

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CAPWEST SECURITIES, INC.
(CRD No. 30002),

Respondent.

Disciplinary Proceeding
No. 2007010158001

Hearing Officer – MC

HEARING PANEL DECISION

December 19, 2011

For violating content standards applicable to communications with the public regarding investments, in violation of NASD Conduct Rules 2110 and 2210, Respondent CapWest Securities, Inc. is censured and fined \$150,000. For failing to implement its supervisory system effectively with regard to reviewing proposed advertising and sales literature, in violation of NASD Conduct Rules 2110 and 3010, Respondent is fined an additional \$25,000. Respondent is also ordered to pay hearing costs.

Appearances

Gary M. Lisker, Senior Counsel, and Gregory R. Firehock, Senior Litigation Counsel, Washington, DC, for the Department of Enforcement.

H. Thomas Fehn, Esq., Los Angeles, California, for Respondent CapWest Securities, Inc.

I. Introduction

The Department of Enforcement filed the Complaint in this disciplinary proceeding on March 4, 2010. The Complaint arose from a FINRA staff review of advertising and sales literature that Respondent CapWest Securities, Inc. (“CapWest”) disseminated to the public, promoting investment in tenants-in-common interests (“TICs”) in real estate from October 1, 2006, through March 31, 2007 (the “Relevant Period”).

TICs are interests in real property, in which an owner (“tenant”) possesses an undivided fractional interest.¹ If offered and sold as investments, they generally constitute investment contracts, and therefore qualify as securities, because when tenants in common purchase undivided fractional interests in rental real property, they pool assets, share the risks and benefits of the enterprise, and earn profits from the efforts of others who lease the property.² In this case, CapWest’s registered representatives actively promoted investing in TICs to the public as a way of deferring capital gains taxes under the Internal Revenue Code.

Pursuant to 26 U.S.C. § 1031, under certain circumstances, an owner of an investment property who sells it and would otherwise be liable for a capital gains tax may defer the tax liability by purchasing property of “like kind,” in a “Section 1031 Exchange.” Section 1031 sets forth the following conditions for deferring tax liability: (i) the investor must identify a potential replacement for the sold property within 45 days; (ii) the investor must complete the purchase of the replacement property within 180 days of the sale of the relinquished property; (iii) the replacement property must be of equal or greater value than the sold property; (iv) the replacement property must be held for “productive use” in business or as an investment; and (v) there can be no more than 35 co-owners holding title as tenants in common, sharing in revenues and expenses.³

In 2005, FINRA issued Notice to Members 05-18, concerning investors engaging in tax-deferred exchanges of real estate for TICs, noting a dramatic growth in such transactions, and stressing the need for member firms, among other things, to comply with the requirements

¹ NASD Notice to Members 05-18, p. 8, n.5 (Mar. 2005).

² *Id.* at 3.

³ Stipulations ¶¶ 2-4; Hearing Transcript, 54. The parties filed 175 stipulations, references to which are designated “Stip.” with paragraph number. References to the testimony at the hearing are designated as “Tr. ___.” References to Enforcement’s Exhibits are designated as “CX-___.”

governing the manner of offering and advertising TICs to the public.⁴ Subsequently, in 2007 FINRA's Advertising Regulation Department conducted a "sweep" of 30 member firms related to advertising of TICs.⁵ After conducting a review of the advertising materials submitted by the firms for compliance with NASD Conduct Rule 2210, FINRA staff referred four firms to Enforcement for formal action. CapWest was one of these firms.⁶

The First Cause of the Complaint alleges that from October 2006 through March 2007, CapWest and its registered representatives disseminated to the public 166 communications⁷ promoting TIC investments, including newsletters, websites, seminars, and newspaper and magazine advertisements, that violated NASD Conduct Rules 2110 and 2210.⁸ The communications allegedly contained statements that were deficient because they: (i) did not contain fair and balanced information explaining the features and risks and did not provide a sound basis for evaluating TICs; (ii) contained exaggerations and misleading illustrations about TICs; and (iii) improperly projected annual returns.

The Second Cause of the Complaint alleges that CapWest violated NASD Conduct Rules 2110 and 3010 by failing to implement its supervisory system effectively, as evidenced by the

⁴ Notice to Members 05-18 (Mar. 2005), at pp. 1-2. (An investment contract "involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946).

