

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

TIMOTHY B. DICKEY
(CRD No. 2541369),

Respondent.

Disciplinary Proceeding
No. C05050017

Hearing Officer - AWH

DEFAULT DECISION

October 3, 2005

Formerly registered representative (1) made unsuitable recommendations, in violation of NASD Conduct Rules 2310 and 2110, (2) engaged in private securities transactions, in violation of NASD Conduct Rules 3040 and 2110, and (3) failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent barred from association with any member firm in any capacity for failing to respond to requests for information. In light of the bar, no further suspensions imposed for the remaining violations. However, Respondent is ordered to disgorge \$221,846.52, the amount of his financial benefit from those violations.

Appearances

Laura Leigh Blackstone, Esq., for the Department of Enforcement.

No appearance by or for Timothy B. Dickey.

DECISION

Background

On April 28, 2005, the Department of Enforcement ("Enforcement") issued a three-cause complaint in this matter, charging Timothy B. Dickey ("Dickey" or "Respondent") with making unsuitable recommendations in violation of NASD Conduct Rules 2110 and 2310, participating in private securities transactions, in violation of NASD Conduct Rules 2110 and 3040, and failing to respond to requests for information

000105 278 05

000061151 2011

from NASD staff ("the staff"), in violation of NASD Conduct Rule 2110 and Procedural Rule 8210. Dickey failed to answer the Complaint or the Second Notice of Complaint and Complaint that Enforcement issued on May 27, 2005. As a result, Enforcement filed a Motion for Entry of Default Decision on July 20, 2005. Dickey did not respond to that Motion. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, the Motion will be granted, and the allegations in the Complaint, which is attached to this Decision, will be deemed admitted.

Findings of Fact¹

Respondent

Timothy Dickey was registered in several capacities with NASD member firm, FFP Securities, Inc. ("FFP") from September 22, 1994, until the termination of those registrations on March 10, 2003. He was registered with NASD as an Investment Company and Variable Contracts Products Principal and Representative, a General Securities Representative, and a Direct Participation Program Representative. Dickey is not currently registered with NASD.

Unsuitable Recommendations

Dickey recommended and implemented an investment strategy for two customers, FS and KG, without a reasonable basis for believing that the strategy was suitable, given the customers' financial needs and conditions. In the process, Dickey earned approximately \$222,000 in commissions on the sales of securities to the two customers.

¹ All findings of fact are based on the admitted allegations of the Complaint, the Declaration Supporting Motion for Entry of Default Decision by Laura Leigh Blackstone, and the seven accompanying exhibits.

Customer FS

FS was 62 years old in 1997 when Dickey began recommending investments for him. FS planned to retire from his dental practice in 1998 or 1999, and had a primary investment objective of earning \$10,000 per month of investment income to support himself during his retirement. His risk tolerance was moderate, and his initial investment with Dickey included approximately \$1,020,000, and a plan to invest the proceeds from the sale of his dental practice.

Dickey recommended an investment strategy that included the purchase of (1) three variable annuities, (2) two variable life insurance policies with high annual premiums, (3) a risky limited partnership interest, (4) restricted shares of the technology stock, Broadband Wireless International Corporation ("BBAN"), and (5) the illiquid Boston Capital Tax Credit Fund.

Although FS was to withdraw \$10,000 per month from the variable annuities to satisfy his need for retirement income, the value of the annuities fluctuated with the market, and, accordingly, monthly withdrawals might come out of income, principal, or a combination of both. The variable annuities had surrender fees for withdrawals over 10%, resulting in limited liquidity. Dickey's strategy also required FS to withdraw funds annually from the variable annuities to pay the premiums on the variable life policies. By November 1998, FS was required to pay \$206,084 in annual premiums on the variable life policies. The restricted shares of BBAN and the investments in the limited partnership and Tax Credit Fund were illiquid and risky. Consequently, they could not produce income that was also required to pay for the annual premiums on the variable life policies.

FS was unable to pay the annual premiums on the variable annuities or provide the income he needed for his retirement. He incurred a financial loss of approximately \$164,370 as a result of Dickey's investment strategy. FS filed an arbitration claim against FFP, which resulted in a \$45,000 settlement.

