

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

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

HUGH EARL CATING
(CRD No. 2240164),

Respondent.

Disciplinary Proceeding
No. 2008013438301

Hearing Officer – MC

DEFAULT DECISION

October 14, 2009

For violations of Conduct Rule 2110 and Procedural Rule 8210, Respondent is barred from associating with any FINRA member firm in any capacity for failing to respond to requests for information and failing to provide testimony as requested by FINRA staff. In light of the imposition of the bar, no separate sanction is imposed for Respondent's violation of Conduct Rule 2110 for failing to follow a customer's instructions.

Appearances

Michael A. Gross, Principal Regional Counsel, Boca Raton, FL, for the
Department of Enforcement.

No appearance by or for Respondent Hugh Earl Cating.

DECISION

I. Introduction

On June 5, 2009, the Department of Enforcement ("Enforcement") for the Financial Industry Regulatory Authority ("FINRA") filed the attached Complaint and Notice of Complaint in this disciplinary proceeding. The Complaint contains two Causes of Action. The First Cause of Action alleges that Hugh Earl Cating ("Cating") violated

Conduct Rule 2110¹ by failing to cancel a customer's variable annuity policy as instructed by the customer within ten days of receiving the policy, as the customer was permitted to do under the terms of the policy. The Second Cause of Action alleges that Cating failed to provide documents and failed to appear to provide testimony pursuant to requests issued by FINRA staff under the authority of Procedural Rule 8210, in violation of Rules 2110 and 8210.²

Enforcement served Cating with the Complaint and Notice of Complaint by certified and first-class mail at his residential address as it appears in the Central Registration Depository ("CRD address"). Cating did not file an Answer to the Complaint. Consequently, Enforcement served Cating with the Complaint and Second Notice of Complaint by certified and first-class mail, also at his CRD address. Again, Cating failed to file an Answer or otherwise respond to the Complaint.

As a result, on August 21, 2009, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions ("Default Motion") supported by the Declaration of Michael A. Gross, and three exhibits.³ Subsequently, on October 5, 2009, Enforcement filed a Supplement to the Default Motion at the request of the Hearing Officer, consisting of three additional exhibits, including the Declaration of Kevin G. Moore, Associate

¹ On December 15, 2008, the first phase of the new consolidated FINRA Rules, resulting from the consolidation of NASD with the member regulation and enforcement functions of NYSE Regulation, went into effect. *See* Regulatory Notice 08-57 (Oct. 2008).

² Cating's failure to appear and provide testimony as requested by Enforcement on February 27, 2009, was a violation of FINRA Rule 2010. For the sake of convenience, however, and because there is no substantive difference between NASD Rule 2110 and FINRA Rule 2010, this Decision cites only to Rule 2110. Otherwise, this Default Decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. The applicable rules are available at www.finra.org/rules.

³ Enforcement's exhibits will be referred to as "C-_" with the appropriate exhibit and page numbers. References in this Decision to the Declaration of Michael A. Gross will be referred to as "Gross Decl." with citation to specific paragraphs.

Principal Examiner in FINRA's Atlanta District Office.⁴ Cating has not responded to the Default Motion.

For the reasons set forth below, the Default Motion is granted.⁵

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Cating first became associated with a FINRA member in April 1992.⁶ Cating's first registration with FINRA was in June 1992, as a General Securities Representative.⁷ Between June 1992 and May 2008, Cating was registered with several FINRA member firms.⁸ During February 2008, the period relevant to this disciplinary proceeding, Cating was registered with FINRA member firm SunTrust Investment Services, Inc. (the "Firm").⁹ The Firm terminated Cating's employment on May 2, 2008.¹⁰

Cating's misconduct alleged in the First Cause of Action occurred while he was associated with the Firm. The misconduct alleged in the Second Cause of Action occurred within two years of the termination of his association with the Firm. Consequently, and because the Complaint was filed within two years of Cating's last

⁴ This Declaration will be referred to as "Moore Decl." with citation to specific paragraphs. The other supplemental exhibits will be referred to as "SC-_" with the appropriate exhibit and page numbers.

⁵ The factual determinations in this Default Decision are based on the allegations of the attached Complaint, which are deemed admitted, as well as the Gross Declaration, and the exhibits filed by Enforcement.

⁶ Gross Decl., ¶ 5; C-1, p. 7.

⁷ C-1, p. 7.

⁸ Gross Decl., ¶ 5; C-1, p. 3.

⁹ Gross Decl., ¶¶ 7-8; C-1, p. 4.

