INITIAL DECISION RELEASE NO. 398
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13532

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

In the Matter of	:	
	:	
PRIME CAPITAL SERVICES, INC.,	:	
GILMAN CIOCIA, INC.,	:	INITIAL DECISION
MICHAEL P. RYAN,	:	June 25, 2010
ROSE M. RUDDEN,	:	
CHRISTIE A. ANDERSEN,	:	
ERIC J. BROWN,	:	
MATTHEW J. COLLINS,	:	
KEVIN J. WALSH, and	:	
MARK W. WELLS	:	

APPEARANCES: Martin F. Healey and Alix Biel for the Division of Enforcement, Securities and Exchange Commission

Robert G. Heim of Meyers & Heim LLP for Respondents Prime Capital Services, Inc., Gilman Ciocia, Inc., Michael P. Ryan, Rose M. Rudden, Matthew J. Collins, and Mark W. Wells

Jane Bruno of Bruno & Degenhardt, P.C., for Respondent Eric J. Brown

Kevin J. Walsh, pro se.[1]

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) concludes that, while associated with a broker-dealer and an investment adviser, Eric J. Brown (Brown), Matthew J. Collins (Collins), Kevin J. Walsh (Walsh), and Mark W. Wells (Wells) violated the antifraud provisions, as well as books and records provisions, of the securities laws in their sales of variable annuities. The ID further concludes that Michael P. Ryan (Ryan) and Rose M. Rudden (Rudden) failed reasonably to

[1] The proceeding has ended as to Respondents Christie A. Andersen, Prime Capital Services, Inc., and Gilman Ciocia, Inc. Prime Capital Servs., Inc., 97 SEC Docket 23,052 (Nov. 30, 2009); Prime Capital Servs., Inc., Exchange Act Release No. 61719 (Mar. 16, 2010).

supervise them (and Collins failed reasonably to supervise Brown) so as to detect and prevent their violations. The ID orders Brown, Collins, Walsh, and Wells to disgorge, respectively, $41,992, $2,915, $24,790, and $6,609; bars each from association with any broker, dealer, or investment adviser; orders each to cease and desist from violations of the antifraud and books and records provisions; and orders each to pay a civil money penalty of $130,000. Ryan and Rudden are each barred from association in a supervisory capacity with any broker, dealer, or investment adviser with the right to reapply after one year and are each ordered to pay a civil money penalty of $65,000.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on June 30, 2009, 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), and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act).

The undersigned held a nineteen-day hearing between December 1, 2009, and January 15, 2010. Hearing sessions were held in West Palm Beach, Florida (December 1-4, 2009), and New York City (December 14-18, 2009, and January 4-8, 11-15, 2010). A large number of witnesses testified, including several Respondents,[2] customers, and expert witnesses, and numerous exhibits were admitted into evidence.[3]

The findings and conclusions in this ID are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division's March 5, 2010, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; (2) Respondents Ryan, Rudden, Collins, and Wells's March 19, 2010, Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief; and (3) the Division's March 26, 2010, Reply. All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

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[2] Respondent Brown and former Respondent Christie A. Andersen testified in the Division's direct case. Respondents Ryan, Rudden, Collins, and Wells testified in their direct cases. Respondent Walsh, who appeared only at the hearing sessions in Florida in which the Division offered testimony of customer witnesses, did not testify or otherwise present a direct case.

[3] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and jointly by Prime Capital Services, Inc., Gilman Ciocia, Inc., Ryan, Rudden, and Wells will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively. By agreement of the parties, certain exhibits that were pre-marked by both the Division and these Respondents were offered and admitted under the Division's exhibit numbers.

B. Allegations and Arguments of the Parties

This proceeding concerns Respondents' roles in the sale of variable annuities to elderly customers. The OIP alleges that, between November 1999 and February 2007 (the relevant period), Brown, Collins, Walsh, and Wells, registered representatives associated with Prime Capital Services, Inc. (PCS), a Commission-registered broker-dealer, sold variable annuities to elderly customers in south Florida. The OIP alleges that the four made material misrepresentations and omissions and/or that the variable annuities that they sold were unsuitable investments for the customers. The OIP alleges that the four were employees of Gilman Ciocia, Inc. (G&C), a Commission registered investment adviser and that Collins, Walsh, and Wells were also associated with Asset & Financial Planning, Ltd. (AFP), a Commission-registered investment adviser. Thus, the OIP alleges that Brown, Collins, Walsh, and Wells willfully violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 and aided, abetted, and caused violations by PCS of Exchange Act Section 17(a) and Rule 17a-3.

