

**COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2018-AH-00046**

DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

vs.

AGREED ORDER

INDEPENDENT CAPITAL, LLC; and
MICHAEL DAVID PRATER

RESPONDENTS

FACTUAL BACKGROUND

1. The Kentucky Department of Financial Institutions (DFI) is responsible for administering the provisions of Kentucky Revised Statutes (KRS) Chapter 292, the Securities Act of Kentucky (the “Act”), as well as the rules and regulations enacted thereunder.

2. Respondent Independent Capital, LLC, (CRD #172757) (the “Firm”) is a registered investment adviser with DFI and maintains an office location of 450 Old Vine Street, Lexington, Kentucky 40507.

3. Respondent Michael David Prater (CRD #4835266) is a registered investment adviser representative and is the managing member of the Firm. Prater has been registered as an investment adviser representative with the Firm since September 15, 2015.

4. DFI conducted a routine examination of the Firm on October 18, 2017. The preliminary results of this examination were recorded in a Statement of Findings letter, which was mailed to the Firm on November 20, 2017. This letter requested a response from the Firm by December 21, 2017. However, despite several written reminders, DFI did not receive a response from the Firm until March 23, 2018. By failing to provide a timely written response as requested,

Respondents violated Title 808 of the Kentucky Administrative Regulations (KAR), Chapter 10:450 § 2(26)(d).

5. During this examination of the Firm, DFI discovered that the Firm had a single investment client (the “Client”). DFI requested that the Firm produce an executed advisory contract for the Client during the course of the examination. The Firm provided a number of documents relating to the Client’s account, including a fee schedule, but did not produce an advisory contract containing all of the requirements of 808 KAR 10:440 § 2(18). Production of this contract was also requested in the Statement of Findings letter sent on November 20, 2017, and again in a follow-up letter sent to the Firm on April 12, 2018. DFI eventually received an executed advisory contract for the Client on May 14, 2018 that satisfied the requirements of 808 KAR 10:440 § 2(18); however, this contract reflected an execution date of May 4, 2018. The Firm managed the Client’s account prior to May 4, 2018, without a written advisory contract, thereby violating 808 KAR 10:450 § 2(18). Additionally, in failing to provide this advisory contract in a timely manner as requested by DFI, Respondents violated 808 KAR 10:450 § 2(25).

STATUTORY AUTHORITY

6. 808 KAR 10:440 § 2(18) prohibits an investment adviser or investment adviser representative from “[e]ntering into, extending, or renewing an advisory contract unless the contract is in writing and discloses the following:

- (a) The nature of the advisory services to be provided;
- (b) The time period that the contract remains in effect;
- (c) The advisory fee and the formula for computing the fee;
- (d) The amount of the prepaid fee to be returned if there is contract termination or nonperformance;
- (e) Whether the contract grants discretionary power to the adviser and, if so, the terms of the discretionary power;

- (f) Whether the contract grants custody of client funds to the adviser and, if so, the terms of the custody; and
- (g) That the adviser shall not assign the contract without the prior written consent of the client.”

7. 808 KAR 10:450 § 2(25) and (26) prohibit an investment adviser or an investment adviser representative from:

“(25) Failing to make requested records available to or otherwise impeding a representative of the Department of Financial Institutions conducting an authorized examination or investigation; and

(26) Failing to respond in a timely manner to a written request from an authorized representative of the Department of Financial Institutions for:

- (a) Information;
- (b) An explanation of practices or procedures;
- (c) A response to a complaint filed with the department; or
- (d) A response to a written statement of findings from an examination.”

8. The Commissioner possesses a range of administrative authority in addressing violations of the Act, including the imposition of civil fines up to twenty thousand dollars (\$20,000.00) for each violation of the Act. *See* KRS 292.337 and KRS 292.500(14).

9. The Commissioner finds that this Agreed Order is in the public interest.

10. In managing the Client’s account without a written advisory contract that satisfied the requirements of 808 KAR 10:440 § 2(18), Respondents violated 808 KAR § 2(18).

11. In failing to provide written responses and documents as requested by DFI, Respondents violated 808 KAR 10:450 § 2(25) and (26).

