FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CECIL E. NIVENS (CRD No. 2110613), Respondent.	Disciplinary Proceeding No. 2014040873501 Hearing Officer – CC **DEFAULT DECISION** September 18, 2017

Respondent recommended to 15 customers variable universal life annuity purchases funded by the customers' withdrawals from existing variable annuity contracts. In doing so, Respondent circumvented the firm's written procedures because he failed to process the purchases as variable annuity replacements, in violation of FINRA Rule 2010. In connection with these transactions, Respondent submitted documents to the firm that contained misrepresentations and false information, in violation of FINRA Rules 4511 and 2010. For these violations, Respondent is suspended for two years and ordered to disgorge to FINRA $185,737, the amount of his ill-gotten gains.

Appearances

For Complainant: Laura Leigh Blackston, Esq., and David B. Klafter, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

No appearance by or on behalf of Respondent Cecil E. Nivens.

DECISION

I. Introduction

On March 1, 2017, FINRA's Department of Enforcement filed a two-cause Complaint with FINRA's Office of Hearing Officers ("OHO"). The Complaint alleged in cause one that, while associated with member firm NYLife Securities, LLC ("NYLife"), Respondent Cecil E. Nivens circumvented the firm's written procedures and violated FINRA Rule 2010[1] by failing to identify and process 15 variable universal life annuity ("VUL") purchases as replacements even though they were. Cause two alleged that, for each VUL purchase, Nivens submitted to the firm

[1] FINRA's Rules are available at www.finra.org/rules.

annuity documents containing misrepresentations and false information to disguise the fact that the VUL purchases were replacement transactions, in violation of FINRA Rules 4511 and 2010.

In response to the Complaint, Nivens sent an unsigned facsimile to Enforcement. I issued an Order finding that Nivens' submission did not comply with FINRA's rules and required that Nivens file a FINRA Rule-compliant Answer with OHO by June 14, 2017. He did not.

On June 7, 2017, I convened a telephonic pre-hearing conference. OHO served Nivens with advance notice of the pre-hearing conference, but Nivens failed to participate. I thereafter ordered Nivens to appear by telephone at a pre-hearing conference on June 14, 2017, to demonstrate good cause why he should not be held in default. OHO served Nivens with advance notice of the pre-hearing conference, but Nivens failed to participate.

On July 21, 2017, Enforcement filed a Motion for Entry of Default Decision ("Default Motion"), together with the Declaration of Laura Leigh Blackston, Esq. ("Blackston Decl.") in support of the Default Motion and seven exhibits.[2]

As stated in detail below, I find Nivens in default, grant Enforcement's Default Motion, and deem the allegations of the Complaint admitted, pursuant to FINRA Rules 9215(f), 9241(f) and 9269(a).

II. Findings of Fact and Conclusions of Law

A. Nivens' Background

Nivens first entered the securities industry in 1990.[3] He was associated with NYLife and registered as an investment company and variable contracts products representative and direct participation programs representative from 1990 through 2014.[4] Nivens voluntarily terminated his association with NYLife on February 1, 2014.[5] Nivens remains unregistered and has not re-associated with a FINRA member firm.[6] On February 28, 2014, NYLife filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reflecting Nivens' termination of registration.[7] NYLife subsequently filed four amendments to the Form U5 between June 23, 2015, and November 23, 2015.[8]

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[2] In this decision, Enforcement's exhibits are referenced as CX-1 through CX-7.

[3] CX-1.

[4] CX-1, at 2.

[5] CX-1, at 3. The Central Registration Depository ("CRD") indicates Nivens voluntarily resigned from NYLife after being asked to provide documentation of his payments to the Internal Revenue Service relating to a personal debt and a written explanation of his use of a personal email address to communicate with a client. *Id.*

[6] CX-1, at 2.

[7] Blackston Decl.¶ 9; CX-2.

[8] Blackston Decl. ¶ 5.

B. FINRA's Jurisdiction

FINRA has jurisdiction to proceed with this disciplinary proceeding pursuant to Article V, Section 4(a) of FINRA's By-Laws because (1) Enforcement filed the Complaint with OHO on March 1, 2017, within two years of NYLife's filing of an amended Form U5 on June 23, 2015[9]; and (2) the Complaint alleged that Nivens engaged in misconduct during the period when he was associated with a FINRA member firm.[10]

C. Origin of the Investigation

The initial Form U5 NYLife filed disclosed that Nivens resigned rather than respond to a firm inquiry for information regarding payments to the Internal Revenue Service.[11] The four Form U5 amendments NYLife subsequently filed disclosed additional allegations of Nivens' wrongdoing.[12] Enforcement commenced a cause investigation of Nivens' conduct as disclosed in the Form U5 and subsequent amendments.[13] Enforcement's investigation led to the filing of the Complaint in this matter.[14]

