

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TIMOTHY BEHANY  
(CRD No. 2878998),

EDWARD M. VANGROUW  
(CRD No. 1032559),

And

CARL MARTIN TREVISAN  
(CRD No. 715623),

Respondents.

Disciplinary Proceeding  
No. E9B2003026301

Hearing Officer – AWH

**HEARING PANEL DECISION**

March 20, 2007

**Respondents each improperly obtained contingent deferred sales charge waivers for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled. Respondent Behany is suspended from associating with any NASD member in any capacity for two years, fined \$40,000, and ordered to requalify by examination; Respondent VanGrouw is suspended from associating with any NASD member in any capacity for two years, fined \$20,000, and ordered to requalify by examination; Repondent Trevisan is barred from associating with any NASD member in any capacity.**

Appearances:

Lynn M. Kaseta, Esq., David B. Klafter, Esq., Michael J. Newman, Esq.,  
and Jonathan M. Prytherch for the Department of Enforcement.

Kevin P. Conway, Esq., and Jennifer M. Jordan, Esq., for Timothy Behany.

Jeffrey L. Liddle, Esq., and Jeffrey Zimmerman, Esq., for Edward M. VanGrouw.

Andrew W. Sidman, Esq., and Yoonsun Chung, Esq., for Carl M. Trevisan.

## **DECISION**

### **Procedural History**

On February 14, 2006, the Department of Enforcement filed a Complaint against Timothy Behany, Edward M. VanGrouw, and Carl M. Trevisan, alleging that, in order to obtain sales charge waivers for certain of their customers, they each separately (1) misrepresented that those customers were disabled, and (2) thereby caused their member firm's books and records to contain false and misleading information with regard to those customers, in violation of NASD Conduct Rules 2110 and 3110.<sup>1</sup> Each respondent filed an Answer to the Complaint and a request for a hearing. On September 22, 2006, VanGrouw orally agreed to terms of settlement with Enforcement, and, accordingly, the hearing as to him was stayed until December 15, 2006. On September 26, 2006, a hearing was held on the allegations against Respondents Behany and Trevisan before a Hearing Panel composed of the Hearing Officer, a former member of the District 10 Committee, and a current member of the District 11 Committee. Because a written settlement agreement was not finalized with Respondent VanGrouw, a

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<sup>1</sup> The Complaint also named as a respondent David Joseph Cottam, who resolved the Complaint against him by settlement.

hearing on the allegations against him was held on January 8, 2007, before the same Hearing Panel.

## **Findings of Fact<sup>2</sup>**

### **The Respondents**

Timothy Behany entered the securities industry in March 1997 and was registered as a General Securities Representative through Citigroup Global Markets Inc. (“Citigroup”) from July 7, 1997, until he was discharged and his registration terminated on May 16, 2002. He was most recently registered through GunAllen Financial, Inc., from May 12, 2005, until April 21, 2006. He is not currently registered with any NASD member firm. He has no prior disciplinary history.<sup>3</sup>

Edward M. VanGrouw entered the securities industry in 1983. From 1988 until 1992 he was registered as a General Securities Representative with Lehman Brothers Inc. In April 1992, he registered through Citigroup where he is currently registered.<sup>4</sup> He provides services to more than 200 households. He has no prior disciplinary history.<sup>5</sup>

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<sup>2</sup> References to the Department of Enforcement’s exhibits are designated CX\_; Respondent Behany’s exhibits, as RBX\_; Respondent VanGrouw’s exhibits, as VGX\_; Respondent Trevisan’s exhibits, as RTX\_; Stipulations, as Stip.\_; the transcript of the September 26 hearing, as TrI.\_; and the transcript of the January 8 hearing as TrII.\_.

<sup>3</sup> CX-1, CX-29, TrI. 122-23.

<sup>4</sup> CX-2. In 1992, the firm was known as Smith Barney. CX-22, at 5.

<sup>5</sup> TrII. 69-70.

Carl M. Trevisan first became registered with NASD as a General Securities Representative in 1980. He has been registered through Citigroup, where he is currently employed, since July 1993. In 1998 he became a Certified Investment Management Analyst, and in 1999 or 2000, he became a Certified Financial Planner. He and a junior partner have accumulated approximately \$300 million in customer funds under management, and have approximately 400 households as customers, with about 1,300 accounts. During 2001 – 2002, Trevisan’s gross commissions exceeded \$1 million. He has no prior disciplinary history.<sup>6</sup>

### **The Violations**

Although their reasons vary, each Respondent admits that he obtained contingent deferred sales charge (“CDSC”) waivers for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled. From January 2000 through May 2002, Behany obtained CDSC waivers for 98 customers in connection with 194 mutual fund redemptions by falsely representing, on Citigroup’s electronic order entry system, that those customers were disabled.<sup>7</sup> From August 2001 through June 2002, VanGrouw obtained CDSC waivers based on inaccurate disability information for 19 customers in connection with 59 mutual fund redemptions or exchanges.<sup>8</sup> From September

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<sup>6</sup> CX-3, Stip. ¶ 2; TrI. 59, 143-48.

