

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2005002269401

RECEIVED
2007 SEP -5 P 12:07
REGISTRATION & DISCLOSURE

TO: Department of Enforcement
NASD

RE: AXA Advisors, LLC, Respondent
Broker-Dealer
(BD No. 6627)

Pursuant to Rule 9216 of NASD Code of Procedure, AXA Advisors, LLC ("AXA") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against Respondent alleging violations based on the same factual findings.

Respondent understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Enforcement and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against Respondent; and
3. If accepted:
 - a. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against Respondent;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about Respondent's disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and
 - d. Respondent may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects Respondent's

000119248 2007

testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

Respondent also understands that its experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

AXA has been a member of NASD since January 23, 1974. The firm conducts a general securities business and is primarily engaged in the distribution of investment company products, such as mutual funds, variable life insurance and variable annuity contracts. The firm has approximately 6,800 registered individuals and 1,700 branch offices. AXA does not have any prior relevant disciplinary history with the Securities and Exchange Commission, any self-regulatory organization, or any state securities regulator.

I.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against it;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

Respondent further specifically and voluntarily waives any right to claim that a person violated the *ex parte* prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

II.

ACCEPTANCE AND CONSENT

- A. Respondent hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by NASD:

Summary

In 2001, AXA offered its customers a fee-based brokerage account called CapAdvantage. Rather than paying a commission on every trade made in the account, customers paid an annual fee based on the total value of assets in the account.

From February 2001 through June 2005 (the "Review Period"), AXA failed to establish and maintain a supervisory system reasonably designed to review and monitor its fee-based brokerage business, in violation of NASD Conduct Rules 3010 and 2110. Neither AXA's practices in supervising accounts, nor its written procedures for CapAdvantage accounts were adequate.

As a result of these deficiencies in AXA's supervisory system and procedures, AXA allowed customers to open and continue in CapAdvantage accounts even if the accounts were inappropriate for the investors in light of the fee-in-lieu of commission structure, the \$1,000 minimum annual fee, or the required \$50,000 minimum in assets. AXA collected CapAdvantage fees from accounts after the accounts went a full year with no transactions, imposed fees even if the account stayed below the minimum asset level for a year, and charged asset-based fees for CapAdvantage accounts before the accounts ever reached the minimum value that was supposed to trigger the asset-based fee.

In addition, during the review period, AXA used written internal and external communications that were misleading, in violation of NASD Conduct Rules 2210, 2211 and 2110.

Background

In 1995, the Securities and Exchange Commission released the Report of the Committee on Compensation Practices, generally referred to as the Tully Report. The Tully Report discussed conflicts in broker compensation and encouraged broker-dealers to structure compensation so that it aligned the customer and broker's interests. Transactional commissions can provide an incentive for an unscrupulous broker to recommend excessive trading in an account to generate more commissions. The Tully Report noted that fee-based accounts are one way to guard against such abuses. Many firms have created such accounts. The concerns addressed by the Tully Committee, namely conflicts between a broker and client created by compensation-structures, do not disappear in fee-based accounts. This case addresses certain conflicts that arose out of one firm's fee-based product.

In November 2003, NASD released Notice to Members 03-68 (NTM 03-68), which *reminded* members that “they must have reasonable grounds for believing that a fee-based program is appropriate for a particular customer, taking into account the services provided, cost, and customer preferences.” As noted in NTM 03-68, “[i]t generally is inconsistent with just and equitable principles of trade—and therefore a violation of Rule 2110—to place a customer in an account with a fee structure that reasonably can be expected to result in a greater cost than an alternative account offered by the member that provides the same services and benefits to the customer.” Accordingly, before opening a fee-based account for a customer, members must have reasonable grounds for believing that such an account is appropriate for that particular customer. NTM 03-68 stated:

[M]embers should make reasonable efforts to obtain information about the customer’s financial status, investment objectives, trading history, size of portfolio, nature of securities held, and account diversification. With that and any other relevant information in hand, members should then consider whether the type of account is appropriate in light of the services provided, the projected cost to the customer, alternative fee structures that are available, and the customer’s fee structure preferences. In addition, members should disclose to the customer all material components of the fee-based program, including the fee schedule, services provided, and the fact that the program may cost more than paying for the services separately.¹

NASD member firms are required to tailor their supervisory procedures to their business. That means that firms that offer fee-based accounts must have supervisory procedures that screen and review fee-based accounts to determine whether that type of account is appropriate for that customer.

