

BEFORE THE ARKANSAS SECURITIES COMMISSIONER
Case No. S-17-0079
Order No. S-17-0079-17-OR01

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ARKANSAS SECURITIES DEPT.

IN THE MATTER OF
ANDREW HARDIE

CONSENT ORDER

This Consent Order is entered pursuant to the Arkansas Securities Act, codified at Ark. Code Ann. §§ 23-42-101, *et seq.* (Repl. 2000), (Act), the Rules of the Arkansas Securities Commissioner promulgated under the Act (Rules), and the Arkansas Administrative Procedures Act, codified at Ark. Code Ann. §§ 25-15-201, *et seq.* (Repl. 2002) in accordance with an agreement by and between the Staff of the Arkansas Securities Department (Staff) and Andrew Hardie in full settlement of all claims that could be brought against Hardie by the Staff in the factual situation set out below.

Hardie admits jurisdiction of the Act and Arkansas Securities Commissioner (Commissioner), waives his right to formal hearing and, without admitting or denying the findings of fact made herein, consents to the entry of this order and agrees to abide by its terms.

FINDINGS OF FACT

1. Andrew Hardie is a resident of Rogers, Arkansas. His CRD number is 1765110, and since July 31, 2017, he has not been registered in any capacity pursuant to the Act.
2. Hardie applied for dual registration as a broker-dealer agent with Cabot Lodge Securities on May 28, 2017. During the Staff's review of Hardie's application for registration with Cabot Lodge Securities, the violations below were discovered. Hardie's application with Cabot Lodge Securities was termed without registration.

3. Hardie subsequently applied for registration with IFS Securities on September 6, 2017. Hardie's registration with IFS Securities is currently pending.
4. Hardie was previously registered in Arkansas as:
 - a. A broker-dealer agent with Wilbanks Securities, Inc. (Wilbanks) (CRD #40673) from May 21, 2015 until July 31, 2017, but authority to execute trades at Wilbanks was unavailable during the summer of 2017 and FINRA ultimately suspended the registration of Wilbanks on August 4, 2017;
 - b. A broker-dealer agent from August 12, 2010 until April 17, 2015 and investment adviser representative from September 16, 2010 until April 17, 2015 with Stifel, Nicolaus & Company, Inc. (Stifel) (CRD #793);
 - c. A broker-dealer agent with Wells Fargo Advisors, LLC (CRD #19616) from January 1, 2008 until August 12, 2010; and
 - d. A broker-dealer agent with A.G. Edwards & Sons, Inc. (CRD #4) from September 10, 1987 until January 1, 2008.
5. While registered with Stifel, Hardie recommended and sold non-traditional exchange traded funds (ETFs), including inverse ETFs, and leveraged inverse ETFs (collectively, Non-traditional ETFs) to a number of his clients. These securities remained in the client accounts and were transferred to accounts at Wilbanks when Hardie moved his registration to the new firm. Several of Hardie's clients have now held their positions in Non-traditional ETFs for as long as seven years and continue to hold them.
6. ETFs are index funds traded as though they are equity stocks. Inverse ETFs are keyed to a particular index or market and designed to fluctuate inversely to that index or market. Leveraged ETFs increase or decrease in value by multiples, usually of two or three. For

example, a leveraged ETF keyed to the S & P 500 index is intended to deliver returns of two or three times the change in the S & P 500 index, and an inverse leveraged ETF is intended to deliver the inverse of the change in the index for example, a 20% positive return when there is a 10% loss in the index. The Non-traditional ETFs Hardie recommended to his clients all reset on a daily basis, and were designed to deliver the return promised in one day.

7. Non-traditional ETFs are designed for a one-day performance. Adverse returns could result from holding them for longer periods of time, particularly if the index to which the Non-traditional ETFs is keyed goes in a direction other than the direction anticipated when the Non-traditional ETFs were purchased. These characteristics of Non-traditional ETFs were well known and could be easily ascertained at the time Hardie recommended the purchase of the Non-traditional ETFs in question, as shown by the following:
 - a. The Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 09-31 in June 2009, entitled “Non-Traditional ETFs.” It was explained in the notice that inverse and leveraged ETFs are “highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis.” Because these Non-traditional ETFs reset daily and compounded any returns or losses, their performance “can differ significantly from their stated daily objective,” the notice stated. On the first page of the notice was a clear warning: “inverse and leveraged ETFs... are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.” This warning that “inverse and leveraged ETFs are typically not suitable for retail

investors who plan to hold them for more than one trading session” was repeated on page 3 of the notice under the heading, “Suitability.”