<sup>7</sup> Stip. ¶ 13; Behany’s Answer, ¶ 10.

<sup>8</sup> CX-7; VanGrouw’s Answer, ¶ 15.

2001 through June 2002, Trevisan obtained CDSC waivers for 14 customers in connection with 31 mutual fund redemptions by representing, on Citigroup's electronic order entry system, that those customers were disabled, although none was disabled.<sup>9</sup>

### **The Process for Obtaining CDSC Waivers**

Citigroup employed an electronic order entry system for mutual fund transactions.<sup>10</sup> A registered representative would bring up an order entry screen that required a multi-step process to fill various information fields. The representative would tab to each field, including one that was entitled "CDSC waiver." The default for that field was blank. If no waiver was sought, the representative would leave the field blank and tab to the next field. If a waiver was sought, the representative would have to enter "1" for a waiver on grounds of death, "2" for disability, or "3" for a qualified distribution. After pressing "Enter," the Mutual Fund Verify Screen would appear, displaying the information entered by the representative, and requiring the representative to enter his password. After the password was entered, a confirmation screen would appear, displaying all the information pertaining to the order.<sup>11</sup>

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<sup>9</sup> CX-8; Stip. ¶¶ 19, 20.

<sup>10</sup> Trevisan's exclusive use of the electronic order entry system is pertinent to the allegations of the Complaint against him. Mutual fund transactions could also be entered by paper tickets. A paper ticket would be initialed by a branch manager, and an internal confirmation of an electronic transaction would be initialed by a branch manager. TrI. 73; TrII. 111-12, 120-21.

<sup>11</sup> Stip. ¶ 5; CX-25-27; TrI. 71-77, 86-88.

## **Context and Effect of the Violations**

### Respondent Behany

In 2000, Behany knew that his customers could redeem 10 to 12 percent of their mutual fund holdings without penalty. However, he found the process to be “cumbersome, especially with clients with four or five positions.” When he inquired how to make the redemption process easier, he was told by a senior partner to enter a disability waiver “because you’re really not hurting anyone. They are entitled to that money and it makes things easier.”<sup>12</sup> Although he knew it was wrong, he began entering disability waivers for clients who were experiencing, and complaining about, significant losses in their mutual fund accounts during a time when the stock market was declining precipitously.<sup>13</sup>

In connection with 194 transactions that totaled \$1,428,576.25, Behany obtained CDSC waivers for 98 customers, thereby depriving mutual fund companies of approximately \$42,857, and unjustly enriching the customers by the same amount. He generated net commissions of approximately \$600.00 (an

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<sup>12</sup> TrI. 115-16.

<sup>13</sup> TrI. 117.

average of only \$3.03 per transaction) on the amount of CDSC's that were waived and reinvested.<sup>14</sup>

### Respondent VanGrouw

From August 2001 through June 2002, VanGrouw obtained CDSC waivers for 19 customers, related to 59 transactions that totaled \$697,881.11. Those waivers amounted to approximately \$20,936.43. He generated net commissions of approximately \$318.23 (38 percent of \$837.46 gross commissions).<sup>15</sup>

A number of VanGrouw's customers were anxious and distressed about the financial state of the securities market which was experiencing a downturn. At a firm function or trip he overheard some people "talking about you're able to liquidate a mutual fund and not be - - have the client not pay the fee."<sup>16</sup> Acting on that information, he suggested to his clients that there was a way for him to have

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<sup>14</sup> CX-5-6. The amounts of CDSC waivers are only approximations, based on assumptions by the NASD investigator, using an average CDSC of 3%. The \$600.00 commission figure is also only an approximation, based on an assumption of a standard 4% gross commission on \$42,875 (\$1,714.29) and a net to Behany of 35% of that amount. *See* Behany Post-Hearing Memorandum, nn. 32, 34. In any event, the commission amounts were supplied by Enforcement "to contradict the argument, as set forth by Behany, that altruism motivated his false disability claims." Enforcement's Post-Hearing Submission, p. 7. However, the Hearing Panel concludes that the small size of the net commissions did not motivate Behany (or the other respondents, as discussed below) to seek the disability waivers.

