

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Bernard G. McGee (CRD # 1203327),

Respondent.

DISCIPLINARY PROCEEDING
No. 2012034389202

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. In March 2011, Bernard G. McGee recommended that his customer, CF, surrender four variable annuities valued at approximately \$494,000, which represented approximately half her net worth, and purchase a “charitable gift annuity” (“CGA”) from an entity called 54F. CF followed McGee’s recommendation.

2. By surrendering her variable annuities, CF incurred surrender charges of approximately \$36,500. The remainder of the proceeds, approximately \$454,000, McGee invested with 54F ostensibly for the purchase of a CGA.

3. 54F paid McGee more than \$59,000 in fees for CF’s CGA investment.

4. McGee made material misrepresentations and omissions to induce CF to surrender her variable annuities and purchase the CGA from 54F. McGee falsely told CF that she was facing a large tax liability and that the CGA would offset that tax liability. Additionally,

McGee failed to disclose to CF that 54F would pay him a fee of approximately 13% for her purchase of the CGA.

5. McGee had no reasonable basis to recommend that CF surrender her variable annuities and purchase the CGA because he failed to conduct sufficient due diligence on 54F and its CGA product. Furthermore, McGee's recommendation was not suitable for CF in light of her financial condition, investment objectives, and the large surrender fees she incurred.

6. McGee hid his relationship with 54F from his firm, Cadaret Grant & Co., Inc. ("Cadaret"). Cadaret learned of the relationship only after CF hired a lawyer who complained to Cadaret about McGee's recommendations and CF's CGA investment.

7. McGee moved his Cadaret office to a building owned by 54F in late 2010 or early 2011, but he willfully failed to disclose his new address to Cadaret or on his Form U4 until December 2011.

8. Between July 15, 2007, and July 1, 2011, McGee provided false answers on five annual compliance questionnaires he executed and submitted to Cadaret. McGee claimed in the questionnaires that he had disclosed all of his business-related email addresses. In fact, McGee had an undisclosed outside email address which he used to conduct securities business. Furthermore, after the CF transactions, McGee claimed on a compliance questionnaire that he had not been involved in any offers or sales of any type of investment that were not processed through Cadaret or that were done without Cadaret's written permission.

9. McGee violated Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and FINRA Rule 2020 by misrepresenting and omitting material information to CF in connection with the sale of securities; FINRA Rule 2310 and IM-2310-2 by making unsuitable

recommendations to CF; FINRA Rule 3270 for not disclosing to Cadaret his outside business activity; FINRA Rule 1122 and Article V, Section 2 of the By-Laws of the Corporation for willfully failing to timely update his Form U4 with his new office address; and NASD Rule 2110 and FINRA Rule 2010 for lying on compliance questionnaires submitted to Cadaret.

RESPONDENT AND JURISDICTION

10. Bernard G. McGee (CRD No. 1203327) is currently associated with a FINRA member firm as a General Securities Representative and a General Securities Sales Supervisor. McGee first became registered in 1988 and has since been registered with five FINRA member firms. McGee was associated with Cadaret (CRD No. 10641) from April 2007 until October 2012 as a General Securities Representative and a General Securities Sales Supervisor. He was permitted to resign in October 2012 while under internal investigation for the conduct described in this Complaint.

11. While registered with Cadaret and his current firm, McGee conducted business through an entity known as M.T. Flanagan & Associates. McGee also acted as an independent insurance agent through M.T. Flanagan & Associates.

FACTS

A. McGee's Customer, CF

12. CF, who was a customer of McGee's, is 73 years old and lives in Waterloo, New York. She first became a customer of McGee's in 2007 when he was associated with another FINRA member firm. When McGee left that firm to associate with Cadaret, CF transferred her account to Cadaret. Her account at Cadaret was opened with a "long term growth" investment objective and a "moderate" risk tolerance.

13. Before CF's purchase of a 54F CGA, her holdings with McGee totaled approximately \$840,000. Approximately \$494,000 was invested in four variable annuities. Two of the variable annuities were issued and underwritten by HFS, a Connecticut-based insurer, and the other two were issued and underwritten by PL, a California-based insurer. The remainder of her Cadaret account was invested in various individual securities and REITs.

14. On McGee's recommendation, CF originally purchased the two HFS annuities between March and May 2009. She purchased the two PL annuities in late 2009 and late 2010 on McGee's recommendation that CF use her available penalty-free yearly premium withdrawals from the HFS annuities to fund the two new PL annuities. McGee received approximately 5% commission on CF's purchases of the four annuities.