CapAdvantage

AXA is a full-service broker-dealer that began offering its clients CapAdvantage, a non-advisory fee-based brokerage account, through a pilot program in February 2001. In May 2001, AXA launched CapAdvantage nationally. CapAdvantage grew from about 1,500 accounts at the end of 2001 to over 10,000 accounts by the middle of 2005. By 2005, a significant portion of AXA’s revenue came from CapAdvantage fees.

In CapAdvantage accounts, the firm charged customers an annual fee based on the total value of Eligible Assets² held in the account. During the Review Period AXA generally charged clients an asset-based fee of between 1.25% and 0.50%, with the rates declining as assets hit higher

¹ NTM 03-68.

² “Eligible Assets” are those assets, defined by AXA in the CapAdvantage Account Agreement and Client Benefits and Service Guide, used to assess the fees in a CapAdvantage account.

levels. Each CapAdvantage account was subject to a minimum annual fee of \$1,000.³ Fees were deducted directly from a client's CapAdvantage account each quarter.

The CapAdvantage asset-based fee was not linked to the number of transactions that occurred in an account. Thus, certain customers gained an economic advantage by having a CapAdvantage account instead of a commission-based AXA account. Even customers that were not heavy traders could obtain economic benefits from CapAdvantage because customers were able to purchase certain mutual funds at NAV in a CapAdvantage account.

However, customers who did little trading, or who had small accounts, were not appropriate for CapAdvantage. According to AXA, customers appropriate for CapAdvantage were "not pure 'buy-and-hold' but . . . are not frequent traders either," and had "a minimum of \$50,000 in Eligible Assets." AXA informed its brokers that it would closely monitor the trading activity in CapAdvantage accounts.

Pursuant to a previously announced change in product platforms, AXA will discontinue its fee-based brokerage programs, including CapAdvantage, during the third quarter of 2007.

***AXA Failed to Establish and Maintain a Supervisory System
Reasonably Designed to Review and Monitor Its Fee-Based Business***

NASD Conduct Rule 3010 requires firms to establish and maintain a supervisory system, including written procedures, reasonably designed to achieve compliance with applicable securities laws and regulations and NASD Rules. AXA violated NASD Conduct Rules 3010 and 2110 by failing to establish and maintain a supervisory system reasonably designed to review and monitor its fee-based brokerage business.

AXA recognized and instructed its brokers that CapAdvantage accounts were not appropriate for certain categories of investors. But the firm's system and procedures were not reasonably designed to determine whether CapAdvantage initially was, or remained, appropriate for customers opening CapAdvantage accounts.

During the development of CapAdvantage the firm acknowledged that fee-based accounts raised new supervisory and compliance issues. AXA recognized that infrequent or excessive traders, low balance accounts, and accounts that held limited assets such as mutual funds or cash only required close monitoring. However, these issues were not resolved prior to the launch of the product, and were not adequately addressed during the Review Period.

***Failure to Adequately Monitor CapAdvantage Account Opening and the Inception of
CapAdvantage Fees***

AXA did not adequately monitor the opening of CapAdvantage accounts during the Review

³ Certain accounts were "householded" and subject to different minimum fee and minimum eligible asset rules. Household accounts were not included in the staff's account-based analysis.

Period. AXA's account opening process relied on the broker to ensure that a client was appropriate for CapAdvantage. The account opening documents were forwarded by the broker to a central operations location where a principal approved the account. However, this review was not meaningful. For example, account opening documents that reflected less than \$50,000 in anticipated funding, or gave no indication of the anticipated value, were routinely opened with no follow-up from operations despite the fact that such accounts did not meet the firm's CapAdvantage requirements.

In March 2004, AXA implemented a requirement that all new CapAdvantage clients complete a supplemental questionnaire concerning, among other things, anticipated trading activity and account holdings. However, the firm did not create a policy or procedure governing evaluation of the information the clients provided. The collection of this information, while a start in the right direction, was not sufficient without guidance or standards for evaluating the responses.