D. Nivens' Default

When Enforcement filed the Complaint on March 1, 2017, Nivens' address of record as reflected in CRD was in Gastonia, North Carolina ("CRD Address").[15] Enforcement did not know of a more current address.[16] Enforcement served Nivens with the First Notice of Complaint and Complaint by certified mail at Nivens' CRD Address.[17] Enforcement also sent a copy to Nivens' CRD Address by first-class mail.[18] On March 16, 2017, the United States Postal Service ("USPS") returned a delivery receipt signed by "Judy Capps," indicating the certified mailing

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[9] Article V, Section 4(a)(i) of FINRA's Corporate By-Laws states that a person whose association with a member has been terminated and is no longer associated with any member shall continue to be subject to the filing of a complaint based upon conduct that commenced prior to the termination, but any such complaint shall be filed within two years after the effective date of termination of registration, provided, however that any amendment to a Form U5 that is filed within two years of the original Form U5 and discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period. NYLife's June 23, 2015 Form U5 amendment disclosed that Nivens was the subject of investment-related, consumer-initiated written or oral complaints that were not disclosed in the initial Form U5 filing. CX-3, at 4, 6-44.

[10] Blackston Decl. ¶ 11.

[11] CX-2, at 2. CRD also indicates Nivens was subject to enhanced supervision at the time of his resignation. CX-1, at 3.

[12] Blackston Decl. ¶ 5.

[13] *Id.* ¶¶ 4-6.

[14] *Id.*

[15] *Id.* ¶ 12; CX-1.

[16] Blackston Decl. ¶ 13.

[17] *Id.*¶ 14; CX-1; CX-4.

[18] Blackston Decl. ¶ 14; CX-4.

was delivered on March 13, 2017.[19] The USPS did not return the first-class mailing.[20] Nivens' Answer to the First Notice of Complaint was due on or before March 29, 2017.[21]

Nivens did not file an Answer or a written request for extension of time to file an Answer. Instead, Nivens contacted OHO by telephone. He stated that he recently underwent eye surgery and had not fully recovered his vision. Nivens represented that Enforcement agreed to a 13-day extension. Given Nivens' representations regarding his vision, I did not require Nivens to submit a written request for extension and granted him until April 19, 2017, to file an Answer.[22]

Nivens did not file an Answer.[23] On April 24, 2017, Enforcement issued a Second Notice of Complaint, which directed Nivens to file an Answer by May 11, 2017.[24] Enforcement served Nivens with the Second Notice of Complaint and Complaint by certified mail at Nivens' CRD Address.[25] Enforcement also sent a copy to Nivens' CRD Address by first-class mail.[26] On May 25, 2017, the USPS returned the certified mailing marked "Return to Sender," "Unclaimed," "Unable to Forward."[27] The USPS did not return the first-class mailing.[28] Nivens did not file an Answer.

On May 8, 2017, Enforcement forwarded to OHO a five-page, unsigned facsimile that Nivens submitted to Enforcement.[29] On May 9, 2017, I issued a notice of receipt of Nivens' "Answer" and issued an Order scheduling an initial pre-hearing conference to be conducted by telephone on June 7, 2017.[30] The Order advised the parties of the date and time of the pre-hearing conference, provided the call-in number and passcode, and stated that Respondent's failure to participate in the initial pre-hearing conference could be deemed a default. OHO served Nivens by first-class mail at his CRD Address.

On May 12, 2017, Enforcement filed a motion requesting that I direct Nivens to file an Answer that complied with FINRA Rule 9215.[31] Nivens did not respond to Enforcement's motion. On May 31, 2017, I granted Enforcement's motion and found that Nivens' facsimile was

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[19] Blackston Decl. ¶ 16; CX-4.

[20] Blackston Decl. ¶ 17.

[21] CX-4, at 1.

[22] Blackston Decl. ¶ 19.

[23] *Id.* ¶ 20.

[24] CX-5.

[25] Blackston Decl. ¶ 21; CX-5.

[26] Blackston Decl. ¶ 21; CX-5.

[27] Blackston Decl. ¶ 26; CX-5, at 2.

[28] Blackston Decl. ¶ 27.

[29] *Id.* ¶ 23; CX-6.

[30] Blackston Decl. ¶ 24.

