

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK VERNON BROWN
(CRD No. 2233771),

Respondent.

Disciplinary Proceeding
No. 2005000931301

DEFAULT DECISION

Hearing Officer – SW

Dated: November 9, 2006

The Hearing Officer imposes a bar on Respondent for engaging in an egregious scheme involving: (i) violations of NASD Conduct Rule 2110 when he forged the signatures of four customers on letters of authorization and forged the signature of one customer on an annuity application; (ii) violations of NASD Conduct Rule 2110 when he effected unauthorized trades in annuities in the accounts of two customers; (iii) violations of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2211, when he made misrepresentations and omissions to implement an annuity switching scheme to defraud his customers; and (iv) violations of NASD Conduct Rules 2310 and 2110 when he recommended unsuitable variable annuity switches to four customers.

The Hearing Officer imposes a second bar on Respondent for violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210 when he failed to appear for an on-the-record interview scheduled by the NASD staff pursuant to Rule 8210.

Appearances

William Brice La Hue, Esq., Regional Counsel, Atlanta, GA, and Rory C. Flynn, Of Counsel, Washington, DC, for the Department of Enforcement.

No appearance for Respondent Mark Vernon Brown.

DECISION

I. Introduction

On May 26, 2006, the NASD Department of Enforcement (“Enforcement”) filed the attached five-count Complaint against Mark Vernon Brown (“Respondent”). The first cause of the Complaint alleges that Respondent forged the signatures of five customers, in violation of NASD Conduct Rule 2110. The second cause of the Complaint alleges that Respondent effected unauthorized trades in the accounts of two customers, in violation of NASD Conduct Rule 2110. The third cause of the Complaint alleges that Respondent made misrepresentations and omissions to implement a switching scheme to defraud customers, in violation of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2211. The fourth cause of the Complaint alleges that Respondent recommended unsuitable variable annuity switches to four customers, in violation of NASD Conduct Rules 2310 and 2110. The fifth cause of the Complaint alleges that Respondent failed to appear at an on-the-record interview scheduled by the NASD staff pursuant to Rule 8210, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

On August 16, 2006, Enforcement filed a Motion for Entry of Default Decision (“Motion”), supported by the Affidavit of William Brice La Hue, Esq., Regional Counsel in NASD’s Atlanta, GA office, and three exhibits.¹ Enforcement supplemented its Motion on

¹ Hereinafter, the statements in the Motion will be designated as “Motion, p.”; the statements in the La Hue Affidavit will be designated as “AFF at ¶”; and Enforcement’s exhibits will be designated as “CX-” with the appropriate exhibit and page number.

August 28, 2006 and August 30, 2006.² For the reasons set forth below, the Hearing Officer grants Enforcement's Motion, as supplemented.

II. Respondent's Default

On May 24, 2006, Enforcement served the Complaint and Notice of Complaint on Respondent, via certified and first-class mail, at his current residential address, as reflected in the Central Registration Depository ("CRD address").³ (CX-2, p. 1; AFF at ¶ 7). NASD received a receipt for the mailing signed by Respondent, indicating that the mailing was delivered. (CX-3; AFF at ¶ 7). Respondent did not file a response to the Complaint. (AFF at ¶ 8).

On June 23, 2006, Enforcement served the Complaint and a Second Notice of Complaint on Respondent, via certified and first-class mail, at his CRD address. (*Id.*). Again, Respondent failed to file an Answer to the Complaint. (AFF at ¶ 10).

Enforcement complied with NASD Procedural Rule 9134(b)(1) by sending the mailings to Respondent's CRD address. Accordingly, the Hearing Officer finds that Respondent received effective constructive notice of this proceeding and defaulted by failing to answer the Complaint.⁴

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent entered the securities industry in April 1992. (CX-2, p. 6; AFF at ¶ 5). Respondent was associated with Raymond James & Associates, Inc. and Wachovia Securities, LLC ("Wachovia"). (CX-2, p. 4). Subsequently, Respondent became associated with Advest,

² The statements in the August 28, 2006 Supplemental Affidavit will be designated as "SUPP AFF at ¶," and the statements in the August 30, 2006 Supplemental Motion will be designated at "SUPP Motion, p."

³ Respondent's CRD address is [REDACTED] (CX-1, p. 1; CX-2, p.1).

⁴ The following Findings of Fact and Conclusions of Law incorporate the allegations in the attached Complaint, pursuant to Rules 9215(f) and 9269 and NASD Notice to Members 99-77.

Inc. ("Advest") as a general securities representative from October 2003, to December 2004. (CX-2, p. 4; AFF at ¶ 5). On December 9, 2004, Advest filed a Form U-5 terminating Respondent's registration for irregularities with his annuity business. (CX-1). Respondent currently is not employed in the securities industry. (CX-2, p. 4).