B. The 54F Corporation

15. 54F is a corporation based in Cazenovia, New York. According to its website and other marketing materials, when a customer of 54F purchased a CGA, 54F claimed to allocate the customer's investment by purchasing one or more fixed or indexed annuities with a portion of the customer's funds and making charitable donations on the customer's behalf with the rest of the customer's funds. The charities that received donations were organizations that were associated with 54F, 54F's chief executive officer, JG, and one charity called CHC which was associated with one of McGee's brokerage clients.

16. McGee first became aware of 54F after meeting JG at a Cazenovia golf club. JG thereafter provided McGee with 54F marketing materials.

17. 54F purported to sell CGAs by obtaining referrals from third party financial professionals, such as McGee, as well as through other means. To encourage such referrals, 54F offered to pay third parties a fee of at least 8% for referrals that resulted in a CGA investment.

18. McGee was aware that 54F offered a referral fee and expected to collect a fee of at least \$49,264 for recommending CF's CGA purchase. McGee's expected fee was based on 10% of the \$492,642 gross proceeds from the surrender of CF's four variable annuities.

19. Between March 2011 and January 2012, McGee in fact received \$59,264 in fee payments from 54F for CF's purchase of the CGA from 54F.

C. McGee Induced CF's Transactions

20. In March 2011, McGee met with CF and falsely told her she was going to incur a large tax liability. To address this, he recommended that she sell her four variable annuities and purchase a 54F CGA in order to receive tax deductions. McGee explained that the CGA could eliminate or reduce CF's pending tax liability by virtue of the charitable giving 54F would make on her behalf.

21. McGee did not tell CF that 54F would pay him a fee for any investment she made in 54F.

22. Based on McGee's misrepresentations and omissions, CF agreed to sell her variable annuities and invest the proceeds with 54F.

23. On or about March 17, 2011, McGee called CF and informed her that redemption checks from HFS and PL were being delivered to her home and that he would come to her home to collect them. McGee then arrived at CF's home, drove with her to her bank, and completed the deposit slip which CF used to deposit the checks in her account. McGee then had CF give

him a signed check made payable to 54F on which McGee wrote the amount of \$454,998.75, which he gave to 54F.

24. McGee received three payments from 54F as a result of CF's CGA investment. On March 25, 2011, McGee received a check from 54F in the amount of \$49,264. On September 16, 2011, McGee received a second check from 54F for \$5,000. On January 9, 2012, McGee received a third check from 54F for \$5,000. McGee deposited all three checks in his bank account.

25. McGee's fees represented 13% of CF's total investment—including the amount of CF's investment ostensibly to be donated to charity.

26. McGee did little if any due diligence on 54F or the CGA product prior to recommending that CF purchase a CGA:

- a. McGee never gained a full understanding of the CGA product or 54F;
- b. McGee did not obtain or review financial statements from 54F;
- c. McGee did not speak to any other CGA holders to ascertain their experiences with 54F or its charitable gifting practices;
- d. McGee was unaware of which annuities 54F purchased on behalf of CGA investors, including CF; and
- e. McGee did not do any due diligence on the charities to whom 54F purportedly donated investors' money. Other than CHC, McGee was unaware which charities would receive CF's donations.

D. 54F's Use of CF's Funds

27. Over the next year, 54F used \$254,998 of CF's \$454,998 investment to purchase three equity indexed annuities in her name. The first annuity was purchased on July 1, 2011, in the amount of \$90,000, the second annuity was not purchased until January 22, 2012, in the amount of \$90,329, and the third was finally purchased on March 22, 2012, in the amount of \$74,669.

28. 54F claimed that the remaining \$200,000 was donated to four charities on CF's behalf. Each of the four charities was affiliated with either 54F, 54F's employees, or, in the case of CHC, affiliated with one of McGee's brokerage customers.

29. The three annuities were issued and underwritten by an insurance company named LFG and were approved for sale only in New Jersey. The paperwork for the annuities was processed by JW, 54F's treasurer, who falsified the application paperwork, forged CF's name, and falsely represented on the paperwork that the annuity contracts were negotiated and signed by CF in New Jersey.

30. CF did not authorize the annuity purchases made in her name, never met or spoke with JW, and was never in New Jersey.

31. In the time period between the annuity purchases and purported charitable donations made in CF's name, 54F used her funds to finance its operations.

