

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DEREK M. WHITLEY
(CRD No. 4854389),

Respondent.

Disciplinary Proceeding
No. 2007009347101

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

October 14, 2008

Respondent is barred for misuse of customer funds, in violation of Conduct Rule 2110; and for failure to respond to requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Appearances

Helen G. Barnhill, Senior Regional Counsel, Denver, CO (Mark P. Dauer, New Orleans, LA, Of Counsel) for the Department of Enforcement.

No appearance by or for Derek M. Whitley.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”) charged Derek M. Whitley (“Whitley” or the “Respondent”) with misusing customer funds, in violation of NASD Conduct Rule 2110, and with failing to respond to requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110.¹

¹ The FINRA Rules, which include NASD Procedural and Conduct Rules, are at www.finra.org/Rules.

Enforcement filed the Complaint with the Office of Hearing Officers on June 25, 2008. Whitley did not answer or otherwise respond to the Complaint. Consequently, on September 11, 2008, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of Helen G. Barnhill ("Barnhill Decl.") and six exhibits. Whitley did not reply to the motion.

II. Findings of Fact and Conclusions of Law

A. Respondent's Default

The Hearing Officer finds that Enforcement properly served the Respondent with the Complaint by mailing the Complaint and the First and Second Notices of Complaint to his most current residential address shown in the Central Registration Depository (the "CRD Address"). Enforcement mailed the First Notice of Complaint by first-class certified mail on June 20, 2008. On June 30, 2008, Enforcement received the certified mailing receipt signed by "Derek Whitley."² Nonetheless, Whitley did not answer the Complaint.

Enforcement served the Second Notice of Complaint on Whitley by first-class certified mail on July 21, 2008. To date, Whitley has not filed an Answer with the Office of Hearing Officers.³

Whitley defaulted by failing to answer the Complaint.⁴ Accordingly, pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer deems the allegations in the attached Complaint admitted and grants Enforcement's motion for entry of a default decision.

² Barnhill Decl. ¶ 11.

³ Barnhill Decl. ¶ 12.

⁴ *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (NASD Procedural Rule 9134(b)(1) allows for constructive notice by mailing a complaint to the respondent's most recent CRD address) (quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998)).

B. Jurisdiction

Whitley entered the securities industry in September 2004 and became registered as an Investment Company and Variable Contracts Products Representative with American Family Securities, Inc. ("AFS"), a FINRA member firm, on November 1, 2004. On June 21, 2007, AFS filed a Uniform Termination Notice for Securities Industry Registration (Form U5) on Whitley's behalf.⁵

Whitley's registration with FINRA terminated effective June 21, 2007, and he has not been registered or associated with a FINRA member firm since that date.⁶ Nonetheless, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's Bylaws, because (1) the Complaint was filed within two years following the termination of his registration with FINRA and (2) the Complaint charges him with misconduct committed while he was associated with a FINRA member firm and with failing to respond to FINRA's requests for information made during the two-year period following his registration termination.⁷

C. Misuse of Funds

The First Cause of Action alleges that Whitley misused \$5,254.12 in insurance premiums that he received from nine customers between March 31, 2006, and June 21, 2007. Whitley failed to forward the funds to American Family Life Insurance Company⁸ or return the funds to the customers.

The Hearing Officer finds that the allegations in the Complaint and the other evidence submitted by Enforcement show that Whitley violated Conduct Rule 2110 by misusing customers' insurance premiums.

⁵ Ex. 1.

⁶ *Id.*

⁷ See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/Rules (then follow "NASD Manual" hyperlink to "Corporate Organization: Bylaws").

⁸ American Family Life Insurance Company is affiliated with AFS.

D. Failure to Respond to Requests for Information

The Second Cause of the Complaint alleges that Whitley failed to respond to two requests for information FINRA staff sent in connection with the investigation of his misuse of funds while at AFS. The staff properly served Whitley with each request pursuant to Procedural Rule 8210.

