INITIAL DECISION RELEASE NO. 733
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15790

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of MICHAEL A. HOROWITZ and MOSHE MARC COHEN	INITIAL DECISON January 7, 2015

APPEARANCES: Dean M. Conway, Britt Biles, Peter J. Haggerty, and Christopher Matthews for the Division of Enforcement, Securities and Exchange Commission

Moshe Marc Cohen, *pro se*

John J. Hoffman, Acting Attorney General of New Jersey, and Jason N. Silberberg, Deputy Attorney General, for non-party Bonnie E. Bajor

Craig A. Stewart, Arnold & Porter LLP, for non-party Baruch Weiss

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on March 13, 2014, pursuant to Section 8A of the Securities Act of 1933 (Securities Act); Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act); Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act); and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act).[1] The OIP alleges willful violations by Moshe Marc Cohen (Cohen) of Sections 17(a)(1) and 17(a)(2) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, and alleges that Cohen willfully aided and abetted and caused a broker-dealer's violations of Section 17(a) of the Exchange Act and Exchange Act Rule 17a-3(a)(6). During a three-day hearing in August 2014, the Division of Enforcement (Division) presented ten witnesses, including Cohen. Cohen presented himself and one additional witness.

[1] The case has ended as to Michael A. Horowitz. *Michael A. Horowitz*, Securities Act Release No. 9620, 2014 WL 3749703 (July 31, 2014).

Thirty-five exhibits were admitted into evidence. The last brief was filed on November 18, 2014.[2]

Issues

The issues presented are whether, in January and February 2008 (the Relevant Period), Cohen (1) willfully violated the antifraud provisions of the Securities Act, the Exchange Act, and Exchange Act rules by providing false information to a broker-dealer regarding how soon clients intended to access their investments in variable annuities, and engaged in a scheme and course of business to defraud; and (2) willfully aided and abetted and caused the broker-dealer's violations of provisions of the Exchange Act requiring broker-dealers registered with the Commission to make and keep current, for prescribed periods, certain books and records. OIP at 2, 16-18.

Findings of Fact

The factual findings and legal conclusions are based on the entire record. I applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision.

<u>Moshe Marc Cohen and Woodbury Financial Services</u>

Cohen is a thirty-eight-year-old resident of Brooklyn, New York. Answer at 2. After attending Ner Israel Rabbinical College in Baltimore County, Maryland, and Johns Hopkins University in Baltimore, Maryland, Cohen obtained a bachelor of science degree in finance from Touro College in New York City. Tr. 862-63. Cohen worked briefly in sales before joining Provident Mutual and later U.S. Planning Group as a partner. Tr. 864-65. U.S. Planning Group was a New York corporation, with Mike Frieda (Frieda) as the principal and Fredda Elzweig as the third partner. Tr. 533, 554, 559-60, 598, 865.

Woodbury Financial Services, Inc. (Woodbury), is a broker-dealer with its principal office in St. Paul, Minnesota. Tr. 533, 536-37. Woodbury contracts with independent marketing organizations (IMOs), groups of independent registered representatives for which Woodbury acts as broker-dealer. Tr. 535. Each registered representative in the IMO is an independent contractor of Woodbury rather than a direct employee. Tr. 538. The IMOs are generally run by a principal, who manages the IMO's registered representatives on a day-to-day basis. Tr. 535, 537.

U.S. Planning Group was one of the IMOs with which Woodbury was affiliated. Tr. 533. Through his status as a partner of U.S. Planning Group, Cohen was a registered representative

[2] I will cite to the transcript of the hearing as "Tr. __." I will cite to the Division and Respondent's exhibits as "Div. Ex. __" and "Resp. Ex. __." I will use similar designations in citations to the post-hearing filings. Where an exhibit lacks page numbers, or clear page numbers, but there are bates-stamped pages, I will cite to just the last three digits of the respective bates numbers, leaving off the prefix.

associated with Woodbury from 2003 through his resignation on February 20, 2008.[3] Tr. 638, 865, 921. During the Relevant Period, Cohen held Series 6, 7, 24, 63, and 65 securities licenses. Tr. 846.

Variable Annuities

A variable annuity is an investment product sold by life insurance companies. Tr. 445, 448. The owner of a variable annuity initially invests a sum of money in the annuity and can choose how to invest that money by distributing it into various sub-accounts, similar to a mutual fund. Tr. 448-49; *see* Div. Ex. 634 at 109. For example, the owner can choose to invest in a sub-account that tracks the S&P 500, in a bond market sub-account, in a sub-account that provides only interest, or in more aggressive portfolios. Tr. 236-37; Div. Ex. 634 at 6, 109, 139. Whatever investment gains are made in the owner's sub-accounts are tax-deferred until the money is withdrawn from the annuity. Tr. 448. No matter how poorly the investments perform, however, the owner still receives back his full initial investment in the annuity. Tr. 40-41, 52. If the sub-accounts in which the money is invested perform well, the owner collects his initial investment amount plus any market gains; if the market tanks and the amount in the owner's sub-accounts drops below his initial investment amount, the owner still gets back his full initial investment.[4] Tr. 40-41, 52, 802.

Variable annuities generally have a set period of time, known as a surrender period, during which the owner of the annuity is penalized for withdrawing or transferring his money.[5] Tr. 449-50, 485. The surrender period typically lasts seven to ten years after the purchase of the annuity. Tr. 449-50, 485. During the surrender period, if the annuity owner withdraws any money or transfers the annuity to another insurance company, he must pay a penalty or fee to do so, called a surrender charge. Tr. 449-50, 485. The surrender charge is usually between six to eight percent of the account value. Tr. 450. After the surrender period ends, the owner generally may withdraw or transfer the money in the annuity without penalty and can elect to do so in a lump sum or in monthly installments. Tr. 449. If the owner chooses the latter option, the insurance company would then "annuitize" the owner's money, paying him a monthly income for a set period of time depending on the annuity contract's terms. Tr. 449. For example, the owner might receive his money in monthly installments over ten years, twenty years, or his remaining lifetime. Tr. 449; *see* Div. Ex. 633 at 106-07.

Two additional features of variable annuities are central to this case. The first is known as a bonus or credit enhancement feature. Tr. 235; Div. Exs. 396, 633 at 108. In order to make

[3] While Cohen maintains that he resigned on February 20, 2008, according to records of the Financial Industry Regulatory Authority, Inc., Cohen was discharged by Woodbury on February 25, 2008. *See* Moshe Marc Cohen BrokerCheck Report at 9, *available at* http://brokercheck/finra.org (last visited Dec. 11, 2014). Official notice, pursuant to 17 C.F.R. § 201.323, is taken of this record.

[4] This concept, known as principal protection, assumes that the insurance company remains solvent. Tr. 24, 52.

[5] But only if the person who serves as the measuring life is still alive, as explained below.

variable annuities a more attractive product, insurance companies often offer an upfront bonus, generally between four and seven percent of the amount invested by the owner. Tr. 235-36; Div. Ex. 396. The bonus is immediately credited to the owner's account; for example, if the owner invests $1,000,000 in a variable annuity with a ten percent bonus feature, $100,000 is credited to him immediately, such that he has a full $1,100,000 to distribute among the various sub-account options. Tr. 235-36; *see* Div. Exs. 633 at 212; 634 at 109.

A second important feature of variable annuities is their relationship to a "measuring life." Variable annuities are tied to the length of a particular individual's life; when the designated individual dies, all of the money in the annuity may be withdrawn or reinvested free of charge, even if the death occurs during the surrender period. Tr. 278, 281-82. Some annuities also have an enhanced death benefit, such that upon the death of the designated individual, a certain percentage of the initial investment is added to the owner's account. Tr. 493, 732; Div. Ex. 396. Unlike life insurance, variable annuities do not require a medical examination of the person who serves as the measuring life. Tr. 28. The individual designated as the measuring life can be the owner of the annuity; such annuities are known as owner-driven annuities. Tr. 281-82. A second type is an annuitant-driven annuity, in which an individual other than the owner, called the annuitant, serves as the measuring life. Tr. 281-82. This type of variable annuity is the subject of this proceeding.

Variable annuities share certain similarities with some types of life insurance policies – both are sold by insurance companies, are tied to a designated individual's life span, have a death benefit, and may offer the option of distributing the owner's investment or premiums in sub-accounts which can generate market gains. Tr. 448-49, 466-67. The parties do not appear to dispute that life insurance policies generally have an insurable interest requirement, meaning that insurance companies usually require the insured person to have some connection to the purchaser of the policy – a husband could purchase a policy for his wife, but he could not purchase a policy for a random stranger. Tr. 462-63; Resp. Br. at 41-42. There is some disagreement, however, about whether the same is true for annuitant-driven variable annuities, such that where the owner is not the measuring life, the owner must have some connection to the annuitant. Jay Baker, a manager at Penn Mutual Insurance Company (Penn Mutual), testified that he believed variable annuities have an insurable interest requirement, but he did not know whether Penn Mutual had a policy specifically stating a prohibition on stranger-owned variable annuities. Tr. 519-22. Cohen disputes that variable annuities require an insurable interest, and another witness testified that he did not believe such a requirement existed for the annuities at issue in this proceeding. Tr. 66; Resp. Br. at 15, 41.

The Variable Annuity Investment Strategy

Michael A. Horowitz (Horowitz) Originates the Strategy

Horowitz, who was the subject of a Commission Order dated July 31, 2014, originated the strategy to use variable annuities as short-term investment vehicles. Tr. 21; *Michael A. Horowitz*, Securities Act Release No. 9620, 2014 WL 3749703 (July 31, 2014). The strategy involved the purchase by investors of annuitant-driven variable annuities with a terminally ill individual, generally a person in hospice care or in an assisted living facility, designated as the annuitant (i.e., a terminally ill individual was identified to serve as the measuring life). Tr. 23-24, 466, 689, 898-900. Variable annuities with favorable bonus features were selected, such that a significant percentage of money was immediately credited to the owner's account. Tr. 23. When the terminally ill annuitant died, the owner of the annuity collected both his original investment and the bonus amount. Tr. 23; *see* Div. Ex. 634 at 283-84. The faster the annuitant died, the sooner the owner was able to collect his principal, any gains from the sub-account investments, and the bonus. Tr. 26, 253. The selection of terminally ill annuitants meant that the owners of the annuities stood to get back their money quickly, making a fast and sizeable return on their original investment without the risk of getting back less than their full investment due to the principal protection feature of variable annuities. Tr. 80-81. Under the strategy, the annuity owner and the annuitant had no relationship or connection outside of the variable annuity contract; they were strangers. Tr. 906. The annuitants and their families did not receive any portion of the proceeds of the annuity, all of which flowed back to the annuity owner upon the annuitant's death. Tr. 178. In most cases, it appears the annuitants' families were unaware that an annuity was taken out on the life of the terminally ill patient. Tr. 693-94.