The OIP also charges that Ryan and Rudden, who also were associated with PCS, G&C, and AFP, failed reasonably to supervise Brown, Collins, Walsh, and Wells (and Collins failed reasonably to supervise Brown during a portion of the relevant period) with a view to preventing and detecting their violations of the federal securities laws. The OIP alleges that PCS and Ryan's supervisory system was inadequate because it lacked a system to implement PCS's written supervisory procedures and failed to implement systems that could reasonably be expected to detect and prevent violations of the securities laws, including systems for review and follow-up of branch exams, supervisory review and approval of variable annuity transactions, responding to customer complaints, and compliance with state regulatory orders. Additionally, the OIP alleges that Ryan, from 2000 through 2006, failed reasonably to respond to red flags of wrongdoing in the variable annuity sales practices of Brown and that Rudden, from 2004 through 2007, so failed as to Brown, Collins, Walsh, and Wells. Also, the OIP alleges that Rudden inadequately investigated customer complaints. Finally, the OIP alleges that Collins failed to review Brown's variable annuity sales or to respond reasonably to red flags of wrongdoing in the variable annuity sales practices of Brown.

Respondents do not dispute that the four registered representatives sold variable annuities to the customers at issue. However, Collins and Wells urge that the investments they sold were suitable and that they did not make any material misrepresentations or omissions in selling the variable annuities. Brown did not appear at the hearing on his behalf (although he testified as a witness subpoenaed by the Division). Walsh appeared at hearing sessions during which his customers testified. However, he declined to cross-examine those witnesses or call any witnesses or offer any evidence in his own behalf (nor was he called as a witness by any other party). Ryan, Rudden, and Collins deny that they failed reasonably to supervise the registered representatives at issue.

The Division is seeking broker-dealer and investment adviser bars against Brown, Collins, Walsh, and Wells; broker-dealer and investment adviser supervisory bars against Ryan and Rudden; disgorgement; civil penalties; and cease-and-desist orders. Respondents Ryan, Rudden, Collins, and Wells argue that the charges against them are unproven and no sanctions should be imposed.

Respondents Brown and Walsh did not participate in the hearing beyond Answers that denied wrongdoing.

C. Statute of Limitations

The proceeding and the relief authorized in the OIP are affected, in part, by 28 U.S.C. § 2462, a statute of general applicability that provides a five-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996).[4] Some of the conduct alleged in the OIP occurred before June 30, 2004 – five years before the June 30, 2009, institution of this proceeding. The OIP authorizes "remedial action," which includes broker-dealer and investment adviser bars pursuant to Sections 15(b) of the Exchange Act and 203(f) of the Advisers Act and civil penalties pursuant to Sections 21B of the Exchange Act and 203(i) of the Advisers Act. OIP at 16. Such "remedial action" is subject to the five-year statute of limitations in 28 U.S.C. § 2462.[5] However, acts outside the statute of limitations may be considered to establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations. Sharon M. Graham, 53 S.E.C. 1072, 1089 n.47 (1998) (citing Fed. R. Evid. 404(b) and Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960)), aff'd, 222 F.3d 994 (D.C. Cir. 2000); Terry T. Steen, 53 S.E.C. 618, 623-24 & n.16 (1998) (citing H.P. Lambert Co. v. Sec'y of the Treasury, 354 F.2d 819, 822 (1st Cir. 1965)). Further, such acts may be considered in determining the appropriate sanction if violations are proven. Steen, 53 S.E.C. at 623-25.

The OIP also authorizes disgorgement and cease-and-desist orders pursuant to Sections 8A of the Securities Act, 21C of the Exchange Act, and 203 of the Advisers Act. Disgorgement is not subject to 28 U.S.C. § 2462. Christopher H. Zacharias v. SEC, 569 F.3d 458, 471-72 (D.C. Cir. 2009); Johnson 87 F.3d at 491-92. Likewise, cease-and-desist orders are not subject to 28 U.S.C. § 2462. Herbert Moskowitz, 55 S.E.C. 658, 683-84 (2002).