⁵ Tr. 29-30. A sweep is a mechanism to review compliance with regulatory requirements; here, it involved a request to firms to provide advertising materials they used related to TICs over a designated period, which the Advertising Regulation Department then reviewed for potential violations of FINRA rules. Tr. 26-30.

⁶ Tr. 38-40.

⁷ The Complaint alleges that there were 167 violative communications, but Enforcement noted that this was an error. The parties stipulated that the correct number of pieces at issue is 166.

⁸ As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). Because the misconduct alleged in the Complaint occurred from October 1, 2006, through March 31, 2007, prior to the effective date of the new consolidated rules, this decision refers to and relies on the NASD Conduct Rules that were in effect at the time the misconduct occurred. The applicable rules are available at www.finra.org/rules.

fact that CapWest's compliance personnel reviewed and approved the violative communications with the public.

The Hearing Panel held the one-day hearing in Denver, Colorado, on April 12, 2011.

II. Respondent

CapWest became a FINRA member in 1992. During the Relevant Period and at the time of the hearing, CapWest maintained its headquarters in Lakewood, Colorado, operating more than 30 branch offices nationwide with 45 registered representatives.⁹ The Central Registration Depository reflects that, subsequent to the hearing of this matter, FINRA cancelled CapWest's registration on September 23, 2011, for failing to pay outstanding fees. Nonetheless, because CapWest was registered with FINRA at the time of the misconduct alleged in the Complaint and was registered when the hearing was held, FINRA retains jurisdiction over CapWest for the purposes of this disciplinary proceeding.

III. The Hearing

At the hearing, the facts were largely undisputed. The parties stipulated to the admissibility of copies of the original communications at issue and agreed that they were prepared by CapWest registered representatives, reviewed and approved by CapWest supervisors, and disseminated to the public.

Enforcement presented its case through a single witness, J. Martin Levine, an Investigator Specialist who has been employed with FINRA's Office of Advertising for 12½ years. He participated in the sweep and reviewed the communications concerning TICs submitted to FINRA by CapWest.¹⁰ In his testimony, Levine described the procedures employed by FINRA

⁹ Stip. ¶ 1.

¹⁰ The communications CapWest submitted at the request of FINRA staff and that Levine reviewed are listed at CX-172, pp. 33-45, and CX-174, p. 8.

staff conducting the sweep. He also recounted his review of 268 CapWest communications with the public for compliance with Rule 2210.¹¹

The only other witness was Dale Hall, CapWest's president and chief executive officer. The thrust of his testimony was that after FINRA brought the deficiencies in the communications to CapWest's attention, CapWest took remedial steps to ensure that its supervisory procedures relating to communications with the public would be implemented, and that CapWest's sales literature and advertising would comply with the Rule.

IV. Findings of Fact and Conclusions of Law

A. Communications with the Public

The First Cause of Action alleges that the communications CapWest disseminated to the public failed to meet the requirements of Rule 2110 in a variety of ways. The 268 communications CapWest's representatives disseminated to the public are generic, designed to elicit potential investor interest in TICs generally, not to promote investment in any particular product.¹² CapWest representatives disseminated the communications to the public during the Relevant Period in the form of brochures, advertisements in magazines and newspapers, newsletters, websites, or letters to prospective investors.¹³ The registered representatives distributed them widely. Some appeared in the magazines *Broker Agent*,¹⁴ *Haven*,¹⁵ and *Central*

¹¹ Tr. 30-39.

¹² Tr. 189.

¹³ Tr. 51-52 (newspaper or magazine ad); Tr. 159 (newsletter); Tr. 152-153 (website); Tr. 82-83 (letter).

¹⁴ Tr. 92; CX-13.

¹⁵ Tr. 120; CX-46.

Coast Magazine.¹⁶ Others were distributed in the form of brochures, letters to seminar participants,¹⁷ and other mailings to prospective investors and financial professionals.¹⁸

1. The Communications Are Not Fair and Balanced and Fail to Provide a Sound Basis for Evaluating TICs

a) Findings of Fact

A number of the CapWest communications fail to disclose: (i) the risks involved in TICs; (ii) the existence of restrictions imposed on tax deferrals by provisions of the Internal Revenue Code; and (iii) the fact that property maintenance costs may erode tax benefits.

