

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FREDERICK DAVID HOLLOWAY
(CRD No. 248814),

Respondent.

Disciplinary Proceeding
No. 2016050025401

Hearing Officer–DW

**AMENDED¹ HEARING PANEL
DECISION**

April 11, 2019

Respondent Frederick David Holloway improperly recommended variable annuity exchanges for dozens of clients. During a FINRA investigation into his conduct, Holloway responded to Rule 8210 requests for documents and information by improperly withholding documents and providing altered documents. The investigation also revealed that while conducting his business Holloway engaged in other dishonest conduct, including impersonating customers and others on the telephone, completing blank, pre-signed annuity exchange applications and related documents for customers, cheating on continuing education courses, and overstating his advisory business on his Form ADV. For failing to comply with Rule 8210 requests and for cheating on his continuing education, Holloway is barred from association with any FINRA member in any capacity. No sanctions are imposed for his other violations in light of the bars.

Appearances

For the Complainant: Mitka T. Baker, Esq. and Jonathan I. Golomb, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Bradford Carney, Esq., Royston, Mueller, McLean & Reid, LLP

¹ This decision was amended to correct a factual finding reflected on page 10.

DECISION

I. Introduction

Respondent Frederick David Holloway (“Holloway”) sold investment products to clients through his firm, Holloway & Associates, Inc., in Easton, Maryland. Despite the name, there are no associates; the only employees at the firm’s two-room office are Holloway and his secretary. Holloway has been the only registered representative at the firm since its inception in 1982.

In late 2009, Holloway’s long-time secretary resigned, and was soon replaced by Holloway’s then-client (and friend), NL. In this decision, we call her Jane. When working at the firm, Jane became convinced that Holloway was engaging in improper business practices. Jane was most troubled by her belief that Holloway was harming his clients by improperly switching them from one variable annuity to another to generate commissions. So she wrote a letter to the head of FINRA’s Department of Enforcement (“Enforcement”) reporting Holloway. An investigation soon followed.

During the investigation, Enforcement requested that Holloway produce his files for several clients who had switched variable annuities. Holloway provided some, but not all, of the requested documents. Unbeknownst to Holloway, Jane told the Enforcement investigator that Holloway was holding back documents. After Holloway failed to produce all the documents following a second request, Enforcement conducted an in-person inspection of his office. The inspection confirmed Jane’s report that Holloway had not produced everything in the requested client files. Jane provided details to Enforcement during the investigation into Holloway’s other problematic business practices, such as having clients sign blank documents, having her pretend to be a client or a representative of a different firm on phone calls, or having her complete Holloway’s required state insurance online continuing education courses for him.

After its investigation, Enforcement brought this action alleging six causes of action, including that as part of 42 variable annuity exchanges, Holloway lacked a reasonable basis for recommending that clients switch variable annuities. Enforcement also charged Holloway with improperly withholding documents during the investigation and engaging in other dishonest conduct. Holloway denies the allegations. He maintains that he had a substantial basis for his recommendations, and that his failure to immediately produce relevant documents was merely a product of his confusion about the requests. He claims the other charges of dishonest conduct are minor infractions at best. This Hearing Panel held a hearing on the claims and defenses in Washington, D.C.

II. Findings of Fact

A. The Respondent

Holloway started his career in the securities industry in 1971.² In 1982, he opened his own broker-dealer, Holloway & Associates, Inc. (the “firm”), in Easton, Maryland.³ Since then, Holloway has been continuously registered with the firm.⁴ He is the firm’s sole registered representative.⁵ Holloway holds Series 1, 24, and 26 licenses, and holds a Maryland state license to sell insurance.⁶ Holloway was also a registered investment adviser representative through his firm F. David Holloway, RIA, in Maryland from March 1991 through 2016, although he had no fee-based advisory clients after 2006.⁷

During the relevant period of January 2013 through June 2016, Holloway earned roughly 70 percent of his income from variable annuity sales commissions.⁸ The rest of his income came from insurance and mutual fund sales.⁹

B. Background on Variable Annuities

A variable annuity is a hybrid security and insurance product.¹⁰ Like a traditional annuity, it is a contract between an investor and an insurance company where the investor agrees to make a lump-sum payment or a series of payments called premiums during an “accumulation phase” in exchange for a regular stream of payments or a lump-sum payment in a future payout period called the “annuitization phase.”¹¹

The “variable” aspect of the annuity comes from investors’ ability to participate in market gains (or losses) through a range of investment options provided by annuity “subaccounts” similar to mutual funds that invest in stocks, bonds, and money market

² Stipulation (“Stip.”) ¶ 2.

³ Stip. ¶ 2.

⁴ Stip. ¶ 2.

⁵ Stip. ¶ 1.

⁶ Stip. ¶ 3.

⁷ Stip. ¶¶ 5, 6.

⁸ Stip. ¶ 4.

⁹ Stip. ¶ 4.

¹⁰ Complainant’s Exhibit (“CX-”) 19, at 89.

¹¹ CX-19, at 134-35; *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *7-9 (Feb. 27, 2012).

instruments.¹² Income and investment gains from variable annuities are generally tax-deferred until withdrawn.¹³

Beyond these basics, a variable annuity investor can choose from many optional features. For instance, a variable annuity might include the right to a guaranteed stream of periodic payments for as long as the investor lives, even if those benefits exceed the paid-in premiums or market gains.¹⁴ Another example is a “death benefit,” which provides the investor’s surviving beneficiaries a specified amount (typically at least the amount of the investor’s payments to the insurance company less accumulated withdrawals).¹⁵ These and other optional features¹⁶ make up the insurance aspect of the product, and are typically available to investors at additional cost.¹⁷ Other costs associated with variable annuities include administrative fees, mortality and expense risk (or “M&E”) fees, as well as “surrender charges” assessed if the investor withdraws money during the early years of the investment.¹⁸

The variable annuities marketed to Holloway’s customers here are sold by Transamerica. The company sells various classes of annuities, each with slightly different features. The so-called “B-share” variable annuity has no up-front sales charges beyond customary annual administrative and M&E fees, but does impose a surrender charge on investors who withdraw their funds during the first seven years.¹⁹ The M&E fee is 1.15 percent of the premium paid into the annuity each year, and the surrender fee ranges from 3 to 8 percent of the premium, decreasing over the seven-year period.²⁰ Transamerica’s “X-share” annuity is like its B-share, but offers investors an additional “premium enhancement” or bonus amount added to the contract value, in exchange for higher administrative and M&E fees and a longer, nine-year surrender period.²¹ For the X-share, the annual M&E fee is 1.5 percent per year.²² The X-share’s

¹² CX-19, at 161-62.

¹³ CX-19, at 90.

¹⁴ Joint Exhibit (“JX-”) 2, at 5.

¹⁵ CX-19, at 80, 90.

¹⁶ There are a wide variety of other optional features, including a stepped-up death benefit, guaranteed minimum income benefit, long-term care insurance, and up-front bonus credits, that are also available to the investor at specified charges. *See* CX-19.

¹⁷ CX-19, at 165-66.

¹⁸ CX-19, at 166. Variable annuities generally contain a “free-look” period of several days after the initial investment during which investors can terminate the contract without incurring a surrender charge.

¹⁹ JX-2, at 16.

²⁰ JX-2, at 16.

²¹ JX-2, at 10.

²² JX-2, at 10.

bonus added to the premium is up to 5.5 percent (depending on the investor's age), while its fees are 35 basis points (or about 25 to 30 percent) higher than the B-share.²³

When an investor buys a variable annuity, the selling insurance company pays the broker a commission.²⁴ The commission varies depending on the insurance company, the relationship between the broker-dealer and the insurance company, the type of annuity sold, and how much money the customer invests.²⁵ Commissions at times are paid in full at the time of sale, over the life of the contract, or for another defined period.²⁶

C. Holloway's Variable Annuity Exchange Recommendations

Variable annuities are the core of Holloway's business.²⁷ His book of business during the relevant period included about \$50 million in variable annuities.²⁸ Before the relevant period, Holloway mostly sold John Hancock variable annuities to his customers.²⁹ Holloway later solicited several of his clients to switch out of the Hancock product and into Transamerica annuities.³⁰ The allegations at issue focus on Holloway's recommendations to 39 clients that they engage in 42 separate switch transactions during the relevant period. As a result of these switches, Holloway earned \$214,989 in commissions, while his clients paid a total of \$114,470 in surrender fees.³¹

Holloway recommended that several customers exchange their annuity for a more expensive product with additional riders, features, and subaccounts.³² While the M&E fees for the existing John Hancock annuity and the new Transamerica product were comparable, the exchanges typically led to a 37 to 52 percent increase in contract costs.³³ And in 37 of the 42 exchanges, Holloway's clients incurred surrender charges ranging from \$50 to over \$29,000 as a result of surrendering their Hancock annuity before its surrender period expired.³⁴

²³ Answer ("Ans.") ¶ 7.