During the fall of 2007, Horowitz, a registered representative at Morgan Stanley, pitched this investment strategy to his clients, chose the variable annuities to be purchased, and submitted the annuity purchases to Morgan Stanley or other broker-dealer firms. Tr. 20-22, 30, 42, 253, 280. Hoping to increase the size of his variable annuity business, Horowitz began looking for institutional capital to fund more purchases of variable annuities with terminally ill annuitants. Tr. 28-29. Platinum Partners Credit Opportunities Fund (Platinum), an asset-based lending hedge fund based in New York, eventually became an investor in the venture, along with Centurion, a hedge fund that appears to be related to Platinum.[6] Tr. 19, 29, 52, 234-35. Brian Jedwab (Jedwab), a portfolio manager and managing director of Platinum, testified that he first heard of the investment strategy in mid-October 2007 from Baruch Gottesman (Gottesman). Tr. 19, 22. Jedwab had not met Gottesman prior to their meeting in October 2007. Tr. 22. At that meeting, Gottesman described the strategy and explained that Horowitz was the broker orchestrating it. Tr. 22, 27. A few days later, Gottesman coordinated a phone call with Horowitz, Jedwab, and their respective legal counsel to discuss Platinum's investment of a significant amount of money in variable annuities. Tr. 27-28. Horowitz also came to Platinum's New York office to lay out the strategy for Murray Huberfeld (Huberfeld), Platinum's chief investment officer at the time, as well as Platinum's legal counsel. Tr. 29-30.

After the in-person meeting, and after obtaining a legal opinion from its attorneys that the strategy was legal, Platinum decided to move forward with investing in variable annuities. Tr. 30-32, 423-25. In late 2007, a limited liability corporation called BDL Group, owned by Platinum, was created to receive funds from Platinum/Centurion with which to purchase variable annuities and to take in the annuity proceeds upon the annuitants' deaths. Tr. 32-33. Howard

[6] Platinum and Centurion appear to have overlapping executive management, and witnesses did not always clarify whether they were referring to Platinum, Centurion, or both. Tr. 87, 241, 384-85. For the purposes of this Initial Decision, the term "Platinum/Centurion" is used when witnesses appear to be referring to both funds.

Feder (Feder),[7] a commodities trader and friend of a Platinum executive officer named Mark Nordlicht (Nordlicht), was brought in to manage BDL Group and oversee the investment strategy on behalf of the hedge funds. Tr. 31-32, 229-31. Feder and BDL Group acted as an intermediary between Platinum/Centurion and Horowitz in connection with the annuity purchases. Tr. 33. BDL Group's sole purpose was managing Platinum/Centurion's investments in variable annuities, and it engaged in no other business other than the variable annuity investments. Tr. 241. Feder was BDL Group's only employee, and BDL Group was run out of Feder's home. Tr. 35, 240-41. Feder agreed that he was "for all intents and purposes, the person who was BDL [Group]." Tr. 240. All of BDL Group's money came from Platinum/Centurion; BDL Group did not have independent capital. Tr. 57-58.

Nominees Purchase the Variable Annuities

It was initially anticipated that BDL Group would purchase the variable annuities directly, using the money given to it by Platinum/Centurion. Tr. 34. However, Feder testified that "the broker"[8] told him that BDL Group would need to use individuals to purchase the annuities because some of the insurance companies precluded the purchase of variable annuities by entities. Tr. 36, 242. The individuals, referred to as nominees, would be the nominal owners of the annuity contracts, whose names appeared on the annuity applications. Tr. 36, 38. Bank accounts were also set up for the nominees, and BDL Group deposited funds in those accounts with which the nominees purchased the variable annuities. Tr. 38, 242. Tens of millions of dollars flowed from Platinum/Centurion, to BDL Group, to the nominees' accounts. Tr. 244, 359-60, 711. When the annuitants died and the nominees received the payouts from the insurance companies, they returned the money to BDL Group via check or wire transfer. Tr. 38, 93. In exchange for this service, the nominees received a flat payment from BDL Group of $20,000; as with the rest of BDL Group's capital, this money originally came from Platinum/Centurion. Tr. 38-39, 98-99, 114, 243; Resp. Ex. 1191. The nominees did not retain any of the money deposited into their new bank accounts by the insurance companies. Tr. 244-45; Resp. Ex. 1191.

The nominees were generally close friends or relatives of Platinum/Centurion principals and their respective spouses. Tr. 37. They were chosen based on the determination that they were people whose bank accounts would not be at risk from creditors and who were trusted to return the money paid out by the insurance companies. Tr. 36-37, 244. The eight nominees were Daniel Zeidman (Zeidman), Esther Zeidman, Richard Jedwab (R. Jedwab), Marilyn Jedwab (M. Jedwab), Julie Jedwab, Bina Levy (Levy), Isaac Levy, and Judah Pearlstein. Tr. 37-38.

[7] Feder received a bachelor of arts degree in accounting, with a minor in economics, from Queens College. Tr. 227-28. He then worked briefly for two accounting firms before beginning his career working on the floor of a commodities exchange. Tr. 229. He does not hold any professional licenses. Tr. 228.

[8] Both Horowitz and Cohen are identified as "brokers" for the investment strategy, and witnesses occasionally failed to specify which of the two was being identified. Tr. 242-43. Because Cohen replaced Horowitz in early 2008, as explained *infra*, references to "broker" from that period onward presumably refer to Cohen. Tr. 243, 246-47, 290, 310.

Four of these nominees testified at the hearing: Zeidman, Levy, R. Jedwab, and M. Jedwab. Tr. 83, 108, 156, 205.

Zeidman is a practicing physician and close personal friend of Jedwab. Tr. 38, 84-85. His wife, Esther, also served as a nominee. Tr. 38, 84. Zeidman had a very limited understanding of the investment strategy and his role in it; he knew that Platinum/Centurion wanted to invest in products he only later realized were variable annuities, and Zeidman understood that "[Platinum/Centurion] couldn't do the product so we were going to do it. That was basically all I knew." Tr. 85-86. He recalled that Zeidman approached him, gave him this basic explanation, and asked that he and his wife sign any documents brought to them by Feder. Tr. 85-86, 103, 107. Zeidman did not read the documents and did not know what they contained, but believed they were not yet filled out at the time he and his wife signed. Tr. 87-88. Zeidman testified that he did not meet or communicate with Cohen, though he was copied on an email between Feder and Cohen dated February 13, 2008. Tr. 99-100; Div. Ex. 301.

Levy had a similarly limited understanding of the details of the variable annuity investment scheme. Levy recalled that her brother, Huberfeld, approached her and asked her to sign some documents. Tr. 110-11. Levy's husband also served as a nominee. Tr. 112. Levy recalled that Feder brought her and her husband documents to sign and instructed them on where to sign them; she was told to sign in Florida, her husband in New Jersey. Tr. 116. Levy did not read the documents. Tr. 117. She testified that she never met or communicated with Cohen. Tr. 126.

Jedwab's father and mother, R. Jedwab and M. Jedwab, also served as nominees. Tr. 158, 165. R. Jedwab testified that he was asked to serve as nominee by Huberfeld, who told him that the investments would be made in his and his wife's names and that they would need to sign various documents. Tr. 161-62. As with the other nominees, Feder brought R. Jedwab the paperwork, which was not yet filled out, and R. Jedwab and M. Jedwab signed and returned it to Feder. Tr. 167, 176-77, 212-13. R. Jedwab did not read the documents. Tr. 213. Neither R. Jedwab nor M. Jedwab knew what a variable annuity was or had a clear understanding of the investment, and neither met or spoke with Cohen. Tr. 161-62, 179-80, 206-08, 218.

A Nominee Agreement dated November 13, 2007, was entered into by BDL Group and R. Jedwab.[9] Resp. Ex. 1191. The agreement identifies R. Jedwab as the "Nominee" and requires him to open a bank account "in [his] own name," with BDL Group depositing money in the account, retaining full control over its use, and owning all gains, earnings, proceeds, or profits earned on any investments. Resp. Ex. 1191. In practice, each of the nominees testified that they were instructed to open bank accounts not in their own names but in the name of newly created family trusts. Tr. 93-94, 117-118, 168, 172-73, 291-92. R. Jedwab recalled that in January 2008, Feder told him that in connection with being a nominee a family trust would be established in his name and the variable annuity bought in the trust's name rather than his individual name.

[9] M. Jedwab signed an identical agreement, also dated November 13, 2007. Resp. Ex. 1191. It is unclear from the record whether all of the other nominees signed substantially similar agreements. Exhibit 1191, in addition to agreements signed by R. Jedwab and M. Jedwab, contains the last page of a nominee agreement signed by Levy.

Tr. 168. The Richard Jedwab Trust agreement, dated January 15, 2008, identifies R. Jedwab as the trust's settlor and M. Jedwab as the trustee. Tr. 171; Div. Ex. 347 at 554. Also created were the Marilyn Jedwab Trust, of which R. Jedwab was trustee (Tr. 204; Div. Ex. 621 at 522, 530); the Bina Levy Trust, of which Isaac Levy was trustee (Div. Ex. 285 at 168); and the Daniel Zeidman Trust, of which Esther Zeidman was trustee (Div. Ex. 634 at 002, 005, 009).[10] Feder's father drafted the trust documents. Tr. 292.

The trusts were created exclusively for the variable annuities investment, and they were not utilized by the nominees in any other capacity. Tr. 171-72, 291-92. While Feder relayed to the nominees that family trusts would be used in the investment strategy, Feder testified that it was either Cohen or Horowitz who gave him this instruction. Tr. 168, 290. Cohen represented that it was he who came up with the idea of using trusts as the "legal owners of the annuities." Resp. Br. at 3. He explained that listing a trust as the owner of the variable annuity on the application ensured it "would automatically be designated as Annuitant-Driven and would pay at the demise of the Annuitant." *Id.* at n.1. Cohen described this as a "solution" to the "owner-driven problem" – Platinum/Centurion did not want to purchase annuities with the owners as the measuring lives, because the nominees were generally in good health and were not expected to die quickly, meaning that Platinum/Centurion would be unable to get a fast return on its investment. Resp. Pre-Hearing Br. at 18; Tr. 281-82.

The nominees testified unequivocally that all of the money in the trusts' bank accounts belonged to BDL Group or Platinum/Centurion, not themselves. Tr. 92-93, 123, 177. None of the trusts had any independent capital. Tr. 291. The trusts received money from BDL Group to purchase the annuities, and each nominee either wired money or wrote a check to BDL Group or Platinum/Centurion when money was deposited in the nominees' accounts by the insurance companies after the deaths of the annuitants. Tr. 93, 125, 178, 291.

Cohen Becomes Involved in the Investment Strategy

Cohen maintains that by December 2007, Horowitz was not permitted by Morgan Stanley to sell variable annuities. Resp. Pre-Hearing Br. at 15; Resp. Br. at 12-13; *see also* Div. Ex. 636 at 51-53. In late December 2007 or early January 2008, Cohen met with Horowitz in Las Vegas, Nevada.[11] Answer at 14. According to Cohen, Horowitz told him "that he knew of a Hedge Fund that was interested and ready to purchase a substantial amount of variable annuities for the family members and partners of the Fund," and asked Cohen "if he would be interested in placing the Orders on behalf of the funds." Resp. Pre-Hearing Br. at 15. On December 24,

[10] There are twenty-eight purchases of variable annuities at issue in this proceeding, none of which involve trusts in the names of the other three nominees, though Isaac Levy did serve as a trustee for the Bina Levy Trust. *See* OIP at 16; Div. Ex. 621 at 219. Evidence suggests that a trust was set up in Isaac Levy's name but that Platinum/Centurion ended its investments in variable annuities prior to Cohen submitting any applications in that name. Div. Ex. 335.

