

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT (AMENDED)
NO. C10040013

TO: Department of Enforcement
NASD

RE: AXA Advisors, LLC, Respondent
Broker-Dealer
BD No. 6627

Pursuant to Rule 9216 of NASD's Code of Procedure, Respondent AXA Advisors, LLC ("AXA" or the "firm") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below, and as an amendment to the original AWC accepted by NASD on February 25, 2004 (the "February 25, 2004 AWC"). This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against it alleging violations based on the same factual findings.

Respondent understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Enforcement and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against it; and
3. If accepted:
 - a. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against it;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about Respondent's disciplinary records;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and
 - d. Respondent may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying,

directly or indirectly, any allegation in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects Respondent's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

Respondent also understands that its experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

AXA has been a member of NASD since January 23, 1974. The firm conducts a general securities business and is primarily engaged in the distribution of investment company products, such as mutual funds, variable life insurance and variable annuity contracts. The firm has approximately 7,000 registered individuals and 200 branch offices. AXA does not have any prior relevant disciplinary history with the Securities and Exchange Commission, any self-regulatory organization, or any state securities regulator.

I.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against it;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

Respondent further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and

conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

II.

ACCEPTANCE AND CONSENT

AXA hereby accepts and consents, without admitting or denying the allegations or findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by NASD:

A. SUMMARY

This disciplinary matter arises from AXA's failure to provide opportunities to purchase Class A shares of certain mutual funds at net asset value ("NAV") by numerous investors during the time period of February 2000 through July 2003. In particular, these mutual funds offered "NAV Transfer Programs" that allowed investors to purchase Class A shares at NAV and not pay any sales charges, if the customer invested proceeds from the redemption of shares of another mutual fund and previously had paid either a front-end or back-end sales charge.

AXA's Investment Products Group (the "Products Group") failed to exercise reasonable due diligence to identify essential terms and conditions of NAV Transfer Programs of certain mutual fund offerings, with the result that investors who were eligible to purchase Class A shares under the NAV Transfer Programs (1) purchased Class A shares and incurred front-end sales charges that they should not have paid, and/or (2) purchased Class B shares of these mutual funds, even though they qualified to purchase the Class A shares under the NAV Transfer Program. These investors became subject to contingent deferred sales charges ("CDSCs"), as well as the higher ongoing distribution and service fees ("Rule 12b-1 fees" or "fees") associated with the Class B shares.

During the period of June 2000 through July 2003, Erik Mosholt ("Mosholt"), the manager of the Products Group, was responsible for establishing, maintaining, and enforcing a reasonable system designed to learn essential terms and conditions of mutual fund offerings and to identify all NAV Transfer Programs for the benefit of AXA's customers. The Products Group, however, did not have adequate systems or procedures in place to identify and determine the availability of NAV Transfer Programs. In fact, the Products Group, whose responsibilities included conducting due diligence of all third-party mutual funds sold by the firm, did not have any written procedures regarding the functions for which the Products Group was responsible.

B. MUTUAL FUND SHARE CLASSES

Most mutual funds offer three classes of shares to individual investors: Class A, Class B, and Class C shares. Investors may purchase Class A or Class B shares at NAV subject to a sales charge. The sales charge on the Class A shares is paid by the investor at time of purchase and is

referred to as an initial sales charge. The sales charge incurred upon redemption of the Class B shares is referred to as the CDSC. In general, investors may also purchase Class C Shares at NAV, without paying an initial sales charge or CDSC, as long as the shares are held for one year or more. In addition to these sales charges, all classes of shares are subject to Rule 12b-1 fees, which are higher for Class B and C shares than those of Class A shares. Also, over a period of time, Class B shares ultimately convert to Class A shares, while Class C shares do not.

C. PURCHASES OF CLASS A SHARES AT NAV

1. GENERAL

When purchasing Class A shares, investors typically purchase the shares at the “public offering price,” which is the NAV plus the initial sales charge. Most mutual funds, however, offer investors the opportunity to purchase Class A shares at NAV – without paying an initial sales charge – under certain circumstances.

For example, most mutual funds allow investors who invest \$1 million or more to purchase the shares at NAV without paying any sales charge, so long as these shares are held for at least one year. Other examples of NAV opportunities include those provided by mutual funds to employees of broker-dealers, as well as employees of the mutual fund companies and their affiliates.