²⁴ Hearing Transcript ("Tr.") (Holloway) 829-31.

²⁵ Tr. (Goodman) 324.

²⁶ Tr. (Goodman) 324; (Holloway) 829.

²⁷ Stip. ¶ 4.

²⁸ Ans. ¶ 7.

²⁹ Tr. (Goodman) 309; (Holloway) 730.

³⁰ Tr. (Goodman) 309.

³¹ CX-24.

³² CX-23.

³³ Tr. (Goodman) 455. The Hancock and the Transamerica B-Share fees are comparable. As explained below, for a number of clients Holloway recommended an exchange into the X-share, urging the use of its bonus feature to offset surrender fees. As explained above, the X-share has higher M&E fees than the other annuities because of that bonus feature.

³⁴ CX-24.

To justify the substantial surrender costs incurred as a part of most of the transactions, Holloway recommended to clients that the “bonus” feature of the Transamerica X-share annuity would offset the surrender costs.³⁵ While the amount of the “bonus” met or exceeded the surrender fees, the X-share’s bonus feature came at the price of increased annual fees and a longer surrender period for the client.³⁶ Because of these increased fees, Transamerica’s prospectus warned against such an approach because of the increased fees attributable to the bonus.³⁷ Holloway was aware of the warning but disregarded it.³⁸ And Holloway never disclosed these increased costs to his customers.³⁹

Yet Holloway maintained that the Transamerica annuity was the superior product.⁴⁰ He maintained that the premium enhancement, or “bonus” feature of the X-share annuity, was a significant feature. And Holloway justified his exchange recommendations based on other benefits he believed his clients would receive, including Transamerica’s guaranteed withdrawal benefit feature.⁴¹ He also cited the Transamerica income feature, which offers 5.5 percent compounded interest and a highest monthly step-up benefit to the withdrawal base.⁴² Transamerica also provides an “income enhancement” rider, which increases the withdrawal amount for the applicant or spouse by 50 percent if either of them is confined to a long-term care facility.⁴³ Holloway similarly touted Transamerica’s joint income rider, which provides protected income streams for the life of the applicant and spouse.⁴⁴

Of course, those benefits come at a cost.⁴⁵ And the Hancock annuities that Holloway recommended his clients abandon (often at substantial cost) *also* provided several benefits.⁴⁶ The Hancock annuity also provided investors an income feature, though with simple interest at a slightly lower 5 percent rate.⁴⁷ It also provided a step-up benefit, though calculated on an annual (rather than monthly) basis.⁴⁸ And as Holloway acknowledged, certain Hancock annuities had features *superior* to Transamerica, including a 7 percent (instead of 5 percent) increase to the

³⁵ Tr. (Holloway) 814.

³⁶ Tr. (Holloway) 811-14.

³⁷ Tr. (Holloway) 815; JX-2, at 11.

³⁸ Tr. (Holloway) 815-16.

³⁹ Tr. (Holloway) 813-14.

⁴⁰ Tr. (Holloway) 730.

⁴¹ Tr. (Holloway) 732-33.

⁴² Tr. (Holloway) 734-36.

⁴³ Tr. (Holloway) 744.

⁴⁴ Tr. (Holloway) 743-44.

⁴⁵ Tr. (Holloway) 740.

⁴⁶ Tr. (Holloway) 730.

⁴⁷ Tr. (Goodman) 456.

⁴⁸ Tr. (Holloway) 735-36.

annual benefit base.⁴⁹ In some instances, clients lost substantial value by leaving the Hancock product because the client's guaranteed withdrawal benefit substantially exceeded the market value of the annuity.⁵⁰

So the question for Holloway's clients was whether any additional benefits of the Transamerica annuity were worth the surrender charges and increased fees they would pay as part of the transactions. But in urging his clients to make these exchanges, Holloway never provided them the information necessary to reasonably determine whether the juice was worth the squeeze. Holloway never quantified the value of the new investment's various benefits, nor undertook any analysis or comparison of these supposed benefits against the benefits of the old annuity along with the costs associated with these exchanges.⁵¹ He used no financial planning software, spreadsheets, or online tools to weigh the pros and cons of the exchanges.⁵² Nor did he create income projections comparing the future guaranteed income streams available from the products.⁵³ He did not prepare, let alone show his clients, any documents comparing the product costs.⁵⁴

We do not credit Holloway's hearing testimony that he undertook comparisons of this nature. Holloway testified that he did "talk with [his] clients and compare fees between the [Hancock and Transamerica] products."⁵⁵ But during his on-the-record investigative testimony, Holloway gave the following sworn answers:

Q. All right. Now, let's just – let's just go over a general question about your practices with respect to recommending the exchanges from the John Hancock products to the Transamerica products. Do you present the client at the time you're describing why you think the new policy is better for the client? Do you break it down to tell them how much they're going – how much they're paying in the old product versus how much they're paying in the new product?

A. Not specifically.⁵⁶

⁴⁹ Tr. (Holloway) 741-42; CX-9, at 75.

⁵⁰ Tr. (Holloway) 826-28; CX-9, at 18, 31 (client lost over \$20,000 in benefits from exchange).

⁵¹ Tr. (Goodman) 340-44; (Holloway) 820.

⁵² Tr. (Holloway) 820.

⁵³ Tr. (Holloway) 819-20.

⁵⁴ Tr. (Holloway) 817-18. Years prior to the transactions now at issue, Holloway *did* create a written side-by-side comparison of the material terms of two variable annuity products to explain the relative pros and cons of the products to a client contemplating an exchange. Tr. (Holloway) 934-37. And that client, having weighed the relative merits of the two annuities, decided not to go forward with a proposed exchange. Tr. (Holloway) 937-38.

⁵⁵ Tr. (Holloway) 819.

⁵⁶ Tr. (Holloway) 819-20; CX-21, at 62.

Later during that same testimony, Enforcement asked Holloway *again* whether he did any comparisons for his clients, as the dialogue below reveals.

Q. Now, I just want to reiterate – I just want to make sure that you’re – as part of your calculus in terms of whether – whether you’re recommending something moving from John Hancock to Transamerica for a given client, is it your practice to go in and figure out how much more money one of them is going to cost versus the other one?

A. Over what time period?

Q. Just as of the time period of – as of the time that you’re proposing the exchange to take place, what would be the cost of the new product in basis points versus what – how much is the John Hancock product, in basis points at that time?

A. Whether it’s more or less?

Q. Yes. Uh-huh.

A. No. I don’t.

Q. Okay. Why don’t you do that?

A. Because I don’t need to. I use this [Indicating an exhibit]. I’m sorry. Yes, yes. I’m not very good at this. I don’t feel I have to get into the specifics, I remember a question you asked me when I [was] the only one in my office. You said, Mr. Holloway, do you prepare, in looking at these, an Excel spreadsheet? Those were your exact words. I remember thinking, no, I don’t. I said – said no. If I did that, I probably – nobody would ever do anything. They would probably just go, whoa, indecision time, this is just way too much. That’s a little Dave Holloway’s interpretation of that.⁵⁷

The exhibit Holloway referred to in this explanation is a marketing presentation for the Transamerica product.⁵⁸ According to Holloway, he used a similar document for each of the transactions here.⁵⁹ He customized the presentation to the particular situation of the individual client.⁶⁰ It reflects hypothetical policy values, cash values, guaranteed payouts, and other data points of the Transamerica annuity over time based on the client’s situation.⁶¹ As a marketing presentation, the document extols the various benefits and features of the Transamerica

⁵⁷ Tr. (Holloway) 824-25; CX-21, at 68.