[11] Cohen admitted that he met with Horowitz "in or around December of 2007" in his Answer, but in his post-hearing brief appears to claim that this meeting took place on January 4, 2008. Answer at 14; Resp. Br. at 20.

2007, Cohen sent Alona Horowitz[12] a copy of Woodbury's new customer account packet, which identified and included various forms Woodbury required its registered representatives to complete when submitting a variable annuity sale for processing. Div. Ex. 119. Cohen's email stated "here is the form needed see the annuity pages." *Id.* Included in the new customer account packet are the new account and point of sale forms discussed *infra*. *Id.*

In early January 2008, Cohen replaced Horowitz as the registered representative executing the purchases of variable annuities on behalf of Platinum/Centurion. Tr. 246-47, 289-90; Div. Ex. 636 at 233. On or near January 12, 2008, a conference call attended by Horowitz, Feder, Nordlicht, and Cohen was held to examine Platinum/Centurion's variable annuity investment options. Tr. 259-62, 274, 391-93, 407. Discussed on the call was a spreadsheet, sent by Horowitz to Feder on January 12, 2008, which listed a number of variable annuity products offered by different insurance companies. Tr. 262; Div. Ex. 396. The spreadsheet identified various features of the products, including bonus percentage, surrender period, rollbacks of commissions or bonuses, and whether the annuities were owner-driven or annuitant-driven. Tr. 274-82; Div. Ex. 396. The spreadsheet also contained a column entitled "$1 million investment and Death in 60 Days," which detailed the hypothetical returns under various market conditions if the annuitants died within 60 days. Div. Ex. 396. Feder testified that either Cohen or Horowitz created the spreadsheet. Tr. 288.

Cohen disputes that he was the creator of the spreadsheet, though he stated during his investigative testimony that he created a similar spreadsheet based on research he performed on different variable annuity products. Resp. Br. at 2 & n.2, 19-20, 22; Div. Ex. 636 at 215. Cohen admits that he researched different annuity products prior to the January call, and represents that during the call he explained the difference between owner-driven and annuitant-driven annuities, recommending that Platinum/Centurion choose products in the latter category. Resp. Pre-Hearing Br. at 18. Feder testified that all of the suggestions regarding variable annuity products in which Platinum/Centurion might invest came from Cohen. Tr. 263, 265, 392. Feder also testified that the decision of which of the products to purchase was made collectively, with Nordlicht having the ultimate say, while Jedwab believed that Horowitz, and later Cohen, decided which annuity policies Platinum should purchase. Tr. 42-43, 265. In any event, Cohen was the broker who executed the purchases of such products beginning in early 2008. Tr. 310.

Cohen Alerts Woodbury to Large Amount of Impending Variable Annuity Sales

In order to sell the variable annuity products of a particular insurance company, Cohen had to be appointed with the insurer to sell annuities in the state where he sought to make the sale.[13] Tr. 460-61. In email exchanges with Woodbury's licensing and registration specialist

[12] Alona Horowitz was not involved in the variable annuity investment strategy. Tr. 295; Div. Ex. 636 at 155-56. She is a relative of Horowitz, and it appears Cohen used her email address to direct the new customer account packet to Horowitz. Tr. 294-96; Div. Ex. 636 at 155-56. Alona Horowitz forwarded Cohen's email to Feder on January 13, 2008. Div. Ex. 119.

[13] The appointment process was described by a manager at Penn Mutual as a "formality"; an insurance company merely appoints an individual licensed to sell insurance in a given state to sell the insurance company's insurance products in that state. Tr. 461.

between January 16 and January 18, 2008, Cohen requested that Woodbury immediately process his paperwork to be appointed to sell the variable annuities of a list of insurance companies. Tr. 552-58, 588; Div. Ex. 292. On January 18, Cohen communicated that he was "planning on doing over 50 million of variable annuities business in the first quarter" of 2008, and stated that he "need[ed] [Woodbury] to process all appointments with companies requested immediately." Div. Ex. 292. To explain the urgency, Cohen claimed that he "ha[d] a competitor right behind me and d[id] not want to lose the business due to some leg dragging on anyone[']s part." *Id.* He also stated that "[n]ext week is my only shot to sit with this client and I expect to leave the appointment with applications not empty handed and redfaced." *Id.* It appears Woodbury ultimately processed at least some of Cohen's requested appointments. *See, e.g.*, Tr. 590-91; Div. Ex. 292.

Cohen's Sales of Variable Annuities

Cohen Sells Twenty-Eight Variable Annuities in Early 2008

There were three forms involved in each variable annuity purchase: (1) a Woodbury new account form; (2) a Woodbury point of sale form; and (3) the insurance company's annuity application form. Tr. 296-99; Div. Ex. 119 at 3. Once the variable annuity product was selected, Cohen gave Feder[14] the blank forms needed to purchase the annuities. Tr. 245-50, 300-02. The bulk of Feder's work involved ensuring that these forms were signed expeditiously by the nominees. Tr. 245, 300-02. He marked with sticky notes the place on each form where the nominees should sign. Tr. 301. Feder testified that he neither completed the forms nor told Cohen how to complete them. Tr. 249, 302-03. He did, however, provide Cohen with basic information on the nominees, such as name, date of birth, social security number, address, driver's license number, affiliations with brokers or dealers, net worth, and tax bracket.[15] Tr. 303-04, 370-75.

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[14] Cohen disputes that he interacted directly with Feder prior to February 1, 2008. Resp. Br. at 3. Instead, Cohen claims that his direct contacts were Gottesman and Horowitz, who acted as intermediaries between Cohen and Feder with respect to the exchange of information and paperwork until February 2008. Resp. Br. at 3, 6. Feder testified repeatedly that he received the Woodbury point of sale, new account forms, and applications from Cohen; he made no mention of any intermediary. *See* Tr. 246-50. Cohen has presented no evidence to support his claim that an intermediary was involved.

[15] Feder settled with the Commission on claims that the financial information he provided was false, and that he was at least reckless in not knowing that the registered representatives involved in the investment strategy were going to provide false investment access information on the forms. *See Howard Feder*, Exchange Act Release No. 71713, 2014 SEC LEXIS 945 (Mar. 13, 2014).

Feder collected the signed documents and sent them back to Cohen, still uncompleted other than having the nominees' signatures on them.[16] Tr. 313. Cohen never showed Feder how he eventually completed the forms or asked him to verify Cohen's answers to any of the questions on the forms. Tr. 314. Cohen did not discuss the answers on the forms with the nominees, nor did Feder believe that Cohen gave the nominees copies of the completed forms prior to their submission to Woodbury. Tr. 100, 141-42, 179-80, 217-18, 346.

The annuity applications requested biographical information on the annuitant, including address, date of birth, and social security number. *See, e.g.*, Div. Ex. 621 at 954. Whoever interfaced with the terminally ill annuitants in order to obtain their signatures and personal information appears to have been misleading or unclear; the record suggests that annuitants did sign the annuity applications, but that at least their families were uninformed why the annuitants were supplying information and their signatures. Tr. 345, 693-94. Cohen testified that he was not involved in interacting with or obtaining annuitants, testifying that "I had zero to do with the hospice. I got a piece of paper with their name, or I got applications that were signed by them, but I had zero knowledge on what actually – the party – or who the parties were." Tr. 899. He admitted, however, that he understood that the annuitants "were not in good health." Tr. 900. The record does not identify the person from whom Cohen received information on annuitants or the annuitants' signatures.

Between late January 2008 and mid-February 2008,[17] Cohen sold twenty-eight variable annuities to nominees, totaling over $35,000,000 in value. Answer at 15; Div. Exs. 621, 628-634. These annuities were sold by at least seven different insurance companies. Div. Exs. 621, 628-634. For each annuity, Cohen submitted to Woodbury the completed annuity application, new account form, and point of sale form, and Woodbury approved the sales and forwarded them on to the insurance companies. Tr. 631-32, 635-36, 718-19, 833-34; Div. Ex. 621. Each of the annuities designated a terminally ill individual as the annuitant. Tr. 43-44, 252, 700.

Cohen's Answers on Woodbury's Point of Sale Form for Variable Annuities

Section 4 of Woodbury's point of sale form for variable annuities, entitled "Investment Access," asks:

> **I anticipate that I will begin to access this investment:**
> □ Never □ 0-5 years □ 6-10 years □ 11-15 years □ 15+ years □ after age 59 ½

Div. Ex. 119 at 086. Cohen marked the box for "11-15 years" on each of the point of sale forms he submitted to Woodbury in connection with Platinum/Centurion's purchases of variable annuities. Tr. 898-902; Div. Ex. 621.

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[16] Feder also emailed Levy during the course of obtaining her and her husband's signatures on the forms, reminding her that the money invested might be inaccessible for up to nine years, the surrender period on the annuities. Tr. 134.

[17] According to Cohen, all twenty-eight sales were made on two dates: January 28, 2008, and February 7, 2008. Resp. Br. at 3.

Section 5 of the point of sale form, entitled "Surrender Charges/Sales Charge Structure," listed a number of different reasons why the annuity owner was purchasing the annuity. Div. Ex. 621. Cohen generally checked the boxes for "Potential for greater returns," "Death benefit features," "Tax deferred treatment of earnings," "Multiple fund managers," "Bonus feature," and "Participate in equities market." *Id.*

Section 7 of the point of sale form asked the registered representative to identify the source of the funds used to purchase the annuity. Div. Ex. 621. For some of the forms, Cohen marked the box for "Other" and wrote in "Trust"; he sometimes also, or instead, marked "Cash/Checking/Savings/CD." Div. Ex. 621.

At the end of each point of sale form, Cohen certified that he was "familiar with the current client and ha[d] satisfied myself that the source of funds used for this transaction do not appear to be related to money laundering." Div. Ex. 621. He also affirmed that he "believe[d] the information provided is complete and accurate to the best of my knowledge and that this transaction is suitable for the client." Div. Ex. 621. The nominees signed the point of sale forms for the annuities purchased in the name of the trusts for which they were trustee, in the space indicated for "client signature." *Id.*

Some Annuitants Learn of the Sales

The nominees and respective annuitants did not know each other, and the investment strategy did not anticipate that they would ever have the need or ability to contact each other. Tr. 345-46, 350. However, in mid-February 2008, a family member of Stanley Gilbert, one of the annuitants, called Isaac Levy, who served as trustee of the Bina Levy Trust. Tr. 344-45; Div. Exs. 301, 621. Feder emailed Cohen on February 13, 2008, copying Zeidman:

> Isaac Levy got a call from a Mrs. Gilbert from SUNLIFE saying she has some questions for him, he wasn't around to take the call (his wife was) and they are calling back later. What could they be asking and why are they calling these people. Eventually this will lead to errors . . . Please call me back ASAP!!!

Div. Ex. 301. Cohen replied to Feder with the following instructions: "Tell them to talk to agent. Take name and number." *Id.* Feder appeared to believe at the time of his email that Mrs. Gilbert was an employee of Sun Life, one of the insurance companies which sold the variable annuities. Tr. 348-49. Feder understood Cohen's reply email to mean that Cohen would take care of any questions received by the nominees regarding the variable annuities, because the nominees "wouldn't have any answers." Tr. 349-51.