D. Collateral Bar

Citing Teicher v. SEC, 177 F.3d 1016 (D.C. Cir. 1999), Respondents Ryan, Rudden, Collins, and Wells argue that barring them from association with an investment adviser amounts to a prohibited "collateral bar" in that the OIP, which alleges violations of the Securities and Exchange Acts, does not allege any violations of the Advisers Act. This argument fails. The OIP was authorized, inter alia, pursuant to Section 203(f) of the Advisers Act and alleges that each Respondent except Brown is, or was during the relevant period, associated with a registered investment adviser, AFP, and that all six Respondents were associated with G&C, which was a registered investment adviser from 2000 through 2006. Section 203(f) authorizes the

[4] In Johnson, the court ruled that a Commission "proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was a proceeding 'for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise,' within the meaning of § 2462." 87 F.3d at 485.

[5] The censure and suspension in Johnson were described as "remedial action." Johnson, 87 F.3d at 486; Patricia A. Johnson, 52 S.E.C. 253, 260 (1995).

Commission to bar from association with an investment adviser "any person . . . at the time of the alleged misconduct, associated . . . with an investment adviser" who "has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934 . . . ." Advisers Act Sections 203(e)(5), 203(f).

II. FINDINGS OF FACT

A. Variable Annuities[6]

A variable annuity is "a hybrid security and life insurance product" that combines "tax-deferred investment growth and a guaranteed lifetime income." It is a contract between an individual, the contract owner, and an insurance company for which the contract owner makes a single lump-sum purchase or a series of purchase payments in exchange for a regular stream of payments immediately or in the future. The contract is based on the life of an annuitant, who is often the contract owner, and designates a beneficiary that is entitled to receive any benefits due when the annuitant dies. There are two phases to an annuity contract. The time period in which individuals make their purchase payment(s) is known as the accumulation phase. During this phase, those payments are invested, at the discretion of the contract owner, in subaccounts of assets, typically mutual funds that invest in stocks, bonds, money market instruments, or some combination thereof,[7] for the purpose of growth. An annuity can be funded primarily in two ways. One way, called a deferred annuity, contemplates a contract owner accumulating assets via premium payments over time and beginning withdrawals during retirement, generally at the age of 59½. The second way, called an immediate annuity, contemplates a contract owner moving assets into an annuity in a single premium payment and receiving an income stream immediately. The second phase is the payout phase when the insurance company uses the wealth accumulated from the contract owner's purchases and investment proceeds to provide continuous payments for the remainder of the annuitant's life or a definite period of time.[8]

Variable annuities have several features distinguishing them from mutual funds and other investment products. In general, variable annuities differ from mutual funds in that they provide

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[6] The findings of fact in this section are based on: information concerning variable annuities that is publicly available on the Commission's web site, available at http://www.sec.gov/investor/pubs/varannty.htm, of which official notice is taken pursuant to 17 C.F.R. § 201.323; 2008 ANNUITY FACT BOOK (NAVA); Michael J. Borden, PSLRA, SLUSA, and Variable Annuities: Overlooked Side Effects of a Potent Legislative Medicine, 55 MERCER L. REV. 681 (2004); and prospectuses. Prospectuses are found at Div. Exs. 401-21. Additionally, John Duval and John Huggard, who were called by the Division and Respondents, respectively, and were accepted as experts in variable annuities, testified concerning their features in the course of opining on the suitability of transactions for various customers.

[7] A prospectus provides the details of the different investment options for a variable annuity.

[8] Income distributed from an annuity can either be fixed or variable, and investors can choose to receive one lump sum payment instead of recurring payments at the beginning of the payout phase.

periodic payments for the rest of an annuitant's life and they are tax-deferred, meaning annuitants are not taxed on the income and investment gains until the money is withdrawn from the account, at which point, regular income tax rates apply.[9] Further, the contract owner can transfer money between subaccounts without any tax liability.[10] Many additional features of variable annuities are intended to ameliorate the market risk inherent in the performance of the underlying securities purchased in the subaccounts.[11] These features are added to the contract in riders purchased by the contract owner for additional charges. Such riders include "stepped-up" death and living benefits riders that protect income, withdrawals, and principal from unexpected longevity and/or investment underperformance.