Nevertheless, Respondent remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws, because (1) the Complaint was filed within two years after his association with Advest was terminated, and (2) the Complaint charges him with misconduct while he was associated with an NASD member, and failures to provide information requested pursuant to Rule 8210 during the period of retained jurisdiction.⁵

B. Respondent Engaged in Various Types of Misconduct

The Complaint alleges that Respondent engaged in a scheme involving numerous switches of predominately elderly customers' investments in variable annuities by causing the partial liquidations of variable annuities in customers' accounts without the customers' knowledge or authorization. (Complaint at ¶ 2). Respondent then used the proceeds of the partial liquidations to add to another existing variable annuity or to purchase a new annuity with a similar name, thereby generating unwarranted commissions. (*Id.*). In implementing his scheme, Respondent forged customers' signatures, executed unauthorized trades in customers' accounts, made misrepresentations to customers regarding the value of their accounts, omitted to tell customers of surrender charges, and made unsuitable recommendations to customers. (Complaint

⁵ Article V, Section 4(a) of the NASD By-Laws also provides that the running of the two year period of retained jurisdiction recommences from the date of the filing of an amended Form U-5, if the amended Form U-5 (i) is filed within two years of the original Form U-5 filing, and (ii) discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation. Wachovia and Advest filed several amendments to Respondent's Form U-5, indicating that Respondent may have engaged in conduct actionable under the NASD Rules. Accordingly, the two year period of retained jurisdiction extended even beyond December 9, 2006. (CX-2, pp. 8-10).

at ¶ 3). The Hearing Officer finds that the first four counts of the Complaint describe the separate components of one scheme by Respondent to defraud his customers.

1. Count One: Respondent Forged Customers' Signatures

Count one of the Complaint alleges that Respondent forged the signatures of four customers on letters of authorization and forged the signature of one customer on an annuity application. (Complaint at ¶¶ 5-12).

Specifically, the Complaint alleges that Respondent forged the signature of customer CP on letters of authorization to authorize several partial liquidations and investments in CP's account between June 2004 and November 2004.⁶ The Complaint also alleges that Respondent forged the signature of customer EW on letters of authorization to authorize several partial liquidations and investments in EW's account in March 2004 and September 2004.⁷

The Complaint alleges that, in July 2004, Respondent forged the signature of customer EM on a letter of authorization to authorize the transfer of \$50,000 from EM's Putnam Allstate Advisor annuity into her pre-existing Nationwide Best of America Choice Venue annuity. (Complaint at ¶ 10; Exhibit A to Complaint, p. 2).

The Complaint alleges that, in August 2004, Respondent forged the signature of customer DD on a letter of authorization to authorize the transfer of \$13,535 from DD's Nationwide

⁶ CP's forged letters of authorization authorized: (i) the transfer in June 2004 of \$90,000 from CP's Nationwide Best of America Choice Venue 2 annuity into her pre-existing ING Golden Select ES II annuity; (ii) the transfer in September 2004 of \$248,000 from CP's ING Golden Select ES II annuity into her pre-existing Nationwide Best of America Choice Venue 2 annuity; and (iii) the transfer in November 2004 of \$236,000 from CP's Nationwide Best of America Choice Venue 2 annuity into her pre-existing ING Golden Select ES II annuity. (Complaint at ¶¶ 5-7; Exhibit A to Complaint, p. 1).

⁷ EW's forged letters of authorization authorized: (i) the transfer in March 2004 of \$148,800 from EW's Nationwide Best of America Choice Venue annuity and her GE Life Choice annuity into her pre-existing Nationwide Best of America Choice Venue 2 annuity; and (ii) the transfer in September 2004 of \$140,000 from EW's Nationwide Best of America Choice Venue 2 annuity into EW's pre-existing Nationwide Best of America Choice Venue annuity. (Complaint at ¶¶ 8-9; Exhibit A to Complaint, p. 1).

Future annuity into her pre-existing Nationwide Best of America Future Venue annuity.

(Complaint at ¶ 11; Exhibit A to Complaint, p. 2).

Finally, the Complaint alleges that, in April 2004, Respondent forged the signature of customer GO on an annuity application to purchase a Nationwide Best of America Future Venue annuity. (Complaint at ¶ 12).

Forgery involves signing another person's name on a document without permission or authority to do so.⁸ Forgery is wholly inconsistent with NASD's requirement that registered individuals maintain high standards of ethical conduct and observe just and equitable principles of fair trade.⁹

The allegations in the first cause of the Complaint and the evidence submitted by Enforcement are sufficient to establish that Respondent forged his customers' signatures on letters of authorization and on an annuity application, in violation of NASD Conduct Rule 2110.

2. Count Two: Respondent Executed Unauthorized Trades in Two Customers' Accounts

Count two of the Complaint alleges that Respondent executed unauthorized transactions in the accounts of customers CP and DD, without their knowledge or consent. (Complaint at ¶¶ 15-16).

Specifically, the Complaint alleges that, from January 2004 to November 2004, without customer CP's knowledge or consent, in four separate transactions, Respondent liquidated \$656,515 in annuities in CP's account, and then, in four separate transactions, Respondent

⁸ Mark F. Mizenko, Exchange Act Rel. No. 52,600 (Oct. 13, 2005).