<u>Woodbury's Procedures for Sales by Registered Representatives</u>

Suitability Review

Timothy Stone[18] (Stone), a compliance specialist at Woodbury from September 2007 through April 2009, and Steven Lee Smallidge[19] (Smallidge), the IMO national sales director at Woodbury during the Relevant Period, testified at the hearing. Tr. 535, 617, 620. Both agreed that the three forms submitted by Cohen – the Woodbury new account form, the Woodbury point of sale form, and the insurance company's annuity application – were mandatory in order for Woodbury to approve the sale of a variable annuity.[20] Tr. 539, 550-51, 630-31; *see* Answer at 14; Div. Ex. 119 at 074.

The forms would have been analyzed as part of Woodbury's suitability review to ensure that the product being sold by the registered representative was appropriate for the client. Tr. 538-40, 632. As part of that review, Woodbury's suitability principals would examine the information disclosed on the forms, looking at the type of transaction, the age and liquid net worth of the client, and the client's risk tolerance, investment objectives, and time horizon. Tr. 540. After examining the paperwork the registered representative submitted, Woodbury would decide whether the sale made sense for the client. Tr. 540. If the sale passed suitability review, Woodbury would forward it on to the product manufacturer – in this case, the insurance companies offering the variable annuities. Tr. 539. If the sale did not pass review, Woodbury would notify the registered representative and any checks sent to Woodbury would be returned to the customer; if Woodbury was aware that the registered representative had also sent a copy of the paperwork directly to the insurance company, Woodbury would contact the insurer to alert them that the sale had failed suitability and should not be processed.[21] Tr. 477-78, 539, 637.

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[18] Stone earned a bachelor of science degree in law enforcement from Makado State University and a law degree from the William Mitchell College of Law. Tr. 616. He is admitted to the Minnesota state bar but his status is inactive. Tr. 616. After leaving Woodbury, Stone practiced law for a year and then returned to compliance work; he currently runs the supervision department of another broker-dealer firm. Tr. 617-18.

[19] Smallidge earned a bachelor of science in business and finance from the University of Wisconsin at River Falls and holds Series 6, 7, 9, 10, 24, 26, and 63 licenses. Tr. 534. He was previously employed by Fortis Financial Group, which was later acquired by The Hartford, the insurance company that owned Woodbury during the Relevant Period. Tr. 534, 589.

[20] In his Answer, Cohen "admit[ted] that each Variable Annuity sold through his Broker Dealer required a 'Variable Annuity Point of Sale' form to be submitted to the Broker Dealer." Answer at 14. Cohen now disputes that the completion of this form was required for his sales of variable annuities to Platinum/Centurion, which he characterizes as "unsolicited" or "non-recommended." Resp. Br. at 6, 14-15, 25, 28-29.

[21] This situation would arise because some insurance companies allow the registered representatives to send them a copy of the paperwork directly so that they could begin working on it concurrently with the broker-dealer's suitability review. Tr. 636.

Stone testified that insurance companies would not issue annuity contracts if Woodbury did not indicate that the sale had passed Woodbury's suitability review. Tr. 638. Smallidge noted limited situations in which a registered representative was granted permission by Woodbury to send the paperwork to the product manufacturer directly – for instance, when a sale needed to be processed quickly due to a looming tax deadline – but Woodbury still conducted a suitability review before the sale was executed. Tr. 541-42, 636.

The twenty-eight variable annuity sales submitted by Cohen passed Woodbury's suitability review. Tr. 631-32, 636-38, 718-19.

Woodbury's Financial Representative Procedures Manual

As an associated registered representative, Cohen was required to comply with the provisions in Woodbury's Financial Representative Procedures Manual (Manual). Tr. 638; Div. Ex. 618. On January 2, 2008, Cohen signed an acknowledgement that he read, understood, and agreed to abide by the Manual's requirements. Tr. 643, 645-47; Div. Ex. 612.

The Manual in effect during the Relevant Period, dated March 30, 2007, informed registered representatives that "[a]ll new business, including means of payment for purchase, is reviewed for suitability prior to processing," and stated that "Woodbury must conduct its suitability review and approve the sale before the business (application, paperwork and funds) can be processed." Div. Ex. 618 at 605. The Manual also required Woodbury's registered representatives to provide complete, pertinent, and accurate information about prospective customers to Woodbury so that it could conduct the suitability review, and prohibited the registered representatives from altering, changing, adding, or deleting anything from applications or other paperwork after it was signed by the customer. Tr. 677-78; Div. Ex. 618 at 603. The Manual instructed that "[t]he responsibility to know your customer lies with you. Of particular importance are the representations pertaining to investment objectives, risk tolerance, income, net worth, etc." Div. 618 at 594. It also instructed that "[a]ll product applications and payments [were to] be sent directly to Woodbury within 24 hours of receipt and not to the product manufacturers." *Id.* at 1605. The Manual warned that exceptions to its policies "are generally not granted," and advised registered representatives to contact Woodbury if they had any questions about the Manual's content or application to a particular set of circumstances. *Id.* at 559.

In addition, the Manual warned in a separate variable annuities section:

> Variable life and annuity products are complex therefore all efforts should be made to spend a suitable length of time with customers to ensure their understanding. Variable products should not be represented as short-term or liquid investments because of the charges and/or tax penalties for early withdrawals which can be involved.

Div. Ex. 618 at 599-600.

The Manual also contained a section defining and setting forth requirements for unsolicited orders, i.e., when "the selection of the security in question is strictly initiated and chosen by the customer and not recommended, suggested or encouraged by you." Div. Ex. 618 at 608. The registered representative can provide factual information about the security, but he cannot state an opinion as to the merits of the security. *Id.* The Manual provides that unsolicited orders must indicate "unsolicited" and be accompanied by a Low Priced Security – Non Solicitation Acknowledgment Form. *Id.* While the Manual is silent on this point, Stone testified that Woodbury did not permit unsolicited orders for variable annuities. Tr. 722. None of the paperwork submitted by Cohen contains any indication that the sales were unsolicited. Div. Ex. 621.

<u>Variable Annuities as Long-Term Investments</u>

Variable annuities are usually intended to be long-term investments. Tr. 449, 633, 739, 847. Platinum/Centurion's investment strategy, however, depended on getting in and out of the annuity contracts on a short-term basis. Tr. 44-45. Jedwab described the designation of a terminally ill person as annuitant as "key," and stated that Platinum/Centurion was prepared to lock up its money in each annuity for only a period of months, not years. Tr. 44-45. Feder testified that he expected the annuitants to die quickly, freeing up the hedge funds' money in a short period of time. Tr. 232-33.

Cohen does not dispute that Platinum/Centurion hoped the annuitant would die quickly, making its principal investment plus bonus accessible without a surrender charge. Resp. Br. at 16, 36; Tr. 847. Jedwab described the intent of the investment strategy as "us[ing] these variable annuities as a strategy to invest within these contracts with the possibility of **short-term gains** with little risk at the demise of the annuitant." Resp. Pre-hearing Br. at 3 (emphasis added). As he explained during the hearing:

> [The strategy] was using annuities for the short-term death benefit, hoping – annuities are a product generally used for the long term, but the product offered a death benefit, which allowed – which allowed the investors to sort of have a parachute that their annuities became liquid upon death.

Tr. 847. Cohen also acknowledges that the use of terminally ill annuitants was a key component of the strategy; this is shown by his representation that prior to submitting the variable annuity purchases to Woodbury, he did his "own due diligence review on . . . the use of variable annuities with unrelated parties and short-lived annuitants." Resp. Pre-hearing Br. at 20.

Stone testified that Woodbury would not have processed Cohen's sales of variable annuities if Cohen had disclosed that the clients intended to use the products not as long-term investments but in order to achieve short-term gains by designating terminally ill annuitants. Tr. 657-58. Stone explained that part of Woodbury's suitability review was determining whether the product in question was being sold in the correct manner and for its intended purpose. Tr. 633. According to Stone, Woodbury would have looked upon the use of annuities as short-term investments as an unethical and abusive use of the product, and Cohen's sales would have failed suitability review regardless of whether the client was fully aware of the short-term strategy and its risks. Tr. 657-58, 701-02. According to Stone, Woodbury relied on the accuracy and completeness of Cohen's answers to the investment access question when doing its suitability review. Tr. 699. Had Cohen checked the box for "0-5 years," Woodbury would not have processed the sale. Tr. 699. Similarly, had Cohen checked the "Other" box and explained the strategy, the sale also would have been rejected.[22] Tr. 700-01.

Cohen's Communications with Penn Mutual Insurance Company

Penn Mutual had a distribution agreement with Woodbury, through which Woodbury's registered representatives could sell Penn Mutual products once appointed to do so. Tr. 453, 460-61. Jay Baker (Baker), a manager in Penn Mutual's Market Conduct and Compliance department, testified that in early to mid-January 2008, Cohen called Penn Mutual and spoke with Sandy Chu (Chu), who worked with independent broker-dealers such as Woodbury to answer questions regarding Penn Mutual products. Tr. 445-46, 457-59; Div. Ex. 609. Cohen identified himself by name and asked Chu a number of specific questions about Penn Mutual's underwriting process for variable annuities. Tr. 457-59, 504. Cohen specifically asked what might raise red flags in the underwriting department when reviewing a variable annuity application, and he wanted to know the highest dollar amount annuity Penn Mutual would issue. Tr. 457, 506, 508. Chu found these questions concerning, and informed Baker about the call. Tr. 457-59. Baker agreed with Chu that the call was unusual, testifying that "never in [his] 25-year career . . . had a rep call[ed] in and ask[ed] those types of questions." Tr. 458. Baker then looked in Penn Mutual's licensing system and ascertained that Cohen was not appointed to sell Penn Mutual products. Tr. 459. Baker did not feel the need to take any additional action as Cohen could not have sold any potentially suspect annuities without first being appointed with Penn Mutual. Tr. 459-61.

However, about a month later, on February 8, 2008, Cohen faxed two variable annuity applications to Chu at Penn Mutual, each for $4.9 million and each with the anticipated holding period of "10+" years. Tr. 459, 473, 479, 485; Div. Ex. 609. Cohen had signed both applications, certifying to the accuracy and truth of the representations made therein. Tr. 530; Div. Ex. 609 at 770, 784. Baker reviewed the paperwork and noticed that it shared many of the hallmarks he saw in life insurance cases where the owner had no connection to the insured life; these stranger-originated life insurance policies were prohibited by Penn Mutual. Tr. 463-64. Baker found the following characteristics troubling: there was no indication that Woodbury had conducted a suitability review,[23] the applications were missing the owner's and annuitant's signatures, the money was sent by wires from New York banks rather than checks from the owners, the amounts were only slightly below Penn Mutual's $5 million limit for variable

[22] Stone appeared to acknowledge that there should have been follow up by Woodbury during its suitability review because "trust" was marked as the source of funds. Tr. 770.