<sup>15</sup> The parties disagree on the amount and method of calculating VanGrouw's commissions. The Hearing Panel does not accept either methodology because both require assumptions as to what customers would have done had they been required to pay a CDSC. Rather, the Hearing Panel calculates net commissions objectively, in the same way it did for Behany, i.e., using only the total amount of CDSCs waived. Both parties agree that the amount of CDSCs waived by VanGrouw was approximately \$20,936.43. Four percent of that figure is \$837.46, and, at a 38 percent payout (TrII. 92), his net commissions amount to \$318.23.

<sup>16</sup> CX-22, at 10; TrII. 75-76.

the back-end fee waived. However, he did not tell the clients that he was going to be using a disability waiver.

In response to an NASD investigator's request for an explanation for the waivers he obtained, VanGrouw wrote that the "clients in question had suffered significant losses in the funds being redeemed and I used the disability waiver to avoid having them incur additional losses on those investments. In retrospect, I realize that this was an inappropriate use of the waiver, and a serious error in judgment."<sup>17</sup>

#### Respondent Trevisan

From late September 2001 through mid-June 2002, Trevisan obtained 31 CDSC waivers on transactions that totaled \$373,855.93, thereby depriving mutual funds of approximately \$8,089.26. Trevisan earned net commissions on the amounts waived of approximately \$113.25.<sup>18</sup>

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<sup>17</sup> TrII. 52-53; CX-19 at 4.

<sup>18</sup> The approximate amounts of waivers were calculated in the same manner as those for Behany and VanGrouw. However, the \$8,089.26 figure is taken from RTX-16 which correctly adjusts the \$11,215.68, shown on CX-8, to exclude transactions that incurred no actual CDSC because class B shares had been converted to class A shares that do not have a CDSC. The approximate net commissions were calculated using the same method that was used for Behany (4% of \$8,089.26 = \$323.57 gross; 35% of \$323.57 = \$113.25 net). In using the methodology for calculating net commissions, the Hearing Panel makes no assumption as to what customers may have done with their investments had they been charged the CDSCs rather than have them waived. Accordingly, the Hearing Panel rejects as unpersuasive Enforcement's post-hearing argument -- and late filed Morningstar reports that purport to support that argument -- that the poor performance of American Funds, which were recommended by Trevisan, would have prompted customers to have made free exchanges into other funds or money market funds if they knew they were to incur CDSCs otherwise. There is no evidence in the record to support that argument. Accordingly, the Hearing Panel has not found it necessary to consider Trevisan's proffer of documents to counter those attached to Enforcement's post-hearing submission.



Trevisan cannot explain how the waivers for his customers came to be entered. He testified that (1) he believed they were inadvertent mistakes, (2) he and his team sometimes entered hundreds of orders a day, (3) he processed orders quickly, typing orders without looking at the screen, (4) after tabbing to the waiver field, “somehow. . . a number was hit,” (5) he “never saw the disability waiver when [he] looked at the screen,” and (6) he never intentionally requested a disability waiver for a customer he did not believe was disabled.<sup>19</sup>

The Hearing Panel cannot credit Trevisan’s assertion that the requests for disability waivers were accidental. Trevisan requested disability waivers on a total of 31 mutual fund redemptions for 14 customers who were not disabled.<sup>20</sup> As noted above, the process to request a disability waiver required Trevisan first to hit a tab key to reach the CDSC waiver field, and then either to tab again to reach the next field or insert a “1,” “2,” or “3” in the CDSC waiver field to indicate the reason for the waiver. Once he reached the CDSC field, Trevisan had a choice of hitting one of four keys on his computer keyboard. In each of 31 instances, he hit the number “2” key. He never hit the number “1” or number “3” key, either intentionally or accidentally for these 14 customers, nor does he recall ever hitting those two keys to request a waiver on the basis of death or a qualified

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<sup>19</sup> TrI. 155-56, 192-93, 195, 197.

<sup>20</sup> Stip. ¶ 19. Trevisan testified that he typically entered the orders himself. TrI. 149. There is no evidence in the record that anyone else entered the orders at issue in this case.

distribution.<sup>21</sup> He was unable to explain how disability waivers could have been entered by accident or mistake. Given the physical layout of a computer keyboard, it is inconceivable to the Hearing Panel that the number “2” key could have been hit inadvertently 31 times (on five days more than once) over an eight and one-half month period.<sup>22</sup>

### Discussion

NASD Conduct Rule 2110 articulates a “broad ethical principle,” rather than specific acts that are prohibited. The focus of NASD rules is the “professionalization of the securities industry.”<sup>23</sup> To that end, NASD Conduct Rule 2110 obliges an associated person<sup>24</sup> to “observe high standards of commercial honor and just and equitable principles of trade.”<sup>25</sup> Falsifying records submitted to NASD or maintained in a member firm’s official records is inconsistent with that obligation, and the obligation under Conduct Rule 3110 to

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<sup>21</sup> CX-23, pp. 12-13 (tr. pp. 42-43, 46-47).