⁹ Donald M. Bickerstaff, Exchange Act Rel. No. 35,607, 1995 SEC LEXIS 982 (Apr. 17, 1995) (finding that forgery constituted a violation of Article III, Section 1 of NASD's Rules of Fair Practice, the predecessor to NASD Conduct Rule 2110).

reinvested \$639,000 into CP's existing annuities at a cost of \$36,128.22 to CP.¹⁰ (Complaint at ¶ 15; Exhibit A to Complaint, p. 1).

In addition, the Complaint alleges that, between April 2004 and August 2004, without customer DD's knowledge or consent, Respondent liquidated \$14,694.44 of DD's Nationwide Future annuity at a cost of \$1,159.63 and used the proceeds plus \$50,000 in proceeds from a home equity loan to invest a total of \$63,534.81 into a Nationwide Best of America Future Venue annuity. (Complaint at ¶ 16; Complaint at Exhibit A to Complaint, p. 2).

According to IM-2310-2, unauthorized trading is "[c]ausing the execution of transactions which are unauthorized by customers or the sending of confirmations in order to cause customers to accept transactions not actually agreed upon."¹¹ The Securities and Exchange Commission has affirmed that unauthorized trading in a customer's account is a violation of Conduct Rule 2110's requirement to observe just and equitable principles of trade.¹²

The allegations in the second cause of the Complaint and the evidence submitted by Enforcement are sufficient to establish that Respondent executed unauthorized trades in the customer accounts of CP and DD, in violation of NASD Conduct Rule 2110 and IM-2310-2.

3. Count Three: Respondent Implemented a Fraudulent Scheme

In implementing his fraudulent annuity switching scheme, Respondent misrepresented to his employer the source of funds for the additional investments by customers CP, EW, EM, and DD, i.e., Respondent misrepresented that the additional investments were being made with new funds rather than with partial liquidations from pre-existing investments. (Complaint at ¶ 19).

Respondent further misrepresented account values to customers and omitted to disclose to his

¹⁰ The source of the additional \$15,000 in January 2004 over the liquidated amount came from the proceeds of the sale of mutual funds. (Exhibit A to Complaint, p. 1 n.1).

¹¹ IM-2310-2(b)(4)(A)(iii).

¹² Robert Lester Gardner, Exchange Act Rel. No. 35,899, 1995 SEC LEXIS 1532, at *1 n.1 (1995).

customers that their accounts had incurred surrender charges in connection with the liquidations of certain annuities. (Complaint at ¶¶ 20-28).

Count three of the Complaint alleges that, in April 2004, Respondent provided customer EW with a computer printout showing a handwritten value in EW's account of \$321,129.98. (Complaint at ¶ 22; SUPP AFF at ¶ 6). The \$321,129.98 valuation overstated the actual value of EW's account because it included two annuities valued \$126,879.21 that had been liquidated the previous month. (*Id.*).

Next, Respondent wrote on customer EW's June 2004 account statement that the value of her account was \$330,635, when her statement showed an account value of \$193,294.28. (Complaint at ¶ 21). Respondent's misrepresentation disguised the fact that EW had been charged, in the aggregate, over \$12,300 in surrender charges for three prior variable annuity partial liquidations. (SUPP AFF at ¶ 7).

Finally, at an October 2004 meeting with customer EW, Respondent told customer EW that her account was worth in excess of \$300,000. (Complaint at ¶ 20; SUPP AFF at ¶ 8). In fact, as of September 30, 2004, EW's account was worth approximately \$185,000, and by October 31, 2004, the account was still valued at substantially less than \$300,000. (*Id.*).

Respondent also provided customer EM with handwritten notes on his employer's letterhead indicating that EM's trust account was worth \$148,711 as of July 2004. (Complaint at ¶¶ 23-24). However, the value of EM's account as of July 31, 2004 was \$100,172.99, according to her account statements. (Complaint at ¶ 24).

In addition, Respondent failed to disclose to customers CP, EW, and EM that they would be incurring surrender charges in connection with the partial liquidations of the variable annuities in their accounts. (Complaint at ¶ 25).

Section 10(b) of the Exchange Act¹³ and SEC Rule 10b-5 thereunder proscribe fraudulent conduct in connection with the purchase or sale of securities. Conduct Rule 2120, NASD's anti-fraud rule, provides that no member shall effect any transaction in, or induce the purchase or sale of any security, by means of any manipulative, deceptive, or fraudulent device.¹⁴ In order to find a violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, and Rule 2120, there must be a showing that: (1) material misrepresentations and/or omissions were made; (2) the misrepresentations and/or omissions were made with requisite intent, i.e., scienter;¹⁵ and (3) the misrepresentations and/or omissions were made in connection with the purchase or sale of securities.¹⁶

Respondent's misrepresentations regarding the value of his customers' accounts and his omissions concerning the surrender charges that his customers would incur on the distributions from the annuities were material information because the information would have been viewed by a reasonable investor as having significantly altered the total mix of information available.¹⁷ The misrepresentations and omissions were made in connection with the purchase and the sale of securities because, for each switch recommended and executed by Respondent, a variable

¹³ Section 10(b) of the Exchange Act provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors.