[23] Baker testified that the applications faxed by Cohen lacked any attestation from Woodbury memorializing that it had completed its suitability review. Tr. 497. Smallidge testified that applications lacking the owners' signatures, as the Penn Mutual applications did, would not have passed suitability review absent some mistake on the part of Woodbury. Tr. 548.

annuity purchases,[24] the purported owners were recently formed trusts, the owners and beneficiaries lived in different states and had no apparent connection, such as a shared last name, and the product involved a 5% enhanced death benefit. Tr. 465-67, 471-487, 493-97, 507. Baker also conducted a Lexis Nexis search and discovered that one of the annuitants lived in a nursing home in Chicago, while the annuity's owner was a Florida trust (the Daniel Zeidman Trust). Tr. 491, 493-94. Baker decided not to issue the annuities, returned the wired funds, and sent the applications back to Cohen.[25] Tr. 477, 531; Div. Ex. 609.

Baker called Stone at Woodbury on February 12, 2008, outlining the problems he had seen in the faxed applications and notifying him that the business had been rejected by Penn Mutual. Tr. 467; Div. Ex. 609. A follow-up email sent to Stone later that day described Penn Mutual's dealings with Cohen and attached the two applications sent by Cohen to Penn Mutual on February 8, 2008.[26] Tr. 467, 475; Div. Ex. 609. Upon receiving Baker's phone call and email, Stone stopped all pending business submitted by Cohen from processing through Woodbury's system, placed Cohen's compensation on hold, and ceased making commission payments to Cohen for variable annuity sales that Woodbury had already processed. Tr. 684; Div. Ex. 335 at 834.

<u>Woodbury's Attempts to Contact Cohen and U.S. Planning Group</u>

The $50 million in variable annuities sales that Cohen's January 18, 2008, email to Woodbury said he anticipated was significant; Smallidge had never seen that amount of annuities business come in Woodbury's door at one time. Tr. 554. Smallidge emailed Frieda, the principal of U.S. Planning Group, later on January 18 to apologize for the delay in approving Cohen's requested insurance company appointments and to ask for more information on the variable annuity sales. Tr. 558; Div. Ex. 292. Specifically, Smallidge asked:

> [C]an you provide me with what Marc has going with his expectation of doing $50M in [variable annuity] business in the first quarter? Clearly this level of production is no small feat and sounds like a tremendous opportunity, but we should understand more as to the market that he's tapped into, the marketing approach being employed, and the selection criteria of carriers and products.

Div. Ex. 292; *see* Tr. 561. Frieda did not respond to the email. Tr. 559. A few weeks later, on February 7, 2008, Smallidge sent a second email to Frieda. Div. Ex. 332. Smallidge asked Frieda to call regarding Cohen's variable annuity sales, noting that he had "recently seen a

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[24] Baker testified that new annuities were generally purchased with checks; sending the money by wire transfer was uncommon. Tr. 495-96. In addition, Penn Mutual rarely received wires of more than $500,000. Tr. 476.

[25] Cohen did not contact Penn Mutual to question why the applications were rejected. Tr. 531-32.

[26] The record supports that Cohen was not appointed with Penn Mutual. Tr. 457, 525, 527; Div. Ex. 609 at 761.

couple of (large) transactions come through and want[ed] to be sure we're all on the same page[.]" *Id.* Smallidge also engaged Stone and people in Woodbury's marketing and operations groups to help him investigate and understand Cohen's sales. Tr. 564-65. Smallidge did not attempt to contact Cohen directly during this period. Tr. 598-99. He explained that this was because Frieda was the "go-to principal of U.S. Planning Group" and "the supervisor of [the] branch." Tr. 597-98.

On February 8, 2008, Cohen sent Smallidge an email, copying Frieda, with the subject line "Interest in Talking." Div. Ex. 333. Cohen wrote that he had been "privileged to meet some great people over the past few months and would love to share with you some of the sweat stories and long days that have finally paid off," and Cohen offered to speak with Smallidge to discuss his "great success stories that I have and will have for 2008." *Id.* Cohen and Smallidge spoke on February 13, 2008. Div. Ex. 335. Smallidge took notes during their conversation, and on February 14, 2008, sent a lengthy summary of the call to Stone by email. Tr. 605-06; Div. Ex. 335. According to Smallidge, Cohen said he had been networking with socialites and wanted to focus on clients with millions or billions of dollars, an interest that was not shared by Frieda. Div. Ex. 335. When asked about the annuities he was selling, Cohen claimed that they were purchased by very wealthy families engaged in estate planning, with the goal of tax deferral and wealth preservation, not "market timing." Tr. 567, 575-76; Div. Ex. 335. Cohen said he was working with the families' CPA and attorney on the transactions. Tr. 567; Div. Ex. 335.

Smallidge recalls Cohen giving inconsistent answers with respect to the annuitants during the February 13 call: Cohen first said he was not familiar with the annuitants, but later said he completed all of the paperwork on his own (which included information on the annuitants). Tr. 577; Div. Ex. 335. According to Smallidge, Cohen claimed that he "presumed the beneficiaries designated in the trust were family members." Div. Ex. 335. Smallidge asked Cohen for copies of the trust agreements as well as the names of the CPA and attorney assisting Cohen, and gave him an end of the week, or February 15, 2008, deadline. Tr. 579; Div. Ex. 335. Cohen said that he did not have copies of the trust agreements and would need to ask the clients, cautioning that "trusts are often private family matters." Tr. 579; Div. Ex. 335. Smallidge warned Cohen that if Woodbury was not able to conduct a full review of the variable annuity purchases, it might reverse the purchases. Div. Ex. 335. Cohen indicated that he did not want to be responsible for any losses in the event that Woodbury chose to take that action. Tr. 578; Div. Ex. 335.

Cohen did not meet the February 15, 2008, deadline, nor did he ever provide Woodbury with copies of the trust agreements or provide it with the names of the CPA and attorney. Tr. 582. Instead, on February 19, 2008, Cohen emailed Smallidge:

> I have spoken to the Attorney that referred us to these very wealthy and influential clients and he was adamant in not sending us the complete trusts that you requested. I would love to help on this matter, so please help me with a letter or something of substance in order for him to soften his stance. His response was that wealthy individuals set up trusts as an added layer of privacy and he felt that [Woodbury] should not need the complete trusts in order to abide by the "Know your Customer Rule." These clients are legitimate and law abiding citizens with nothing to hide but their right to properly plan their estate.

Div. Ex. 336.

In his testimony, Feder contradicted nearly all of the representations made in Cohen's February 19, 2008, email. Feder explained that: he was Cohen's principal point of contact regarding BDL Group's variable annuity investments; Cohen never asked him for any trust-related documents; and there was no attorney with whom Cohen might have been interfacing to get documents or information on the investments.[27] Tr. 354-55. Feder also testified that the trusts were set up so that BDL Group could execute the short-term annuity strategy on behalf of Platinum/Centurion, not for privacy reasons. Tr. 355-56.

Cohen never mentioned the existence of Horowitz, Feder, BDL Group, or Platinum/Centurion to Smallidge or Stone. Tr. 583-84, 691-93. Nor did he disclose either that hedge funds were the ultimate owners of the annuities or that the strategy involved the use variable annuities for short-term gains rather than long-term investments. Tr. 584, 691-93. Cohen has never identified the CPA to whom he referred during his February 13, 2008, call with Smallidge.

<u>Cohen Leaves Woodbury, and Woodbury Withholds Commissions</u>

On February 20, 2008, the day Cohen testified he resigned from Woodbury, Cohen met with Alexander Novak (Novak), an attorney, and sought Novak's legal advice on how to dissolve his relationship with U.S. Planning Group.[28] Tr. 921, 931-33, 935. Novak did not represent Cohen at the time of this meeting. Tr. 931. While Novak was in Cohen's office, which Cohen was in the process of packing up, Cohen received a call from Smallidge. Tr. 932, 935-36, 941-44. Novak recalled that it was a "heated" conversation in which Smallidge told Cohen that "all of the insurance policies would be revoked," demanded that Cohen pay back all his commissions, and quickly ended the call after learning that Cohen had an attorney in the room. Tr. 937-40, 945-46. After the call, Novak advised Cohen that it was better for a registered representative's record if he resigned rather than being terminated from his broker-dealer. Tr. 949.

In February 2008, Stone flew to New York to visit U.S. Planning Group's office and attempt to speak with Cohen, but found Cohen had cleaned out his office. Tr. 500-01, 687. The office manager told Stone that Cohen had also deleted the memory of the fax and copy machines, and someone had removed a backup tape of the server, which would have held any documents saved on the office's network. Tr. 687-88, 773. Cohen disputes that his departure from U.S. Planning Group was motivated by Woodbury's investigation of his variable annuity sales, instead claiming that he was already in the process of switching to a new broker-dealer before

[27] Cohen claims that he obtained the contact information for Saul Feder, the attorney to whom he says he was referring, on January 19, 2008, and was not able to give Smallidge the information because Smallidge cut short their February 20, 2008, telephone call. Tr. 941-43; Resp. Br. at 46.

[28] Novak testified that Cohen first told Novak that he was planning to leave U.S. Planning Group and resign from Woodbury several weeks prior to his February 20, 2008, meeting with Cohen. Tr. 958.

selling any of the twenty-eight variable annuities at issue in this proceeding. Resp. Br. at 24, 46-47.

Cohen received approximately $700,000 in commissions from Woodbury for his sales of variable annuities on behalf of Platinum/Centurion, but was due approximately $2.2 million based on the total annuities he sold. Tr. 843-44; Div. Ex. 305. Woodbury withheld the remaining amount, and Cohen has commenced a Financial Industry Regulatory Authority (FINRA) arbitration to recover the unpaid balance.[29] Answer at 15; Tr. 842-44.

Platinum/Centurion Cease Investments in Variable Annuities

In March 2008, Platinum/Centurion stopped making new investments in variable annuities. Tr. 357-60; Div. Ex. 130. Feder testified that it was decided to wind up the investment strategy because "[i]t clearly wasn't working the way we thought it would." Tr. 357. On March 25, 2008, Nordlicht emailed Feder to ask that BDL Group stop using the proceeds of variable annuity payouts to purchase new variable annuities, and to instead send all money back to Platinum/Centurion. Tr. 358-59; Div. Ex. 130. At that time, BDL Group was holding tens of millions of dollars on Platinum/Centurion's behalf. Tr. 359-60. All the money was returned to Nordlicht; no funds were retained by any of the trusts. Tr. 360-61.

Arguments of the Parties

The Division argues that Cohen willfully violated Securities Act Sections 17(a)(1) and (2) and Exchange Act Section 10(b) and Rules 10b-5(a), (b), and (c) (collectively, the antifraud provisions) as a result of making materially false statements on the point of sale forms that he signed and submitted to Woodbury. Div. Br. at 41. Specifically, the Division alleges that Cohen's statement that the annuity owners did not anticipate accessing their investments for "11 to 15 years" was false, and that this misrepresentation on the forms was material because Woodbury would have rejected, or at least further scrutinized, his annuity sales if the investment access question had been answered truthfully. *Id.* The Division contends that Cohen's material misstatements on the forms were also part of a scheme to defraud, in violation of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rules 10b-5(a) and (c). *Id.* at 40. The Division also argues that Cohen willfully aided, abetted, and caused Woodbury's violations of Exchange Act Section 17(a) and Rule 17a-3(a)(6) (collectively, the record keeping provisions) by falsifying the point of sale forms and thus, causing Woodbury to keep records that were inaccurate. *Id.* at 46.