⁵⁸ JX-4.

⁵⁹ Tr. (Holloway) 919.

⁶⁰ Tr. (Holloway) 913.

⁶¹ JX-4.

product.⁶² The product's costs and fees, on the other hand, are not prominently featured.⁶³ And it contains *no* comparison of the features (and costs) of the Transamerica product against those of any other annuity that the client might already own.⁶⁴

The analysis reflected in these marketing materials, the lack of any documentation reflecting a meaningful comparison of the annuities being exchanged, along with Holloway's investigative testimony,⁶⁵ persuades us that Holloway conducted no meaningful comparison of the Hancock and Transamerica annuities in the exchanges now at issue. Although Holloway demonstrated at the hearing his familiarity with the operative features of the annuities, we do not believe his claim that he compared pros and cons of exchanging the Hancock and Transamerica annuities with his clients. We find it more likely that the contrary explanation Holloway provided during his investigative testimony, given before the Complaint was filed and before he had reason to shape his testimony in a manner consistent with his present defense, reveals the truth of Holloway's interactions with his customers.

D. Holloway's Improper Business Practices

Jane testified at the hearing that Holloway employed several inappropriate business practices. She attested that Holloway routinely had clients sign variable annuity applications and other forms in blank during meetings; then Jane or Holloway completed the forms back in the office.⁶⁶ Information was added to the forms related to the selection of features, account investments, beneficiary information, and other significant details.⁶⁷ The forms were then submitted to the insurance company for processing without the client seeing the completed form before submission.⁶⁸

Jane testified that Holloway photocopied signature pages of annuity application documents and kept the copies to use for other variable annuity transactions that the customers

⁶² JX-4.

⁶³ See Tr. (Holloway) 921-22 (fees are described in the "disclosures" section of the document on pages 12 and 13).

⁶⁴ JX-4.

⁶⁵ Holloway claimed at the hearing that his on-the-record testimony was an "extremely high pressure" and "intimidating" situation where he was "scared to death" as a result of being "bullied" by Enforcement. Tr. (Holloway) 820-21. But we fail to understand how any purported bullying led to Holloway's answers. And we note that when Holloway designated his entire on-the-record testimony as a proposed exhibit before the hearing, the Hearing Officer overruled Enforcement's objection and afforded Holloway the opportunity to present relevant portions at the hearing. OHO Order 18-16 (2016050025401) (Oct. 31, 2018), at 2, http://www.finra.org/sites/default/files/OHO_Order_18-16_2016050025401.pdf. Yet Holloway failed to offer any evidence of any purported bullying or other inappropriate conduct on Enforcement's part during his on-the-record testimony as reflected in the transcript. We find no reason to doubt the reliability of Holloway's pre-hearing admissions regarding his customer interactions.

⁶⁶ Tr. (NL) 92-96, 104-06, 150-51.

⁶⁷ Tr. (NL) 92-93; Stip. ¶ 10.

⁶⁸ Tr. (NL) 93-94.

later agreed to make.⁶⁹ She also testified that Holloway forged, or directed her to forge, clients' initials on insurance company forms when submitted applications later required corrections or additional information from clients.⁷⁰

She also recounted how Holloway twice directed her to impersonate clients on telephone calls with financial institutions to facilitate fund transfers for variable annuity purchases,⁷¹ and how Holloway claimed to be an employee of an insurance company on a phone conversation when seeking medical information to facilitate insurance policy purchases.⁷²

In addition, in the latter part of 2011, Holloway filed with the FINRA-operated Investment Adviser Registration Depository system ("IARD") a Form ADV (an application for Investment Adviser registration) claiming that he provided investment advisory services for as many as 250 clients and financial planning services for up to 50 clients in the prior year, reflecting as much as \$5 million in investments.⁷³ In fact, Holloway had no investment advisory clients, provided no fee-based financial planning, and had made no investments along those lines for several years.⁷⁴ Jane testified that while working for Holloway, he reprimanded her for calling him an "agent," and directed her to refer to him only as an "advisor."⁷⁵

Jane also described how Holloway enlisted her to complete several hours of online continuing education courses under his name to satisfy his state licensing requirements for variable annuity sales.⁷⁶ She completed three courses totaling 11 credit hours, while Holloway falsely certified that he completed the courses.⁷⁷ The courses included "Selling and Exchanging Annuities: A Look at Suitability Issues" and "Ethics in the Senior Market."⁷⁸

Holloway challenges Jane's truthfulness, dismissing much of her hearing testimony as "the skewed perspective of a disgruntled former employee."⁷⁹ But Holloway *admitted* engaging in each of the practices that Jane described. He admits in his Answer his practice of having clients sign blank variable annuity applications and filling out those applications after meeting with the client.⁸⁰ He also admits that once he obtained a signed but otherwise blank application

⁶⁹ Tr. (NL) 94-97.

⁷⁰ Tr. (NL) 108-09.

⁷¹ Tr. (NL) 114-17; CX-16, at 1.

⁷² Tr. (NL) 117-22.

⁷³ Ans. ¶ 30.

⁷⁴ Ans. ¶¶ 30, 31.

⁷⁵ Tr. (NL) 122-23.

⁷⁶ Tr. (NL) 75-77; Ans. ¶ 26.

⁷⁷ Tr. (NL) 77-78; CX-19, at 2, 4, 5, 22.

⁷⁸ CX-19, at 5, 22.

⁷⁹ Respondent's Post-Hearing Brief at 15.

⁸⁰ Ans. ¶ 15.

for an annuity exchange and photocopied that signature page for use in future transactions for that customer.⁸¹ He similarly admits that he entered customer initials on changes made to forms returned by insurance companies for incorrect or missing information.⁸²

We find no reason to doubt Jane’s truthfulness, and find her description of Holloway’s business practices credible. Holloway’s explanations of his deceptive conduct at the hearing, on the other hand, were not credible. For instance, Holloway attempted to excuse allowing Jane to take his continuing education courses by claiming that at the time he was recovering from serious ankle surgery and could not drive, go into the office, or even put weight on his foot.⁸³ According to Holloway, his serious medical condition justified his conduct—“I don’t want to use my foot as an excuse, but it kind of was a little bit.”⁸⁴ But cross-examination revealed that Holloway did not have his foot surgery until a year *after* Jane completed the courses.⁸⁵ His claimed surgery excuse was false.⁸⁶ He was also dishonest about initialing documents as an accommodation to clients when making changes to application forms, falsely denying misconduct that he admitted during his on-the-record testimony and in his Answer.⁸⁷ We find that Holloway was generally not credible and lacking in candor during his hearing testimony.

E. Holloway’s Responses to Document Requests During the Investigation

Jane testified that over time she grew uncomfortable with Holloway’s practices concerning variable annuity switches.⁸⁸ So she took it upon herself to report Holloway to FINRA.⁸⁹ In mid-May 2016, she wrote a letter to the head of Enforcement reporting that for several years Holloway had engaged in many switch transactions without disclosing to the clients any comparison of the variable annuities being exchanged.⁹⁰

A FINRA investigator contacted Jane shortly thereafter.⁹¹ After Jane provided him the names of ten clients who might have entered into questionable switch transactions, the investigator sent a letter under FINRA Rule 8210 to Holloway requesting all information about the clients.⁹² The letter called for production of a number of materials including “[a]ll

⁸¹ Ans. ¶ 16.

⁸² Ans. ¶ 16.

⁸³ Tr. (Holloway) 696-98.

⁸⁴ Tr. (Holloway) 700.

⁸⁵ Tr. (Holloway) 882-86.

⁸⁶ Tr. (Holloway) 886-87.

⁸⁷ Tr. (Holloway) 889-91; Ans. ¶ 16.

⁸⁸ Tr. (NL) 45-46; CX-1.

⁸⁹ CX-1.

⁹⁰ CX-1.

⁹¹ Tr. (NL) 46.