From the beginning, AXA told CapAdvantage clients and brokers that customers would not be charged asset-based fees until the account first reached \$50,000 in Eligible Assets. During the Review Period brokers were instructed that "CapAdvantage clients can execute transactions of Eligible Assets free of commissions and confirmation charges once the account reaches a minimum of \$50,000 in Eligible Assets." Prior to reaching that investment level, clients were to be charged commissions instead of asset-based fees. (The firm's communications on this issue are discussed further below.) Accordingly, the firm created guidance for the firm's operations office in 2001 stating that CapAdvantage accounts should not be coded for billing as asset-based fee accounts prior to reaching \$50,000 in Eligible Assets.

Despite this understanding, in many instances, the firm coded accounts to be billed asset-based fees prior to reaching the \$50,000 level in Eligible Assets. Further, some time in 2002 or 2003 the firm changed its systems to trigger asset-based fees from the time that the CapAdvantage account hit \$1,000 in Eligible Assets, not \$50,000. Neither the sales force nor customers were informed of this change. Thus, many customers with less than \$50,000 in Eligible Assets in their CapAdvantage accounts were charged the minimum \$1,000 annual fee, and not transaction-based commissions.

Failure to Monitor CapAdvantage Accounts on an Ongoing Basis

The firm informed brokers that "clients who do not expect at least a moderate amount of trading activity in the account or who intend to purchase mutual funds and no other investments should not open a CapAdvantage account, and should instead open a traditional brokerage account." However, the firm did not have adequate procedures in place to monitor CapAdvantage accounts for appropriate levels of trading activity.

It was not until January 2004 that the firm first created exception reports specific to CapAdvantage accounts. The exception reports created by AXA covered inactive accounts, accounts with low balances, and accounts that held limited asset classes, money markets and mutual funds.

Even after the creation of these reports, the firm did not have an adequate system or procedures in place regarding how to follow up on the reports. This lack of follow-up was particularly egregious because approximately half of all CapAdvantage accounts appeared on an exception report. Not surprisingly, response rates to the exception reports sent between January 2004 and January 2005 were low. The response rates for the exception reports sent in June 2005 dramatically improved, as AXA made enhancements to supervisory systems following an organizational restructuring and staffing changes.

“Firms should implement supervisory procedures to require a periodic review of fee-based accounts to determine whether they remain appropriate for their respective customers” and such reviews should be conducted at least annually.⁴ As a result of AXA’s inadequate system and procedures for ongoing monitoring of accounts, during the Review Period, AXA allowed its customers to continue in CapAdvantage without reassessing whether the accounts remained appropriate for them. These deficiencies resulted in tangible harm to three groups of CapAdvantage accountholders:

- *CapAdvantage Accounts With No Trading Activity*

AXA’s system and procedures were not reasonably designed to determine whether clients that engaged in no trading remained appropriate for CapAdvantage. During February 2001 and June 2005, approximately 847 CapAdvantage accounts had no trades during two or more consecutive calendar years and were charged \$2.6 million in fees in these years of inactivity. Two hundred and two (202) of those accounts had at least two calendar years during which they had no activity after the calendar year in which the account was opened. During the period of inactivity, these 202 accounts paid more than \$809,297 in fees when in a traditional account these customers would not have incurred any fees. \$440,419 of the \$809,927 was deducted as fees from these accounts for the period following an entire year of inactivity.

- *CapAdvantage Accounts Remaining Below the Eligible Asset Minimum*

AXA’s system and procedures were not reasonably designed to determine whether clients that held low-balance accounts remained appropriate for CapAdvantage. The firm set the minimum size for a CapAdvantage account at \$50,000 in Eligible Assets. However, AXA allowed clients with assets below the required minimum to remain CapAdvantage clients. During the Review Period, 160 accounts remained below the minimum level for four consecutive quarters and were charged fees that exceeded what they would have paid in commissions. Those 160 accounts paid \$138,916 in fees while they were below the minimum asset level.

- *CapAdvantage Accounts Charged Fees Before Reaching Eligible Asset Minimum*

AXA’s system and procedures were not reasonably designed to screen out new accounts that were not appropriate for CapAdvantage. Further, once accounts were opened the firm failed to ensure that fees being charged were consistent with what brokers and customers were told – that

⁴ NTM 03-68

accounts with less than \$50,000 in Eligible Assets would not be charged asset-based fees. A total of 1,544 accounts were opened below the firm's account minimum and charged approximately \$800,000 in fees prior to reaching \$50,000 in eligible assets. Although some of the accounts reached the account minimum shortly after they were opened, approximately 600 had not reached the account minimum eight months after they were opened and charged asset-based fees.