¹⁰ Gross Decl., ¶ 8; C-1, p. 3.

registration with a member firm, FINRA retains jurisdiction over him for the purposes of this disciplinary proceeding.¹¹

B. Cating's Default

Enforcement served Cating with the Complaint and Notice of Complaint by certified and first-class mail at his CRD address on June 5, 2009.¹² Neither the first-class mailing nor the receipt for the certified mailing was returned to Enforcement.¹³ Cating failed to respond to the Complaint.¹⁴

On July 7, 2009, Enforcement served the Complaint and Second Notice of Complaint on Cating, again by first-class and certified mail at his CRD address.¹⁵ Once again, neither the first-class nor the certified mailing was returned to Enforcement,¹⁶ and Cating failed to file an answer or otherwise respond to the Complaint.¹⁷

Enforcement complied with the requirements of Procedural Rule 9134 by mailing the Complaint and Notices of Complaint to Cating's CRD address as described above. Cating defaulted by failing to file an Answer to the Complaint.¹⁸ Accordingly, the

¹¹ Article V, Section 4, FINRA By-Laws.

¹² Gross Decl., ¶ 15.

¹³ Gross Decl., ¶¶ 16-17.

¹⁴ *Id.*, ¶ 18.

¹⁵ *Id.*, ¶ 19.

¹⁶ *Id.*, ¶¶ 20-21.

¹⁷ *Id.*, ¶ 22.

¹⁸ *Dep't of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (NAC 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)).

allegations in the Complaint are deemed admitted, pursuant to Procedural Rules 9215(f) and 9269(a)(2).

C. Violations

1 Cating Failed to Execute a Customer's Order

The First Cause of Action of the Complaint alleges that in January 2008, customer FT signed an application and other documents related to the purchase of a variable annuity policy through Cating.¹⁹ The policy, which was issued to FT on February 4, 2008, allowed FT to cancel the policy and obtain a refund within ten days of receiving the policy.²⁰ Within that period, and after meeting with Cating and two accountants, FT instructed Cating to cancel the policy and provide a refund.²¹ Despite stating that he would do so, Cating failed to cancel the policy within the prescribed period, causing FT to incur surrender fees of approximately \$37,172.²²

The obligation of a registered representative to follow a customer's instructions "serves as an essential foundation for the customer/registered representative relationship."²³ By failing timely to cancel FT's policy as instructed, Cating violated Conduct Rule 2110.

¹⁹ Complaint, ¶ 9.

²⁰ Complaint, ¶ 10.

²¹ *Id.*, ¶ 11.

²² *Id.*, ¶¶ 11-13.

²³ *District Bus. Conduct Comm. v. Wells*, No. CO790045, 1998 NASD Discip. LEXIS 32 (NAC July 24, 1998), quoted in *Dep't of Enforcement v. Bond*, No. C10000210, 2002 NASD Discip. LEXIS 6, at *12 (Apr. 4, 2002).

2 Cating Failed to Produce Information and Testimony

The Second Cause of Action of the Complaint alleges that Cating failed to provide documents and information relating to the investigation of other customer complaints against Cating, as requested by FINRA staff pursuant to Procedural Rule 8210. FINRA staff sent a letter by first-class mail to Cating at his CRD address on October 30, 2008, requesting documents and information pursuant to Procedural Rule 8210.²⁴ The letter was not returned,²⁵ and Cating did not respond.²⁶ On November 17, 2008, FINRA staff sent a second letter to Cating at his CRD address requesting production of the same documents and information, again pursuant to Procedural Rule 8210, this time by first-class and certified mail.²⁷ The first-class letter was not returned, the certified mail receipt was returned marked “Unclaimed,” and Cating did not respond to the request.²⁸

Subsequently, on February 27, 2009, FINRA staff sent a letter to Cating at his CRD address by first-class and certified mail requesting him to appear to provide testimony on March 13, 2009, pursuant to Procedural Rule 8210.²⁹ The first-class letter was not returned to FINRA, but the return receipt for the certified mailing was returned bearing what appears to be the signature of “Hugh Cating,” indicating delivery of the

²⁴ Complaint, ¶¶ 16-17; Moore Decl., ¶ 4.

²⁵ *Id.*, ¶ 18; Moore Decl., ¶ 4.

²⁶ *Id.*, ¶ 19; Moore Decl., ¶ 4.

²⁷ Complaint, ¶¶ 20-21; Moore Decl., ¶ 5.

²⁸ *Id.*, ¶¶ 22-23; Moore Decl., ¶ 5.

²⁹ *Id.*, ¶¶ 24-25; Moore Decl., ¶ 6.

letter to Cating at his CRD address on March 10, 2009.³⁰ Cating failed to appear to provide testimony on the scheduled date.³¹ By failing to provide the information requested, and by failing to appear to testify, Cating violated Conduct Rule 2110 and Procedural Rule 8210.