⁹² JX-6.

documents, which comprise the complete client and/or account files for” each of the individuals.⁹³ When Holloway received the letter, he told Jane to pull the files of the customers requested.⁹⁴ As Jane assembled and started copying the customer files, Holloway told her not to copy the entire files because they were *not* going to produce everything Enforcement requested.⁹⁵ He said, “[W]e aren’t giving them everything they want.”⁹⁶ Jane later provided to Enforcement her written note memorializing Holloway’s explanation.⁹⁷ He said, “[Y]ou probably don’t know what this is, but there is something in the industry called ‘churning’ and I don’t want them to think I do that.”⁹⁸ So Holloway directed Jane to pull only certain records from the client files, and only for certain time periods.⁹⁹

Holloway then produced the documents to Enforcement.¹⁰⁰ The materials produced constituted less than 20 percent of the client files that Enforcement requested.¹⁰¹ After Holloway produced those materials, Jane called the Enforcement investigator on the phone and told him “you are not getting everything you requested,” that “there’s additional documents and that everything wasn’t released.”¹⁰²

After the investigator reviewed Holloway’s production, he sent him another letter.¹⁰³ This letter requested the same materials again, explaining that Holloway’s “production of a selected transaction(s) for each identified client [did] not appear to fulfill [his first] request,” and reiterated that he was to “provide the complete client files as requested” in the first letter.¹⁰⁴ In an email accompanying the letter, the investigator told Holloway, “It appears you have limited your response to providing selected variable annuity transactions.”¹⁰⁵ The investigator pointed out that given “the extended relationships that you state that you’ve had with many of these clients there is no doubt additional materials available. . . . Please produce the requested client files in their entirety.”¹⁰⁶

⁹³ JX-6.

⁹⁴ Tr. (NL) 49-50.

⁹⁵ Tr. (NL) 50.

⁹⁶ Tr. (NL) 51.

⁹⁷ Tr. (NL) 53-55.

⁹⁸ Tr. (NL) 53-54.

⁹⁹ Tr. (NL) 56-57; CX-5, at 4.

¹⁰⁰ JX-7.

¹⁰¹ Tr. (Goodman) 350; Stip. ¶¶ 14, 17.

¹⁰² Tr. (NL) 61.

¹⁰³ Tr. (Goodman) 350-52.

¹⁰⁴ JX-8.

¹⁰⁵ JX-8, at 6.

¹⁰⁶ JX-8, at 6.

When Holloway sent an email the next day explaining that he was sending more information, the investigator responded, “Please do not consider my second request to be a drop-dead request. In other words, please take some additional time to get me the complete client files [I] requested.”¹⁰⁷ The investigator said that more time was “not a problem” because he was looking for “complete files, not necessarily speed.”¹⁰⁸

After receiving the second letter, Holloway again told Jane that they would not produce everything and repeated his concern that Enforcement thought he was churning.¹⁰⁹ So Holloway again directed Jane to pull only certain forms from the files, and only for certain time periods.¹¹⁰ Holloway then produced a few additional documents, but between his two productions combined had still produced less than 20 percent of the client files the investigator had requested.¹¹¹

Once again, Jane told the investigator that Holloway did not produce the complete client files.¹¹² She then sent a letter to Enforcement enclosing hundreds of pages of documents from client files that Holloway withheld. She also reported that she overheard several of Holloway’s appointments with clients and during those meetings he provided no comparisons between the Hancock and Transamerica annuities.¹¹³

After the two productions, Holloway directed Jane to maintain the original, complete client files that Enforcement requested on top of a file cabinet in the office.¹¹⁴ Suspecting that the two productions were incomplete, Enforcement decided to conduct an unannounced, on-site visit of Holloway’s office, and found the complete client files sitting on top of the cabinet.¹¹⁵ Enforcement’s review of those client files confirmed that Holloway had withheld most of their contents.¹¹⁶ When asked why he had not produced all of the requested materials, Holloway claimed that he misunderstood the requests.¹¹⁷

Months later, after Holloway retained counsel, he produced the complete client files.¹¹⁸ At the hearing Holloway claimed that his failure to produce the materials in response to the first request resulted from his mistake, that he “didn’t probably read the document as thoroughly as

¹⁰⁷ JX-8, at 5.

¹⁰⁸ JX-8, at 5.

¹⁰⁹ Tr. (NL) 63-65.

¹¹⁰ Tr. (NL) 65-66; CX-5, at 4.

¹¹¹ Tr. (Goodman) 350; Stip. ¶¶ 14, 15, 17.

¹¹² Tr. (Goodman) 357.

¹¹³ Tr. (NL) 66-67; CX-6.

¹¹⁴ Tr. (NL) 72, 84-85.

¹¹⁵ Tr. (NL) 73-74; CX-3.

¹¹⁶ Tr. (Goodman) 363-64, Stip. ¶¶ 14, 15, 17.

¹¹⁷ Tr. (Goodman) 367-68.

¹¹⁸ JX-10; Stip. ¶ 17.

[he] should have.”¹¹⁹ When asked why he failed to comply with a *second* letter asking for all documents in the client files, he claimed, “There were things in there that . . . I saw they wanted annuities” and believed that other matters were not responsive.¹²⁰ Yet when later asked why he kept the files stacked on top of his file cabinet after purportedly believing that he made complete responses to Enforcement, Holloway said he kept the files segregated “[b]ecause they were important. They were something that they wanted and [he] wasn’t about to just file them. They were important.”¹²¹ Thus, Holloway admitted he knew that FINRA investigators wanted the files.

Besides the substantial volume of materials not timely produced to Enforcement, certain documents were altered before being produced. On eight account information forms for variable annuity exchanges, Holloway checked the box indicating the client’s investment time horizon.¹²² When Holloway later produced through counsel copies of the original account information forms, the box indicating the client’s investment time horizon was blank.¹²³ Holloway apparently added the checked boxes to the copies of the forms he originally produced to Enforcement. The year before the Enforcement inquiries, FINRA cited Holloway during a cycle examination for failing to include customers’ investment time horizons on account information forms.¹²⁴

III. Conclusions of Law

A. Suitability Violations for Variable Annuity Switches (Cause One)

Cause one alleges Holloway’s violation of the rule that governs suitability determinations in the particular context of variable annuities, FINRA Rule 2330.

FINRA Rule 2111, the general suitability rule, requires an associated person to have a reasonable basis to believe that a recommended transaction is suitable for the customer, based on information the associated person obtained through reasonable diligence to learn the customer’s investment profile.¹²⁵ A customer’s investment profile includes, among other things, the customer’s age, financial situation and needs, investment objectives, investment experience, investment time horizon, and other information that the customer may provide. “The suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct.”¹²⁶

¹¹⁹ Tr. (Holloway) 775.

¹²⁰ Tr. (Holloway) 775.

¹²¹ Tr. (Holloway) 777.

¹²² Ans. ¶ 37.

¹²³ JX-14; CX-11.

¹²⁴ Stip. ¶ 18.

¹²⁵ FINRA Rule 2111.

¹²⁶ Supplemental Material to FINRA Rule 2111, General Principle 2111.01.

Recommendations are generally unsuitable where “(i) the representative’s understanding of the investment is insufficient to establish a reasonable basis for making a recommendation; (ii) the representative inadequately assesses whether the recommendation is suitable for the specific investor to whom the recommendation is directed; or (iii) the level of trading recommended by the representative is excessive in light of the customer’s investment needs and objectives.”¹²⁷

Given particular concerns of abuses associated with sales of variable annuity products, FINRA established a special rule governing suitability determinations in these transactions.¹²⁸ FINRA Rule 2330 permits a representative to recommend the purchase or exchange of a deferred variable annuity only when the representative has a reasonable basis to believe that the purchase or exchange not only meets the suitability requirements of FINRA Rule 2111, but also meets several additional annuity-specific suitability determinations.¹²⁹ These determinations require, among other things, full disclosure to the client of all material fees, costs, and features associated with the annuity.¹³⁰

FINRA Rule 2330 also addresses the particular context of variable annuity exchanges, permitting an exchange only after consideration of whether (i) the customer would incur a surrender charge, be subject to the starting of a new surrender period, lose existing benefits (such as death, living, or other contractual benefits), or be subject to increased fees or charges (such as M&E fees, investment advisory fees, or charges for riders and similar product enhancements); and (ii) the customer would benefit from product enhancements and improvements.¹³¹ The rule requires that these exchange considerations be memorialized in writing, “documented and signed by the associated person recommending the transaction.”¹³²

The first cause alleges that Holloway failed to meaningfully compare the benefits, fees, and surrender costs associated with variable annuities being exchanged, or document any suitability analysis, in connection with 42 variable annuity exchanges, all in violation of FINRA Rules 2330(b)(1) and 2010.¹³³

¹²⁷ *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *26 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

¹²⁸ Notice of Filing Proposed Rule and Amendment No. 1 Thereto Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities, Release No. 34-52046A, 2005 SEC LEXIS 1776, at *7-8 (July 19, 2005) (discussing NASD Rule 2821, now codified as FINRA Rule 2330).