[31] *Id.* ¶ 25.

deficient for three reasons. First, Nivens failed to file it directly with OHO. Second, he failed to sign the document. Third, he did not specifically admit, deny, or otherwise address each allegation of the Complaint.[32] Consequently, I directed Nivens to file with OHO an Answer conforming to the requirements of FINRA Rule 9215 on or before June 14, 2017.[33] OHO served Nivens with the May 31, 2017 Order at his CRD Address by first-class mail and overnight delivery. Nivens failed to file a Rule 9215-compliant Answer by June 14, 2017, as ordered.

On the morning of June 7, 2017, Nivens contacted Enforcement by telephone and stated that he did not intend to participate in the initial pre-hearing conference scheduled for that day.[34] I convened the pre-hearing conference as scheduled. Counsel for Enforcement participated. Nivens did not participate.[35]

On June 8, 2017, I issued an Order requiring Nivens to appear by telephone at a pre-hearing conference to demonstrate good cause why he should not be held in default for his failure to participate in the June 7, 2017 pre-hearing conference. The Order advised Nivens that FINRA Rule 9241(f) allows the Hearing Officer to issue a default decision, pursuant to FINRA Rule 9269, against a party who fails to appear in person or through counsel at a pre-hearing conference of which the party has due notice. The Order also advised Nivens that FINRA Rule 9269 authorizes a Hearing Officer to deem the allegations against a defaulting Respondent to be admitted, impose sanctions against a defaulting Respondent, and assess costs. The Order provided a call-in number and passcode for a June 14, 2017 show-cause hearing and reminded Nivens that his failure to appear, in person or through counsel, could be deemed a default.

OHO served Nivens with the June 8, 2017 Order by first-class mail and overnight courier at his CRD Address and electronic mail. Nivens responded to the notice sent by electronic mail with an email stating "Go away."[36]

I convened the show-cause hearing as scheduled on June 14, 2017. Counsel for Enforcement participated. Nivens did not participate.[37]

On June 15, 2017, I directed Enforcement to serve on Nivens and file with OHO a motion for entry of a default decision.

FINRA Rule 9134 provides for service of a complaint on a natural person by certified mail at the person's residential address as reflected in the CRD. Rule 9134 provides for service

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[32] FINRA Rule 9215(a) requires that each respondent named in a complaint file an answer with OHO. Rule 9215(a) also directs respondents to file answers in accordance with FINRA Rule 9137, which requires that every filing of a party in a disciplinary proceeding be signed by the party.

[33] Blackston Decl. ¶ 28.

[34] *Id.* ¶ 29.

[35] *Id.* ¶ 30.

[36] *Id.* ¶ 31.

[37] *Id.* ¶ 32.

of papers other than a Complaint by first-class mail to an individual respondent's residential address as indicated in CRD.

I find that Enforcement properly served Nivens with the Notice of Complaint, Second Notice of Complaint, and Complaint, and OHO properly served Nivens with my May 31, 2017 Order directing him to file a rule-compliant Answer. Although Nivens sent a document by facsimile to Enforcement, he failed to file a Rule 9215-compliant Answer with OHO.[38] I also find that OHO served Nivens in accordance with Rule 9134 with notices of the June 7, and June 14, 2017, pre-hearing conferences, and he failed to participate in both pre-hearing conferences. Pursuant to FINRA Rules 9215(f), 9241(f), and 9269(a), I find Nivens to be in default and deem admitted all allegations of the Complaint.

E. NYLife's Variable Annuity Replacement Policies and Procedures

The period relevant to the Complaint is February 25, 2012, through April 5, 2013 (the "Relevant Period").[39] At that time, NYLife had procedures in place pertaining to variable annuity replacements. NYLife's written supervisory procedures ("WSPs") defined a "replacement" as "a transaction where a new life insurance or annuity policy is to be purchased and the agent knows or should have known that an existing life insurance or annuity policy has been or will be affected or changed within 13 months before or after the proposed purchase."[40] The WSPs listed several changes that would fall into the category of replacement, including withdrawal of funds to pay for all or part of a new policy or annuity.[41]

NYLife's WSPs emphasized the suitability concerns that exist when a customer uses funds from an existing annuity to fund a new product and stated that registered representatives should ensure customers understand all advantages and disadvantages of the new product, including tax ramifications, loss or reduction in benefits, holding periods, and sales charges or acquisition costs.[42]

NYLife's WSPs required a registered representative to complete certain forms as part of the variable annuity application process.[43] The NYLife VUL application included a two-page "Replacement Form."[44] The first question on the Replacement Form asked "Do you own any existing life insurance policies or annuity contracts?" If the applicant responded affirmatively, the registered representative was required to direct the applicant to answer a series of questions regarding the replacement. One of the questions required the applicant to provide a clear

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[38] *Id.* ¶ 33.