For example, some of the communications claim that a TIC owner, unlike an owner of an ordinary investment property, is free of burdensome management responsibilities. A widely circulated advertisement promoting TICs appearing in magazines and bar association bulletins in central California states, “I used to manage my real estate property ... and now I manage my mailbox.” It also asserts that TICs “eliminate time intensive property management burdens associated with being a landlord.”¹⁹ Levine testified that, to comply with Rule 2210, the advertisement should explain what TIC investments involve, and, in order to make a fair and balanced presentation incorporating needed material information, ought to explain the disadvantages arising from the fact that TIC owners lack authority to make day-to-day management decisions concerning owned properties. For instance, Levine testified, a TIC owner is unable to make important decisions that can affect the owned property and may result in substantial expenses, such as to initiate renovations, repairs, or upgrades. In contrast, an owner of non-securitized real estate can decide when and what improvements to pay for, and if or when

¹⁶ Tr. 95; CX-20.

¹⁷ Tr. 103; CX-33.

¹⁸ Tr. 111; CX-34; CX-35.

¹⁹ CX-12 – CX-29.

to sell. A TIC owner, however, is subject to the vote of a majority of the owners, and may as a consequence be required to contribute substantial sums despite disagreeing over the appropriateness of doing so.²⁰

A form letter to potential investors repeatedly promotes 1031 Exchanges without explaining how they work, and cites tax deferral advantages without mentioning Internal Revenue Code restrictions on the availability of the tax deferrals.²¹

A series of brochures and newsletters promoting TICs appeared on the website of a CapWest representative.²² One claims that TICs “are simpler to acquire than many types of properties ... can be conservative and straight-forward and the returns are generally projected and estimated” and that they offer the advantages of “no management, no fuss, no tenant problems – simply a return on the investment.” These assertions, Levine testified, suggest that TICs are simpler investments than is accurate and imply an unwarranted promise of successful investment.²³ Another brochure states “YOU ARE BUYING A LONG-TERM STEADY INCOME AND REAL ESTATE, will be the LANDLORD/OWNER, AND YOU GAIN TAX BENEFITS.”²⁴ As Levine noted in testimony, this document makes no mention of risks and appears to promise successful results without a basis.²⁵ Another document in the series devoted to TICs refers to “Cash-on-Cash” returns, but does not explain what the phrase means.²⁶

²⁰ Tr. 90-91, 94-95, 101, 151

²¹ Tr. 98, CX-31; Tr. 112, CX-37; Tr. 117, CX-39; Tr. 118-119, CX-42 – CX-45; Tr. 122-123, CX-50 – CX-57; Tr. 125, CX-60; Tr. 127, CX-61.

²² Tr. 152-153; CX-76, p. 1.

²³ Tr. 151; CX-76, p. 3.

²⁴ CX-76, p. 24.

²⁵ Tr. 153.

²⁶ CX-76, pp. 30-31. Levine testified that “cash-on-cash” returns are determined by dividing a property’s pre-tax cash flow by its cost or value. Tr. 154.

CapWest representatives disseminated announcements of seminars to the public that advertised Section 1031 Exchanges but did not explain what they are, and did not indicate that they are subject to Internal Revenue Code restrictions, which should be mentioned in order to provide the reader with a sound basis for evaluating the advertisements.²⁷

Similarly, a number of “newsletters” produced and disseminated by a single CapWest representative to numerous localities all recommend that potential investors consider investing in TICs to take advantage of 1031 Exchanges, but fail to provide any explanation of how 1031 Exchanges work, and do not mention the applicable Internal Revenue Code restrictions. Furthermore, the newsletters list properties available for investors with prices accompanied by columns titled “Cap Rate” and “Rent Multiplier” without an explanation of what these terms mean or how they were derived.²⁸

b) Conclusions of Law

NASD Conduct Rule 2210, “Communications with the Public,” sets forth the minimum standards for communications that member firms disseminate to the public. In relevant part, Rule 2210(d)(1)(A) requires that:

All member communications with the public shall be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in the light of the context of the material resented, would cause the communication to be misleading.

The CapWest communications are replete with references to Section 1031 Exchanges without any explanation of what they are. Many extol the benefits of an absence of management responsibilities without balancing these claims with explanations of the potential disadvantages

²⁷ Tr. 48-50; CX-1 – CX-3. Levine testified that for the purposes of his analysis of communications with the public, he makes no distinction between advertisements and “invitations to seminars,” but analyzes them in the same way by examining what they state within the “four corners of the document.” Tr. 125-126, 204-205.