Cohen makes many arguments for why the conduct alleged by the Division is not legally actionable under the federal securities laws. He argues that the antifraud provisions do not apply to his sales of variable annuities because the alleged misrepresentations were made not to investors but to a broker-dealer.[30] Resp. Br. at 1, 48, 51. He also argues that: the Division's

[29] Cohen now claims the arbitration is about false statements on his U5 forms. Resp. Br. at 24.

[30] Relatedly, Cohen claims that even if his conduct was violative of the antifraud provisions, he did not "willingly attempt to deceive" Woodbury by filling out the point of sale forms as he did. Resp. Br. at 2.

action against him does not serve the public interest or protect investors, stating that "[t]he Division's allegations consist only of common law fraud claims involving breach of fiduciary duty or commercial fraud"; he did not have a fiduciary duty to Woodbury and that the breach of such a duty is not actionable under the securities laws[31]; and Exchange Act Section 17(a) "prohibits only the fraudulent 'sale' of securities not 'purchases' of securities," adding that "[i]n the case of the annuities sold, no sale was made." *E.g.*, *id.* at 47-48, 51, 65.

Cohen also claims that all of the responses he gave on the point of sale forms were given to him by Feder, Gottesman, and/or Horowitz. *Id.* at 6. He contends that he filled out the investment access portions of the point of sale forms truthfully and based on his understanding of what the question was asking. *E.g.*, *id.* at 2-4, 35-37, 61-62. Cohen maintains that even if his answers in the investment access portions of the point of sale forms constitute misrepresentations, such misrepresentations are immaterial. *E.g.*, *id.* at 4-5, 52. He also argues that he did not participate in a scheme to defraud, noting, in part, that he did not engage in any deceptive conduct. *Id.* at 57-61, 70.

Cohen disputes that he acted either intentionally or recklessly. *Id.* at 6, 14, 28, 31, 47, 63-64. He claims that he could not have intended to deceive Woodbury because he did not believe Woodbury was required to conduct a suitability review. *Id.* at 5, 51-57. Regarding the aiding and abetting allegations, Cohen argues he cannot be liable for a secondary violation because Woodbury has never been charged with the primary violation, and that the point of sale form is not a document Woodbury was required to maintain under the record keeping provisions of the Exchange Act. *Id.* at 68. Finally, Cohen also claims that he did not receive a fair hearing and that the Division has attempted to constructively amend "the OIP through various unfounded claims of additional facts" that were not alleged in the OIP. *E.g.*, *id.* at 7, 43, 63. He also argues that the sanctions requested by the Division for his conduct are either precluded by the applicable statute of limitations or excessive and unwarranted. *Id.* at 68-72.

The Division's post-hearing reply brief maintains that Cohen fails to present any valid defense. Div. Reply, *passim*. The Division contends that Cohen's argument that he cannot be found to have violated the antifraud provisions because no investors were harmed misrepresents the law. *Id.* at 3-4. The Division also disputes Cohen's argument that the Division failed to prove a fraudulent scheme and that Cohen's answers on the point of sale form were, at best, immaterially misleading. *Id.* at 4-5, 7-8. The Division maintains that the record is replete with evidence of Cohen's scienter, and challenges Cohen's complaint that he did not receive a fair hearing. *Id.* at 5, 8-10.

In his sur-reply, Cohen focuses on his lack of a duty to have informed either Woodbury or the insurance companies that the annuitants were terminally ill. Resp. Sur-Reply at 1, 5-6. He also argues that any information he withheld from Woodbury was immaterial. *Id.* at 8-11. He reiterates some points made in his initial post-hearing brief, including that the Division has not established scienter and that the hearing was unfair. *Id.* at 12-14, 18-24.

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[31] He argues that he had no duty to disclose the details of the investment strategy to Woodbury and had no duty to correct any misunderstanding by Woodbury. Resp. Br. at 60.

Legal Conclusions

<u>Cohen Willfully Violated Securities Act Section 17(a)(1) and (2), Exchange Act Section 10(b), and Exchange Act Rule 10b-5</u>

Securities Act Section 17(a) makes it unlawful for any person, in the offer or sale of any securities, to (1) employ any device, scheme, or artifice to defraud; or (2) obtain money or property by means of material misstatements or omissions. 15 U.S.C. § 77q(a). Exchange Act Section 10(b) makes it unlawful to use or employ any manipulative or deceptive device or contrivance in contravention of Commission rules. 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5, enacted under this authority, makes it unlawful for any person, in connection with the purchase or sale of any security, to (1) employ any device, scheme, or artifice to defraud; (2) make material misstatements or omissions; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. 17 C.F.R. § 240.10b-5; *see SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002) (the scope of Exchange Act Rule 10b-5 is coextensive with Exchange Act Section 10(b)). A willful violation of these provisions means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

Scienter is required to establish violations of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5; a showing of negligence is sufficient to establish violations of Securities Act Section 17(a)(2). *Aaron v. SEC*, 446 U.S. 680, 695-97, 701-02 (1980); *SEC v. Steadman*, 967 F.2d 636, 641, 643 & n.5 (D.C. Cir. 1992).

The antifraud provisions require the use of the means of interstate commerce or the mails. 15 U.S.C. §§ 77q(a), 78j. Cohen's activities involved repeated transmissions and communications with Feder and Woodbury employees using the means and instruments of interstate commerce, including the telephone and electronic mail. Div. Exs. 292, 301, 333, 335; *see SEC v. Tourre*, No. 10-cv-3229, 2013 WL 2407172, at *11 (S.D.N.Y. June 4, 2013); *Heyman v. Heyman*, 356 F. Supp. 958, 969 (S.D.N.Y. 1973); *cf. Rita J. McConville*, Exchange Act Release No. 51950, 2005 SEC LEXIS 1538, at *38 (June 30, 2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

Cohen's Actions Occurred in the Offer, Sale, or Purchase of Securities

A variable annuity is a "security" within the meaning of the federal securities law. *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67-73 (1959); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109 (2d Cir. 2001). The Supreme Court has adopted an expansive interpretation of "in the offer or sale of any securities" language contained in Section 17(a) of the Securities Act and the "in connection with the purchase or sale of any security" language in Section 10(b) of the Exchange Act. 15 U.S.C. §§ 77q(a), 78j; *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("The requisite showing . . . is deception in connection with the purchase or sale of any security, not deception of an identifiable purchaser or seller." (internal quotation marks and citation omitted)); *SEC v. Zanford*, 535 U.S. 813, 819 (2002) (Section 10(b) should be construed flexibly; giving deference to Commission's broad reading of the phrase "in connection with"); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("in the offer or sale" is expansive enough to encompass the entire selling process). Given this guidance, it is clear that the activities at issue in this proceeding have the requisite relationship to the offer, sale, or purchase of variable annuities to be actionable under the antifraud provisions. To accomplish the offer and sale of twenty-eight variable annuity contracts, Cohen, as a registered representative, submitted to Woodbury point of sale forms and represented to Woodbury that the information on the forms was accurate. Tr. 550-51, 631; Div. Ex. 621.

Cohen Acted With a High Degree of Scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (internal quotation marks omitted); *cf. Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (describing scienter as a "wrongful state of mind"). Scienter may be established by extreme recklessness – an extreme departure from the standards of ordinary care that presents a danger of misleading buyers, sellers, or investors that is either known to the respondent or is so obvious that he must have been aware of it. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc). Scienter may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983).

Cohen acted with a high degree of scienter. The hearing made clear that Cohen is an intelligent man who knew exactly what he was getting involved with. Cohen met with Horowitz and had discussions with Feder; [32] he agreed to be a key participant, and was compensated for selling variable annuities. Resp. Br. at 3, 47. Cohen's multiple efforts to disguise or cover up his actions support the finding that he understood that what he was doing was wrong and that he acted with the clear intention of deceiving Woodbury. For example, Cohen told Smallidge that the annuity owners were wealthy families engaged in estate planning and described his clients' goals as tax deferral and wealth preservation, a claim he repeated on most of the point of sale forms he submitted.[33] Tr. 567-68; Div. Exs. 335, 336, 621. Cohen represented that the source of funds for many variable annuity purchases was "Other" or "Trust," thereby concealing that the trusts were merely conduits for funds from Platinum/Centurion. Div. Ex. 621. Cohen also represented that the trusts were set up "as an added layer of privacy" for the wealthy investors, which he knew was false because he admitted that it was he (Cohen) who came up with the idea for creating the trusts, not to protect anyone's privacy, but to solve the problem of ensuring that the annuities were designated as annuitant-driven and not owner-driven. Div. Ex. 336; Resp. Pre-Hearing Br. at 18; Resp. Br. at 3 & n.3. These repeated falsehoods make clear that Cohen intentionally deceived Woodbury as to the true nature of the variable annuity sales.

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[32] For example, Feder emailed Cohen in February 2008 asking for instructions after a nominee received a phone inquiry from the family of an annuitant that was asking questions. Div. Ex. 301.

[33] On the call, Cohen also repeatedly asked Smallidge if he was alone or using the speakerphone function of his telephone, questions that also belie his claim that he did not believe he had done anything wrong. Div. Ex. 335.

Cohen Provided False Information on the Point of Sale Forms

By checking the "11 to 15 years" box on the twenty-eight point of sale forms, in the "Investment Access" section, Cohen falsely represented that the purchaser of the annuities anticipated that they would "begin to access this investment" in eleven to fifteen years.[34] Div. Ex. 621. On each form, Cohen certified that he "believ[ed] the information provided is complete and accurate to the best of my knowledge and that this transaction is suitable for the client." *Id.*

Despite this certification, Cohen knowingly provided patently false answers to the investment access question. None of the nominees, who were the nominal purchasers, intended to access the investment at *any* point in time, let alone specifically within the eleven to fifteen-year window. The nominees acknowledged, and the nominee agreement clearly stated, that the money invested in the variable annuities belonged to either BDL Group or Platinum/Centurion, making either BDL Group or Platinum/Centurion the true contract owners. Tr. 92-93, 123, 177-178; Resp. Ex. 1191. Even if Cohen had accurately reflected that BDL Group or Platinum/Centurion were the true owners, the investment access answer was still untrue as both BDL Group and Platinum/Centurion expected to exit the variable annuity contracts in a matter of months, not years.[35] Tr. 44-45, 232-34. The overwhelming evidence is that no one involved in this plan to profit from the sale of variable annuities with terminally ill annuitants, including Cohen, expected to wait eleven to fifteen years to access the money in any of the twenty-eight annuity contracts.

Cohen would interpret the investment access section question differently than the Division. He argues that it asked when the annuity purchaser expects to access the investment not including the possibility of receiving the investment back upon the death of the annuitant. Resp. Br. at 2, 9-11. According to Cohen, the question posed was: when do you plan to withdraw money from your investment *prior* to the money being paid out due to the death of the annuitant? *Id.* at 2, 9. Even if this were the question, the answer of "11-15 years" is inaccurate for the reason that no one involved – not the nominees, not BDL Group, and not Platinum/Centurion – *ever* intended to withdraw money prior to the death of the annuitant, because key to the strategy was the expectation that the annuitant would die within a few months. Cohen admits that responding to the investment access section with the answer "'never' could have been justified as well," but he maintains that the response of eleven to fifteen years was the "best answer." *Id.* at 10-11.