[39] Complaint ¶ 1.

[40] *Id.* ¶ 11.

[41] *Id.* ¶ 12.

[42] *Id.* ¶ 13.

[43] *Id.* ¶ 14.

[44] *Id.* ¶ 15.

rationale for the replacement.[45] The Replacement Form also required the registered representative to certify whether a replacement was involved and, if so, discuss a list of concerns with the customer.[46]

The VUL application also asked a series of questions regarding the source of the funds used to purchase the variable annuity and specifically asked whether the source of funds was another annuity.[47] If so, the VUL application required answers to additional questions related to replacement, in addition to the questions included in the Replacement Form.[48]

NYLife's WSPs required a registered principal to review every transaction identified in the aforementioned documents as a replacement.[49] In addition, NYLife maintained surveillance systems triggered by VUL applications and Replacement Forms that monitored for problematic patterns of variable annuity exchanges by individual registered representatives.[50]

F. Nivens' Experience at NYLife

Between 2010 and Nivens' departure from NYLife in 2014, he was subject to heightened supervision requiring a review of the number and suitability of replacement transactions that he processed.[51] NYLife reviewed Nivens' replacement rate on variable products on a quarterly basis and found, for the second half of 2010 and the second quarter of 2011, Nivens had a high replacement rate.[52] As a result, NYLife placed several of Nivens' variable annuity transactions on hold, pending further review.[53] Eventually, the firm approved Nivens' replacement transactions because they did not include surrender charges.[54]

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[45] *Id.*

[46] *Id.* ¶¶ 16, 17.

[47] *Id.* ¶ 18.

[48] *Id.*

[49] *Id.* ¶ 19.

[50] *Id.* ¶ 20.

[51] *Id.* ¶¶ 23, 24.

[52] For the third quarter of 2010, Nivens' replacement rate was 56.25 percent. Complaint ¶ 26. For the fourth quarter of 2010, Nivens' replacement rate was 41.67 percent. *Id.* ¶ 27. For the second quarter of 2011, Nivens' replacement rate was 46.15 percent. *Id.* ¶ 28.

[53] *Id.* ¶ 29.

[54] *Id.* The firm also contacted several of Nivens' customers to ask suitability-related questions before approving the replacement transactions. *Id.* ¶ 30.

During the Relevant Period, Nivens was aware of the heightened supervision that NYLife applied to his variable annuity sales.[55] To avoid detection, Nivens concealed the fact that certain of his variable annuity transactions in 2012 and 2013 were replacements.[56]

G. Nivens Circumvented Firm Procedures and Concealed Variable Annuity Replacements as Alleged in Cause One and Falsified Firm Records as Alleged in Cause Two

Cause one alleged that Nivens violated FINRA Rule 2010 by engaging in unethical conduct. Specifically, cause one alleged that, during the Relevant Period, Nivens circumvented the firm's procedures by failing to identify and process 15 VUL purchases (identified on Appendix A to this Decision) as replacements, even though each VUL purchase was funded by a withdrawal from an existing variable annuity. Cause one alleged that by doing so, Nivens caused eight customers to incur surrender charges unnecessarily and 15 customers to pay federal taxes on their variable annuity withdrawals.

Cause two alleged that, for the same 15 VUL transactions, Nivens falsified the variable annuity-related paperwork, signed the falsified documents, and submitted them to NYLife, in violation of FINRA Rules 4511 and 2010.

1. Nivens' Sales Practices

To convince customers to replace or purchase additional variable annuities, Nivens showed his clients a historical tax chart purporting to demonstrate an average federal tax rate of 60.67 percent between 1913 and the Relevant Period.[57] Nivens queried customers as to whether they expected tax rates to continue to increase then asked, "Do you want to make changes after they change the tax law or before they change the tax law?"[58] Nivens thereafter recommended his customers withdraw funds from their existing variable annuities, deposit the funds into a personal bank account, and write checks from the personal bank account to pay premiums for VUL products that he recommended and sold to them.[59] Nivens represented to his customers that, once their funds were invested in VULs, the VULs would provide tax-free supplemental income.[60]

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[55] Complaint ¶ 31.

[56] *Id.* ¶¶ 32, 33.

[57] *Id.* ¶ 8.

[58] *Id.* ¶ 9.

[59] *Id.* ¶¶ 7, 10.

[60] *Id.* ¶ 10.