¹²⁹ FINRA Rule 2330(b)(1)(A).

¹³⁰ *Id.*

¹³¹ FINRA Rule 2330(b)(1)(B).

¹³² *Id.*

¹³³ A violation of any FINRA rule, including Rule 2330, is a violation of FINRA Rule 2010. *Dep’t of Enforcement v. Werner*, No. 2015048048801, 2017 FINRA Discip. LEXIS 45, at *43-46 (OHO Nov. 6, 2017) (holding that a violation of FINRA Rule 2330 also violates FINRA Rule 2010). *See also Dep’t of Enforcement v. Merrimac Corp.*

1. Holloway Failed to Compare the Exchanged Annuities

We find that the preponderance of the evidence established Holloway's violation of Rule 2330. As reflected in our factual findings above, Holloway admitted in his sworn investigative on-the-record testimony that he conducted no meaningful comparison of the benefits, fees, and surrender costs associated with variable annuities being exchanged.

Holloway defends his failure to compare the material terms of the annuities being exchanged at the time of the relevant transactions by emphasizing his familiarity with the Transamerica annuity he recommended for his clients' purchase, and faulting Enforcement for failing to show that the annuity he sold was unsuitable for specific customers. Holloway points out that "FINRA's lead investigator testified that there is no customer specific suitability problem" and the evidence presented at the hearing "demonstrated [Holloway's] understanding of the products" at issue.¹³⁴ Holloway suggests that this should be the end of the inquiry, contending that "[t]he way a person can violate reasonable basis suitability while meeting the customer specific suitability is by not understanding the product."¹³⁵

Holloway misperceives the investment being recommended. The investment is not simply the purchase of an annuity product, but a replacement transaction where the customer exchanges one annuity for another. The question is not whether one or the other annuity was suitable for the customer, but whether the transaction as a whole was beneficial.¹³⁶ In other words, Holloway should have "carefully consider[ed] whether a replacement is in the best interests of the consumer."¹³⁷ In the somewhat analogous context of a mutual fund exchange recommendation, the NAC found that a representative violated the suitability rule by not making any "discernable effort to determine whether the purportedly better performance of the funds into which he switched his customers would justify the costs associated with the switches."¹³⁸

A similar assessment was called for here. Holloway's general familiarity with the annuity products did not negate his obligation to assess whether the distinctions between the two investments being exchanged outweighed the costs of the deal. In each of the 42 transactions, Holloway recommended that his clients shift their investments from one annuity to another at a cost, despite the similar features of the two products. Although Holloway maintained that several superior features of the Transamerica product justified the costs of the transactions, without an

Sec., Inc., No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *11 n.7 (NAC May 26, 2017) (holding that a violation of any FINRA rule is also a violation of FINRA Rule 2010).

¹³⁴ Holloway's Post-Hearing Brief at 10.

¹³⁵ *Id.*

¹³⁶ Notice to Members 99-35 (May 1999), <http://www.finra.org/industry/notices/99-35> (representative must determine whether "replacing the existing contract with a new contract is suitable").

¹³⁷ Notice to Members 00-44 (July 2000), <http://www.finra.org/industry/notices/00-44>.

¹³⁸ *Dep't of Enforcement v. Wilson*, No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *20 (NAC Dec. 28, 2011).

actual comparison between the two products he could not have an adequate basis to believe an exchange was warranted.¹³⁹ Accordingly, we find that Holloway failed to consider and fully disclose to his clients all material fees, costs, and features associated with the transactions, as required by FINRA Rules 2330 and 2010.

2. Holloway Improperly Emphasized Transamerica’s “Bonus” Feature

The evidence also showed that Holloway improperly marketed the exchanges to clients to justify the substantial surrender costs incurred as a part of the transactions. Holloway recommended to several clients that surrender costs would be offset by the “bonus” feature of the new Transamerica X-share annuity, when in fact Transamerica’s bonus feature came at the price of increased annual fees for the client. Holloway’s recommendation that his customers should view the bonus feature as an offset to surrender costs incurred in the exchange contravened Transamerica’s *express warning* against such an approach because of the increased fees attributable to the bonus.

We find that Holloway’s recommendation that customers consider the Transamerica bonus feature as an offset to surrender charges was improper. “Even for a customer that expresses a desire to avoid an initial sales charge, it is incumbent upon the registered representative to inform the customer of the potential long-term effect of higher ongoing asset based sales charges associated with the class of shares recommended.”¹⁴⁰ By failing to account for the costs associated with the bonus, Holloway demonstrated a lack of “adequate and reasonable understanding of the investment before recommending” the exchange transaction, as required by FINRA Rules 2330 and 2010.¹⁴¹

3. Holloway Failed to Document Any Comparisons

Finally, Holloway admitted that he did not document any product comparisons as part of the exchanges at issue. FINRA created the documentation requirement of Rule 2330 with the understanding that it would “serve the dual purpose of creating a regulatory paper trail and reminding [FINRA] members of the serious analytical undertaking involved in recommending a deferred variable annuity.”¹⁴² Here, we have neither—no paper trail evidencing what disclosures

¹³⁹ *IFG Network Sec., Inc.*, Exchange Act Release No. 54127, 2006 SEC LEXIS 1600, at *39 (July 11, 2006) (Where a representative maintained a generalized belief that higher fee product would enable customers to “enjoy greater returns on their investments, . . . [but] had not . . . performed any mathematical analysis (or made any sort of inquiry) to support this belief,” the representative “did not have a reasonable basis for concluding that disclosure of these additional costs were unnecessary.”).

¹⁴⁰ *Dep’t of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *68 n.30 (NAC Dec. 20, 2007), *aff’d*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009).

¹⁴¹ *See Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *31 (Mar. 27, 2017) (recommendation must be based upon sufficient evidence).

¹⁴² Notice of Filing Amendment 2 to Proposed Rule Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities, Release No. 34-54023, 2006 SEC LEXIS 1444, at *24 (June 21, 2006) (interpreting the language of NASD Rule 2821, now codified as FINRA Rule 2330).

about the exchanges Holloway made to his clients, nor any substantial sense that Holloway carefully weighed the pros and cons of the variable annuities before recommending the switches.

Indeed, years before the transactions now at issue, Holloway *did* create a written side-by-side comparison of the material terms of two variable annuity products to explain the relative pros and cons of the products to a client contemplating an exchange. And that client, having weighed the relative merits of the two annuities, decided not to go forward with a proposed exchange. Holloway admitted his own subjective concern that providing this required information would be “way too much” for his customers and would result in “indecision time”¹⁴³ instead of a sale that might earn Holloway a lucrative commission. Because he failed to document that he provided his customers any meaningful product comparisons in the transactions now at issue, we find that Holloway violated Rule 2330.

For these reasons, we find that Holloway violated FINRA Rules 2330 and 2010 as alleged.

B. Dishonest Business Conduct (Causes Two through Five)

In causes two through five, Enforcement alleges that Holloway engaged in unethical and dishonest conduct. FINRA Rule 2010 requires that the business-related conduct of FINRA members and their associated persons comport with “high standards of commercial honor and just and equitable principles of trade.”¹⁴⁴ It mandates that securities industry participants not only conform to legal and regulatory requirements, but also conduct themselves in the course of their business with integrity, fairness, and honesty.¹⁴⁵

The rule’s intentionally broad scope is calculated to remediate “methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market.”¹⁴⁶

Enforcement alleges Holloway breached this ethical mandate by (1) misusing and falsifying documents in connection with variable annuity exchanges; (2) impersonating customers and insurance company representatives; (3) using Jane to complete Holloway’s continuing education courses; and (4) filing an investment adviser registration that overstated

¹⁴³ Tr. (Holloway) 824-25; CX-21, at 68.

