positions, and that this may cause the price of the common shares to be higher than it might otherwise be. Stabilization periods did not exceed 90 days and were generally shorter in duration.

Following the stabilization period, the price of CEF shares in the secondary market was determined by the market and may have reflected either a premium or a discount of the shares' net asset value ("NAV") excluding the offering expenses. Since expenses to the customer at the time of the IPO were built into the offering price of the CEF, its market price generally declined after the stabilization period. Without trading at a discount or a premium, all other factors being equal, it would have been reasonable to expect the market price of the CEF at the end of the stabilization period to be approximately 4.5% below the initial offering price.

### **The Respondent's Unsuitable Recommendations**

From April 2003 through August 2006, the Respondent recommended that certain of his customers purchase CEFs in the initial public offerings. Generally, he received a production credit of 3% of the value of the shares his customers purchased at IPO. These production credits were applied to his commission grid or pay-out percentage such that he typically received a commission equal to approximately .75 - 1.25% of the value of the shares purchased by his clients.

Despite the generally long term nature of these investments, and based in part on his erroneous belief that the customers did not pay the initial fee,, the Respondent consistently recommended that they sell these CEFs in the short term, defined as less than 120 days after they were purchased in the initial public offering. The Respondent recommended a sale within 120 days of purchasing the CEF in the initial public offering in 66% of the customer accounts to which he recommended an IPO purchase. Close to 50% of the shares his customers bought in the initial public offering were sold on his recommendation within 120 days of the IPO.

The Respondent made the recommendations to buy the CEFs in the initial public offering and sell them in the short term without a sufficient understanding of the pricing of CEFs and the risks and rewards of the investment. The Respondent mistakenly believed that closed end fund IPOs would behave like equity IPOs. Prior to a Merrill Lynch internal investigation, he did not understand the stabilization period associated with closed end funds, and had an incorrect understanding of the expenses associated with closed end fund IPOs, including the impact of the underwriting fee on the aftermarket price. The Respondent's recommendations to buy the CEPs in the initial public offering and sell them in the short term contributed to his customers losing approximately \$221,000.

Before recommending a transaction, NASD Rule 2310 requires a broker to "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." A broker cannot determine whether a recommendation is suitable for a specific customer unless the broker understands the nature of the product, as well as the potential risks and rewards associated with the product. Because the Respondent failed to fully understand the pricing of CEFs and the risks and rewards of the investment, the Respondent did not have reasonable grounds for believing that his recommendations that his customers purchase CEFs in the initial public offering and sell them in the short term were suitable.

By engaging in the course of conduct described above, the Respondent violated NASD Conduct Rules 2310 and 2110.

4. That Section 8.E(1)(j) of the Act provides, inter alia, that the registration of a salesperson may be revoked if the Secretary of State finds that such Salesperson

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has been suspended by any self-regulatory organization Registered under the Federal 1934 Act or the Federal 1974 Act arising from any fraudulent or deceptive act or a practice in violation of any rule, regulation or standard duly promulgated by the self-regulatory Organization.

5. That FINRA is a self-regulatory organization as specified in Section 8.E(1)(j) of the Act.

The Respondent's registration as a salesperson and as an investment adviser representative in the State of Illinois is subject to revocation pursuant to Section 8.E(1)(j) of the Act.

WHEREAS, by means of the Stipulation Respondent has acknowledged and agreed that he shall be levied costs incurred during the investigation of this matter in the amount of Seven Hundred Fifty dollars (\$750.00). Said amount is to be paid by certified or cashier's check, made payable to the Office of the Secretary of State, Securities Audit and Enforcement Fund.

WHEREAS, by means of the Stipulation Respondent has acknowledged and agreed that He has submitted with the Stipulation a certified or cashier's check in the Amount of Seven Hundred Fifty Dollars (\$750.00). Said check has been made payable to the Office of the Secretary of State, Securities Audit and Enforcement Fund and represents reimbursement to cover the cost incurred during the investigation of this matter.

WHEREAS, by means of the Stipulation Respondent has acknowledged and agreed that he will comply with all of the terms and conditions contained in the Heightened Supervision Plan ("Plan") between him and his employing firm dated March 4, 2010. Further, acknowledge and agrees that the Plan has a minimum duration of twelve (12) months from date of inception, however, he will continue to comply with the Plan for one (1) year from the entry of this Consent Order.

WHEREAS, by means of the Stipulation Respondent has acknowledged and agreed that he completed the course entitled "Structured Products" on March 1, 2010.

WHEREAS, the Secretary of State, by and through his duly authorized representative, has determined that the matter related to the aforesaid formal hearing may be dismissed without further proceedings.


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NOW THEREFORE IT SHALL BE AND IS HEREBY ORDERED THAT:

1. The Respondent is levied costs of investigation in this matter in the amount of Seven Hundred Fifty dollars (\$750.00); payable to the Office of the Secretary of State, Securities Audit and Enforcement Fund, and on March 31, 2010 has submitted Seven Hundred Fifty dollars (\$750.00) in payment thereof.
2. The notice of Hearing dated December 1, 2009 is dismissed.
3. The Respondent shall continue to comply with the aforementioned Heightened Supervision Plan for one (1) year from the entry of this Consent Order.
4. The formal hearing scheduled on this matter is hereby dismissed without further proceedings.

ENTERED- This 15<sup>th</sup> day of April 2010.

  
JESSE WHITE  
Secretary of State  
State of Illinois

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