AGREEMENT AND ORDER

12. To resolve this matter without litigation or other adversary proceedings, DFI and Respondents agree to compromise and settle all claims arising from the above-referenced factual background in accordance with the terms set forth herein.

13. In the interest of economically and efficiently resolving the violations described herein, DFI and Respondents hereby agree as follows:

- a. For purposes of settlement, but without admitting or denying the findings of fact or conclusions of law set forth herein, Respondents agree to pay a civil fine in the amount of **two thousand dollars (\$2,000)** for the violations described herein, which shall be due and payable upon the entry of this Agreed Order;
- b. All payments under this Order shall be in the form of a certified check or money order made payable to “Kentucky State Treasurer” and mailed to the Department of Financial Institutions, Securities Division, 2018-AH-00046, 1025 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601; *and*
- c. Respondents shall devote the time and resources necessary to ensure continual and full compliance with the Act.

14. Respondents waive their right to demand a hearing at which they would be entitled to legal representation, to confront and cross-examine witnesses, and to present evidence on their own behalf, or to otherwise appeal or set aside this Agreed Order.

15. Respondents consent to and acknowledge the jurisdiction of DFI over this matter and that this Agreed Order is a matter of public record and may be disseminated as such.

16. DFI agrees that, as the violations described herein do not arise from fraudulent, manipulative, or deceptive conduct, neither disqualification under Rule 506(d)(1) of Regulation D (17 C.F.R. 230.506(d)(1)(iii)(b)) nor disqualification under Rule 262(a) of Regulation A (17 C.F.R. 230.262(a)(3)(ii)) should arise as a consequence of this Agreed Order.

17. In consideration of execution of this Agreed Order, Respondents for themselves, and for their successors and assigns, hereby releases and forever discharges the Commonwealth of

Kentucky, DFI, Office of Legal Services, and each of their members, agents, and employees in their individual capacities, from any and all manner of actions, causes of action, suits, debts, judgments, executions, claims and demands whatsoever, known and unknown, in law or equity, that Respondents ever had, now have, may have or claim to have against any or all of the persons or entities named in this paragraph arising out of or by reason of this investigation, this disciplinary action, this settlement or its administration.

18. By signing below, the parties acknowledge they have read the foregoing Agreed Order, know and fully understand its contents, and that they are authorized to enter into and execute this Agreed Order and legally bind their respective parties.

19. This Agreed Order shall constitute the Final Order in this matter.

IT IS SO ORDERED on this the 29th day of MAY, 2019.

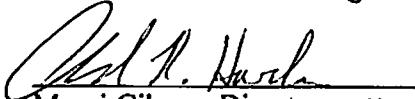


CHARLES A. VICE
COMMISSIONER

Consented to:

On behalf of the Department of Financial Institutions,

This 28th day of May, 2019.




~~Marni Gibson~~, Director : Chad K. Harlow
Division of Securities
Department of Financial Institutions

AND

On behalf of himself and the Firm,

This 24 day of May, 2019. *SDM*



Michael David Prater, Managing Member
Independent Capital, LLC

ACKNOWLEDGEMENT

STATE OF Kentucky)
)
COUNTY OF Carter)

On this the 24 day of May, 2019, before me Anita Perry,
Michael David Prater personally appeared and acknowledged himself to be the Respondent
named herein and the managing member of Independent Capital, LLC, and acknowledged that he
entered into and executed the foregoing instrument for the purposes therein contained.

My Commission Expires: 1.5.21


Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Agreed Order** was sent on this the 29th day of May, 2019, by certified mail, return receipt requested, to:

Independent Capital, LLC
Attn: M. David Prater, Managing Member
450 Old Vine Street
Lexington, Kentucky 40507
Respondent

Frost Brown Todd, LLC
Attn: Joshua O'Bryan, Member
400 West Market Street, Suite 3200
Louisville, Kentucky 40202-3363
Counsel for Respondent

And by Hand-Delivery to:

Mr. Stuart D. Michael
1025 Capital Center Drive, Suite 200
Frankfort, KY 40601
Counsel for Department of Financial Institutions



Kentucky Department of Financial Institutions