¹⁴⁴ *Dep’t of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *14 n.14 (NAC Oct. 10, 2007), *aff’d*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008).

¹⁴⁵ *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *21 n.20 (Feb. 13, 2015) (“[T]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. [The Rule] protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation.”).

¹⁴⁶ *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009).

Holloway's adviser activity. As we explain, we find that Holloway violated Rule 2010 in each respect.

1. Holloway Misused and Falsified Documents (Cause Two)

The evidence established that as part of variable annuity exchanges, Holloway misused and falsified documents in several respects. First, the undisputed hearing evidence showed that Holloway caused customers to sign blank application documents in connection with variable annuity exchanges. Later, either he or Jane filled out the blank areas of the forms and then submitted the documents for processing without further review by the customer. This was unethical conduct. As a registered representative, Holloway "should have known that the accuracy of a brokerage firm's records is one of the bedrocks upon which the public trust in the financial markets is built."¹⁴⁷ So he "should have known that customers should not be signing blank documents, and that [he] should not be completing documents with information . . . that the customers had not seen."¹⁴⁸ By creating records associated with the annuity switches "signed by customers without confirming the information with the customers, [Holloway] failed to uphold the industry standards for dealing with customers justly and equitably."¹⁴⁹

And Holloway took the use of blank documents further. He admits that one time he obtained a signed, uncompleted application for an annuity exchange and photocopied that signature page for use in other transactions for that customer. Even though the contemplated transactions did not occur, this misuse of a customer signature was inconsistent with the ethical standards of the industry. Holloway similarly admits that he (or Jane acting at his direction) entered customer initials next to changes made to forms returned by insurance companies for incorrect or missing information. Holloway maintains that he merely wrote customer initials as an accommodation to his customers and obtained their permission to do so. But the NAC has made clear that "a registered representative's signing of a customer's name to a document related to a broker-dealer's business, without proper written authority, [is] violative of [FINRA Rule 2010,] even without proof that the registered representative also lacked oral authority."¹⁵⁰ There was no evidence of any written authorization permitting Holloway to forge customer initials. So even crediting his claim that he received oral authorization from his clients to enter their initials, his conduct was unethical and in violation of FINRA Rule 2010.

2. Holloway's Impersonation Misconduct (Cause Three)

The evidence also established that several times Holloway directed Jane to impersonate clients on telephone calls to financial institutions to facilitate fund transfers for variable annuity purchases. On other occasions, Holloway and Jane claimed to be employees of Transamerica on

¹⁴⁷ *Dep't of Enforcement v. Hill*, No. C8A050060, 2006 NASD Discip. LEXIS 47, at *29 (OHO Nov. 14, 2006).

¹⁴⁸ *Id.* at *29-30.

¹⁴⁹ *Id.* at *31.

¹⁵⁰ *Dep't of Enforcement v. Bukovcik*, No. C8A050055, 2007 FINRA Discip. LEXIS 21, at *9 (NAC July 25, 2007).

phone conversations when seeking medical information about their customers to facilitate annuity purchases.

The NAC has held that this conduct is unethical. “[P]articipation in an impersonation scheme for the purpose of obtaining confidential customer information was in complete disrespect of the duty to maintain the confidentiality of customer information [and] ran counter to fundamental principles of agency law that required [the respondent] to obtain the customer’s prior consent before retrieving their confidential information.”¹⁵¹ Misrepresenting himself on the phone to facilitate annuity purchases was unethical conduct that violated FINRA Rule 2010.

3. Holloway’s Misrepresentations about His Continuing Education Courses (Cause Four)

Holloway claimed credit for several continuing education courses necessary for his license to sell variable annuities in the state of Maryland, while in fact Jane completed the coursework. By cheating on his continuing education coursework, Holloway engaged in yet another species of dishonest misconduct.

We find this conduct likewise violated FINRA Rule 2010. The purpose of the rule “is to protect investors from unethical behavior, and it is well settled that [FINRA’s] disciplinary authority under Rule [2010] is broad enough to cover a wide range of unethical conduct,” including cheating on licensing examinations.¹⁵² Submitting a certification falsely certifying Holloway’s completion of continuing education coursework to a state regulator is misconduct that negatively “reflects on an associated person’s ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public,” in violation of FINRA Rule 2010.¹⁵³

4. Holloway’s Form ADV Misstatements (Cause Five)

Holloway also made misstatements in the Form ADV he filed with the FINRA-operated IARD. The Form ADV claimed that he provided investment advisory services for as many as 250 clients and financial planning services for up to 50 clients in the prior year, reflecting as much as \$5 million in investments. In fact, Holloway had no investment advisory clients, provided no fee-based financial planning, and had made no investments along those lines for several years.

By falsely holding himself out as an investment advisor who managed a substantial portfolio of investments, he engaged in dishonest business-related conduct. We find that

¹⁵¹ *Dep’t of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *24-25 (NAC Mar. 4, 2013) (quotation omitted).

¹⁵² *Dep’t of Enforcement v. Shelley*, No. C3A050003, 2007 NASD Discip. LEXIS 8, at *12 (NAC Feb. 15, 2007) (cheating on Series 24 examination).

¹⁵³ *Dep’t of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22, 25-27 (NAC Feb. 27, 2007) (falsified documents to state insurance regulator violated FINRA Rule 2010).

Holloway's dishonesty in reporting his business on the Form ADV likewise violated FINRA Rule 2010. "Falsifying documents is misconduct that 'adversely reflects on a person's ability to comply with regulatory requirements' and violates the mandate of Rule 2010."¹⁵⁴

C. Holloway's Document Production Misconduct (Cause Six)

Enforcement finally alleges in cause six that Holloway violated FINRA Rule 8210 by withholding documents and producing altered documents during the investigation. FINRA Rule 8210 requires that an associated person provide information about any matter involved in a FINRA investigation, complaint, examination, or proceeding. "FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain information concerning an associated person's securities-related business ventures."¹⁵⁵ A violation of FINRA Rule 8210 is also a violation of FINRA Rule 2010.¹⁵⁶

"Associated persons therefore must cooperate fully in providing FINRA with information and may not take it upon themselves to determine whether the information FINRA has requested is material."¹⁵⁷ Delay or neglect on the part of members and their associated persons in responding to Rule 8210 requests for information and documents undermines FINRA's ability to conduct investigations and thereby protect the public interest.¹⁵⁸

Holloway withheld material documents from his production. His nondisclosure was not the product of confusion or mistake, but his concern that the documents, if produced, would reveal that he was engaging in improper conduct in the variable annuity exchanges being investigated. The law is clear that a respondent like Holloway who "responded only partially to FINRA's information requests" still violates Rule 8210, as "associated persons may not decide which specific FINRA information requests they will fulfill."¹⁵⁹

Holloway also caused the alteration of several documents Enforcement requested before production. Several annuity application documents were altered to include investment time horizons—information that FINRA previously directed Holloway to obtain from his customers. Holloway is responsible for submitting these falsified documents to Enforcement. When, as here, a person "is aware that the false information is being provided by the member firm to FINRA in

¹⁵⁴ *Dep't of Enforcement v. Simbric*, No. 2011026168901, 2012 FINRA Discip. LEXIS 29, at *9-10 (OHO Apr. 23, 2012).

¹⁵⁵ *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *12 (NAC Dec. 12, 2012).

¹⁵⁶ *Dept. of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. Lexis 2, at *15 (NAC Mar. 9, 2015).

¹⁵⁷ *Gallagher*, 2012 FINRA Discip. LEXIS 61, at *13 (citing *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009)).

¹⁵⁸ *See, e.g., PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12-13 (Apr. 11, 2008), *petition for review denied*, 566 F.3d 1172 (D.C. Cir. 2009).