* * *

For example, customers who continued in CapAdvantage during the Review Period without having the firm reassess the appropriateness of their accounts include:

- In August 2001, customer QS opened a CapAdvantage account, which maintained an average account balance greater than \$3.5 million. There were no trades in the account from 2002 through 2004. During that period the firm deducted approximately \$73,000 in asset-based fees, including \$46,000 from 2003 to 2004.
- In December 2002, customers LM and SM opened a CapAdvantage account. On or before December 2003, the account fell below \$50,000 in Eligible Assets and continued below the minimum for four quarters. Between January 2004 and December 2004, the account was charged more than \$1,800 in fees.
- In December 2001, customer TM opened a CapAdvantage account by depositing approximately \$2,000 into the account. AXA assessed CapAdvantage fees, based on the \$1,000 minimum fee; despite the fact the account did not meet the funding requirements for CapAdvantage. No other deposits were made in the account, which was depleted of all funds.

As a result, AXA violated NASD Conduct Rules 3010 and 2110.

AXA Produced and Distributed Sales Literature That Was Misleading

During the Review Period, AXA distributed inaccurate and misleading sales literature, public communications, institutional sales material, and internal communications. These materials were subject to the content standards set forth in NASD Conduct Rule 2210(d) or 2211(d) and contained two violations of those standards.

First, the firm instructed its brokers and clients that CapAdvantage accounts would not be charged asset-based fees until the account reached \$50,000 in Eligible Assets. This did not reflect how fees were actually imposed. Second, the firm asserted that a benefit of CapAdvantage accounts was that the interests of the client and the broker were aligned. The firm stated that this alignment occurred because the broker's compensation was not linked to the number of transactions in the account. However, because the firm required brokers to partially absorb ticket charges for transactions, brokers made less money with each transaction conducted by a client, creating a potential conflict of interest between the broker and the client.

The Firm Inaccurately Stated That CapAdvantage Clients Would Not Be Charged Asset-Based Fees Before Reaching \$50,000 in Eligible Assets

Since the inception of CapAdvantage, AXA trained its sales force and educated clients that prior to reaching the \$50,000 threshold in a CapAdvantage account, clients would not be charged asset-based fees. The firm produced internal communications, including its training and reference guides, that incorrectly advised the sales force that before an account reached \$50,000 in Eligible Assets the account would not be assessed an asset-based fee. Apparently, this accurately reflected the firm's initial intention. It did not, however, reflect how fees were actually charged.

Other communications contained similar language. One presentation stated "transactions executed by the client prior to the account reaching the \$50,000 minimum billable amount will be charged commissions and any other trade related fees." Internal training and reference material consistently stated that fees would not be assessed until the account held \$50,000 in Eligible Assets. The same inaccurate information was conveyed to clients in the initial Client Benefits and Services Guides.

Although the firm represented that CapAdvantage accounts would be assessed the initial quarterly fee when properly funded with the minimum account size, the firm in fact charged numerous clients with asset-based fees before the account reached the threshold. As stated above, approximately 1,500 CapAdvantage accounts were charged asset-based fees before the accounts reached \$50,000 in Eligible Assets. Therefore, internal and public communications that stated that a \$50,000 threshold was required before asset-based fees would be assessed were inaccurate in violation of NASD Conduct Rules 2210(d) and 2211(d).

The Firm Inaccurately Informed Clients and Employees That CapAdvantage Aligned the Interests of the Broker and Client

AXA also created and distributed sales literature that asserted that the CapAdvantage account aligned the interests of the broker and the client. For example, AXA advised clients that "your Financial Professional's compensation is not tied to the number or size of transactions that you make, but rather to the value of your account. This way, you can concentrate together on what really matters – the best strategy to help grow assets and help achieve your financial goals." In internal documents the firm similarly advised the sales force that CapAdvantage accounts aligned the interests of the broker and the client because broker compensation was not linked to transactions.

