

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ANDREW J. ARAGONA
(CRD No. 1320844),

Respondent.

Disciplinary Proceeding
No. 2010023963301

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

May 2, 2012

Respondent is suspended for one year from associating with any FINRA registered firm in any capacity and fined \$138,500 (including disgorgement of commissions) for making unsuitable recommendations to switch variable annuity contracts, in violation of NASD Conduct Rules 2310 and 2110.

Appearances

Sean W. Firley, Esq., for the Department of Enforcement.

No appearance by or on behalf of Andrew J. Aragona.

DECISION

I. Introduction

Respondent Andrew J. Aragona (“Aragona”) was formerly associated with Newbridge Securities Corporation (“Newbridge”) and registered with FINRA as a General Securities Representative. Aragona left Newbridge in March 2009. On July 28, 2010, Newbridge filed an amended Uniform Termination Notice for Securities Industry Registration (Form U5) on Aragona’s behalf that disclosed a customer complaint that alleged that Aragona had recommended unsuitable variable annuity switches. Following receipt of the amended Form U5,

FINRA initiated an investigation that led to the Department of Enforcement (“Enforcement”) filing the attached Complaint with the Office of Hearing Officers. The Complaint alleges that Aragona recommended two variable annuity switches that were unsuitable for Customer E.P., in violation of NASD Conduct Rules 2310 and 2110.

Aragona did not answer or otherwise respond to the Complaint. Accordingly, the Hearing Officer found Aragona in default and granted Enforcement’s motion for entry of a default decision.

II. Procedural History

On November 30, 2011, Enforcement filed the Complaint with the Office of Hearing Officers. Enforcement also served a copy of the Complaint and First Notice of Complaint on Aragona by first-class certified mail, return receipt requested, at his most current residential address recorded in the Central Registration Depository (“CRD”), as well as to a second address Aragona had provided to FINRA staff during its investigation.¹ Aragona did not respond to the Complaint.

On December 28, 2011, the deadline for Aragona to file an answer, he met with an Enforcement attorney at FINRA’s Florida office and discussed the Complaint.² Aragona did not file a written answer to the Complaint.

On December 29, 2011, Enforcement served a copy of the Complaint and a Second Notice of Complaint on Aragona at both addresses by first-class certified mail, return receipt requested.³ Enforcement received a signed receipt for the mailing sent to the second address

¹ Declaration Supporting Mot. for Entry of Default Decision (“Decl.”) ¶ 11.

² Aragona had several additional communications with FINRA representatives to discuss a possible settlement of the charges pending against him. Decl. ¶ 13, n.1.

³ Decl. ¶ 15.

bearing an illegible signature.⁴ To date, Aragona has not filed an answer with the Office of Hearing Officers.

On February 22, 2012, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions (“Default Motion”). The Default Motion is supported by the declaration of Sean W. Firley, Esq. and three exhibits.⁵ Aragona did not file a response to the Default Motion.⁶

The Hearing Officer grants Enforcement’s Default Motion and deems the allegations in the attached Complaint admitted pursuant to Rules 9215(f) and 9269(a).

III. Findings of Fact and Conclusions of Law

A. Background

Aragona first registered with FINRA as a General Securities Representative in 1985. He worked at a number of FINRA-registered firms before joining Newbridge in July 2007. Aragona was registered as a General Securities Representative at Newbridge from July 11, 2007, until March 19, 2009.⁷ Aragona left Newbridge voluntarily.⁸

After Aragona left Newbridge, the firm received notice of an arbitration claim filed by Customer EP. On July 28, 2010, Newbridge filed an amended Form U5 to disclose the arbitration claim.⁹

⁴ Decl. ¶ 17.

⁵ Enforcement’s exhibits are labeled CX-1 through CX-3.

⁶ Aragona received actual notice of the Default Motion. He called the Office of Hearing Officers on March 12, 2012, and spoke to the FINRA Case Administrator assigned to this proceeding.

⁷ The Hearing Officer took official notice of Aragona’s registration summary in CRD by Order dated April 9, 2012.