The staff sent the first request on October 24, 2007, to Whitley at his CRD Address by certified and first-class mail. He did not respond to the request.

On November 9, 2007, the staff sent Whitley a second request for the same information regarding his misuse of funds. The staff sent the second request to his CRD Address by certified and first-class mail. On November 16, 2007, FINRA received the certified mailing receipt signed by "Derek Whitley." Nonetheless, he did not respond in any manner to this request.

The Hearing Officer finds that Whitley violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond in any manner to FINRA's requests for information concerning its investigation into his misuse of customer funds.

III. Sanctions

A. Failure to Respond to Requests for Information

The FINRA Sanction Guidelines ("Sanction Guidelines") recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.⁹ Where mitigation exists, the Sanction Guidelines recommend consideration of a suspension in all capacities of up to two years.

The Hearing Officer finds that a bar is the appropriate sanction under the facts and circumstances of this case. The record reflects that Whitley failed to respond in any manner, and there are no mitigating factors that would justify imposition of a lesser sanction.

⁹ FINRA Sanction Guidelines 35 (2007), available at <http://www.finra.org/RegulatoryEnforcement/index.htm> (then follow "FINRA Sanction Guidelines" hyperlink).

Accordingly, the Hearing Officer will bar Whitley from associating with any FINRA member in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

B. Improper Use of Customer Funds

The Sanction Guidelines for improper use of customer funds recommend a fine of \$2,500 to \$50,000 and a bar.¹⁰ Where the improper use resulted from the respondent's misunderstanding of his customer's intended use of the funds or other mitigating factors exist, the Sanction Guidelines recommend consideration of a suspension of six months to two years. Here, there is no evidence of any mitigating factors. Whitley did not forward the funds to the insurance company, and he has not repaid the customers. Accordingly, the Hearing Officer finds that a bar is the appropriate sanction for this violation.¹¹

IV. Order

Derek M. Whitley is barred from association with any member firm in any capacity for: (1) failure to respond in any manner to FINRA's requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110; and (2) misuse of customers' funds, in violation of NASD Conduct Rule 2110.¹² The bars will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.



Andrew H. Perkins
Hearing Officer

¹⁰ Sanction Guidelines 38.

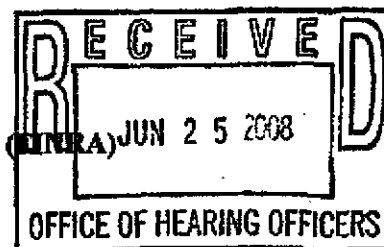
¹¹ Cf., e.g., *Bernard D. Gorniak*, Exchange Act Release No. 35,996, 1995 SEC LEXIS 1820, at *6-7 (July 20, 1995) (holding that a bar is appropriate where the respondent held, for a substantial period, customer funds that were intended for the purchase of mutual funds).

¹² The Hearing Officer did not order restitution because the record reflects that American Family Life Insurance Company credited the customers' accounts with the amount of the premium payments they sent the Respondent.

Copies to:

Derek M. Whitley (by FedEx, next-day delivery, and first-class mail)
Helen G. Barnhill, Esq. (by e-mail and first-class mail)
Mark P. Dauer, Esq. (by e-mail)
David R. Sonnenberg, Esq. (by e-mail)

**FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)
OFFICE OF HEARING OFFICERS**



Department of Enforcement,

Complainant,

v.

Derek M. Whitley,
CRD No. 4854389,

Respondent.

Disciplinary Proceeding
No. 2007009347101

Hearing Officer:

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent Derek M. Whitley misused insurance customer funds by collecting insurance premiums from nine customers but not applying the funds to the customers' insurance policies. This conduct violated NASD Conduct Rule 2110. In addition, Whitley failed to respond to NASD Procedural Rule 8210 requests for information and documents, in violation of Procedural Rule 8210 and Conduct Rule 2110.