32. In 2012, CF hired a lawyer who complained to McGee, Cadaret, and 54F about the surrender of her variable annuities and investment in 54F. After CF's lawyer demanded documents related to CF's transactions, 54F provided CF with letters purportedly evidencing her

charitable donations made between April and September 2011 and provided her with documents regarding the LFG annuity purchases in her name.

E. McGee Concealed His Relationship with 54F From Cadaret and Provided False Answers on Compliance Questionnaires

McGee Provided Cadaret False Information Concerning His Relationship with 54F

33. In 2011, McGee submitted a joint business proposal to 54F's CEO, JG. McGee's proposal outlined a plan for 54F and McGee to generate more than \$800,000 in commissions and fees by jointly selling \$15 million worth of insurance and securities products.

34. 54F owned a property located in Cazenovia, New York which contained both a main house and a carriage house. 54F had an office in the main house. McGee and JG entered into a verbal lease agreement that allowed McGee to occupy the carriage house rent-free.

35. Sometime between late 2010 and March 2011, McGee moved his Cadaret office into the carriage house. McGee did not update his Form U4 or disclose to Cadaret that he had moved his office to the carriage house until December 5, 2011. Cadaret was unaware of McGee's business relationship with 54F and his rent-free arrangement with 54F, and his failure to update his Form U4 to reflect his new office address served to hide his relationship with 54F.

36. While McGee was associated with Cadaret, the firm required its representatives to complete annual compliance questionnaires. The primary objective of the questionnaire was to verify representatives' sales activities and other business activities.

37. On an annual compliance questionnaire that McGee completed and submitted to Cadaret on July 1, 2011, McGee listed his old office address, not the carriage house address, as his branch office location. McGee attached to the questionnaire a copy of his letterhead and business cards that reflected his address as the old office address.

38. On the July 1, 2011, McGee also represented to Cadaret that he had not been involved in any offers or sales of any type of investment, whether or not registered with the Securities and Exchange Commission, that were not processed through Cadaret without Cadaret's written permission. McGee's representation to Cadaret was false and he knew it was false.

McGee Provided Cadaret False Information Regarding His Outside Email Account

39. In addition to the false information he provided regarding his office address in July 2011, McGee provided other false answers on five annual compliance questionnaires he submitted to Cadaret between July 15, 2007, and July 1, 2011.

40. On each of the five annual compliance questionnaires, McGee represented that he had disclosed to Cadaret all of his business-related email addresses.

41. In 2007, McGee began using an undisclosed Yahoo! email address. McGee used the Yahoo! email to communicate about his securities business.

42. McGee represented on the compliance questionnaires that the only email address he used was his Cadaret-issued email address and submitted business cards and letterhead that contained only that email address. McGee's answers were false and McGee knew they were false.

**FIRST CAUSE OF ACTION
FRAUD
WILLFUL VIOLATIONS OF SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND
SEC RULE 10b-5 AND FINRA RULE 2020**

43. The Department realleges and incorporates by reference paragraphs 1 through 42 above.

44. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder are broad anti-fraud provisions. Exchange Act Rule 10b-5 makes it unlawful for any person “[t]o employ any device, scheme, or artifice to defraud” or “[t]o engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,” in connection with the purchase or sale of any security.

45. FINRA Rule 2020 states that “[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.”

46. As described above, McGee made materially false misrepresentations to CF when he told her that she was facing a large tax liability and that charitable deductions were needed to offset that tax liability.

47. McGee failed to tell CF that he would make nearly \$60,000 on her purchase of the CGA from 54F. McGee’s failure to disclose his significant financial economic incentive in connection with his recommendation that she sell her variable annuities and purchase the CGA from 54F was a material omission.

48. These misrepresentations and omissions were made by McGee in connection with the sale of a security by CF and to induce CF to engage in that transaction.

49. McGee knew, or recklessly disregarded, that his statements and omissions to CF were materially false, misleading, and unfounded.

50. McGee directly or indirectly employed the means or instrumentalities of interstate commerce or of the mails in connection with CF’s transactions.

51. As a result of the foregoing conduct, Respondent McGee willfully violated Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 and violated FINRA Rule 2020 and, by virtue of those violations, FINRA Rule 2010.