¹⁴ Prime Investors, Inc., Exchange Act Rel. No. 38,487, 1997 SEC LEXIS 761, at *24 (Apr. 8, 1997) (making material misstatements of fact in connection with a sale of a security is a violation of Conduct Rule 2120).

¹⁵ See Aaron v. SEC, 446 U.S. 680, 686-87 n.5 (1980); Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

¹⁶ For Section 10(b) of the Exchange Act, and SEC Rule 10b-5 thereunder, the transactions must also involve interstate commerce or the mails, or a national securities exchange. Respondent used a means and instrumentality of interstate commerce when he communicated with the customers via telephone across state lines. See SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992), 1992 U.S. Dist. LEXIS 1322, at **148-149 (1992).

¹⁷ Basic, Inc. v. Levenson, 485 U.S. 224, 231-232, (1988).

annuity was liquidated or partially liquidated and a new variable annuity or an additional position in a pre-existing variable annuity was purchased. (SUPP AFF at ¶ 12).

Scienter is established by a showing that the Respondent acted intentionally or with severe recklessness.¹⁸ Respondent acted with scienter because he intentionally made the misrepresentations and omissions in connection with the switch transactions in an effort to garner additional commissions.

The allegations in the third cause of the Complaint and the evidence submitted by Enforcement are sufficient to establish that Respondent made material misrepresentations and omissions, with the requisite scienter, in connection with the purchase or sale of securities, in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5 thereunder, NASD Conduct Rule 2120,¹⁹ and Conduct Rule 2110.²⁰

In addition, the written notes that Respondent provided to his customers overstating their account values, constituted correspondence as defined in NASD Conduct Rule 2211(a)(1). Because the notes contained false and misleading statements, the notes violated NASD Conduct 2211 as it pertains to correspondence. (SUPP Motion, pp. 1-2).

4. Count Four: Respondent Recommended Unsuitable Switches

Count four of the Complaint alleges that, from January 2004 through November 2004, Respondent recommended that customers CP, EW, EM, and DD liquidate portions of annuities held in their accounts and use the proceeds from those sales to purchase other annuities, as more fully described on Exhibit A to the Complaint. (Complaint at ¶ 31; Exhibit A to Complaint).

¹⁸ Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994), 1994 U.S. App. LEXIS 3326 at **14 (1994).

¹⁹ District Business Conduct Committee for District 9 v. Michael R. Euripides, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45, at *7 (1997).

²⁰ Micah C. Douglas, Exchange Act Rel. No. 37,865, 1996 SEC LEXIS 3008, at *1 n.1 (1996).

The recommendations lacked a reasonable basis because they involved a series of flips, through distributions from the partial liquidations of one variable annuity and the use of the proceeds to purchase another variable annuity, followed by further distributions and investments often into the same annuity from which the initial distribution had been taken.²¹ As a result of the unsuitable variable annuity switches that he executed, Respondent collected unwarranted commissions totaling almost \$50,000 and caused unwarranted expenses for his customers. (Complaint at ¶ 34).

NASD Conduct Rule 2310(a) provides that, in recommending a purchase of a security to a customer, a broker “shall 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.”²² Just as, “switching among certain fund types may be difficult to justify if the financial gain or investment objective to be achieved by the switch is undermined by the transaction fees associated with the switch,”²³ switching among annuities may be difficult to justify.

The allegations in the fourth cause of the Complaint and the evidence submitted by Enforcement are sufficient to establish that Respondent had no reasonable basis upon which to believe that any of the annuity switches that he recommended were suitable for his four customers, in violation of NASD Conduct Rules 2110 and 2310.

²¹ For example, in January 2004, Respondent liquidated an investment in customer CP’s ING Golden Select ES II annuity to invest in Nationwide Best of America Choice Venue 2 annuity, and six months later, Respondent liquidated CP’s investment in the Nationwide Best of America Choice Venue 2 annuity to reinvest in ING Golden Select ES II annuity. (Exhibit A to Complaint, p. 1). Three months later, Respondent liquidated CP’s investment in ING Golden Select ES II annuity to reinvest in Nationwide Best of America Choice Venue 2 annuity. (*Id.*) Two months after that, in November 2004, Respondent again liquidated CP’s investment in Nationwide Best of America Choice Venue 2 annuity to reinvest in ING Golden Select ES II annuity. (Exhibit A to Complaint, p. 1).

²² A violation of Rule 2310 and IM-2310-2 constitutes a violation of Rule 2110 which requires observance of “high standards of commercial honor and just and equitable principles of trade.” See Jack H. Stein, Exchange Act Rel. No. 47,335, 2003 SEC LEXIS 338 (Feb. 10, 2003).

²³ Notice to Members 95-80, 1995 NASD LEXIS 109, at *9.