2. Nivens' Preparation and Submission of Variable Annuity Documentation

Each of the 15 VUL applications indicated on Appendix A to this Decision was accompanied by a Client Profile requesting suitability information.[61] Specifically, the Client Profile asked, "What source of funds are you using to purchase this product?"[62] The form directed the registered representative to check all that apply and listed as choices: checking/savings; income; stocks/bonds; certificates of deposit; sale of business or property; death benefit proceeds; inheritance/gift; life insurance; mutual funds; pension or retirement accounts; annuities; or other.[63] If the "annuity" choice was marked, the Client Profile warned that using annuity funds to purchase a VUL could result in the customer's paying surrender charges, incurring tax liabilities, or paying other penalties.[64] It also required the registered representative to provide details regarding the annuity from which funds were withdrawn.[65]

In the 15 VUL purchases listed on Appendix A, Nivens failed to disclose that an annuity was a source of the funds, although all 15 customers funded their VUL purchases with withdrawals from other annuities.[66] For each purchase, Nivens marked "checking/savings, "inheritance/gift," or some other source of funding, but never "annuity."[67] In six instances, NYLife contacted Nivens regarding the customers' ability to pay the annual premiums because of concern about the customers' annual income levels.[68] Rather than disclose that the customers intended to pay annual premiums through withdrawals from existing annuities, Nivens falsely stated that the customers had adequate liquid net worth to cover the premiums.[69]

Nivens' 15 VUL applications were accompanied by Replacement Forms.[70] The Replacement Forms required the signature of both the customer and Nivens and explained that certain methods of funding a VUL purchase would be considered a replacement.[71] The Replacement Forms clearly indicated that a "financed purchase," which is a VUL purchase funded from a withdrawal from an existing annuity, would be considered a replacement.[72] Question 1 on the Replacement Forms directly asked, "Do you own any existing life insurance

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[61] *Id.* ¶ 47.

[62] *Id.* ¶ 48.

[63] *Id.* ¶¶ 48, 49.

[64] *Id.* ¶ 50.

[65] *Id.*

[66] *Id.* ¶ 51.

[67] *Id.*

[68] *Id.* ¶ 52.

[69] *Id.*

[70] *Id.* ¶ 55.

[71] *Id.* ¶¶ 57, 58.

[72] *Id.* ¶ 59.

policies or annuity contracts?" In eight of the 15 VUL sales, Nivens falsely answered "No," even though the customers owned existing variable annuities.[73] In the remaining seven instances, Nivens correctly answered "yes," but falsified a related question regarding premium payments.[74] Question 3 on the Replacement Forms asked, "Are you considering using funds from your existing policies or annuity contracts to pay premiums due on the [VUL]?"[75] Nivens falsely answered "no" in these seven instances, despite the fact that, on his advice, the 15 customers financed their VUL premium payments with withdrawals from existing variable annuities.[76]

Nivens signed the bottom of the Replacement Forms, which contained the statement, "I certify that the responses herein are, to the best of my knowledge, accurate" next to the space where Nivens signed.[77] They also contained a producer acknowledgement in boldface type that stated, "By reason of this transaction, is a replacement involved?"[78] In each instance, Nivens checked "No," representing falsely that the transaction was not a replacement.[79]

3. Nivens Compromised NYLife's Oversight

Nivens' VUL sales were reviewed by a NYLife supervisor who was unaware the purchases were replacement transactions, and the supervisor therefore did not perform the heightened review required for Nivens' replacements.[80] NYLife nonetheless suspended approval of six of the VUL applications, pending resolution of the firm's questions.[81] In each instance, NYLife's compliance personnel contacted Nivens to discuss whether the application should be approved given the ratio of the annual premiums to the customers' annual income.[82] Instead of honestly advising the firm that the customers intended to pay their annual premiums with withdrawals from existing variable annuities, Nivens suggested the compliance department consider the customers' liquid net worth as a source of funding.[83]

In the 15 VUL transactions at issue, Nivens' customers paid approximately $439,805 in first-year premiums for their VUL purchases.[84] For these purchases, Nivens received $185,737 in

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[73] *Id.* ¶ 60.

[74] *Id.* ¶ 61.

[75] *Id.*

[76] *Id.*

[77] *Id.* ¶¶ 62-63.

[78] *Id.*

[79] *Id.* ¶ 63.

[80] *Id.* ¶ 34.

[81] *Id.* ¶ 53.

[82] *Id.*

[83] *Id.* ¶ 54.