Cohen also argues that the answer of eleven to fifteen years was correct because the annuity owners did not have to cash out upon the death of the annuitant; he claims that "[the

[34] Cohen was the "maker" of this statement, as the evidence shows that he had ultimate authority over which box to check and whether and how to answer the question. *See Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2298 (2011).

[35] Feder testified that Platinum/Centurion might have had to keep its money in the annuities longer if the annuitants' health were to unexpectedly improve; however, the expectation was that the annuitants would die quickly, freeing up the money far earlier than eleven to fifteen years. Tr. 232-33, 253, 282.

clients] could choose to change the annuitant to another terminally ill annuitant while locking in their gains each time and continue the annuities for as long as they ch[o]se." Resp. Br. at 16. Even if true, there is no evidence that the annuity purchasers had a long-term plan for these investments. The answer of "11-15 years" was plainly false.

The False Information Cohen Provided to the Broker-Dealer was Material

The standard for materiality in the context of securities law is articulated from an investor's perspective, i.e., "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *see also TSC Indus, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). On a more basic level, a material fact is one which is significant or essential to the issue or matter at hand. *Black's Law Dictionary* (7th ed.) 611. Here the recipient of the false information was not an investor but a registered representative's associated broker-dealer. While the traditional formulation of materiality contemplates fraud against actual or potential investors, the antifraud provisions are not so limited; it is clear that these provisions also proscribe fraud perpetrated on broker-dealers. *See Naftalin*, 441 U.S. at 776-77; *Graham v. SEC*, 222 F.3d 994, 1002-03 (D.C. Cir. 2000). Evaluation of materiality in this context can be accomplished by changing the designation of the actors to consider what is material from the broker-dealer's perspective. *Cf. U.S. v. Tager*, 788 F.2d 349, 355 (6th Cir. 1986) (misrepresentations to a broker-dealer were material where they lulled the broker-dealer into transferring the transaction's risk to itself). Disclosing the fact that the variable annuity contract's true owner expected to recover its investment, plus any signing bonus, in a short period of time because the annuitants were terminally ill persons, would have significantly altered the information available to the broker-dealer in deciding whether to approve the sales.

Cohen's actions were material because Woodbury would not have allowed the sale of the twenty-eight annuities to investors if Cohen had provided a correct answer to the investment access question and been forthcoming in the information he provided to Woodbury, and the insurance companies would not have sold the contracts. Tr. 638, 657-58, 699-700. In fact, when Woodbury found out that Cohen was utilizing a short-term investment strategy by designating hospice patients as annuitants, it immediately stopped processing Cohen's variable annuity sales and began an investigation into his activities. Tr. 684.

Cohen argues that his answers to the investment access question are immaterial because FINRA does not require a suitability review for his sales of variable annuities because they were "non-recommended" or "unsolicited" sales.[36] Resp. Br. at 4-5, 28. Cohen's argument is unpersuasive. First, Woodbury's Manual, which Cohen had pledged to abide by, stated that all new business must be submitted by a registered representative to be reviewed by Woodbury for suitability prior to processing. Div. Exs. 612, 618 at 605. There is nothing to support Cohen's position, and even if he were interpreting FINRA materials correctly, Cohen was bound by rules of the broker-dealer with which he was associated and Woodbury required a suitability review

[36] According to Cohen, FINRA uses the terminology of "recommended" or "unrecommended" to refer to what the Manual called solicited and unsolicited sales. Tr. 869.

before approving any sales of variable annuities. Tr. 539, 632-34, 808. Cohen claims an exception for unsolicited orders, yet Woodbury did not permit unsolicited annuity purchases and there is no evidence that Cohen followed any of the Manual's requirements for unsolicited orders, such as marking them as "unsolicited" and submitting additional paperwork. Tr. 722; Div. 618 at 608; *see* Resp. Br. at 6.

For all the reasons set forth above, I find that Cohen, acting with scienter, willfully violated Securities Act Section 17(a)(2), Exchange Act Section 10(b), and Exchange Act Rule 10b-5(b) by repeatedly providing materially false information to a broker-dealer on the point of sale forms with the intent to deceive the broker-dealer.

Cohen's Misrepresentations Were Part of a Device, Scheme, or Artifice to Defraud and Constituted Acts, Practices, or Courses of Business Which Operated as a Fraud or Deceit upon the Broker-Dealer

As noted earlier, Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c) specifically prohibit any device, scheme, or artifice to defraud and any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. 15 U.S.C. § 77q(a)(1); 17 C.F.R. § 240.10b-5(a), (c). In order to violate Exchange Act Rule 10b-5(a) or (c), the conduct must be manipulative or deceptive. 15 U.S.C. § 78j(b); *John P. Flannery*, Securities Act of 1933 Release No. 9689, 2014 SEC LEXIS 4981, at *38-39. This requirement does not apply to Section 17(a)(1). *Flannery*, 2014 SEC LEXIS 4981, at *53-54.

The Commission's recent decision in *John P. Flannery* makes clear that in order to establish liability under Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c), there must be a showing of particular instances of misconduct by the defendant; it is insufficient to simply allege an overarching "scheme." *Flannery*, 2014 SEC LEXIS 4981, at *103 n.142. However, the Commission also expressed its disagreement with the holdings of several circuit courts of appeals that only conduct separate from fraudulent misstatements may be considered when evaluating alleged violations of these provisions. *Id.* at *46-52, 58-60. The Commission found that

> a misstatement is undoubtedly a "device" or "artifice" to defraud. Thus, one who (with scienter) "makes" a material misstatement in the offer or sale of a security has violated Section 17(a)(1) — such conduct surely constitutes "employ[ing]" a "device, scheme, or artifice to defraud." In our view, so too has any defendant who (with scienter) drafts or devises a misstatement or uses a misstatement made by others to defraud investors. In each case, the person has "employ[ed]" a "device" or "artifice to defraud."

Id. at *58-59 (internal citations omitted).

This Initial Decision finds that Cohen's violations were part of a device, scheme, or artifice to defraud Woodbury into selling variable annuities that the broker-dealer would not have sold if it knew the true facts surrounding the sales. Cohen's participation in this scheme is shown by his deceptive conduct throughout the Relevant Period. For example, in an act of chutzpah or naiveté, Cohen called Penn Mutual in early to mid-January 2008 to learn what characteristics of a variable annuity application might lead an insurance company to further investigate the details of the sale, and later followed up with applications that he thought would avoid scrutiny, hoping to deceive Penn Mutual into issuing the annuity contracts. Tr. 457, 506, 508; Div. Ex. 609. Cohen also recommended that trusts be listed as the nominal purchasers of the variable annuities to ensure that the contracts would be designated as annuitant-driven, and to conceal that the true owners of the annuities were hedge funds. Resp. Br. at 3; Tr. 281-82. And, by instructing Feder on how to deal with the inquiries from annuitants' families, Cohen assisted in preventing the nominees from making statements that might have illuminated the true nature of the investment strategy. These manipulative and deceptive acts by Cohen, along with the many misrepresentations described above, were part of a scheme to defraud and operated as a fraud or deceit in violation of Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c).

Cohen's Arguments in His Defense are Unpersuasive

Cohen argues that fraud against a broker-dealer is not actionable under the antifraud provisions because no actual or potential investor was harmed. Resp. Br. at 1, 47-50. As noted above, *United States v. Naftalin*, 441 U.S. 768 (1979), rejected this line of argument. Fraud against a broker-dealer is actionable under the antifraud provisions because "the welfare of investors and financial intermediaries are inextricably linked – frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole." *Id.* at 776; *see also Graham*, 222 F.3d at 1002-03.

Cohen also attacks the applicability of Securities Act Section 17(a), claiming that there were no "sales" of the variable annuities, only purchases. Resp. Br. at 65. The cases he cites do not support Cohen's proposition, and in any case, predate the Supreme Court's clarification that the "in the offer and sale" requirement of Section 17(a) should be interpreted broadly. *Naftalin*, 441 U.S. at 773 (citing 15 U.S.C. § 77b(a)(3), which defines sale broadly to include "every . . . disposition of a security or interest in a security, for value.").

Cohen argues that the Division has attempted to "constructively amend" the OIP by making allegations not contained therein. *E.g.*, Resp. Br. at 7-8, 11, 22, 27. This argument is unavailing. I have found Cohen violated the antifraud provisions of the federal securities laws, as was alleged in the OIP, based on facts adduced from hearing testimony and admitted exhibits. *See* OIP at 17-18. The doctrine of constructive amendment, intended to ensure that the essential elements of the offenses charged in a criminal indictment are not subsequently modified, is inapplicable in this civil administrative proceeding, in which I have based liability only on the violations alleged in the OIP. *See U.S. v. Vilar*, 729 F.3d 62, 80-81 (2d Cir. 2013).

Cohen also argues that he had no duty to disclose any details about the investment strategy to Woodbury or the insurance companies, or to respond to any of Smallidge's questions regarding the variable annuity sales. *E.g.*, Resp. Br. at 3, 15. Stone disputed Cohen's argument, testifying that, from the broker-dealer's perspective and under the broker-dealer's policies and procedures, the registered representative had a duty to disclose such information. Tr. 764-65. In any case, it is clear that the federal securities laws require that industry participants be truthful, i.e., not make material misstatements and never engage in a scheme to defraud. As discussed above, Cohen failed to heed those requirements.

I reject Cohen's evaluation of witnesses' credibility, and early on in the proceeding, I rejected his position that the equitable doctrines of laches and estoppel barred the proceeding.[37] Cohen's assertion that the charges against him violate the Constitution's prohibition against *ex post facto* laws is also unavailing. *See* Resp. Br. at 39. Contrary to Cohen's suggestion, the Division does not allege that the variable annuity investment strategy was in and of itself illegal. The Division instead alleges that Cohen, through material misrepresentations and a scheme to defraud, violated the antifraud provisions of the securities laws – provisions that were in place well before Cohen's conduct at issue. As discussed above, Cohen indeed violated these provisions.

Cohen also argues that he did not receive a fair hearing. Resp. Br. at 7, 46-47; Resp. Sur-Reply at 21-24. I signed forty-three subpoenas requested by Cohen for persons to testify at hearing. *See Michael A. Horowitz*, Admin. Proc. Rulings Release No. 1676, 2014 SEC LEXIS 2855 (Aug. 7, 2014). After the close of the Division's case, Cohen was given the opportunity to present his defense. Tr. 884-85, 908. Cohen testified on his own behalf and called Judah Pearlstein (Pearlstein) and Novak to testify. Tr. 884-85, 928, 963. The Division objected to Pearlstein's testimony on the grounds that Pearlstein never served as nominee for any of the twenty-eight annuities that are the subject of the OIP. Tr. 963-64. I sustained the Division's objection and prohibited Pearlstein from testifying. Tr. 964; *see* 17 C.F.R. §201.111. When Novak's testimony ended midday on Wednesday, August 27, 2014, Cohen did not have any other witnesses present to testify and I concluded the hearing. Tr. 965-66. Cohen indicated he would have two witnesses appear the following week, but he had not requested a continuance and I had scheduled a hearing in another proceeding during that week. Tr. 965-67.

Cohen Willfully Aided and Abetted and Caused Woodbury's Exchange Act Section 17(a) and Rule 17a-3(a)(6) Violations

Exchange Act Section 17(a)(1) requires, in relevant part, that

> [e]very . . . broker or dealer who transacts a business in securities through the medium of any such . . . registered broker or dealer . . . shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest.