5. Count Five: Respondent Failed to Appear at an NASD Requested Interview

Count five of the Complaint alleges that Respondent failed to appear for an on-the-record interview scheduled by the NASD staff regarding the allegations of forgery and unauthorized trading contained in a Form U-5, which allegations NASD was investigating. (Complaint at ¶¶ 37-41). Specifically, on September 12, 2005, the NASD staff mailed a notice to Respondent at his CRD address, via certified and first-class mail, requesting that he appear for an on-the-record interview on September 28, 2005. (Complaint at ¶ 38). In a telephone conversation with the NASD staff on September 22, 2005, Respondent confirmed that he had received NASD's request that he appear and testify. (Complaint at ¶ 40). Respondent also indicated that he would not be appearing as requested. (*Id.*). Respondent did not appear on September 28, 2005. (Complaint at ¶ 41).

Procedural Rule 8210(a)(1) provides, in part, that “[f]or the purposes of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or the Rules of [NASD], . . . [NASD] staff shall have the right to: require a member, person associated with a member, or person subject to [NASD]’s jurisdiction to provide information orally, in writing, or electronically . . . and to testify. . . , under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding.” Failure to comply with Rule 8210 is a serious violation because it subverts NASD’s ability to perform its regulatory responsibilities.²⁴

Based on Respondent’s September 22, 2005 conversation with the NASD staff, the Hearing Officer finds that Respondent received actual notice of the September 28, 2005 on-the-

²⁴ See, e.g., *Richard J. Rouse*, Exchange Act Rel. No. 32,685, 1993 SEC LEXIS 1831, at *7 (1993); *Joseph G. Chiulli*, Exchange Act Rel. No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for NASD to conduct its investigations effectively, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

record interview. In any event, Respondent is deemed to have received effective constructive notice of the on-the-record interview because the notice was sent to Respondent's CRD address pursuant to Rule 8210(d).

The allegations in the fifth cause of Complaint, and the evidence submitted by Enforcement, are sufficient to establish that Respondent failed to appear for the on-the-record interview scheduled by the NASD staff, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.²⁵

IV. Sanctions

A. The Hearing Officer Imposes a Single Sanction for Respondent's Implementation of a Fraudulent Scheme Involving Forgery, Unauthorized Trades, Misrepresentations and Omissions, and Unsuitable Recommendations

Because Respondent's forgery, unauthorized trades, misrepresentations and omissions, and unsuitable recommendations were all a part of one fraudulent scheme to obtain unwarranted commissions from his elderly customers, the Hearing Officer finds that a single sanction is appropriate to address the four violations alleged in counts one through four of the Complaint.

The NASD Sanction Guidelines for each of the four violations recommend a bar in an egregious case. Specifically, for forgery, the Sanction Guidelines recommend fines ranging from \$5,000 to \$100,000, and a bar in egregious cases.²⁶ For unauthorized transactions, the Guidelines recommend fines ranging between \$5,000 and \$75,000, and a suspension of 10 business days to one year, in cases involving customer loss, and a longer suspension of up to two years or a bar, in egregious cases.²⁷ For fraud involving intentional or reckless

²⁵ See Dep't of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

²⁶ NASD Sanction Guidelines, p. 39 (2006).

²⁷ Id., p. 103 (2006).

misrepresentations or material omissions of fact, the Guidelines recommend fines ranging from \$10,000 to \$100,000, a suspension of 10 business days to two years, and, in egregious cases, a bar.²⁸ For unsuitable recommendations, the Guidelines recommend fines ranging between \$2,500 and \$75,000, and in egregious cases, a suspension of up to two years or a bar.²⁹

The Hearing Officer finds Respondent's actions were egregious for six reasons. First, Respondent's actions were intentional. Respondent intentionally made misrepresentations and omitted material information when dealing with his customers; he intentionally executed unauthorized trades and forged signatures; and he knowingly made unsuitable recommendations. Second, Respondent attempted to conceal his misconduct and thereby lull his customers into inaction. Third, Respondent engaged in a pattern of misconduct involving up to five different customers. Fourth, Respondent engaged in the misconduct over an extended period of time, approximately nine months. Fifth, Respondent's misconduct resulted in his monetary gain. Sixth, Respondent's conduct caused injury to his elderly customers who suffered significant financial losses.

Accordingly, the Hearing Officer, consistent with the Guidelines, bars Respondent from association with any NASD member in any capacity for his egregious fraudulent scheme, which involved forgery, unauthorized trading, misrepresentations and omissions, and unsuitable recommendations.³⁰

²⁸ Id., p. 93 (2006).

²⁹ Id., p. 99 (2006).

³⁰ The Hearing Officer also finds that each of the four separate components of this egregious scheme, *i.e.*, the forgery, the unauthorized trading, the misrepresentations and omissions, and the unsuitable recommendations, would independently support a bar.

B. Respondent Failed to Appear for an On-the-Record Interview

For failing to appear at a scheduled on-the-record interview pursuant to the NASD staff's Rule 8210 request, Enforcement recommended that Respondent be barred. The NASD Sanction Guidelines provide that a bar should be standard when an individual respondent does not respond in any manner to a request issued pursuant to Rule 8210.³¹ The record does not indicate the existence of any mitigating factors that would warrant a lesser sanction. Accordingly, the Hearing Officer accepts Enforcement's recommendation, and bars Respondent from associating with any member firm in any capacity for failing to respond to the NASD staff's requests issued pursuant to NASD Procedural Rule 8210.