[84] *Id.* ¶ 22.

commissions in addition to commissions he already had received on the purchases of the variable annuities he initially sold to the same customers.[85]

4. Findings of Violation Under Cause One

FINRA Rule 2010 requires member firms to adhere to high standards of commercial honor and just and equitable principles of trade. FINRA Rule 0140 states that associated persons shall have the same duties and responsibilities under FINRA's rules as member firms. An associated person violates just and equitable principles of trade and therefore Rule 2010 when he or she engages in unethical conduct.[86]

Circumventing firm procedures to conceal annuity switches is unethical conduct that violates FINRA Rule 2010.[87] Nivens circumvented NYLife's supervisory and compliance procedures by failing to identify and process the 15 VUL purchases listed on Appendix A to this Decision as replacements, even though each purchase was funded by a withdrawal from an existing variable annuity, and therefore was a replacement transaction. I find that, by doing so, Nivens failed to adhere to high standards of commercial honor and just and equitable principles of trade, and violated FINRA Rule 2010, as alleged in cause one.

5. Findings of Violation Under Cause Two

FINRA Rule 4511 requires member firms to preserve books and records as required under FINRA rules, the Securities Exchange Act of 1934 ("Exchange Act"), and Exchange Act Rules. FINRA Rule 4511, together with FINRA Rule 2010, required Nivens "to complete annuity-related firm records accurately and completely and prohibited him from concealing facts from the firm and inserting inaccurate information in firm records."[88] For each of the VULs listed on Appendix A to the Complaint, Nivens submitted to NYLife variable annuity-related documents containing misrepresentations and false information disguising the fact that these transactions were in reality replacements and prevented the firm from performing an appropriate supervisory review. I find that, by doing so, Nivens violated FINRA Rules 4511 and 2010, as alleged in cause two.

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[85] *Id.* ¶ 35.

[86] *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (NAC Apr. 23, 2010); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8 (NAC May 7, 2003).

[87] *See Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *59 (NAC Oct. 1, 2013) (finding that respondent who concealed annuity switches by submitting false information to the firm violated NASD Rule 2110, precursor to FINRA Rule 2010); *Skiba*, 2010 FINRA Discip. LEXIS 6, at *13-14 (finding that respondent's failure to submit proper variable annuity documentation to the firm violated Rule 2110, now Rule 2010, because the firm's supervisory system could not flag the transactions as variable annuity replacements).

[88] *Pierce*, 2013 FINRA Discip. LEXIS 25, at *59. *See also Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, at *6 (NAC Dec. 18, 2000) ("Submitting false information … on variable annuity applications is a violation of [FINRA's] just and equitable principles of trade rule.").

III. Sanctions

For Nivens' violations, I suspend him for two years from associating with any member firm in any capacity and order that he disgorge $185,737 to FINRA.

The misconduct I find under causes one and two of the Complaint relates to Nivens' circumvention of NYLife's procedures for variable annuity sales and his submission of inaccurate and false information in connection to 15 VUL transactions. FINRA's Sanction Guidelines ("Guidelines") state that, in certain instances, it may be appropriate to aggregate violations for purposes of imposing sanctions.[89] Because these violations stem from the same conduct and are inter-related, I impose a single set of sanctions for causes one and two.

The Guidelines do not specifically address violations related to the circumvention of firm procedures and concealing variable annuity replacements. When the Guidelines do not provide specific guidance, adjudicators are encouraged to look to guidelines for analogous violations.[90] I therefore consulted the guidelines for falsification of records.[91]

The guidelines for falsification of records recommend consideration of the nature of the document falsified.[92] Here, the falsified documents related to variable annuity sales. As a result of Nivens' falsifications, the firm was unable to recognize the transactions as variable annuity switches or replacements. If Nivens had properly characterized the transactions as variable annuity replacements, the firm may have engaged in additional regulatory scrutiny and could have possibly intervened to help the customers avoid monetary losses. The nature of the falsified documents also prevented NYLife from conducting a proper suitability review. This factor must be considered aggravating.

Also aggravating is the fact that Nivens did not act in good faith and intentionally concealed variable annuity replacements from NYLife.[93] Nivens was fully aware that the VUL transactions he recommended and executed were replacements. Both NYLife's procedures and the VUL applications stated that a transaction in which funds were withdrawn from one variable product to fund the purchase or premium payment of another was a replacement.[94] Between 2010 and 2013, Nivens was on heightened supervision because of his high replacement rate.[95] As a

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[89] *See* FINRA Sanction Guidelines (2017) at 4, http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

[90] *See* Guidelines at 1.

[91] *See Id.* at 37 (Forgery, Unauthorized Use of Signatures, or Falsification of Records).

[92] *Id.* (Principal Consideration No. 1).

[93] *Id.* at 7 (Principal Consideration No. 10), 8 (Principal Consideration No. 13), 37 (Principal Consideration No. 2).

[94] *See* Complaint ¶¶ 11, 58, 59.