2. NAV TRANSFER PROGRAMS

Some mutual funds offer investors the opportunity to purchase Class A shares at NAV through NAV Transfer Programs, regardless of the amount invested. Under these programs, an investor using proceeds from the redemption of another mutual fund, for which the investor paid a sales charge, is eligible to use those proceeds to purchase Class A shares at NAV. If the investment qualifies for such an NAV Transfer Program, the investor will not pay a sales charge on the purchase of Class A shares. Investors who purchase Class B shares of these funds when they qualify for the NAV Transfer Program become subject to higher ongoing fees, as well as CDSCs. Therefore, if the investor qualifies for this Program, there would be no reasonable basis for the investor to purchase any other class of shares.

D. AXA’S INVESTMENT PRODUCTS GROUP

During the period of June 2000 through July 2003, Mosholt, first as Vice President, and later as Senior Vice President of the Products Group, supervised, *inter alia*, AXA’s review of third-party mutual funds for possible distribution, and the ongoing review of the selected funds. The Products Group also served as an educational and informational resource for the firm’s sales force. In addition, the Products Group was responsible for developing asset allocation services, proprietary mutual funds, and the firm’s fee-based products.

E. AXA'S FAILURE TO IDENTIFY AVAILABLE NAV TRANSFER PROGRAMS

When conducting due diligence of third-party mutual funds offered to its customers, the primary focus of the Products Group was on the funds' performance, investment objectives, e.g., growth versus value, and the investment approach of the individual fund managers. Before selecting a new mutual fund to be offered to AXA's customers, the Products Group reviewed the prospectus of the mutual fund. After the firm approved a mutual fund for sale, the Products Group reviewed certain marketing and sales materials prepared by the fund companies. The Products Group did not, however, review prospectuses or Statements of Additional Information ("SAIs") on a regular basis. This lack of review contributed to the Products Group's failure to learn about two NAV Transfer Programs.

In June 2000, the Pacific Investment Management Company LLC ("PIMCO") initiated an NAV Transfer Program, which lasted, through several iterations, until October 2002. Generally, eligibility for the PIMCO Program required that investors use redemption proceeds from a mutual fund for which a sales charge was paid.

Beginning February 1, 2000, and through at least July 2003, Eaton Vance Distributors, Inc. ("Eaton Vance") offered an NAV Transfer Program. Eligibility for this Program required that investors use redemption proceeds from a mutual fund, provided that the redemption occurred within sixty days of the purchase of the Eaton Vance shares and that the redeemed shares were subject to a sales charge.

The Products Group failed to identify and learn essential terms and conditions of these programs, notwithstanding the fact that the PIMCO Program was described in its Shareholder's Guide, which was part of the SAI, and that the Eaton Vance Program was described in the prospectus.

From June 2000 through July 2003, the Products Group, which was under Mosholt's direction, failed to conduct adequate due diligence to identify all available opportunities to purchase Class A shares through NAV Transfer Programs such as the PIMCO and Eaton Vance Programs. This failure was, in large part, a result of the lack of adequate systems or procedures to identify NAV Transfer Programs. Moreover, the firm had no written supervisory or compliance procedures for the Products Group. The lack of adequate systems or procedures to identify NAV Transfer Programs led to the firm's failure to ensure that qualifying investors received the benefit of the PIMCO and Eaton Vance NAV Transfer Programs.

F. THE RESULTING HARM TO INVESTORS

1. PIMCO

During the period of August 2001 through October 2002, one PIMCO fund, the PIMCO Total Return Fund was AXA's fourth-best selling fund based on sales of mutual funds by commissions. In fact, during this period, AXA customers invested \$242,000,000 in PIMCO funds.

Beginning in June 2000 and through October 2002, PIMCO offered an NAV Transfer Program. By AXA's own calculations, during the period of August 2000 through October 2002, customers invested approximately \$6,200,000 in Class A shares of PIMCO mutual funds that qualified for, but did not receive, NAV pricing. The firm earned approximately \$200,000 in concessions from initial sales charges paid by investors in these transactions.

By AXA's own calculations, during the period of June 2000 through October 2002, customers invested approximately \$11,400,000 in Class B shares of PIMCO mutual funds when they could have qualified for the NAV Transfer Program. The firm earned approximately \$455,000 in concessions from these transactions.