V. Order

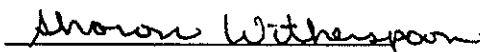
The Hearing Officer imposes a bar on Respondent Mark Vernon Brown from associating with any member firm in any capacity for engaging in an egregious scheme involving:

- (i) forging the signatures of four customers on letters of authorization and forging the signature of one customer on an annuity application, in violation of NASD Conduct Rule 2110;
- (ii) engaging in unauthorized trades in annuities in the accounts of two customers, in violation of NASD Conduct Rule 2110; (iii) defrauding customers, in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and 2211; (iv) making unsuitable variable annuity switch recommendations to four customers, in violation of NASD Conduct Rules 2310 and 2110.

The Hearing Officer imposes a second bar on Respondent for failing to appear for an on-the-record interview scheduled by the NASD staff pursuant to Rule 8210, in violation of NASD

³¹ Sanction Guidelines, at p. 35 (2006).

Conduct Rule 2110 and NASD Procedural Rule 8210. If this Default Decision becomes the final disciplinary action of NASD, the bars shall become effective immediately.


Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 9, 2006

Copies to:
Mark Vernon Brown (via FedEx and first-class mail)
William Brice La Hue, Esq. (via electronic and first-class mail)
Mark P. Dauer, Esq. (via electronic and first-class mail)
Rory C. Flynn, Esq. (via electronic and first-class mail)

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK VERNON BROWN
(CRD No. 2233771)

Respondents.

Disciplinary Proceeding
No. 2005000931301

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant alleges as follows:

RESPONDENT

1. Respondent Mark Vernon Brown ("Brown") was first registered as a general securities representative in November 1987, while associated with an NASD member firm. He was employed by Advest, Inc. ("Advest") until November 2004. Numerous amended Forms U-5 have been filed extending the NASD's jurisdiction over Brown until at least August 2007. Brown is not currently employed by a NASD member; however he remains subject to the jurisdiction of the NASD pursuant to Article V, Section 4 of the NASD Bylaws.

BACKGROUND

2. Respondent Brown engaged in a scheme spanning several years involving numerous switches of predominately elderly customers' investments in variable annuities between different annuities in their accounts. For the most part, Brown commenced the switching in each customer account by taking a partial distribution from an annuity already held in the customer's account directly with the annuity company without the customer's knowledge or authorization. The distribution would then be deposited into the

customer's account so that the total value of the account would not change except for any applicable surrender charge. Thereafter, he used these funds to add to another existing variable annuity or purchase a new annuity with a similar name. He further misrepresented to his employer/member that the purchase was made with new funds, thereby preventing a switch review. Brown was paid commissions on the additional investments in the variable annuities he purchased.

3. In perpetrating this scheme, Brown executed unauthorized transactions, forged customer signatures, misrepresented to customers the value of their accounts, misrepresented the source of funds to his employer/member, omitted to disclose surrender charges, made unsuitable switches in multiple customer accounts and obtained unwarranted commissions.

FOR A FIRST CAUSE OF COMPLAINT

NASD Conduct Rule 2110

(Forgery)

4. The allegations set forth in paragraphs 1 through 3 above, are hereby realleged and incorporated herein by reference.

Customer CP

5. In or about June 2004, Respondent Brown forged the signature of CP on a letter of authorization ("LOA") authorizing the transfer of at least \$90,000 to a pre-existing ING annuity owned by customer CP.
6. In or about September 2004, Respondent Brown forged the signature of CP on a LOA authorizing the transfer of \$248,000 to a pre-existing Nationwide annuity owned by customer CP.

7. In or about November 2004, Respondent Brown forged the signature of CP on a LOA authorizing the transfer of \$236,000 to an ING Golden Select ES II annuity owned by customer CP.

Customer EW

8. In or about March 2004, Respondent Brown forged the signature of EW on a LOA authorizing the transfer of \$148,800 to a pre-existing Nationwide variable annuity owned by EW.
9. In or about September 2004, Respondent Brown forged the signature of EW on a LOA authorizing the transfer of \$140,000 to a pre-existing Nationwide variable annuity owned by EW.

Customer EM

10. In or about July 2004, Respondent Brown forged the signature of EM on a LOA authorizing the transfer of \$50,000 to a pre-existing Nationwide variable annuity owned by EM.

Customer DD

11. In or about August 2004, Respondent Brown forged the signature of DD on a LOA authorizing the transfer of \$13,536 to a pre-existing Nationwide variable annuity owned by DD.

Customer GO

12. In or about April 2004, Customer GO authorized the purchase of a Nationwide Best of America ("BOA") Future Venue Annuity; however, Respondent Brown forged the signature of GO on the application for such annuity.

13. Each such forgery on the LOAs for customers CP, EW, EM and DD and on the annuity application for customer GO constitute separate and distinct violations of NASD Conduct Rule 2110 by Respondent Brown.