15 U.S.C. § 78q(a)(1).

Exchange Act Rule 17a-3(a) requires registered broker-dealers to, among other things:

[37] The defenses of estoppel and laches were among Cohen's twenty-nine affirmative defenses filed on April 21, 2014, which were denied during a prehearing conference held on July 7, 2014. Answer at 16; Prehearing Conf. Tr. at 24.

> make and keep current . . . [a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. . . show[ing] the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation.

17 C.F.R. § 240.17a-3(a) (formatting altered).

The records retained by registered broker-dealers must be accurate and correct, even if the information itself is not mandated. *Eric J. Brown*, Securities Act Release No. 9299, 2012 SEC LEXIS 636, at *32 n. 20 (Feb. 27, 2012) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc.*, Exchange Act Release No. 33367, 1993 WL 538899, at *7 (Dec. 22, 1993)); *see Sinclair v. SEC*, 444 F.2d 399, 401-02 (2d Cir. 1971). "[B]roker-dealers are required to make recordkeeping a priority" and "[t]hese records are the basic source documents and transaction records of a broker-dealer, and the keystone of the surveillance of brokers and dealers by [the Commission's] staff and by the securities industry's self-regulatory bodies." *Ko Sec., Inc.*, Exchange Act Release No. 48550, 2003 WL 22233255, at *4 (Sept. 26, 2003) (internal quotation marks and citation omitted).

"Scienter is not required to" establish a primary violation of "Exchange Act Section 17(a)(1) and the rules thereunder." *Orlando Joseph Jett*, Securities Act Release No. 49366, 2004 SEC LEXIS 504, at *75 (Mar. 5, 2004). However, to establish aider and abettor, or secondary, liability, the Division must show that (1) a violation of the record keeping provisions occurred; (2) the respondent substantially assisted in the violation; and (3) the respondent provided that assistance with the requisite scienter.[38] *Eric J. Brown*, 2012 SEC LEXIS 636, at *33. Either knowledge or recklessness satisfies the scienter requirement when the alleged aider and abettor is a fiduciary or active participant. *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1010 & n.9 (11th Cir. 1985); *IIT, Int'l Inv. Trust v. Cornfield*, 619 F.2d 909, 923 (2d Cir. 1980).

This Initial Decision has already established that the twenty-eight point of sale forms submitted by Cohen contained material misrepresentations, meaning that Exchange Act Section 17(a)(1) and Rule 17a-3(a)(6) were violated.[39] Cohen was significantly responsible for these

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[38] "[O]ne who aids and abets a primary violation is necessarily 'a cause of' that violation." *Eric J. Brown*, 2012 SEC LEXIS 636, at *33. "An individual can be a cause of a broker-dealer's violations of the books and records provisions 'if he was responsible for an act or omission that he knew or should have known would contribute to the violation.'" *Id.* at *32 (citation omitted).

[39] Cohen argues that he cannot be found to be an aider or abettor because Woodbury was not charged as a principal violator. Resp. Br. at 68. This argument has been rejected by the

violations because he completed these forms and submitted them to Woodbury. Tr. 631-32, 902. Cohen knew that what he supplied to Woodbury was false and was at least reckless in not knowing that the falsehoods would become part of Woodbury's records. Accordingly, I find that Cohen aided, abetted, and caused violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(6) thereunder.

Sanctions

The Division asks that Cohen is made to disgorge $766,958, representing the commissions he received on the sales of variable annuities, plus $210,204 in prejudgment interest calculated from March 1, 2008, through July 31, 2009. Div. Br. at 47, Ex. A. In addition, the Division asks that I order Cohen to: pay a third-tier penalty for each of his twenty-eight fraudulent variable annuity sales; cease and desist from violating the securities laws; and be barred from the securities industry. *Id.* at 48-50.

Civil Money Penalty

Cohen's conduct occurred in January and February 2008, more than five years before the OIP was issued on March 13, 2014. The statute of limitations is therefore an issue. The relevant statutory provision in civil enforcement proceedings is 28 U.S.C. § 2462, which provides that:

> an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .

In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), the Supreme Court held that in government enforcement actions seeking civil penalties, Section 2462's statute of limitations begins to run when the violation occurs, not when it is discovered by the enforcement authorities. 133 S. Ct. at 1220-24. Since there is no evidence of violations by Cohen within the five-year period prior to the issuance of the OIP, civil money penalties are time-barred.

Bar from Association

The seminal case determining which sanctions are subject to Section 2462 is *Johnson v. SEC*, 87 F.3d 484, 488-92 (D.C. Cir. 1996). *Johnson* held that censure and a suspension from the industry are punitive, "qualify therefore as a 'penalty' within meaning of § 2462," and are barred if untimely. *Id.* Accordingly, Section 2462 also prohibits the imposition of an associational bar on Cohen.

Commission. *See Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 SEC LEXIS 4543, at *64 n.89 (Feb. 27, 2014) (citing *Swartwood, Hesse, Inc.*, Exchange Act Release No. 31212, 1992 WL 252184, at *3 n.8 (Sept. 22, 1992)).

Cease and Desist

Sanctions that do not fall within the terms "civil fine, penalty, or forfeiture," are not subject to Section 2462's five year statute of limitations. 28 U.S.C. § 2642; *SEC v. Alexander*, 248 F.R.D. 108, 115 (E.D.N.Y. 2007). Section 2462 therefore does not apply to disgorgement, prejudgment interest, or cease-and-desist orders, each of which may be ordered for conduct occurring more than five years prior to the commencement of the enforcement proceeding. *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); *Zacharias v. SEC*, 569 F.3d 458, 470-71 (D.C. Cir. 2009); *Johnson*, 87 F.3d at 491.

Section 8A of the Securities Act and Section 21C of the Exchange Act provide that the Commission may order a person who has violated those statutes or any rules or regulations thereunder, or who was a cause of a violation of the statutes or the regulations due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing the violation or any future violation. 15 U.S.C. §§ 77h-1(a), 78u-3(a). The Commission has established that the risk of future violations and the public interest factors cited by the court in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), are relevant considerations in determining whether respondents should be ordered to cease and desist. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *116 (2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). In addition, the Commission considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.*

Steadman v. SEC articulated the following factors to use in assessing the public interest:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d at 1140; *see Joseph J. Barbato*, Securities Act Release No. 7638, 1999 SEC LEXIS 276, at *49 n.31 (Feb. 10, 1999); *see also Donald T. Sheldon*, Exchange Act Release No. 31475, 1992 SEC LEXIS 3052, at *68-69 (Nov. 18, 1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995).

The *Steadman* factors weigh heavily in favor of a cease-and-desist order. Cohen's misconduct involved repeated fraudulent misrepresentations on forms that he submitted to his broker-dealer about securities, the twenty-eight variable annuities that Cohen sold to investors. On each of the twenty-eight forms he submitted, Cohen affirmed that the information he provided was accurate and the product sold was suitable for the investor, when he knew he was supplying inaccurate information. Relying on Cohen's untruthful responses, Woodbury approved sales it would not have allowed if it had known the truth about the annuitants and the investors.

In addition, Cohen verbally furnished Woodbury with false information and omitted material information about the variable annuity sales, thus preventing Woodbury from knowing that the sales by design involved the designation of dying annuitants in order to make short-term profits for hedge funds. His misrepresentations were recurring, egregious acts. Cohen acted with a high degree of scienter, and has given no indication that he recognizes his actions violated both securities statutes and regulations and his associated broker-dealer's rules.

Cohen provided many arguments and excuses, but no acknowledgement that his actions were wrong and no assurance against future violations. Cohen's lies on forms submitted to his associated broker-dealer, his efforts to cover up his actions in later communications with Woodbury, his sudden removal of files from U.S. Planning Group's offices, and his refusal to acknowledge any wrongdoing do not bode well for his future compliance with the securities statutes. If he continues working in the securities industry, Cohen would be presented with the opportunity for future violations of the securities laws. Though Cohen's fraud was committed against Woodbury, fraud against broker-dealers threatens both investors and the marketplace by increasing the broker-dealers' cost of doing business and creating market uncertainty. *See Naftalin*, 441 U.S. at 776. It is in the public interest to order that he cease and desist from violating the antifraud provisions. With respect to the record keeping violations, Cohen demonstrated a reckless disregard for Woodbury's basic obligations under the securities laws, causing Woodbury to retain records containing blatantly false information. A cease-and-desist order will serve the public interest by indicating that Cohen can no longer engage in such misconduct and will put others on notice that fraud against broker-dealers will not be permitted.

Disgorgement

Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act authorize disgorgement in a cease-and-desist proceeding or in a proceeding in which the Commission can impose a penalty.[40] 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e). Disgorgement of ill-gotten gains is an equitable remedy designed to deprive the wrongdoer of his unjust enrichment and thereby deter him and others from violating the securities laws. *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1191-92 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999). "The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d. Cir. 1997); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."). "[D]isgorgement need only be a reasonable approximation of profits causally connected to the [securities law] violation." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

It is well-settled that disgorgement of ill-gotten gains is appropriate and necessary in a Commission enforcement proceeding. Woodbury would not have allowed the sale of twenty-

[40] The OIP authorized disgorgement and civil penalties under Investment Company Act Section 9, 15 U.S.C. § 80a-9, and Advisers Act Section 203, 15 U.S.C. § 80b-3; the Division, however, did not seek any remedies under these provisions. Div. Br. at 47-48.

eight variable annuities if Cohen had not fraudulently misrepresented the facts as to each of the sales. For the same reasons discussed above, the *Steadman* factors strongly support a disgorgement order. Cohen should not be allowed to keep commissions he received as a direct result of conduct that violated the securities statutes. Based on these findings and pursuant to Commission Rule of Practice 600, 17 C.F.R. § 201.600, Cohen must disgorge $766,958, plus prejudgment interest on that amount calculated from March 1, 2008, the first day of the month after his last fraudulent sale, through the last day of the month preceding the month in which disgorgement is paid.

Record Certification

Pursuant to Commission Rule of Practice 351(b), 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on December 18, 2014.

Order

I ORDER that, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934:

> Moshe Marc Cohen shall cease and desist from: committing or causing violations, and any future violations, of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 17(a) of the Securities Exchange Act of 1934, and Exchange Act Rules 10b-5 and 17a-3(a).

I FURTHER ORDER that, pursuant to Section 8A(e) of the Securities Act of 1933 and Sections 21B(e) and 21C(e) of the Exchange Act of 1934:

> Moshe Marc Cohen shall disgorge $766,958.00, plus prejudgment interest. Prejudgment interest shall be calculated at the rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), shall be compounded quarterly, and shall run from March 1, 2008, through the last day of the month preceding the month in which payment is made. 17 C.F.R. §§ 201.600(a)-(b).

Payment of disgorgement and prejudgment interest shall be made no later than twenty-one days following the day this Initial Decision becomes final. *See* 17 C.F.R. § 201.601(a). Payment must be made in one of the following ways: (1) Moshe Marc Cohen may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Moshe Marc Cohen may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Moshe Marc Cohen may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Boulevard, Oklahoma City, OK 73169.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Brenda P. Murray
Chief Administrative Law Judge