²⁸ Tr. 159-162; CX-84 – CX-157.

inherent in a TIC owner's lack of control over potentially costly management decisions. Most make no mention of any of the risks inherent in TICs, such as their lack of liquidity and potential loss of capital. They create an unwarranted impression of likely success. The seminar announcements advertise TICs and Section 1031 Exchanges but do not explain or even mention Internal Revenue Code restrictions that can diminish tax benefits. Other advertisements use terms such as "cap rates" and "cash-on-cash returns" without explaining them as they should. For these reasons, the Panel finds the communications are not fair and balanced, do not provide a sound basis for a prospective investor to evaluate the claims, and are therefore deficient and violative of Rule 2210(d)(1)(A).

2. The Communications Contain Exaggerated and Misleading Statements

a) Findings of Fact

A series of informational brochures makes claims about the level of protection provided to investors by the Securities and Exchange Commission's regulation of TICs. They assert that "The SEC ... regulates securities, and was formed to protect investors ... [and] advocates full disclosure, and the sponsors as well as the securities dealers ... must follow many rules" They also describe "cash-on-cash return" projections and extol "effortless cash flow" provided by TICs, implying assured profits, projecting returns of eight percent or greater, and touting CapWest's ability to provide customers with "unparalleled" access to products designed to meet their needs.²⁹

Some advertisements represent that TICs are subjected to rigorous review by stating, "The due diligence conducted on Tenants-In-Common properties is extensive. The real estate sponsor, the lender, and the securities industry each perform thorough analysis to determine if

²⁹ Tr. 164-174; CX-158 – CX-162; CX-165.

the ownership structure is viable and whether the property is physically sound, economically profitable, has a likelihood of increasing in value, and can generate sufficient income to repay the debt obligation.”³⁰

Other advertisements imply that special regulatory scrutiny is given to TIC investments and that this scrutiny provides special protection to investors. For example, one brochure states that “The securities industry is overseen by the SEC ... and NASD ... and is highly regulated.”³¹ Another represents that SEC rules make TICs safe, and states that added scrutiny on several levels and full disclosure are an added benefit for investors.³² A newsletter suggests that in addition to oversight from securities regulators, TICs receive intensive oversight from real estate regulators, such as the “National Association of Realtors (NAR),” described as “a powerful body.” It states further that “TIC sponsors and those related to them are active in self-regulation, and are working with the various bodies mentioned above, as well as state regulators.”³³

Other communications exaggerate the tax benefits of TICs. A brochure titled “§1031 Tax Deferred Property Exchanges” asserts that a Section 1031 Exchange allows a person to sell a property and purchase another “without a tax consequence.”³⁴ Another claims that “By taking advantage of a §1031 exchange, you may conserve equity by not paying tax on realized gain.”³⁵ A slide for a PowerPoint presentation asserts that “capital gains roll over into replacement property tax-free.”³⁶

³⁰ CX-8; CX-68; CX-165.

³¹ CX-8, p. 4.

³² CX-76, p. 47.

³³ CX-76, p. 11.

³⁴ CX-9.

³⁵ CX-164, p. 3.

³⁶ CX-167, p. 5.

b) Conclusions of Law

Rule 2210(d)(1)(B) states, in relevant part:

No member may make any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public.

The Panel concurs with Levine's testimony that the communications emphasizing the regulatory scrutiny directed at TICs imply a degree of safety or protection to investors that is unwarranted and misleading. The statements extolling the tax advantages of TICs also exaggerate and mislead on their face because they say TICs and Section 1031 Exchanges make property sales tax free, when at best they can result in tax deferrals. The Panel finds that even though the documents containing these assertions may contain other statements regarding tax deferral that are more accurate, these assertions are, on their face, misleading and exaggerated, and thus violate Rule 2210(d)(1)(B).