FOR A SECOND CAUSE OF COMPLAINT

NASD Conduct Rule 2110

(Unauthorized Transactions)

14. The allegations contained in paragraphs 1 through 13, above, are hereby realleged and incorporated herein by reference.
15. During the period beginning in January and continuing through November 2004, Brown, while employed by Advest, executed a series of transactions as listed on Exhibit A, attached hereto and made a part hereof, in CP's account without her prior knowledge or authorization.
16. During the period beginning in April and continuing through August 2004, Brown, while employed by Advest, executed a series of transactions as listed on Exhibit A, attached hereto and made a part hereof, in DD's account without her prior knowledge or authorization.
17. Each unauthorized transaction effected in the accounts of CP and DD constitute separate and distinct violations of Conduct Rule 2110 by Respondent Brown.

FOR A THIRD CAUSE OF COMPLAINT

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder and NASD

Conduct Rules 2110, 2120 and 2211

(Scheme to Defraud)

18. The allegations contained in paragraphs 1 through 17, above, are hereby realleged and incorporated herein by reference.

Advest

19. Respondent Brown falsely represented to Advest that the source of the funds for the additional investments into the pre-existing variable annuities of Customers CP, EW, EM, and DD was from a money market fund without disclosing that these funds initially came from 1035 exchange distributions from pre-existing annuities.

Customer EW

20. Respondent Brown met with customer EW about once a month. Brown would review her account and discuss its value. During their October 2004 meeting, Brown informed her that her account was worth in excess of \$300,000. In fact, as of September 30 her account was worth approximately \$185,000 and by October 31, 2004 had only a marginal increase and was valued at less than \$186,000.
21. Moreover, Respondent Brown further wrote on EW's account statements indicating that her account had a higher value than what the statements showed. In particular, Brown wrote on EW's June 2004 account statement reflecting a value of \$330,635 when her statement showed a value of \$193,294.28.

22. Respondent Brown also provided EW with a computer printout for her account that he prepared showing a handwritten value of \$321,128.98. This value included an annuity worth \$126,879.21 that had been liquidated the previous month.

Customer EM

23. Customer EM found the Advest account statements confusing so at one point she asked Respondent Brown for information regarding her account. Brown provided EM with handwritten notes written on Advest letterhead for the Advest branch office located in Tampa, Florida, where Brown was employed.
24. The notes indicate that EM's trust account was worth \$148,711 as of July 2004. However, according to EM's account statements, the value of her account was only \$100,172.99 as of July 31, 2004.

Surrender Charges

25. Respondent Brown failed to disclose to customers CP, EW and EM, that they would be incurring surrender charges in connection with the distributions from variable annuities in their accounts, as more fully described on Exhibit A attached hereto and made a part hereof.

Materiality and Scienter

26. The forgeries, unauthorized trades, source of funds, the surrender charges incurred and the valuations of customer accounts were material facts.
27. Brown acted with scienter in connection with the transactions in customers' CP, EW, EM DD and GO accounts in that he knew that he forged their signatures on various documents, that he executed unauthorized trades, that the accounts had lower values than what he was representing, and that the customers were incurring surrender charges in

connection with the distributions from their annuities or, at a minimum, he was recklessly indifferent to whether the customers knew that he was forging their signatures, executing unauthorized trades in their accounts, that he misrepresented the true values of their accounts and that they were incurring charges in connection with the distributions.

Violations

28. Brown, by engaging in the conduct referenced in paragraphs 1 through 27, above, with scienter, directly or indirectly, in connection with the offer or sale of securities, by the use of means or instrumentalities of interstate commerce, or of the mails: 1) employed devices schemes or artifices to defraud; 2) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or 3) engaged in acts, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers in violation of Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder.
29. Such acts, practices and conduct constitute separate and distinct violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Conduct Rules 2110, 2120 and 2211 by Respondent Brown.

FOR A FOURTH CAUSE OF COMPLAINT

NASD Conduct Rule 2110 and 2310

(Unsuitable Switches)

30. The allegations contained in paragraphs 1 through 29, above, are hereby realleged and incorporated herein by reference.

31. At various times during the period from in or about January 2004 through in or about November 2004, Respondent Brown recommended that public customers CP, EW, EM and DD liquidate portions of variable annuities held in their accounts and use the proceeds from those sales to purchase additional shares of other variable annuities as more fully described on Exhibit A attached hereto and made a part hereof.
32. These recommendations lacked a reasonable basis inasmuch as the customers most often incurred surrender charges as a result of the switches.
33. In addition, the recommendations lacked a reasonable basis because they involved a series of flips through distributions from one variable annuity and an additional or new investment in another variable annuity, followed by further distributions and investments often in the very same annuity from which the initial distribution had been taken.
34. As a result of the unsuitable variable annuity switches that Brown effected, he collected unwarranted commissions totaling almost \$50,000 and caused unwarranted expenses for customers.
35. Such acts, practices and conduct constitute separate and distinct violations of Conduct Rules 2110 and 2310 by Respondent Brown.