Customer KG

In November 1999, KG was 65 years old and had retired due to a disabling brain tumor. He had investments totaling approximately \$930,000 and a \$1 million whole life policy with a cash value of approximately \$225,000. He was receiving monthly annuity payments of \$2,400, as well as long-term disability payments that would cease in 2001. His investment objectives were to earn income to supplement his monthly annuity payments, and retain liquidity to meet possible medical expenses.

Dickey recommended an investment strategy for KG that was quite similar to the one he recommended for FS, including the purchase of: a variable annuity, two variable life insurance policies with high annual premiums, a risky limited partnership interest, restricted shares of BBAN, and shares of Boston Capital Tax Credit Fund. Again, because the value of the annuities varied with fluctuations in the market, withdrawals could come from income, principal, or a mixture of both.

Due to his disability, KG's insurance premiums were high, and, as a result, the cash value of his policies was substantially less than the premiums paid. By September 2002, KG had paid approximately \$320,000 in premiums, but the cash value of the variable life policies was only \$86,000. Therefore, he could not borrow from those policies if he needed to supplement his retirement income.

As with FS, the strategy required KG to withdraw funds from the variable annuity to pay the annual premiums on the variable life policies. However, the annuity had a surrender fee for withdrawals over 10%, resulting in limited liquidity that failed to provide KG with enough income to pay the annual premiums of \$160,000 on the variable life policies. The other investments were illiquid and could not be used to pay the premiums or provide supplemental income for his own use. As a result, he was forced to let the insurance policies lapse in September 2002. KG lost approximately \$471,878 on the investments. He filed an arbitration claim against the firm and settled for \$475,000.

Private Securities Transactions

Dickey sold restricted shares of BBAN stock, owned by the president of BBAN, to customers FS and KG in the amount of \$94,629, and earned commissions on those sales, without first providing written notice to, and obtaining written approval from, his employer firm. BBAN was not was not a stock that Dickey was authorized to sell, nor was the sale of that stock within the regular course and scope of Dickey's employment with FFP.

Requests for Information

In connection with its investigation into the first two Causes of Complaint, on June 2, 2004, NASD staff issued a request for Dickey to provide information. The request for information was sent via first class mail to Dickey's last known Central Registration Depository residential address ("CRD address").² Dickey did not respond to the June 2 request, nor was the letter returned.

The staff sent second and third requests for information to Dickey's CRD address on June 18, 2004, and June 28, 2004, respectively. The June 18th request for information

² [REDACTED] 01.

was sent via first class and certified mail. The first class mailing was not returned, but the certified mailing was returned with a handwritten notation that read: "Moved, Left no address" and "[REDACTED]". The staff mailed the June 28 request for information to the new address via first class and certified mail. The certified mail return receipt was returned to the district office, with the signature "C. Dickey for Tim Dickey." The delivery date on the receipt was July 3, 2004.

On July 6, 2004, the staff sent a fourth request for information to Dickey at [REDACTED] (the "N.W. 133rd address"). The certified letter was returned to the district office on August 10, 2004, marked "Unclaimed." Dickey has not responded to any of the requests for information.

Service of Complaint

On April 28, 2005, the NASD staff sent the Notice of Complaint and Complaint by first class and certified mail to Dickey's CRD address as well as the N.W. 133rd address. The certified mail return receipt from the Notice and Complaint sent to the CRD address was returned, signed by "Joe Molder." The Notice of Complaint and the Complaint sent to the N.W. 133rd address were returned, with hand written notation: "Does not live @ this address."

On May 4, 2005, the staff received a telephone call from Dickey's former spouse who provided a more current address for Dickey: [REDACTED] (the "MacArthur Blvd. address"). The staff served the Notice of Complaint and the Complaint by first class and certified mail to Dickey at the MacArthur Blvd. address on May 4, 2005. The certified mail receipt was returned on

May 9, 2005, with the signature of "Joe Molder" reflecting a delivery date of May 6, 2005.

The staff sent a Second Notice of Complaint and Complaint, on May 27, 2005, to Dickey's CRD address, the 6521 N.W. 133rd address, and the MacArthur Blvd. address. The certified mail return receipts for those mailings were returned to the district office, each with the signature of "Joe Molder." Dickey did not file an Answer to the Complaint or the Second Notice of Complaint and Complaint.