2. EATON VANCE

As noted above, beginning February 1, 2000, and through at least July 2003, Eaton Vance offered an NAV Transfer Program. NASD found that during the fourteen-month period of May 2002 through July 2003, at least 16 customers invested approximately \$850,000 in Class A shares of Eaton Vance mutual funds that qualified for, but did not receive, the benefit of the NAV Transfer Program. Customers incurred at least \$33,000 in sales charges that should not have been paid.

During the fourteen-month period of May 2002 through July 2003, NASD identified at least 13 customers who invested approximately \$310,000 in Class B shares of Eaton Vance funds that could have qualified for the NAV Transfer Program. The firm earned approximately \$12,000 in concessions from these transactions.

G. NASD RULE VIOLATIONS

1. From on or about June 1, 2000 through on or about October 31, 2002:
 - a) AXA failed to ensure that investors who qualified to purchase Class A shares of PIMCO funds at NAV through PIMCO's NAV Transfer Program, received this benefit. By failing to ensure that these investors received the benefit of the NAV Transfer Program, AXA violated NASD Conduct Rule 2110; and
 - b) AXA representatives recommended unsuitable purchases of Class B shares of PIMCO funds to investors who could have qualified for the NAV Transfer Program had they purchased Class A shares. By recommending these unsuitable transactions, AXA violated NASD Conduct Rules 2310 and 2110.
2. From on or about February 1, 2000 through on or about July 18, 2003:
 - a) AXA failed to ensure that investors who qualified to purchase Class A shares of Eaton Vance funds at NAV through Eaton Vance's NAV Transfer Program, received this benefit. By failing to ensure that these investors

received the benefit of the NAV Transfer Program, AXA violated NASD Conduct Rule 2110; and

- b) AXA representatives recommended unsuitable purchases of Class B shares of Eaton Vance funds to investors who could have qualified for the NAV Transfer Program had they purchased Class A shares. By recommending these unsuitable transactions, AXA violated NASD Conduct Rules 2310 and 2110.
3. From in or around June 2000 through in or around July 2003, AXA, acting through Mosholt, failed to establish, maintain and enforce a supervisory system reasonably designed to identify all categories of opportunities for investors to purchase mutual funds at NAV. By reason of the foregoing, AXA and Mosholt violated NASD Conduct Rules 3010 and 2110.

H. SANCTIONS

AXA consents to the imposition, at a maximum, of the following sanctions:

1. The firm has been fined \$250,000, \$50,000 of which was joint and several with Mosholt, pursuant to the terms of the February 25, 2004 AWC;
2. The firm and Mosholt have been censured, pursuant to the terms of the February 25, 2004 AWC;
3. An undertaking that AXA will perform the following:
 - a) AXA retained, within 30 days of the effective date of the February 25, 2004 AWC, the services of an Independent Consultant not unacceptable to the Department of Enforcement. AXA has and shall continue to exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant. AXA retained the Independent Consultant to: (i) conduct a comprehensive review of, and make written recommendations for the revision of, AXA's supervisory and compliance procedures and systems in connection with the firm's investment company securities business, including its due diligence review of investment company products; and (ii) (a) assess, evaluate, and confirm the adequacy of AXA's methodology used to identify and compensate investors who qualified for, but did not receive the benefit of any available NAV Transfer Program, and (b) assess, evaluate, and confirm AXA's determinations of restitution amounts in accordance with the parameters set forth in paragraph H(3)(b)(3) below.
 - b) Within 160 days of the effective date of the February 25, 2004 AWC, the Independent Consultant provided the Department of Enforcement with a

written report (the "Initial Report"), not unacceptable to the Department of Enforcement, confirming the following items:

- (1) The appropriateness of AXA's methodology used to identify and compensate investors for the time period of February 1, 2000 through the effective date of the AWC, who qualified for, but did not receive, the benefit of any available NAV Transfer Program, either by purchasing Class A shares and paying an initial sales charge or by purchasing a class of shares other than Class A shares even though they qualified to purchase Class A shares at NAV through the NAV Transfer Program (the "qualifying investors").
- (2) The list of all qualifying investors. The list shall be in the form of an electronic file prepared by AXA, in the format of a Microsoft Excel spreadsheet, and include all qualifying investors, and details of the qualifying purchase transactions, including the date of the purchase, the specific mutual fund purchased, the amount invested, and information identifying the investors including their names, addresses, and account numbers.
- (3) The appropriateness of AXA's written restitution plan with respect to the proposed compensation to be provided to all qualifying investors, including:
 - (a) Plans for refunds to those qualifying investors who purchased Class A shares, but did not receive NAV pricing, and were charged and paid an initial sales charge;
 - (b) Plans for compensating those qualifying investors who purchased and continue to hold a class of shares other than Class A shares. AXA shall offer those investors who still hold these shares compensation in such a manner that each investor is placed in a substantially equivalent financial position to the position such investor would have been in with respect to that single transaction had the investor purchased Class A shares instead of other class(es) of shares;
 - (c) Plans for qualifying investors who purchased a class of shares other than Class A shares, and sold some or all of those shares to be placed in a substantially equivalent financial position to the position such investor would have been in with respect to that single transaction had the investor purchased Class A shares instead of other class(es) of shares; and