3. The Communications Contain Improper Projections of Returns

a) Findings of Fact

A number of the communications contain unwarranted projections of future earnings. One announcement promoting a variety of "alternative" investments, including Section 1031 Exchanges and TICs, in large, bold print states "Investments may yield 10% or higher!"³⁷ As Levine testified, the use of the word "may" is insufficient to cure the impermissible projection of this high return because, absent a historical basis supporting the projection, it is unwarranted.³⁸

A PowerPoint presentation prepared by a CapWest representative for use at a workshop projects "6-7% income ... [which] translates into 60,000-75,000 dollars of income per year on a building you sell for 1,000,000."³⁹ Another presentation claims that a tax advantage of TICs is

³⁷ Tr. 131; CX-63.

³⁸ Tr. 132.

³⁹ Tr. 148; CX-74, p. 53.

that “40%-70% of Income” is “Offset with Anticipated Deductions,” and that a hypothetical investor in a TIC property can earn “a first year cash-on-cash flow of 7% with .5% projected increase per year which should grow to 9% in the 5th year” but provides no basis for the claims.⁴⁰ A form letter sent by one CapWest representative asserts that TICs “typically ... generate cash-on-cash flow from 6% to 9%.”⁴¹ A list of advertisements for Internet use includes one for circulation on Google stating that TIC properties produce “Potential monthly cash flow over 8%,” and an advertisement for circulation on Yahoo inexplicably states, “TIC properties can potentially cash flow over 10%.”⁴² Another document on a CapWest registered representative’s website promoting TICs asserts that “some Note funds backed by real estate are available (8% to 9.25% return)” and “Cash-on-Cash ... usually ranges between 6.25% and 7% initially.”⁴³

A script apparently intended for use on radio refers to the “effortless cash flow” obtainable from TICs, described as “no management property” and projects income, stating that a “typical apartment deal today starts with cash-on-cash return of about 6% to 6.9% (annual percentage, paid monthly)” and “[s]ome of the other asset classes may pay higher, maybe 7.5% to 8%.”⁴⁴ As Levine noted in his testimony, the script contains no historical basis for these projections.⁴⁵

b) Conclusions of Law

Rule 2210(d)(1)(D) prohibits price predictions:

⁴⁰ Tr. 142-143; CX-69, pp. 8, 16.

⁴¹ CX-31.

⁴² The list also includes an advertisement for “Oil & Gas Investors” claiming “Potential Cash Flow over 20%.” CX-75; Tr. 149-150.

⁴³ CX-76, pp. 30-31.

⁴⁴ CX-64, pp. 3, 6.

⁴⁵ Tr. 137-139.

Communications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.

Levine testified without contradiction that the communications discussed above, claiming that TIC investments “typically” provide investors with significant annual returns, constitute unwarranted predictions or projections of future earnings. The Panel agrees. Without presenting historical data supporting the touted potential performance of TIC investments, the advertisements, radio script, and PowerPoint presentations violate Rule 2210(d)(1)(D)’s prohibition against unwarranted projections of performance or forecasts. Their use of “cash-on-cash” flow projections, the adjective “typical” when describing TIC investments, and descriptions of returns that may be earned by a “hypothetical investor” all violate the proscription against predicting or projecting performance.

For the reasons set forth above, therefore, the Panel finds that by disseminating 166 communications with the public, CapWest’s registered representatives caused CapWest to violate NASD Conduct Rule 2110, as alleged in the First Cause of the Complaint.

B. Supervision

The Second Cause of Action alleges that CapWest violated NASD Conduct Rules 2110 and 3010 by failing to implement its supervisory system adequately in connection with its review of the advertising and sales literature in this case.

The adequacy of CapWest’s written supervisory procedures relating to communications with the public was not an issue. The written procedures called for preview and approval of communications by a principal before dissemination.⁴⁶ Accordingly, CapWest principals reviewed and approved all of the flawed communications in evidence.⁴⁷ Simply put, as alleged

⁴⁶ Tr. 240-241; CX-171.

⁴⁷ Tr. 36-37.

in the Second Cause of the Complaint, CapWest failed to provide the principals responsible for reviewing the sales literature and advertisements with an adequate understanding of FINRA's advertising rules. Consequently, through those principals, CapWest failed to implement its procedures effectively. The result was that the communications promoting TICs in this case did not meet the standards set by NASD Rule 2210 but nonetheless were approved and disseminated to the public. Of the 268 communications with the public concerning TICs that CapWest reviewed and approved for use by its representatives, 166, or 61.9 percent, did not comply with the advertising rule.