Discussion and Conclusions

NASD Jurisdiction over Formerly Associated Persons

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a registered person after the effective date of the individual's termination of registration. During the period of retained jurisdiction, NASD may file a complaint based on conduct that occurred while the individual was registered with a member firm, or based on such person's failure to provide information requested pursuant to NASD Procedural Rule 8210, if the request was made and the complaint was filed during the period of retained jurisdiction.

Here, the Complaint was filed within two years of the termination of Dickey's registration. It is based on conduct that occurred while he was registered with FFP Securities, Inc., and his failure to provide information that was requested during the period of retained jurisdiction. Accordingly, NASD has jurisdiction over this proceeding.

Respondent's Default

Enforcement properly served the Complaint on Dickey by sending it via first class and certified mail to his CRD address, as well as to two other addresses obtained during

the course of the investigation. Pursuant to NASD Procedural Rule 9134, the mailings provide constructive notice of the instant proceeding. Because Dickey failed to respond to the Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint against Dickey are deemed admitted.

Unsuitable Recommendations

NASD Conduct Rule 2310 requires that a registered representative have a "reasonable basis" for believing that a recommendation made to a customer regarding the purchase, sale, or exchange of any security is suitable for that individual. A violation of Conduct Rule 2310 is also a violation of Rule 2110, in contravention of "just and equitable principals of trade."³ Here, Dickey recommended an investment strategy for two individuals that was clearly unsuited to their investment goals and needs.

Both FS and KG had a need for a consistent stream of income from their investments to cover their expenses in retirement. Given the limited liquidity of the investments and the foreseeable risk that they might not be able to cover even the high annual premiums on the life insurance policies, Dickey had no reasonable basis for recommending that either FS or KG invest funds according to his investment strategy. That strategy caused an unnecessary depletion of his two customers' assets and substantial financial losses, while he benefited by receiving commissions of almost \$222,000. By recommending that unsuitable strategy, Dickey violated NASD Conduct Rules 2310 and 2110.

³ *Dep. of Enforcement v. Daniel Richard Howard*, 2000 NASD Discip. LEXIS 16 (NAC Nov. 16, 2000).

Private Securities Transactions

NASD Conduct Rule 3040 requires an associated person who participates in private securities transactions to provide prior written notice to the member firm with which he is associated, and, if the person is to receive selling compensation, to receive from the firm written approval for such participation. The purpose of the rule is to ensure that a member firm adequately supervises the suitability and due diligence responsibilities of the associated person.⁴ The Rule also serves to "protect employers against investor claims arising from an associated person's private transactions and to prevent customers from being misled as to the employing firms' sponsorship of the transactions."⁵ A violation of Rule 3040 is also a violation of Conduct Rule 2110.⁶

In this case, Dickey participated in the sale of \$94,629 of restricted shares of BBAN to FS and KG, and earned commissions on those sales, without providing written notice to, and obtaining written approval from, his employer, FFP. BBAN was not a stock that the firm sold to its customers, and selling the stock was outside the scope of Dickey's employment. Accordingly, by participating in those sales, he violated NASD Conduct Rules 3040 and 2110.

Failure to Respond

NASD Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its

⁴ See *Dep't of Enforcement v. Carcaterra*, 2001 NASD Discip. LEXIS 39, at *8 (NAC Dec. 13, 2001).

⁵ *Id.* at *8-9.

⁶ See Steven J. Gluckman, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

regulatory functions without subpoena power.⁷ When an individual fails to respond to information requests, NASD's ability to perform its regulatory responsibilities is subverted.⁸ A violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110.⁹

By letters dated June 2, 2004, June 28, 2004, and July 6, 2004, the NASD staff requested that Dickey provide certain information concerning the activities described in the First and Second Causes of Complaint. The requests were sent pursuant to the requirements of Procedural Rule 8210. Dickey failed completely to respond to the staff's requests for information, thereby violating Rules 8210 and 2110.

Sanctions

Unsuitable Recommendations

For unsuitable recommendations, the NASD Sanction Guidelines suggest a fine of \$2,500 to \$75,000.¹⁰ The General Principles for sanctions allow adjudicators to increase the recommended fine amount by adding the amount of the respondent's financial benefit.¹¹ In addition, the Guidelines recommend a suspension for a period of 10 business days to one year, or a longer suspension or a bar in egregious cases.¹² In determining whether the offense was egregious, the adjudicator may consider, among other things, the number of acts involved in the offense, the length of time over which the

⁷ See Joseph G. Chiulli, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information); *Dep't of Enforcement v. Benz*, No. C01020014, 2003 NASD Discip. LEXIS 11, at *18 (OHO Mar. 4, 2003) ("Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function.").