However, it was the firm's practice to charge brokers a portion of the ticket charges for each transaction effected in a CapAdvantage account, up to \$8 for each transaction. Thus, a broker's compensation declined when a CapAdvantage client engaged in transactions. While the impact on broker compensation for large accounts was proportionally small, for accounts with fewer assets, the impact that charge-backs had on broker compensation could have been more significant.

Thus, by creating a financial disincentive to brokers for transactions and stating that the asset-based fee aligned interests, the firm misled customers in violations of NASD Conduct Rule 2210(d).

Based on the use of these materials, AXA violated NASD Conduct Rules 2210, 2211 and 2110.

* * *

The sanctions set forth below take into account AXA's demonstrable steps to enhance its system and procedures and close accounts that were not appropriate for CapAdvantage. In addition, the firm has undertaken voluntary remediation efforts that go beyond the remediation required in this AWC.

- B. Respondent also consents to the imposition, at a maximum, of the following sanctions:
1. A censure;
 2. A fine in the amount of \$1.2 million; and
 3. The payment of restitution in the 1,906 instances listed on Attachment A, B and C in the total amount of \$1,391,427 plus interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code (26 U.S.C. § 6621), from June 30, 2005, until the date this AWC is accepted by the NAC. The underlying restitution amounts:
 - a. \$440,419, the CapAdvantage fees paid by the 202 accounts that opened in one calendar year and had no trading in two subsequent calendar years, for the period after a full calendar year of no trading activity (Attachment A);
 - b. \$138,916, the fees charged to the 160 accounts that remained below the minimum level for four consecutive quarters and were charged fees that exceeded what they would have paid in commissions (Attachment B);
 - c. \$812,092, the fees charged to the 1,544 accounts opened below the firm's account minimum and charged in fees prior to reaching \$50,000 (Attachment C).

Satisfactory proof of payment of the restitution or of reasonable and documented efforts undertaken to effect restitution shall be provided to NASD staff no later than 120 days after acceptance of this AWC. If for any reason AXA cannot locate any customer identified in Attachments A, B and C after reasonable and documented efforts within such period, or such additional period agreed to by the staff, AXA shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property, or abandoned property fund for the state

in which the customer is last known to have resided.

4. AXA shall:
 - a. Within 90 days from the Notice of Acceptance of this AWC, AXA shall complete the remediation process to customers requiring refunds.
 - b. Within 120 days following the Notice of Acceptance of this AWC, AXA shall file a report with NASD, certified and signed by, an officer of AXA who is registered with NASD at the time of the certification providing a detailed listing of all qualifying CapAdvantage customers in the format of Microsoft Excel, including each customer's name, account number and the total dollar amount of restitution provided to each customer.
 - c. For good cause shown, and upon receipt of a timely written request from AXA, NASD staff may extend any of the dates set forth above.
5. At the time of offering this AWC, AXA has stated that it will discontinue all of its fee-based brokerage business by September 30, 2007. AXA will provide written notice of whether it has ceased its fee-based brokerage business to NASD by October 30, 2007.

The sanctions imposed herein shall be effective on a date set by NASD staff.

III.

OTHER MATTERS

- A. Respondent understand that it may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by NASD, nor does it reflect the views of NASD or its staff.
- B. Respondent agrees to pay any monetary sanctions imposed upon notice that this AWC has been accepted and that such payments are due and payable and have attached an Election of Payment form showing the method by which Respondent proposes to pay any fine imposed. Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

Respondent certifies that it has read and understood all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce Respondent

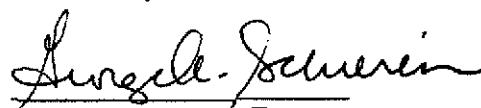
to submit it.

July 20, 2007
Date

AXA Advisors, LLC

By: 
Edward H. Dane
President, AXA Advisors, LLC

Reviewed by:


George A. Schieren, Esq.
Counsel for Respondent
Clifford Chance
31 West 52nd Street
New York, NY 10019
212 878-3283

Accepted by NASD:

September 5, 2007
Date

Signed on behalf of the
Director of ODA, by delegated authority


Julie K. Glynn
Regional Counsel
NASD Department of Enforcement
One Liberty Plaza
New York, New York 10006
212 858-4776; 212 858-4770

NASD Regional Director
Hans Reich
Senior Vice President
NASD, District 10
One Liberty Plaza
New York, New York 10006