FOR A FIFTH CAUSE OF COMPLAINT

NASD Conduct Rule 2110 and Procedural Rule 8210

(Failure To Respond to NASD Request for Information)

36. The allegations contained in paragraphs 1 through 35, above, are hereby realleged and incorporated herein by reference.
37. On or about December 9, 2004, the NASD Atlanta District office received a Uniform Notice of Termination for Securities Industry Registration ("Form U-5") filed by Advest

on behalf of Respondent Brown. The Form U-5 alleged, among other things, that Brown forged customer signatures and executed unauthorized trades. The NASD Atlanta District office initiated an investigation into the allegations on the Form U-5.

38. By letter dated September 12, 2005, sent via first class and certified mail to Brown at his CRD address of [REDACTED] Brown was requested, pursuant to Procedural Rule 8210, to appear and give sworn testimony on September 28, 2005 at 10:00 a.m. His testimony was requested regarding the allegations disclosed on his Form U-5, which the NASD was investigating.
39. The September 12, 2005 letter sent by first class mail was not returned but a receipt for the letter sent by certified mail was returned indicating that it had been delivered.
40. On or about September 22, 2005, Brown contacted the NASD staff and confirmed that he had received the NASD's request that he appear and testify. He also indicated that he would not be appearing as requested.
41. On September 28, 2005, Brown failed to appear and testify as requested.
42. Such failure to appear and testify as requested by the September 12, 2005 letter constitutes separate and distinct violations of NASD Procedural Rule 8210 and Conduct Rule 2110 by Respondent Brown.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

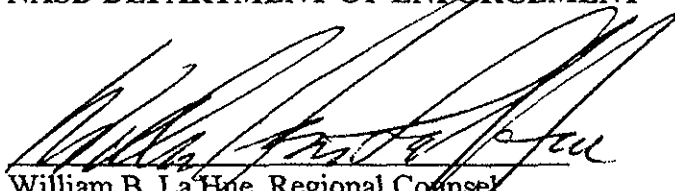
- A. Findings of fact and conclusions of law that Respondent Brown committed the violations charged and alleged herein;

- B. An order imposing sanctions upon Respondent Brown in accordance with NASD Rule 8310;
- C. An order requiring Respondent Brown to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest.
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

Date:

5/24/06


William B. LaHue, Regional Counsel
Andrew A. Favret, Regional Chief Counsel
NASD Department of Enforcement
Atlanta District Office
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
(404) 239-6111; Fax No. (404) 264-1586

NASD District Director

Daniel J. Stefek, Director
NASD, Atlanta District Office
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
(404) 239-6128

Of Counsel

Rory C. Flynn, Of Counsel
NASD Department of Enforcement
1801 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 974-2974; Fax No. (202) 721-8318

Roger D. Hogoboom, Of Counsel
NASD Department of Enforcement
370 17th Street, Suite 2900
Denver, CO 80202
(303) 446-3114; Fax No. (303) 620-9540

Exhibit A

CP'S ADVEST ACCOUNT				
DATE	LIQUIDATED	COST	INVESTED	VARIABLE ANNUITY
January 2004	\$50,000	None	\$65,000 ¹	ING Golden Select ES II Nationwide Best of America ("BOA") Choice Venue 2
June 2004	\$96,000	\$6,000	\$90,000	Nationwide BOA Choice Venue 2 ING Golden Select ES II
September 2004	\$260,515	\$16,628.22	\$248,000	ING Golden Select ES II Nationwide BOA Choice Venue 2
November 2004	\$250,000	\$13,500	\$236,000	Nationwide BOA Choice Venue 2 ING Golden Select ES II
TOTALS	\$656,515	\$36,128.22	\$639,000	

EW'S ADVEST ACCOUNT				
DATE	LIQUIDATED	COST	INVESTED	VARIABLE ANNUITY
January 2004	\$63,696.45	\$3,696.45	\$60,000	Nationwide BOA Choice Venue 2 GE Life Choice VA
March 2004	\$93,629.01 \$63,752.90	\$4,859.48 \$3,752.90	\$148,800	GE Life Choice VA Nationwide BOA Choice Venue Nationwide BOA Choice Venue 2
September 2004	\$149,453.84	\$9,453.84	\$140,000	Nationwide BOA Choice Venue 2 Nationwide BOA Choice Venue
TOTALS	\$236,024.20	\$21,762.67	\$348,800	

¹ The source for the additional \$15,000 over the liquidated amount came from the proceeds of the sale of mutual funds.

EM'S ADVEST ACCOUNT				
DATE	LIQUIDATED	COST	INVESTED	VARIABLE ANNUITY
July 2004	\$52,826	\$2,916	\$50,000	Putnam Allstate Advisor Nationwide BOA Choice Venue
TOTALS	\$52,826	\$2,916	\$50,000	

DD'S ADVEST ACCOUNT				
DATE	LIQUIDATED	COST	INVESTED	VARIABLE ANNUITY
April 2004			\$50,000 ²	Nationwide BOA Future Venue VA
August 2004	\$14,694.44	\$1,159.63	\$13,534.81	Nationwide Future VA Nationwide BOA Future Venue VA
TOTALS	\$14,694.44	\$1,159.63	\$63,534.81	

² This sum represents the proceeds from the home equity loan.