[95] *See Id.* ¶¶ 23-31.

result, Nivens' replacement transactions were scrutinized, and he concealed replacements to avoid oversight. I find that Nivens acted in bad faith. This is an aggravating factor.[96]

Nivens further aggravated his misconduct by causing significant customer loss.[97] In order to assess this aggravating factor, I considered the potential tax repercussions of variable annuity exchanges.[98] Nivens did not process withdrawals from customers' variable annuities as tax-free exchanges, even though the funds were used to purchase another variable annuity contract, because he wanted to avoid detection by NYLife.[99] Nivens was able to conceal the nature of these exchanges by directing the customers to withdraw funds from their existing annuities, deposit the withdrawals into their personal bank accounts, and write personal checks to cover their annual premiums.[100] But by failing to process the replacements as tax-free exchanges, Nivens caused the 15 customers to incur additional federal tax liability on their withdrawals.[101] If Nivens had properly characterized and processed the transactions as tax-free exchanges, the customers could have avoided significant tax liability.[102] Additionally, eight of the 15 customers unnecessarily incurred surrender charges on their variable annuity withdrawals totaling $4,258.19.[103] I consider it aggravating that Nivens' conduct caused the customers considerable monetary harm.[104]

I also consider aggravating the fact that Nivens' failure to characterize the transactions as replacements made the warnings accompanying the VUL applications appear irrelevant to the customers.[105] Each variable annuity application contained a two-page document titled "Important Notice" that included warnings, explanations, and important factors to consider in variable annuity exchanges and instances in which the customer keeps both annuity contracts.[106] Because

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[96] Guidelines at 7 (Principal Consideration No. 10), 8 (Principal Consideration No. 13), 37 (Principal Consideration No. 2).

[97] *Id.* at 7 (Principal Consideration No. 11).

[98] Variable annuity earnings are tax-deferred until they are withdrawn by the investor. *Pierce*, 2013 FINRA Discip. LEXIS 25, at *16. Section 1035 of Subtitle A, Chapter 1, Subchapter O, Part III of the United States Internal Revenue Code provides that an individual may exchange an existing variable annuity contract for a new annuity contract without paying any tax on the income and investment gains in the current variable annuity contract. *See SEC Investor Tips; Variable Annuities: What You Should Know*, at 6 (Apr. 18, 2011), https://www.sec.gov/reportspubs/investor-publications/investorpubsvaranntyhtm.html. In order to achieve a tax-free exchange, however, the old annuity contract must be exchanged for a new annuity contract directly from one insurance company to another. *Id.* The annuity investor may not receive a check for the proceeds from one variable annuity and use the funds to purchase a new annuity. *Id.*

[99] Complaint ¶ 36.

[100] *Id.* ¶ 38.

[101] *Id.* ¶ 37.

[102] *Id.*

[103] *Id.* ¶ 40.

[104] Guidelines at 7 (Principal Consideration No. 11).

[105] Complaint ¶ 39.

[106] *Id.*

Nivens certified on page one of the customers' documentation that the transactions did not involve replacements, he made the two-page disclosure appear irrelevant to the customers.[107]

I find it aggravating that Nivens' actions enabled him to benefit monetarily.[108] As a result of the 15 VUL transactions listed on Appendix A, Nivens received $185,737 in commissions on VUL purchases.[109] He received these commissions in addition to the commissions he had already received on the initial variable annuities he sold to the same customers.

It is also aggravating that Nivens engaged in numerous violative acts over an extended period of time (15 VUL transactions during the period from February 25, 2012, through April 5, 2013).[110] In addition, Nivens failed to follow NYLife's procedures and concealed variable annuity replacements after his firm warned him that this conduct was suspect. The firm placed him on heightened supervision between 2010 and 2013 because of his high level of variable annuity replacements, yet he continued his pattern of frequently recommending variable annuity replacements to unknowing customers in order to reap maximum personal benefits and without regard for the good of his customers. I consider this aggravating.[111]

Of the 15 customers listed on Appendix A to this Decision, between 2013 and 2015, 14 surrendered their VULs or NYLife rescinded them as a result of customer complaints and settlement agreements between the customers and NYLife.[112] NYLife paid $558,848 to the customers listed in Appendix A to resolve complaints related to Nivens' VUL sales.[113] The Guidelines recommend that adjudicators consider ordering restitution where appropriate.[114] Here, the firm has already resolved the customers' claims against Nivens, so I have not ordered restitution.

The Guidelines also direct that, in order to remediate misconduct, adjudicators consider the amount of a respondent's ill-gotten gain.[115] Nivens received $185,737 in commissions from the VUL sales that he improperly failed to characterize as replacement transactions. Given the numerous aggravating factors present, the dearth of mitigating factors, and the amount of Nivens' ill-gotten gains, I suspend Nivens from associating with any member firm in any capacity for two years and order that he disgorge to FINRA $185,737, to deprive him of those gains.