<sup>22</sup> Enforcement introduced a customer note made by Trevisan which states that he sold the customer’s fund shares “for no charge.” CX-31K, p. 1. Tevisan testified that he made the note after he was told by a team member that there was no remaining CDSC with respect to that fund. The Hearing Panel does not credit that testimony. The fact that Trevisan entered *and received* a CDSC disability waiver on the sale of that fund undermines his testimony that he thought no CDSC would be incurred. CX-8, p. 3; TrI. 174-75. The note was made on the same date that the sale was executed and the CDSC was waived. RTX-16 (Bates 01755). He could not explain how a disability waiver could have been entered when he thought there would be no remaining CDSC. TrI. 175.

<sup>23</sup> *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, \*11 (NAC June 2, 2000).

<sup>24</sup> General Provision 0115 extends the obligations of Conduct Rule 2110 to associated persons, as well as members.

<sup>25</sup> *DBCC v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, \*16 (NBCC Jan. 20, 1998) (citations omitted).

make and preserve accurate book and records.<sup>26</sup> Submitting false information about customers to mutual funds, in order to obtain sales charge waivers to which those customers would not otherwise be entitled, is a violation of NASD Conduct Rule 2110.<sup>27</sup> Even if the goal were to benefit the customers and not enrich themselves, it was unethical and improper for Behany, VanGrouw, and Trevisan to falsify the information to accomplish that goal. Entering false disability waiver information in the books and records of a member firm also violates Conduct Rule 3110.<sup>28</sup> Accordingly, each Respondent violated Conduct Rules 2110 and 3110.

### **Sanctions**

For falsification of records, the NASD Sanction Guidelines recommend the imposition of a fine of \$5,000 to \$100,000, as well as a bar in egregious cases, or a suspension of up to two years where there are mitigating factors.<sup>29</sup> Enforcement requested that the Hearing Panel impose a bar on each respondent for his violations. However, the Hearing Panel concludes that, treating each respondent individually, a fine approximating the amount of CDSC charges waived, a lengthy suspension, and a requalification requirement are the

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<sup>26</sup> *DBCC v. Sickels*, No. C9A950036, 1997 NASD Discip. LEXIS 23, \*\*10, 11 (NBCC Jan. 22, 1997) (citing *Charles E. Kautz*, Exchange Act Release No. 37,072, 1996 SEC LEXIS 994, \*7 (Apr. 5, 1996)).

<sup>27</sup> *See, e.g., Department of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, at \*6 (NAC Dec. 18, 2000) (submitting false information about customers on variable annuity applications).

<sup>28</sup> *See, e.g., Department of Enforcement v. Charles J. Cuozzo, Jr.*, No. C9B050011, (NAC Feb. 27, 2007).

<sup>29</sup> NASD SANCTION GUIDELINES, at 39 (2006 ed.).

appropriate sanctions under the facts of this case for two respondents, and a bar is appropriate for one.

#### Respondent Behany

Behany's violations are quite serious and extensive. Over a period of 28 months, he deliberately entered false information on 194 mutual fund transactions for 98 customers. Although he testified that he was told by a senior partner that no one would be hurt by obtaining false disability waivers instead of incurring other redemption penalties, that advice is not mitigating, particularly where he knew that it was wrong to enter false information in the books and records of the firm and the mutual funds involved.

However, the Hearing Panel credits Behany's testimony, as well as supporting documentary evidence, showing that he acted out of a misguided motivation to benefit customers who incurred significant losses in a down market, not for personal enrichment. While his motive does not excuse his misconduct, it weighs against a bar. The Hearing Panel also credits his testimony expressing remorse and taking full responsibility for his conduct; moreover he did not attempt to conceal his conduct, and he cooperated fully in the investigation.<sup>30</sup> In addition, he has been terminated by the firm. Nevertheless, while his customers were not harmed, the mutual funds were deprived of considerable charges that were waived. In order to remedy his misconduct and to deter future misconduct

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<sup>30</sup> See *Cuozzo*, at p.15.

by Behany and others, the Hearing Panel will suspend him in all capacities for two years, fine him \$40,000 (approximately the amount of which he deprived the mutual funds), and order him to requalify by examination.