- b. The United States Securities and Exchange Commission (SEC) issued an investor alert simultaneously with FINRA Regulatory Notice 09-31. It, too, noted that inverse ETFs were one-day products, stating that the “performance of these ETFs over a period longer than one day can differ significantly from their stated daily performance objectives.”

- 8. Hardie recommended, sold, and is currently holding the following Non-traditional ETFs:

<u>Name</u>	<u>Type</u>
Proshares Ultrashort S&P 500	Inverse 2X to the S&P 500
Proshares Short S&P 500	Inverse to the S&P 500
Direxion Daily S&P 500	Inverse 3X to the S&P 500

- 9. The prospectuses of the Non-traditional ETFs Hardie recommended and sold state quite clearly that they are to be used for one-day trades, as shown by the following:

- a. The prospectuses of Proshares state “the Fund seeks investment results for a single day only, not for longer periods.” In addition, the Proshares prospectuses state “[t]he Fund does not seek to achieve its stated investment objective over a period of time greater than a single day.”
- b. The prospectus of Direxion Daily S&P 500 states “[t]he Fund does not seek to achieve its stated investment objective for a period of time different than a trading day.”

- 10. Contrary to the regulatory notice produced by FINRA, the investor alert published by the SEC, and the prospectuses produced by the issuers of these securities, several of Hardie’s clients’ accounts have held positions in Non-traditional ETFs continuously for up to

seven years. Unrealized losses in these Non-traditional ETF positions have reached as much as 70%.

11. In addition, many of Hardie's clients' accounts with Non-traditional ETF holdings were and are over-concentrated with these securities positions. One client's account holdings in Non-traditional ETF's are over 34% of the total account value.
12. Hardie's clients with accounts holding positions in Non-traditional ETF's are not institutional investors with stated objectives of high levels of speculation. The holding periods and concentration levels of these securities exceed prudent positions for even high speculation institutional investor accounts.

CONCLUSIONS OF LAW

13. The Commissioner has jurisdiction over this matter pursuant to Ark. Code Ann. § 23-42-308.
14. Under Ark. Code Ann. § 23-42-308(a)(2)(B) the Commissioner may by order deny, suspend, make conditional or probationary, or revoke any registration if he or she finds that an applicant or registrant has willfully violated or willfully failed to comply with any provision of the Act or Rules.
15. Under Rule 308.01(d), recommending to a customer the purchase, sale or exchange of any security when a broker-dealer or agent does not have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to his other security holdings and as to his financial needs shall be considered unethical and grounds for denial, suspension or revocation. Hardie disregarded the characteristics of the Non-traditional ETFs and the needs of his clients. Hardie therefore had no reasonable basis for recommending that his clients buy

and hold the Non-traditional ETFs for an extended period of time, nor did he have a reasonable basis for recommending that his clients buy and hold the excessive concentration levels of these products in violation of Rule 308.01(d).

16. Under Ark. Code Ann. § 23-42-308(a)(2)(G) the Securities Commissioner may by order deny, suspend, make conditional or probationary, or revoke any registration if he or she finds that a broker-dealer has engaged in dishonest or unethical practices in the securities business. Hardie's recommendations that his clients buy and hold the Non-traditional ETFs for an extended period of time and buy and hold the excessive concentration levels of these products were unethical practices in violation of Ark. Code Ann § 23-42-308(a)(2)(G).

UNDERTAKING

17. In settlement of this matter, Hardie agrees with the Staff to:
 - a. Not be registered as an agent of a broker-dealer or representative of an investment adviser for a period of sixty-five (65) days beginning on July 31, 2017; and
 - b. Pay a fine in the amount of \$5,000 upon entry of this Order.

OPINION

18. This order is in the public interest. The facts set out in paragraphs 1 through 10 support the violations of the Act and Rules set out in paragraphs 11 through 14.

ORDER

IT IS THEREFORE ORDERED that:

1. An application for registration for Andrew Hardie pursuant to the Act, as a broker-dealer agent or investment adviser representative will not be approved by the Commissioner for a sixty-five (65) day period beginning July 31, 2017; and

2. Hardie shall pay a fine to the Department in the amount of \$5,000 upon entry of this Order.

WITNESS MY HAND AND SEAL this 5th day of October, 2017.



B. EDMOND WATERS
Arkansas Securities Commissioner

CONSENT TO ENTRY OF ORDER

I hereby agree to the entry of this Consent Order and consent to all terms, conditions, and orders contained therein; and waive any right to appeal from this Order.



Andrew Hardie, Respondent
CRD # 1765110

Approved as to content and form:



Aislinn Andrews, Staff Attorney
Arkansas Securities Department