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[107] *Id.*

[108] Guidelines at 8 (Principal Consideration No. 16).

[109] Complaint ¶ 35.

[110] Guidelines at 7 (Principal Consideration Nos. 8, 9).

[111] *Id.* at 8 (Principal Consideration No. 14).

[112] Complaint ¶ 41.

[113] *Id.* ¶ 42.

[114] Guidelines at 4 (General Principle No. 5).

[115] *Id.* at 5 (General Principle No. 6).

IV. Order

Respondent Cecil E. Nivens concealed information from NYLife and circumvented the firm's written procedures by failing to identify and process 15 variable annuity purchases listed on Appendix A as replacement transactions, in violation of FINRA Rule 2010. In connection with these transactions, Nivens submitted to the firm variable annuity documents containing misrepresentations and false information to disguise that the variable annuity purchases were actually replacement transactions, in violation of FINRA Rules 4511 and 2010. For this misconduct, Nivens is suspended for two years from associating with any FINRA member firm in any capacity and ordered to disgorge to FINRA $185,737.

If this decision becomes FINRA's final disciplinary action, the suspension shall become effective with the opening of business on November 6, 2017. The disgorgement shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

Carla Carloni
Hearing Officer

Copies: Cecil E. Nivens (*via overnight courier and first-class mail*)
Laura Leigh Blackston, Esq. (*via electronic and first-class mail*)
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Jeffrey Pariser, Esq. (*via electronic mail*)

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Case No. 2014040873501

2012-2014 Exchanges that Nivens Falsely Certified as Non-Exchanges

	Customer	VA Contract(s)	Date(s) of VA Withdrawal(s)	Amount(s) of VA Withdrawal(s)	VA Surrender Charge	VUL Contract Date	VUL Policy No.	Total Annual Premium	Net Commissions to Nivens
1.	BW	[redacted]	5/23/2012 4/24/2013	$15,000 $15,852	$290	5/18/2012	[redacted]	$15,852	$8,453
2.	DM	[redacted]	6/12/2012 3/18/2013	$17,568 $17,568		2/25/2012	[redacted]	$17,658	$4,340
3.	DC	[redacted]	11/15/2012 11/11/2013	$30,000 $30,000	$207.58	11/13/2012	[redacted]	$36,000	$16,403
4.	EM	[redacted]	9/26/2012 9/26/2012	$22,688.67 $25,000	$632.55	7/28/2012	[redacted]	$51,999	$9,457
5.	JG	[redacted]	4/10/2012 5/10/2012 6/11/2012	$2,500 $2,500 $2,500		5/11/2012	[redacted]	$7,561	$11,963
6.	JH	[redacted]	4/8/2013 5/22/2013	$19,200 $14,150		3/26/2013	[redacted]	$39,999	$16,973
7.	KM	[redacted]	5/8/2012	$13,950		3/5/2012	[redacted]	$14,100	$3,011
8.	LE	[redacted]	6/27/2012 6/10/2013	$20,254 $22,100		6/13/2012	[redacted]	$22,100	$11,050
9.	LF	[redacted]	7/18/2012 5/9/2013 5/16/2013	$32,250 $24,739.41 $5,000	$260.59	5/2/2012	[redacted]	$32,250	$13,821
10.	PP	[redacted]	5/31/2012 6/1/2012	$25,000 $6,000	$17.31	5/25/12	[redacted]	$32,097	$16,048
11.	RR	[redacted]	7/17/2012 7/12/2013	$58,500 $49,045.56	$1,398.14	7/6/2012	[redacted]	$58,093	$18,842
12.	SM	[redacted]	4/16/2013 4/18/2013	$25,000 $988		4/5/2013	[redacted]	$25,988	$12,993
13.	SP	[redacted]	7/27/2012 7/15/2013	$10,000 $10,000		7/16/2012	[redacted]	$9,728	$4,863

	Customer	VA Contract(s)	Date(s) of VA Withdrawal(s)	Amount(s) of VA Withdrawal(s)	VA Surrender Charge	VUL Contract Date	VUL Policy No.	Total Annual Premium	Net Commissions to Nivens
14.	ST	[redacted]	10/23/2013	$24,409.55		10/8/2012	[redacted]	$33,600	$14,847
15.	TH	[redacted]	7/9/2012 7/11/2012 6/20/2013 6/24/2013	$25,000 $14,215 $25,000 $17,780	 $77.47 $485.52	6/27/2012	[redacted]	$42,780	$22,673
							Total	$439,805	$185,737