III. Sanctions

A. Failure to Execute Customer Order

FINRA's Sanction Guidelines recommend a fine in the range of \$5,000 to \$75,000, consideration of suspension in all capacities for ten business days to one year, and consideration of a longer suspension or a bar in egregious cases of failure to execute customer orders.³² The Sanction Guidelines suggest that adjudicators, when assessing a violation of this nature, consider whether the violation resulted from a misunderstanding by the respondent. In this instance, Enforcement represents that the violation is not egregious but, based on its investigation, likely resulted from a misunderstanding on Cating's part.³³ Consequently, Enforcement recommends a suspension in all capacities for ten business days and a fine of \$10,312.50, of which \$7,500 would be a fine and \$2,812.50 would be disgorgement of his commission on the transaction at issue.³⁴

Under the circumstances of this case, Enforcement's recommendations are reasonable and appropriate, and would be adopted, if a sanction were to be imposed upon

³⁰ *Id.*, ¶ 26; SC-2, p. 4; Moore Decl., ¶ 6.

³¹ *Id.*, ¶ 27; Moore Decl., ¶ 6.

³² *FINRA Sanction Guidelines*, p. 103 (2007).

³³ Default Motion, p. 4.

³⁴ Enforcement represents that FT was made whole as a result of a settlement with the Firm, rendering an order for restitution unnecessary. Default Motion, p. 4.

Cating for this violation. In light of the bar imposed below, however, for Cating's violations of Procedural Rule 8210, it is unnecessary in this case to levy any additional sanctions for his failure to execute customer FT's order.

B. Failure to Produce Information and Testify

The Guidelines recommend a bar when a respondent fails to respond in any fashion to a request for information issued pursuant to Procedural Rule 8210.³⁵ If mitigating factors are present, the Sanction Guidelines recommend consideration of a suspension in any or all capacities for up to two years, and a fine of \$25,000 to \$50,000.

As has often been observed, "Conduct Rule 2110 and Procedural Rule 8210 are crucial components of [FINRA's] examinations and investigations ... Procedural Rule 8210 gives [FINRA] the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation. The Rule further states that no member or person shall fail to provide such information."³⁶ Concerning sanctions for violating Rule 8210, "[t]he Guidelines treat a failure to respond ... as egregious."³⁷

In this case, Cating failed to respond to FINRA staff requests for documents and information, and failed to appear to provide testimony, after having been properly served with written requests issued under the authority of Procedural Rule 8210. With regard to the request for testimony, the receipt for the certified mailing served on Cating on February 27, 2009, appears to have been signed by him on March 10, 2009, indicating

³⁵ *Guidelines, supra* at 35.

³⁶ *Dep't of Enforcement v. Gregory R. Masceri*, No. C8A040079, 2006 NASD Discip. LEXIS 29, at *35 - *36 (NAC Dec. 18, 2006).

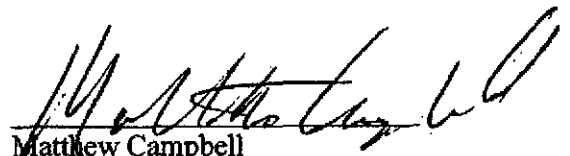
³⁷ *Id.* at *41.

that Cating had actual notice of his scheduled testimony.³⁸ Nonetheless, Cating neither appeared nor responded in any way to the two previously served requests for information issued by FINRA staff. In the absence of any mitigating circumstances, a bar is the appropriate sanction for Cating's violations of Conduct Rule 2110 and Procedural Rule 8210, for failing to respond in any manner to multiple requests for information issued to him by FINRA staff, and for failing to appear and testify, as alleged in the Second Cause of the Complaint.

IV. Order

Respondent Hugh Earl Cating is barred from associating in any capacity with any FINRA member firm for violating Conduct Rule 2110 and Procedural Rule 8210 by failing to provide information in response to two requests issued by FINRA staff pursuant to Procedural Rule 8210, and failing to appear to provide testimony as requested by FINRA staff pursuant to Procedural Rule 8210.

The bar will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.


Matthew Campbell
Hearing Officer

Copies to:

Hugh E. Cating (*via FedEx and first-class mail*)
Michael A. Gross, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

³⁸ SC-2, p. 4.

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

vs.

HUGH EARL CATING
(CRD No. 2240164),

Respondent.

DISCIPLINARY PROCEEDING
No. 2008013438301

HEARING OFFICER —

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. In February 2008, while registered with FINRA and while associated with a FINRA member, Hugh Earl Cating failed to execute the order of customer FT to surrender a variable annuity during the "free-look" period, in violation of NASD Conduct Rule 2110.

2. Cating also failed to respond to requests for documents and information dated October 30, 2008 and November 17, 2008, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Lastly, he failed to appear for investigative testimony on March 13, 2009, in violation of FINRA Rules 8210 and 2010.