¹⁵⁹ *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *55-56 (Sept. 24, 2015).

response to a request for information issued pursuant to [FINRA] Rule 8210,” a violation of the rule is established.¹⁶⁰

IV. Sanctions

We now impose sanctions for Holloway’s violations. We do so bearing in mind that the purpose of FINRA’s disciplinary process is to protect the investing public, support and improve overall business standards in the securities industry, decrease the likelihood of recurrence of misconduct by the disciplined respondent and deter others from engaging in similar misconduct.¹⁶¹

We first consider the Principal Considerations of FINRA’s Sanction Guidelines (“Guidelines”) that apply to all sanction formulations. Several of the Principal Considerations are applicable to all of the misconduct (or violations or causes). The first is whether the respondent engaged in numerous acts or a pattern of misconduct.¹⁶² We find that the broad array of violative conduct proven here, through six distinct causes of action, most reflecting dishonesty and deception, itself constitutes a pattern of misconduct. Holloway’s improper conduct spanned several years and included dozens of discrete acts. The breadth of violations proven here demonstrates a pattern of improper and violative behavior.

The second relevant Principal Consideration is whether the respondent tried to delay FINRA’s investigation, conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.¹⁶³ We find that Holloway did just that, and concealed and manipulated evidence during the investigation to shield from scrutiny what he perceived to be his own misconduct. In so doing, he delayed and frustrated the investigation.

The third relevant Principal Consideration is whether the respondent’s misconduct resulted from an intentional act, recklessness, or negligence.¹⁶⁴ We find that much of Holloway’s misconduct was intentional. In particular, he deliberately withheld documents pertinent to the investigation of his annuity exchange recommendations. And he deliberately took credit for continuing education coursework that he knew he had not completed.

¹⁶⁰ *Dep’t of Mkt. Regulation v. Naby*, No. 20120320803-01, 2017 FINRA Discip. LEXIS 27, at *17 (NAC July 24, 2017).

¹⁶¹ FINRA Sanction Guidelines at 2 (2019) (General Principle No. 1), <http://www.finra.org/industry/sanction-guidelines>.

¹⁶² Guidelines at 7 (Principal Consideration No. 8: Whether the respondent engaged in numerous acts and/or a pattern of misconduct).

¹⁶³ Guidelines at 8 (Principal Consideration No. 12: Whether the respondent attempted to delay FINRA’s investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA).

¹⁶⁴ Guidelines at 8 (Principal Consideration No. 13: Whether the respondent’s misconduct was the result of an intentional act, recklessness or negligence).

With these Principal Considerations in mind, we address the factors specific to each of Holloway's violations.

A. Unsuitable Recommendation to Switch Variable Annuities (Cause One)

In determining the appropriate sanction, we consider the Guideline for making unsuitable recommendations.¹⁶⁵ The Guideline provides for a fine of \$2,500 to \$116,000. Adjudicators should consider suspending a respondent in any or all capacities for 10 business days to two years. Where aggravating factors predominate, adjudicators should strongly consider a bar for an individual respondent. The Guideline also directs adjudicators to apply the Principal Considerations applicable to all violations.

Besides the overarching Principal Considerations discussed above, there are several aggravating factors specific to this violation. Although Holloway may well have caused injury to his clients by causing them to incur unnecessary fees and expenses, Enforcement does not quantify the harm so we cannot say that this weighs heavily in aggravation.¹⁶⁶ But Holloway certainly obtained significant personal gain through the transactions, a fact that does aggravate his misconduct.¹⁶⁷ There is clearly a pattern of misconduct that also aggravates Holloway's violation. And we also find aggravating Holloway's failure to take responsibility for his misconduct by offering deceptive testimony at the hearing.¹⁶⁸ Indeed, Holloway's lack of candor and refusal to acknowledge his misconduct at the hearing calls into question his willingness and ability to comply with the regulatory requirements of the industry.¹⁶⁹

We identified no mitigating factors, nor did Holloway suggest any in his submissions or at the hearing.¹⁷⁰

In light of Holloway's failure to meaningfully analyze or assess these exchanges despite the risk that the transactions might not be beneficial for his clients, a significant sanction is warranted. Holloway's misconduct was serious, and calls for an equally serious sanction. However, while we find a suspension of six months and a \$15,000 fine appropriately remedial

¹⁶⁵ Guidelines at 95. There is no Guideline for violations of FINRA Rule 2330 involving a registered representative's obligations in variable annuity exchanges. Accordingly, we apply the somewhat analogous Guideline for making unsuitable recommendations in violation of Rule 2111.

¹⁶⁶ Guidelines at 7 (Principal Consideration No. 11: Whether the respondent's misconduct resulted in injury to other parties).

¹⁶⁷ Guidelines at 8 (Principal Consideration No. 16: Whether the respondent's misconduct resulted in the potential for monetary gain).

¹⁶⁸ Guidelines at 7 (Principal Consideration No. 10: Whether the respondent attempted to conceal his misconduct).

¹⁶⁹ *Mitchel H. Fillet*, Exchange Act Release No. 79018, 2016 SEC LEXIS 3773, at *18 n.16 (Sept. 30, 2016) (“[Respondent’s] refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future.”).

¹⁷⁰ See *ACAP Financial v. SEC*, 783 F.3d 763, 767 (10th Cir. 2015) (limiting its analysis of mitigating factors to those actually pursued by respondents).

for Holloway's violation of FINRA Rule 2330, we do not impose this sanction in light of bars that we impose for his other violations.¹⁷¹

B. Holloway's Dishonest Business Conduct (Causes Two through Five)

1. Holloway's Misuse and Falsification of Documents (Cause Two)

Holloway misused and falsified documents in several respects: he caused customers to sign blank applications in connection with variable annuity exchanges and he later filled out the blank areas without the customer's review. He obtained a signed, uncompleted application for an annuity exchange and photocopied that signature page for use in other transactions. And he entered customer initials next to changes made to forms returned by insurance companies for incorrect or missing information. The Guideline most applicable to this sort of misconduct pertains to forgery and falsification of records.¹⁷²

This Guideline recommends a suspension of 10 days to six months, assuming the conduct was authorized by the customer.¹⁷³ It also urges us to consider a fine of \$5,000 to \$11,000.¹⁷⁴ The Guideline recommends that adjudicators consider the nature of the documents forged, whether the documents pertained to a transaction that the customer agreed to, and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.¹⁷⁵

Here, the documents included variable annuity account opening documents, clearly significant to investments that Holloway recommended. Yet we give Holloway the benefit of his claim that he acted in the good-faith belief that his actions were authorized. And we find that his clients did, in fact, agree to the transactions memorialized in the documents. Weighing these factors against the substantial pattern of misconduct by Holloway in this area, we find that the misconduct was serious, and the appropriate sanction for his violation of FINRA Rule 2010 would be a four-month suspension and a \$7,500 fine. But we again do not impose this sanction in light of the bars that we impose for his other violations.

2. Holloway's Impersonation Misconduct (Cause Three)

Several times Holloway either impersonated clients or claimed to be an employee of Transamerica on phone calls to facilitate annuity purchases or directed Jane to do so. Although there is no guideline directly applicable to impersonation misconduct, the NAC has found that the Guideline for forgery or falsification of records is most closely applicable.¹⁷⁶ This Guideline

¹⁷¹ Guidelines at 10 ("Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss.").

¹⁷² Guidelines at 37.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (For falsifications involving transactions where forgery is authorized and in the absence of customer harm).

¹⁷⁵ *Id.*

¹⁷⁶ *Golonka*, 2013 FINRA Discip. LEXIS 5, at *25.

recommends a bar in egregious cases and, where mitigating factors exist, a suspension of two months to two years along with a fine of \$5,000 to \$155,000.¹⁷⁷

The NAC has found that misconduct of this sort “reflects negatively on [a respondent’s] ability to comply with the regulatory requirements that are fundamental to the securities industry.”¹⁷⁸ It reflects a “troubling” willingness to engage in deception to obtain improper disclosure of confidential information.¹⁷⁹ Assessing the conduct in light of the Principal Considerations, there were two instances of customer impersonation and at least one instance of Transamerica employee impersonation, so this particular conduct was not isolated though not pervasive.¹⁸⁰ The misconduct is aggravated by the fact that the conduct was the result of Holloway’s intentional acts.¹⁸¹ Also aggravating is Holloway’s choice to involve his secretary in his deception.¹⁸² In the absence of mitigating factors, and given the serious nature of the misconduct, we find that the appropriate sanction for Holloway’s impersonation activity in violation of FINRA Rule 2010 would be a suspension of one year and a \$20,000 fine. But we similarly do not impose this sanction in light of the bars that we impose for his other violations.