- (d) The calculation of interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), for such restitution amounts for those categories of qualifying investors identified in subparagraphs (a) and (c) above.
 - (e) The Initial Report shall contain copies of the letters to be sent to each category of qualifying investors notifying them of their restitution amounts or offer(s) of conversion under the restitution plan.
- c) Within 160 days of the effective date of the February 25, 2004 AWC, the Independent Consultant completed a review of AXA's supervisory and compliance procedures and systems in connection with the firm's investment company securities business, including its due diligence review of investment company products, and prepare written recommendations for revision of such supervisory and compliance procedures and systems. The Independent Consultant's recommendations were accompanied by the Independent Consultant's assessment of reasonable time frames, not unacceptable to the Department of Enforcement, for the proper development and implementation by AXA of such recommendations. In consultation with the Independent Consultant, AXA will implement the Independent Consultant's recommendations relating to AXA's supervisory and compliance procedures and systems in connection with AXA's investment company securities business, including its due diligence review of investment company products, in accordance with the Independent Consultant's specified implementation time periods, and shall provide to the Department of Enforcement satisfactory proof of implementation.
- d) Within 120 days of the effective date of this AWC, the Independent Consultant shall provide the Department of Enforcement with a Final Report setting forth the results of AXA's implementation of the restitution plan described above, including the amounts and manner of all restitution provided to the qualifying investors.
- e) For good cause shown, and upon receipt of a timely application from the Independent Consultant or AXA, the Department of Enforcement may extend any of the procedural dates set forth above.
- f) The imposition of a restitution order or any other monetary sanction herein, and the timing of such ordered payments, does not preclude investors from pursuing their own actions. If for any reason AXA cannot locate any investor after reasonable and documented efforts within such period, or such additional period agreed to by the Department of Enforcement, AXA shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed

property, or abandoned property fund for the state in which the investor is last known to have resided.

- g) To ensure the independence of the Independent Consultant, AXA: (i) shall not have the authority to terminate the Independent Consultant without the prior written approval of the Department of Enforcement; (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the AWC at their reasonable and customary rates; (iii) shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports, or documents to the Department of Enforcement.
- h) To further ensure the independence of the Independent Consultant, for the period of the engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with AXA, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. Any firm with which the Independent Consultant is affiliated in the performance of his or her duties under the AWC shall not, without prior written consent of the Department of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with AXA, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.
- i) AXA must cooperate fully with the Independent Consultant, including ensuring the cooperation of AXA's employees. AXA must not place restrictions on the Independent Consultant's communications with the staff of NASD. AXA will make available to NASD, upon request, any and all communications between the Independent Consultant and the firm, and any documents that the Independent Consultant reviewed or relied upon in connection with the engagement.

The sanctions imposed herein shall be effective on a date set by NASD staff.

III.

OTHER MATTERS

- A. Respondent understands that it may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement

does not constitute factual or legal findings by NASD, nor does it reflect the views of NASD or its staff.

- B. Respondent agreed to pay, and has already paid, the monetary fine imposed on it under the terms of the February 25, 2004 AWC. AXA also agrees to comply with the restitution order discussed above and pay the restitution amounts in accordance with the terms of the undertakings set forth above.
- C. Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

AXA certifies that it has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce it to submit it.

AXA Advisors, LLC

Nov 24, 2004
Date

By: 

Name: Edward H. Dane

Title: President

Reviewed by:


Counsel for Firm

Accepted by NASD:

January 5, 2005
Date


Evan J. Gordon
Regional Counsel
NASD, District No. 10
One Liberty Plaza
New York, NY 10006
Signed on behalf of the Director of ODA, by
delegated authority