RESPONDENT

2. Respondent Whitley became associated with and registered through American Family Securities, LLC ("AFS"), a member of FINRA, on November 1, 2004, as an Investment Company & Variable Contracts Products Representative. AFS submitted a Uniform Termination Notice for Securities Industry Registration on or about June 21, 2007 reflecting that Whitley's association with AFS terminated on May 23, 2007. Whitley is not currently registered through or associated with any member firm. However, pursuant

to Article V, Section 4 of the FINRA By-Laws, FINRA retains jurisdiction over him for purposes of this Complaint.

CAUSE ONE OF COMPLAINT

NASD Conduct Rule 2110, Misuse of Insurance Customer Funds, by Respondent Whitley

3. Paragraph number 1 and 2 above, are realleged and incorporated herein by reference.
4. Between approximately March 31, 2006 and June 21, 2007, Respondent Whitley received cash and checks totaling approximately \$5,254.12 from nine customers of American Family Life Insurance Company, an insurance affiliate of his employer-member. The customers intended that the funds be applied towards the payment of insurance premiums. Schedule A, attached hereto and incorporated herein, sets forth the amounts received by Whitley from each customer. Whitley neither transmitted these funds to American Family Life Insurance Company, as was required by the company's procedures, nor returned the funds to the customers.
5. By virtue of such conduct, Whitley violated NASD Conduct Rule 2110.

CAUSE TWO OF COMPLAINT

NASD Procedural Rule 8210 and NASD Conduct Rule 2110, Failure to Provide Information and Documents, by Respondent Whitley

6. The allegations of paragraphs 1, 2, 4 and 5 above, are realleged and incorporated herein by reference.
7. On October 24, 2007, FINRA staff sent to Whitley, by first class and certified mail, a written request for information and documents pursuant to NASD Procedural Rule 8210. The request pertained to the allegations of misuse the subject of Cause One of this

Complaint. The request was sent to Whitley's most current residential address according to Central Registration Depository ("CRD") records, which was [REDACTED] (the "CRD address"). The requested information and documents were to be provided on or before November 7, 2007. The certified mailing was returned to the staff marked "unclaimed" and the first-class mailing was not returned. Staff did not receive any response to the October 24, 2007 request.

8. On November 9, 2007, FINRA staff sent Whitley a second letter by first class and certified mail, seeking information pursuant to NASD Procedural Rule 8210. The letter requested the same information contained in the first 8210 request letter dated October 24, 2007. The request was sent to Whitley's CRD address. The requested information was to be provided on or before November 23, 2007. The Domestic Return Receipt, which was signed by "Derek Whitley", was returned to the staff on November 16, 2007. The first-class mailing was not returned. Staff did not receive any response to the November 9, 2007 request.
9. By virtue of the foregoing, Whitley violated Procedural Rule 8210 and Conduct Rule 2110.

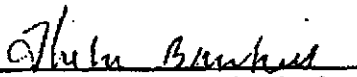
PRAYER

WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under NASD Rule 8310(a), including monetary sanctions, be imposed.
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: June 20, 2008


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Helen.barnhill@finra.org

Department of Enforcement v. Derek Whitley

Disciplinary Proceeding No. 2007009347101

Schedule A – Summary of Insurance Premium Payments to Whitley

DATE OF PAYMENT	CHECK AMOUNT	CASH AMOUNT	CUSTOMER INITIALS
3/31/06	\$1,882.25		GAEHA
7/17/06	\$964		AG
8/18/06 through approximately 4/16/07		\$1,161.73	SS
3/14/2007	\$597		CR
3/21/07		\$75.60	JH
4/16/07		\$148.80	CF
4/27/07	\$50		MB
5/22/07	\$185.74		RBW
6/21/07		\$189	DS and MS
TOTALS	\$3,678.99	\$1,575.13	

Grand Total \$5,254.12