⁸ CX-1, at 22 (Form U5 filed by Newbridge on March 19, 2009).

⁹ CX-1, at 26.

B. Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4(a)(i) of FINRA's By-Laws, because (1) the Complaint was filed within two years after Newbridge filed the amended Form U5 disclosing Customer EP's arbitration claim, and (2) the Complaint charges him with misconduct that occurred while he was associated with a FINRA-registered firm.¹⁰

C. Unsuitable Variable Annuity Transactions

NASD Conduct Rule 2310(a) requires that, in recommending a transaction to a customer, a registered representative "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." The suitability rule thus requires that, before making a customer-specific suitability determination, a registered representative must first have an "adequate and reasonable basis" for believing that the recommendation could be suitable for at least some customers.¹¹ The reasonableness of any recommendation is predicated on a registered representative's understanding of the potential risks and rewards inherent in that recommendation and the potential consequences of such recommendation.¹² Suitability obligations extend to recommendations to switch variable

¹⁰ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

¹¹ *Terry Wayne White*, Exchange Act Rel. No. 27895, 1990 SEC LEXIS 669, at *4 (Apr. 11, 1990) ("It is well established that a broker cannot recommend any security to a customer 'unless there is an adequate and reasonable basis for such recommendation,'" and "[a] broker cannot conclude that a recommendation is suitable for a particular customer unless he has a reasonable basis for believing that the recommendation could be suitable for at least some customers") (quoting *Hanley v. SEC*, 415 F.2d 589, 597 (2d Cir. 1969)).

¹² *Richard G. Cody*, Exchange Act Rel. No. 64565, 2011 SEC LEXIS 1862, at *32 (May 27, 2011) (internal quotes omitted); *see also F.J. Kaufman and Co.*, Exchange Act Rel. No. 27535, 1989 SEC LEXIS 2376 (Dec. 13, 1989).

annuities.¹³ In recommending the exchange of a variable annuity contract, a broker must determine that “replacing the existing contract with a new contract is suitable for the customer. Consideration should be given to such matters as product enhancements and improvements, lower cost structures, and surrender charges.”¹⁴ A recommendation to replace an existing variable annuity contract with a new contract “that doesn’t improve the customer’s existing position” is unsuitable.¹⁵

Enforcement argues in its Default Motion that the facts alleged in the Complaint establish that the two variable annuity switches Aragona recommended to EP were unsuitable because the “purported benefits of the switches were significantly outweighed by the costs incurred by EP.”¹⁶ According to the Complaint, at the time in question, EP was in her late seventies. Her primary investment objective was capital appreciation, and her stated risk tolerance was moderate. Her annual income was more than \$100,000, and she had liquid assets valued at more than \$500,000.

Aragona sold EP four variable annuities before he joined Newbridge in September 2007. Then, between September 2007 and September 2008, Aragona recommended two variable annuity switches to EP. First, Aragona recommended that EP consolidate all of her annuities into one Lincoln National annuity. Aragona recommended the switch to Lincoln National annuity because he understood that it offered “revocable annuitization”¹⁷ and because it would permit EP to leave money to her heirs in a tax efficient manner. EP purchased the Lincoln National annuity

¹³ Notice to Members 99-35, 1999 NASD LEXIS 10 (May 1999) (setting forth various factors a broker must consider before making a recommendation to switch variable annuity contracts).

¹⁴ NTM 99-35, 1999 NASD LEXIS 10, at *12.

¹⁵ Notice to Members 99-86, 1996 NASD LEXIS 108, at *5-6 (Dec. 1996).

¹⁶ Default Mot. at 3.

¹⁷ The Complaint states that revocable annuitization allows the annuitant to specify the payout terms and prevents the beneficiary from changing those terms after the annuitant dies.

for \$1,185,229. She incurred approximately \$69,000 in surrender fees in connection with the switch. Aragona was paid \$67,500 in commissions in connection with the switch.