⁸ Joseph P. Hannan, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

⁹ *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 5, at *25 (NAC Apr. 19, 2000).

¹⁰ NASD SANCTION GUIDELINES (2004 ed.) at 99.

¹¹ *Id.* n.2 (citing General Principle No. 6).

¹² *Id.* at 99.

conduct occurred, whether the misconduct resulted in the potential for the respondent to gain monetarily, and whether the misconduct resulted in injury to another party, and the extent of that injury.¹³

Dickey earned commissions totaling \$221,846.52 as a result of his unsuitable recommendations made to FS and KG. The customers, on the other hand, lost \$164,370 and \$471,878 respectively. Over a four-year period, Dickey effected nine transactions for FS, ranging in size from \$43,000 to \$1,250,000. Over a four month period, Dickey effected six sales for KG, ranging in size from \$44,629 to \$1,873,934.

Considering the substantial losses incurred by the customers and the large commissions Dickey earned as a result of his misconduct, as well as the period of time over which the sales occurred and the total amount of the sales, a suspension of six months and a fine of \$15,000, as requested by Enforcement, would be appropriate. In addition, the fine should be increased by \$221,846.52, representing disgorgement of his financial benefit from the transactions.¹⁴

Private Securities Transactions

The NASD Sanctions Guidelines recommend a fine ranging from \$5,000 to \$50,000 for participating in private securities transactions.¹⁵ Additionally, they suggest a suspension that varies in length according to the dollar amount of sales.¹⁶ Here, where the amount was less than \$100,000, the Guidelines recommend a suspension of 10 days to three months. Among other considerations, the Guidelines suggest that the adjudicator

¹³ Guidelines at 6-7 (Principal Considerations in Determining Sanctions)

¹⁴ The customers have settled their claims of loss with FFP

¹⁵ Guidelines at 15-16

¹⁶ Id.

take account of whether the customers to whom he sold were customers of his employer.¹⁷

In this case, both FS and KG were customers of FFP, and they were injured by the violation. Dickey gave no notice whatsoever to his firm, and subjected it to claims by the customers who lost their investments. Accordingly, as recommended by Enforcement, a fine of \$20,000 and a suspension of three months would be appropriate.

Failure to Respond to Information Requests

For failure to respond to requests for information made pursuant to Rule 8210, the Sanction Guidelines provide that a bar is the standard sanction where, as here, the individual did not respond in any way.¹⁸ Dickey's failures to comply with the requests were unequivocal and complete. There are no mitigating circumstances that would warrant a sanction less than a bar. Accordingly, Dickey will be barred in all capacities for failing to respond in any manner to requests for information made pursuant to Rule 8210.

In light of the bar, no suspensions will be imposed for the unsuitable recommendations or the private securities transactions. However, in conformity with NASD Notice to Members 99-86, Dickey will be fined \$221,846.52, representing disgorgement of his financial benefit from his misconduct.

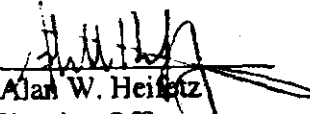
¹⁷ *Id.* The Guidelines also suggest an adjustment if the product sold away is found to involve a violation of federal or state securities laws or SRO rules. The Complaint alleges that the seller of restricted shares of BBAN was charged by the SEC in connection with running a "pump and dump scheme." Neither the Complaint, nor any subsequent filing, discloses the result of that charge. Therefore that allegation has not been considered in determining sanctions in this proceeding.

¹⁸ GUIDELINES at 35.

Order

Timothy B. Dickey is barred from association with any NASD member firm in any capacity for failing to respond to requests for information, in violation of Rules 8210 and 2110. In addition, Dickey is fined \$221,846.52, representing disgorgement of his financial benefit from violating NASD Conduct Rules 2120, 2310, and 3040. The bar will become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Alan W. Heifetz
Hearing Officer

Copies to:
Via First-Class Mail & Overnight Courier
Timothy B. Dickey

Via First-Class & Electronic Mail
Laura Leigh Blackstone, Esq.
Rory C. Flynn, Esq.