At the hearing CapWest did not contest the charge that it failed to implement its procedures adequately. Hall, CapWest's president and chief executive officer, testified that he first became aware of the possibility that CapWest had violated NASD Rule 2210 in April 2007, at the time of the sweep. Tacitly conceding the deficiency of CapWest's implementation of its supervisory procedures, Hall testified that, upon realizing "what the rules were," CapWest changed the procedures and became "able [and] willing" to "get things done the right way." The changes that CapWest instituted included tracking each individual piece of advertising, hiring a new compliance officer experienced with advertising, sending the compliance officer to FINRA's annual advertising conferences, and tasking the compliance officer with ensuring that all communications with the public contain the appropriate disclosures that the sweep found to be missing or deficient.⁴⁸

Rule 3010 required CapWest not only to establish a supervisory system reasonably designed to achieve compliance with securities laws and regulatory rules, but to implement that

⁴⁸ Tr. 225-226, 242.

system effectively. The Panel finds that CapWest failed to do so and therefore violated NASD Rules 2110 and 3010, as charged in the Second Cause of the Complaint.

V. Sanctions

The FINRA Sanction Guidelines applicable to communications with the public recommend a fine of \$1,000 to \$20,000 and, in egregious cases, suspension with respect to any or all activities for up to one year. They also recommend considering imposition of a pre-use filing requirement with the FINRA Advertising Regulation Department for proposed communications with the public. A Principal Consideration is whether the communications were circulated widely.⁴⁹ Furthermore, the General Principles Applicable to All Sanction Determinations state that “the existence of multiple violations may be treated as an aggravating factor,”⁵⁰ and the Principal Considerations in Determining Sanctions focus on “[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct” and whether the misconduct occurred over an extended period of time.⁵¹

Enforcement suggests a fine of \$75,000 and imposition of a pre-use filing requirement for six months for the violations described in the First Cause of the Complaint. As argued by Enforcement, the result of CapWest’s violations was to advise a “wide audience of potential investors” that “TICs offer substantial upside with little or no risks.”⁵²

The Panel agrees with Enforcement’s assessment of the seriousness of CapWest’s violations of Rule 2210. The violations were numerous, occurred over a significant period of time, created a misleading picture of TICs as essentially risk-free investments, and were widely disseminated. CapWest approved the communications while essentially ignoring its own

⁴⁹ *FINRA Sanction Guidelines* at 79 (2011).

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 6, Principal Considerations Nos. 8, 9.

⁵² Pre-Hearing Brief of Complainant Department of Enforcement at 12.

supervisory procedures designed to achieve compliance with the applicable advertising rules that, in turn, are designed to protect the investing public. For these reasons, the Panel concludes that a censure and a substantially larger fine than that recommended by Enforcement are required to achieve the appropriate remedial effect of deterring CapWest, and others, from similar misconduct. The Panel therefore imposes a fine of \$150,000 upon CapWest for the violations described in the First Cause of the Complaint.

Under the circumstances of this case, however, the Panel does not believe it is necessary to impose a pre-use filing requirement as recommended by Enforcement. As noted above, CapWest's president testified that CapWest has taken appropriate measures to ensure that its review of sales literature and advertisements will not be *pro forma* as it was with regard to the TIC materials during the sweep, and that the persons responsible for conducting the reviews understand the requirements of the advertising rule.

For the supervision violations described in the Second Cause of the Complaint, Enforcement recommends a fine of \$25,000.⁵³ The Sanction Guidelines suggest a fine of \$5,000 to \$50,000.⁵⁴ As conceded by Enforcement at the hearing, CapWest's written supervisory guidelines pertaining to communications with the public were reasonably designed, but were not effectively implemented. Under the circumstances of this case, the Panel agrees that a fine of \$25,000 suffices to serve the remedial purpose of deterring CapWest and other member firms from failing to implement relevant supervisory procedures in an effective fashion.

In addition, the Panel orders CapWest to pay the costs of the hearing, in the amount of \$2,867.75, which includes an administrative fee of \$750 and the cost of the hearing transcript.

⁵³ Pre-Hearing Brief of Complainant Department of Enforcement at 14.

⁵⁴ *Sanction Guidelines* at 103.

These fines and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.⁵⁵

HEARING PANEL.

By: Matthew Campbell
Hearing Officer

Copies to:

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⁵⁵ The Panel has considered and rejects without discussion all other arguments of the parties.