Less than a year later, in August 2008, Aragona recommended that EP switch the Lincoln National annuity for a Nationwide Marketflex II annuity. Aragona recommended the switch because he believed the Nationwide Marketflex II annuity provided more flexibility than the Lincoln National annuity in volatile market conditions and because the Nationwide Marketflex II annuity allowed investments in Rydex funds, which funds do not restrict the frequency of trading or charge a penalty for short holding periods. Aragona was wrong about the availability of revocable annuitization. The Nationwide Marketflex II annuity did not offer revocable annuitization, which had been the justification for the initial switch to the Lincoln National annuity. EP purchased the Nationwide Marketflex II annuity for \$1,017,195, and she incurred approximately \$61,000 in surrender fees. Aragona received \$56,000 in commissions in connection with the switch.

The Complaint further alleges that the benefits of revocable annuitization and the ability to invest in Rydex funds were outweighed by the significant costs to EP. In less than one year, EP incurred approximately \$130,000 in surrender charges in connection with the two switches. Accordingly, the Complaint concludes that the annuity switches were not suitable for EP.

The Hearing Officer finds that the Complaint sets out a prima-facie case of unsuitable recommendations. The facts alleged in the Complaint show that Aragona recommended switching four variable annuity contracts for the Lincoln National annuity because it offered revocable annuitization. Nonetheless, he then recommended a second switch to the Nationwide Marketflex II annuity that did not offer that feature. With the second switch, less than a year after the first, Aragona justified the switch on other grounds—the ability to invest in Rydex funds.

These facts, which the Hearing Officer deems admitted for the purposes of this default decision, are sufficient to establish that Aragona failed to conduct an objective, quantitative analysis of the benefits of the recommended switches. EP incurred \$130,000 in surrender fees, which amount was more than 10% of the value of her investment. Aragona, on the other hand, earned \$123,500 from the two switches.

The Hearing Officer finds that Aragona made unsuitable recommendations, in violation of NASD Conduct Rules 2310 and 2110.

IV. Sanctions

Enforcement requests that the Hearing Officer suspend Aragona from associating with any FINRA-registered firm in any capacity for one year, fine him \$15,000, and order that he disgorge the commissions he earned on the switches in the amount of \$123,500.

The FINRA Sanction Guidelines (“Sanction Guidelines”) for unsuitable recommendations provide for a fine of \$2,500 to \$75,000 and a suspension of ten business days to one year.¹⁸ In egregious cases, the Sanction Guidelines provide that adjudicators should consider a longer suspension of up to two years or a bar.¹⁹ The Sanction Guidelines further recommend that the fine amount be increased by the amount of the respondent’s financial benefit.²⁰

The Hearing Officer finds on the record that Aragona’s conduct was serious and deserving of strong sanctions. Customer EP suffered considerable economic injury. She incurred \$130,000 in unnecessary surrender fees. EP had to file an arbitration claim against Newbridge to

¹⁸ FINRA Sanction Guidelines 96 (2011), www.finra.org/sanctionguidelines.

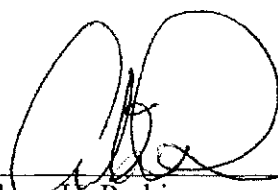
¹⁹ *Id.*

²⁰ *Id.* n.2.

recover those fees. The arbitration ended in a settlement with an undisclosed payment to EP. Accordingly, the Hearing Officer will adopt Enforcement's recommended sanctions.

V. Order

Andrew J. Aragona is suspended for one year from associating with any FINRA-registered firm in any capacity and fined a total of \$138,500 for making unsuitable variable annuity switch recommendations, in violations of NASD Conduct Rules 2310 and 2110. If this Default Decision becomes FINRA's final disciplinary action in this proceeding, the suspension shall commence on July 2, 2012, and end at the close of business on July 1, 2013. The fine shall be due and payable when and if Aragona seeks to re-enter the securities industry.



Andrew H. Perkins
Hearing Officer

Copies to:

Andrew J. Aragona (*via overnight courier and first-class mail*)
Sean W. Firley, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Andrew J. Aragona (CRD No. 1320844),

Respondent.