RESPONDENT AND JURISDICTION

3. Between April 1992 and May 2008, Cating was registered with FINRA and associated with several FINRA members at different times.

4. He currently holds Series 7, 26, 63, and 65 licenses.

5. On July 27, 2005, FINRA member SunTrust Investment Services, Inc. filed a Form U4 on behalf of Cating commencing his association with the firm as of that date.

6. On May 9, 2008, SunTrust filed a Form U5 on behalf of Cating terminating his association with the firm as of May 2, 2008.

7. Cating is not currently associated with a FINRA member. However, he is still subject to FINRA's jurisdiction under Article V, Section 4 of FINRA's By-Laws. Jurisdiction over Cating expires on May 1, 2010, two years after he was last associated with a member.

FIRST CAUSE OF ACTION

**FAILURE TO EXECUTE ORDER OF CUSTOMER FT
VIOLATION OF NASD CONDUCT RULE 2110**

8. The Department realleges and incorporates Paragraphs 1 through 7 by reference.

9. On January 23, 2008, customer FT signed an application and related documents to purchase a variable annuity through Cating.

10. Under the terms of the policy, FT could cancel the policy for a refund within ten days of receiving it, commonly referred to as a "free-look" period. The policy was issued to FT on February 4, 2008.

11. Within the ten-day period, at a February 11, 2008 meeting between Cating, FT, and FT's two accountants, FT instructed Cating to cancel the policy and to have her money returned to her. Cating said that he would take care of the matter.

12. Cating failed to cancel the policy within the "free-look" period, as instructed by FT.

13. FT ultimately incurred fess of approximately \$37,172 to surrender the policy.

14. By failing to execute FT's order to cancel her variable annuity during the "free-look" period, Cating violated NASD Conduct Rule 2110.

SECOND CAUSE OF ACTION

**FAILURE TO PROVIDE DOCUMENTS AND INFORMATION
VIOLATIONS OF NASD PROCEDURAL RULE 8210,
NASD CONDUCT RULE 2110, AND FINRA RULES 8210 AND 2010**

15. The Department realleges and incorporates Paragraphs 1 through 14 by reference.

16. In connection with an investigation of other customer complaints against Cating, the FINRA Atlanta District Office staff ("Staff") sent a letter to Cating wherein it requested that he provide various documents and information regarding the complaints to the Staff by November 14, 2008 ("October 30th Request").

17. The Staff issued the October 30th Request pursuant to NASD Procedural Rule 8210 and sent it to Cating at his residential address reflected in the CRD ("CRD Address") by first class mail.

18. The United States Postal Service ("USPS") has not returned the October 30th Request to the Atlanta District Office.

19. Cating has failed to respond to the October 30th Request, and he has not requested an extension of time to respond to it.

20. On November 17, 2008, the Staff sent a second letter to Cating wherein it requested that he provide the previously requested documents and information to the Staff by December 1, 2008 ("November 17th Request").

21. The Staff issued the November 17th Request pursuant to NASD Procedural Rule 8210 and sent it to Cating at his CRD Address by certified and first class mail.

22. The USPS returned the certified mail receipt for the November 17th Request to the Atlanta District Office marked "UNCLAIMED." The USPS has not returned the November 17th Request sent by first class mail to the Atlanta District Office.

23. Cating has failed to respond to the November 17th Request, and he has not requested an extension of time to respond to it.

24. In connection with its investigation of the aforementioned matters, on February 27, 2009, pursuant to FINRA Rule 8210, the Staff sent a letter to Cating requesting that he appear for investigative testimony on March 13, 2009 at the Atlanta District Office ("February 27th Request").

25. The Staff sent the February 27th Request to Cating at his CRD Address by certified and first class mail.

26. The USPS returned the certified mail receipt for the February 27th Request to the Atlanta District Office. The receipt reflects that the February 27th Request was delivered to Cating's CRD Address on March 10, 2009 and signed for by "Hugh Cating." The USPS has not returned the February 27th Request sent by first class mail to the Atlanta District Office.

27. Cating failed to appear for testimony on March 13, 2009.

28. The Staff does not have knowledge of an address for Cating more current than his CRD Address or any information that that address is out of date or inaccurate.

29. By failing to respond to the October 30th Request and November 17th Request for documents and information, Cating violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

30. By failing to appear for and to provide testimony on March 13, 2009, Cating violated FINRA Rules 8210 and 2010.

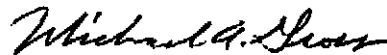
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. Order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that Respondent be required to disgorge fully any and all ill-gotten gains, together with interest; and
- B. Order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Dated: June 5, 2009



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