Respondent VanGrouw

VanGrouw's violations are also serious and extensive. Over a period of just under a year, he obtained disability waivers based on false information for 19 customers in connection with 59 transactions. The Hearing Panel concludes from his testimony, and supporting evidence, that he did not engage in the misconduct to enrich himself. He acted in the face of what he considered to be significant losses in his customers' accounts, and he "capitulated to [customers]" requests for relief from their financial anxiety.<sup>31</sup>

After learning from others about CDSC disability waivers, he informed customers who had losses of more than 20 to 30 percent in their accounts that he would get a waiver of CDSC charges, but that, at sometime in the future, they might be required to repay the charges. Although he did not deliberate whether he was making a wrong choice, he knew his actions were, at a minimum, in a "grey" zone or area, but, nevertheless, reacted to pressure by, and compassion for, his clients.<sup>32</sup> He testified that, today, he has a different understanding. When

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<sup>31</sup> TrII. 128.

<sup>32</sup> TrII. 138-40. The Hearing Panel notes that, notwithstanding his compassion for his clients, he did not discount commissions on the buy side of their reinvestments. TrII. 19.

confronted by his firm, he promptly acknowledged his misconduct and received a Letter of Caution from the firm and paid the firm a fine of \$7,500.

With his years of experience in the securities industry, VanGrouw should have known at the time he obtained the disability waivers that his actions were unethical and violated NASD Conduct Rules, notwithstanding that there was no harm to his customers. And while he testified about his remorse, the Hearing Panel finds, as suggested by Enforcement, that his testimony is tinged with lament for his current predicament: “. . . had I thought out that we would be here or had I thought out that that type of . . . bending of the rules would result in termination or any type of citation or any type of fine, I wouldn’t have done it.”<sup>33</sup> Given the evidence, the Hearing Panel believes that, as an appropriate remedial sanction that will also deter future misconduct by VanGrouw and others, he should be suspended in all capacities for two years, fined \$20,000 (approximately the amount of which he deprived the mutual funds), and ordered to requalify by examination.

#### Respondent Trevisan

Trevisan sought waivers for 14 customers in connection with 31 transactions. The waivers amounted to just over \$8,000, and the commissions he earned as a result of the waivers were nominal. While the extent of his misconduct was not as great as the other respondents’, the seriousness of that

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<sup>33</sup> TrII. 139-40.

misconduct was no less and was aggravated by his proffered explanation of the cause.

The motivation for this successful veteran of the securities industry to seek these waivers remains a mystery. He denies that he intentionally sought to obtain disability waivers for customers who were not disabled, asserts that the waivers were sought by accident, cannot explain how the waiver requests came to be entered, and states that he “never saw the disability waiver when [he] looked at the [computer confirmation] screen.”<sup>34</sup> As noted previously, the Hearing Panel does not find credible the assertion that the requests for disability waivers could be entered by accident, and especially on 31 separate occasions. A preponderance of the evidence demonstrates that Trevisan intended to seek those waivers for whatever reason. He has not been straightforward in his testimony concerning the circumstances of seeking CDSC waivers, has not acknowledged the true rationale for his misconduct, and, thereby, has not demonstrated an ability to comply with the full scope of regulatory requirements necessary to the proper functioning of the securities industry. Accordingly, as requested by Enforcement, the Hearing Panel will bar Trevisan from association with any firm in any capacity. In light of the bar, no fine will be imposed.

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<sup>34</sup> TrI. 155-56.

## **Conclusions**

Timothy Behany is suspended from associating with any NASD member in any capacity for two years, fined \$40,000, and ordered to requalify by examination before again serving in any registered capacity for violating NASD Conduct Rules 2110 and 3110 as set forth above.

Edward M. VanGrouw is suspended from associating with any NASD member in any capacity for two years, fined \$20,000, and ordered to requalify by examination before again serving in any registered capacity for violating NASD Conduct Rules 2110 and 3110 as set forth above.

Carl Martin Trevisan is barred from associating with any NASD member for violating NASD Conduct Rules 2110 and 3110 as set forth above.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes NASD's final disciplinary action in this matter, except that if this decision becomes NASD's final disciplinary action, Behany's suspension shall begin at the opening of business on May 21, 2007, and end at the close of business on May 20, 2009; VanGrouw's suspension shall begin at the opening of business on May 21, 2007, and end at the close of



business on May 20, 2009; and Trevisan's bar shall become effective immediately.

**SO ORDERED.**

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Alan W. Heifetz  
Hearing Officer  
For the Hearing Panel

Copies to:

Timothy Behany (*Via First Class Mail & Overnight Courier*)  
Edward M. VanGrouw (*Via First Class Mail & Overnight Courier*)  
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