DISCIPLINARY PROCEEDING
No. 2010023963301

Hearing Officer - TBD

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Aragona recommended two variable annuity switches that were not suitable for an elderly customer because the purported benefits of the switches were significantly outweighed by the costs incurred by the customer, in violation of NASD Conduct Rules 2310 and 2110.

RESPONDENT AND JURISDICTION

2. Aragona entered the securities industry on September 9, 1985 when he became associated with a FINRA member. From July 10, 2007 until March 19, 2009, Aragona was associated with Newbridge Securities Corporation ("Newbridge"). Aragona has not been associated with a FINRA member firm since his association with Newbridge. While associated with Newbridge, Aragona held Series 7, 63 and 65 licenses.

3. On July 28, 2010, Newbridge amended Aragona's Form U5 to disclose customer EP's arbitration claim.
4. Although Aragona is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the filing of an amendment to his Form U5 disclosing customer EP's complaint, and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

CAUSE OF ACTION

Unsuitable Variable Annuity Transactions Violation of NASD Conduct Rules 2310 and 2110

5. The Department realleges and incorporates by reference paragraphs one through four above.
6. Between September 2007 and September 2008, Aragona recommended two variable annuity switches to customer EP. At the time, customer EP was in her late seventies, had a stated risk tolerance of moderate, annual income of over \$100,000, liquid assets of over \$500,000 and a primary investment objective of capital appreciation.
7. Prior to his association with Newbridge, Aragona had sold EP four variable annuities.
8. Shortly after commencing his association at Newbridge, on September 6, 2007, Aragona recommended that EP consolidate all of her annuities into one Lincoln National ("Lincoln") annuity.

9. Aragona recommended the switch to the Lincoln annuity because it purportedly offered “revocable annuitization”¹ and because the Lincoln annuity permitted EP to leave money to her heirs in a tax efficient manner.
10. The Lincoln annuity was purchased for \$1,185,229 and EP incurred approximately \$69,000 in surrender fees in connection with the switch. Aragona received \$67,500 in commissions in connection with the transaction.
11. In August 2008, less than a year after purchasing the Lincoln annuity, Aragona recommended that EP switch the Lincoln annuity for a Nationwide Marketflex II (“Nationwide”) annuity.
12. Aragona recommended the switch because he believed the Nationwide annuity provided more flexibility than the Lincoln annuity in volatile market conditions and because the Nationwide annuity allowed investments in Rydex² subaccounts.
13. The Nationwide annuity, however, did not offer revocable annuitization, the very purpose for the initial switch that Aragona had recommended.
14. The Nationwide annuity was purchased for \$1,017,195 and EP incurred approximately \$61,000 in surrender fees in connection with the switch. Aragona received \$56,000 in commissions in connection with the transaction.
15. The benefits of revocable annuitization and the ability to invest in Rydex funds were outweighed by the significant costs to EP. Specifically, in less than one year, EP

¹ Revocable annuitization allows the annuitant to specify the payout terms and prevents the beneficiary from changing those terms after the annuitant dies.

² Rydex funds have no restrictions on the frequency of trading and no penalty charge for short holding periods.

incurred a total of approximately \$130,000 in surrender charges in connection with the two switches.

16. Because the costs associated with the two switches significantly outweighed any purported benefits, the two recommendations were not suitable for EP.

17. Based on the foregoing conduct, Aragona violated NASD Conduct Rules 2310 and 2110.

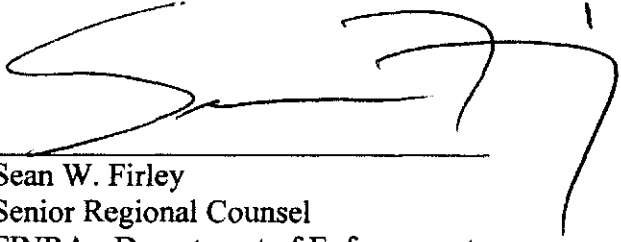
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent(s) committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that the Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest; and
- C. order that the Respondent(s) 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: November 30, 2011



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