3. Holloway’s Continuing Education Cheating (Cause Four)

We next consider the appropriate sanction for Holloway cheating on his continuing education courses by claiming credit for coursework completed by Jane. We find that the most appropriate Guideline for conduct of this nature is that for cheating or using an impostor in qualifying examinations or in the regulatory element of continuing education.¹⁸³ This Guideline provides that for cheating, a bar is standard.¹⁸⁴ A lesser sanction is warranted only where the conduct does not rise to the level of cheating.¹⁸⁵

Although the cheating here occurred in the context of a state licensing continuing educational requirement and not a FINRA exam, we find the misconduct substantively indistinguishable. Holloway admits his cheating, but claims that it was not “willful or egregious” nor “indicative of a pattern of subterfuge.”¹⁸⁶ We reject his effort to minimize the seriousness of

¹⁷⁷ Guidelines at 37 (For falsifications involving transactions where forgery is not authorized and in the absence of customer harm).

¹⁷⁸ *Golonka*, 2013 FINRA Discip. LEXIS 5, at *29.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at *32 (four instances of impersonation misconduct on a single day “did not aggravate [respondent’s] misconduct in a significant way.”).

¹⁸¹ Guidelines at 8 (Principal Consideration No. 13: Whether the respondent’s misconduct resulted from an intentional act).

¹⁸² *Golonka*, 2013 FINRA Discip. LEXIS 5, at *29

¹⁸³ Guidelines at 40.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Holloway’s Post-Hearing Brief at 14.

his dishonesty. More than 50 years ago, the SEC explained that “[i]n view of the vital importance of examinations in the program of upgrading the level of competence in the securities business, we regard a deception in connection with the taking of those examinations . . . to be so grave that we would not find the extreme sanction of revocation or expulsion to be excessive or oppressive unless the most extraordinary mitigative facts were shown.”¹⁸⁷ Holloway identifies no mitigating factors here, nor do we find any. We therefore find that the appropriate sanction for Holloway’s violation of FINRA Rule 2010 is a bar from association with any FINRA member in any capacity.

4. Holloway’s Form ADV Misstatements (Cause Five)

We next turn to Holloway’s overstatements on his Form ADV of the number of his investment advisory clients and the amount of assets under his management. While there is no guideline for falsification on a Form ADV, the Guideline dealing with misstatements on a Form U4 or U5 is analogous to this aspect of Holloway’s misconduct.

The Guideline recommends a fine ranging from \$2,500 to \$39,000 and a suspension in any or all capacities for ten business days to six months for filing false, misleading, or inaccurate Form U4 amendments.¹⁸⁸ For egregious cases, including cases with repeated false, inaccurate, or misleading filings, the Guideline recommends considering suspension of an individual for up to two years in any or all capacities, or a bar. The relevant principal consideration in determining sanctions is the nature and significance of the information at issue.¹⁸⁹

Although Holloway’s overstatement of his investment advisory business was serious, we agree with Enforcement that given the age of the misconduct and the fact that he conducted no advisory business, a suspension near the lower part of the recommended range is appropriate. For these reasons, we would suspend Holloway for 30 business days and fine him \$7,500 for this violation of FINRA Rule 2010, but do not impose the sanction in light of the bars.

C. Holloway’s Document Production Misconduct (Cause Six)

We finally address Holloway’s document production misconduct in violation of FINRA Rule 8210. For failing to respond to requests for information under Rule 8210, the Guidelines recommend a fine of \$25,000 to \$77,000 and state that a bar is the standard sanction.¹⁹⁰ The Guidelines do not specify the appropriate sanction for providing false documents, but case law establishes that, absent mitigating circumstances, a bar is appropriate for such violations.¹⁹¹ “The

¹⁸⁷ *Hugh M. Casper*, 42 S.E.C. 471, 473 (1964).

¹⁸⁸ Guidelines at 71.

¹⁸⁹ *Id.*

¹⁹⁰ Guidelines at 33.

¹⁹¹ Guidelines at 33. *See, e.g., Ortiz*, 2008 SEC LEXIS 2401, at *32-33 (citing *Michael A. Rooms*, 58 S.E.C. 220, 229 (2005) (“[T]he failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry. . . . [A] bar is an appropriate remedy.”)).

failure to respond truthfully to a FINRA Rule 8210 request is as serious and harmful as a complete failure to respond, and comparable sanctions are appropriate.”¹⁹²

In assessing the seriousness of Holloway’s violation, we focus on the importance, as viewed from FINRA’s perspective, of the information requested but not produced along with the number of requests made and the degree of regulatory pressure required to obtain a response.¹⁹³ We also consider whether the respondent thoroughly explains valid reasons for his production shortcomings.¹⁹⁴

Holloway withheld documents that were central to Enforcement’s investigation into his variable annuity exchange recommendations. Indeed, he intentionally withheld the documents because he knew they were important. And he persisted in improperly withholding documents after the Enforcement investigator requested the materials a second time and gave Holloway additional time to fulfill the request. Enforcement had to extend substantial regulatory pressure in order to obtain the materials, ultimately resorting to an unscheduled on-site visit of Holloway’s office. And Holloway had no good explanation for failing to comply. His claim that he misunderstood the request rings hollow in the face of clear and repeated demands for *all* records in the client files at issue.

Holloway also violated Rule 8210 by producing altered documents. Holloway altered several annuity application documents to include investment time horizons. FINRA had warned Holloway that he should be obtaining this information from his customers, and Holloway delivered falsified documents in yet another effort to shield himself from regulatory scrutiny. We find his violations egregious.

Holloway’s egregious violations warrant a bar. We therefore impose a bar from associating with any member firm in any capacity for Holloway’s violations of FINRA Rules 8210 and 2010.

V. Order

We find that Respondent Frederick David Holloway committed the violations alleged in the Complaint and impose remedial sanctions as follows:

Under cause one, Holloway failed to meaningfully compare the benefits, fees, and surrender costs associated with variable annuities being exchanged, or document any suitability analysis, in connection with 42 variable annuity exchanges, all in violation of FINRA Rules 2330(b)(1) and 2010. We would suspend Holloway for six months and fine him \$15,000 for this violation, but in light of the bars we do not impose this additional sanction.

¹⁹² *Harari*, 2015 FINRA Discip. LEXIS 2, at *31.

¹⁹³ Guidelines at 33.

¹⁹⁴ *Id.*

Under cause two, Holloway misused and falsified documents in connection with variable annuity exchanges, in violation of FINRA Rule 2010. We would suspend Holloway for four months and fine him \$7,500 for this violation, but in light of the bars we do not impose this additional sanction.

Under cause three, Holloway impersonated customers and insurance company representatives in connection with processing variable annuity exchanges, in violation of FINRA Rule 2010. We would suspend Holloway for one year and fine him \$20,000 for this violation, but in light of the bars we do not impose this additional sanction.

Under cause four, Holloway cheated on continuing education courses by having his employee complete his coursework, in violation of FINRA Rule 2010. We bar Holloway from association with any FINRA member in any capacity for this violation.

Under cause five, Holloway filed an investment adviser registration overstating his adviser activity, in violation of FINRA Rule 2010. We would suspend Holloway for 30 business days and fine him \$7,500 for this violation, but in light of the bars we do not impose this additional sanction.

Under cause six, Holloway withheld documents and produced falsified documents in connection with an Enforcement investigation, in violation of FINRA Rules 8210 and 2010. We bar Holloway from association with any FINRA member in any capacity for this violation.

If this decision becomes FINRA's final disciplinary action, the bars shall become effective immediately. Respondent is ordered to pay costs in the amount of \$7,768.26, which includes a \$750 administrative fee and \$7,018.26 for the cost of the transcript. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this Decision becomes FINRA's final action.¹⁹⁵



David Williams
Hearing Officer
For the Hearing Panel

Copies to:

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¹⁹⁵ The Hearing Panel considered and rejected without discussion all other arguments of the parties.