**SECOND CAUSE OF ACTION
UNSUITABLE RECOMMENDATIONS
VIOLATIONS OF NASD RULE 2310 AND IM-2310-2**

52. The Department realleges and incorporates by reference paragraphs 1 through 42 above.

53. When recommending the purchase, sale, or exchange of any security to a customer, NASD Rule 2310¹ required that a registered representative “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.” NASD IM-2310-2 provided that “[i]mplicit in all member and registered representative relationships with customers is the fundamental responsibility of fair dealing.”

54. McGee had no reasonable basis to recommend that CF sell her variable annuities and purchase the CGAs because he failed to conduct sufficient due diligence on 54F and its CGA product. Additionally, the transaction was not suitable for CF in light her total net worth, her investment objectives, and the large surrender fees she incurred. McGee did not deal fairly with CF.

55. As a result of the foregoing conduct, McGee violated NASD Rule 2310 and IM-2310-2 and, by those violations, FINRA Rule 2010.

¹ NASD Rule 2310 was replaced by FINRA Rule 2111 which became effective on July 9, 2012.

**THIRD CAUSE OF ACTION
UNDISCLOSED OUTSIDE BUSINESS ACTIVITIES
VIOLATION OF FINRA RULE 3270**

56. The Department realleges and incorporates by reference paragraphs 1 through 42 above.

57. FINRA Rule 3270 prohibits registered persons from being “compensated, or hav[ing] the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.”

58. McGee did not provide prior written notice to Cadaret regarding his outside business activity with 54F.

59. As a result of the foregoing conduct, McGee violated FINRA Rule 3270 and, by that violation, FINRA Rule 2010.

**FOURTH CAUSE OF ACTION
FAILURE TO TIMELY UPDATE FORM U4
WILLFUL VIOLATIONS OF ARTICLE V, SECTION 2(C) OF
FINRA’S BYLAWS OF THE CORPORATION AND FINRA RULE 1122**

60. The Department realleges and incorporates by reference paragraphs 1 through 42 above.

61. Article V, Section 2(c) of the FINRA By-Laws of the Corporation requires that associated persons keep their Forms U4 “current at all times,” and that amendments to Forms U4 be filed “not later than 30 days after learning of the facts or circumstances giving rise to the amendment.” Additionally, FINRA Rule 1122 states that “[n]o . . . person associated with a member shall file with FINRA information with respect to . . . registration which is incomplete

or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof.”

62. McGee moved M.T. Flanagan’s office to a building owned by 54F in late 2010 or early 2011. McGee failed to disclose his new address to Cadaret or on his Form U4 until December 2011. Moreover, in a continuing effort to hide his relationship with 54F from Cadaret, McGee misrepresented his office address on a compliance questionnaire that he executed and submitted to Cadaret on July 1, 2011.

63. As a result of the foregoing conduct, McGee willfully violated Article V, Section 2(c) of the FINRA By-Laws of the Corporation and FINRA Rule 1122 and, by those violations, FINRA Rule 2010.

**FIFTH CAUSE OF ACTION
PROVIDING FALSE INFORMATION TO CADARET
VIOLATIONS OF FINRA RULE 2010 AND NASD RULE 2110**

64. The Department realleges and incorporates by reference paragraphs 1 through 42 above.

65. FINRA Rule 2010 and its predecessor Rule NASD Rule 2110² require that a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

66. McGee represented to Cadaret in each of the five annual compliance questionnaires he submitted to Cadaret from 2007 through 2011 that he had disclosed all outside business-related email addresses. McGee’s representations were false and he knew they were false when he made them.

² NASD Rule 2110 was renumbered as FINRA Rule 2010 effective December 15, 2008.

67. In the signed compliance questionnaire McGee submitted to Cadaret dated July 1, 2011, McGee represented that he had not been involved in any offers or sales of any security, or any type of investment, whether or not registered with the Securities and Exchange Commission, that were not processed through Cadaret during his association with Cadaret, without written permission from Cadaret. McGee's representation to Cadaret was false and he knew it was false when he made it.

68. As a result of the foregoing conduct, McGee violated NASD Rule 2110 (for conduct before December 15, 2008) and FINRA Rule 2010 (for conduct after December 14, 2008).

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed, including that Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- C. order that Respondent bears such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330;
- D. make specific findings that Respondent's conduct, as alleged in the Fourth Cause of Action, was willful; the omitted information was material; and, the omission to state material facts was on a Form U4 application; and

E. make specific findings that Respondent McGee willfully violated Section 10(b) of the Exchange Act.

Dated: November 11, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel L. Gardner", written over a horizontal line.

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