1. Death Benefit

Variable annuities have a death benefit, which guarantees that, if the purchaser dies during the accumulation phase, the designated beneficiary receives at least the amount of the purchase payments made (minus any prior withdrawals), and any losses incurred by the underlying assets are borne by the insurance company. For an additional charge, purchasers can select a "stepped-up" death benefit which provides a greater minimum benefit payment by locking in gains from the performance of the subaccounts.

2. Surrender Charge

Variable annuities provide for payment of surrender charges, which penalize annuitants who withdraw money within a set period of time known as the "surrender period," generally occurring early in the accumulation phase. The time period typically ranges from seven to ten years, and the percentage forfeited to surrender fees generally declines over the time period, with a first-year withdrawal being subject to a higher surrender charge than a withdrawal taken in a

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[9] Tax treatment for variable annuities depends on whether or not the annuity is qualified. For a qualified annuity, which is funded with pre-tax income, the entire amount of payouts is taxed as ordinary income except for any contributions made with after-tax dollars. For non-qualified annuities, a portion of any payout will be taxed as ordinary income and the remaining portion will be considered a return of the principal. Once the principal is recovered, all remaining payments are subject to taxation. It is important to note that there is no additional tax advantage when comparing variable annuities to Individual Retirement Accounts (IRA) or 401(k) plans. This holds true even for qualified annuities in which the annuity is used to fund such retirement plans.

[10] Section 1035 of the U.S. tax code also permits investors to switch from one variable annuity to another without a taxable event occurring; however, such a transfer may cause the contract owner to incur a surrender charge for the former annuity and trigger a new surrender period for the new annuity. Surrender charges and periods are discussed infra at Part II.A.2.

[11] In addition, the contract owner of a variable annuity may also choose to have some portion of the premium invested in a fixed investment subaccount, which typically guarantees some rate of return over a specified time period.

later year.[12] Some variable annuity contracts allow a percentage of the premium to be withdrawn annually without incurring a surrender charge. A 10% penalty tax is collected on any payment from the annuity contract included in the annuitant's gross income, including surrenders and partial surrenders, except if such payment is received after the annuitant turns 59½ or becomes disabled, the contract owner dies, or the payments are received as a series of substantially equal payments periodically for the life or life expectancy of the annuitant.

3. Mortality and Risk Expense Fee

A mortality and expense risk (M&E) fee, equal to a certain percentage of a purchaser's account value, usually around 1.25%, is included in all variable annuities to compensate the insurance company for its risks under the contract. Profit from this charge is often used to pay the insurer's cost of selling the variable annuity, similar to the commission a purchaser pays to his or her financial professional.

4. Other Features

There are other features which can be purchased as a part of a variable annuity contract such as a guaranteed minimum income benefit, long-term care insurance, and bonus credits. The guaranteed minimum income benefit locks in a specific minimum amount of annuity payments, even if the annuity's value is insufficient to meet such demands, often due to investment losses. Long-term care insurance pays for in-home health care or nursing home care for any annuitant who may become seriously ill. Some variable annuities offer bonus credits which add a specified percentage to the value of an annuity contract, usually 1-5% of the purchase payments, in exchange for higher surrender charges, longer surrender periods, and/or higher M&E fees. These bonus credits may only apply to the initial premium payment or payments within a set period of time, and some insurers will rescind bonus credits if withdrawals are made or a death benefit is paid, or under other circumstances.

5. Fees

Several layers of fees accompany the purchase of a variable annuity. The insurance company often assesses a fee to cover administrative expenses. For instance, the addition of any rider to a standard variable annuity contract results in an insurance fee. Annuitants are also responsible for the fees associated with the underlying investments in an annuity's subaccounts, and there are fees for the insurance company's record keeping and account maintenance, either as a flat annual fee of $25-40, or as a percentage of the account's value (approximately 0.15% annually). Additionally, there may be other costs such as initial sales loads or fees for transferring funds from one investment option to another within an account. All additional charges for a variable annuity reduce the value of the account and the return on investment. Overall, the standard fees on average can be up to 2.5% of the underlying assets' value, compared to 1.42% on average for mutual funds.

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[12] Some annuities impose multiple surrender periods that relate back to each premium paid individually, instead of only one period relating back to the initial payment.

Most variable annuity contracts, like most of those at issue in this proceeding, are B-share products with no initial sales charge, but subject to a surrender charge, ranging from 5-7% of the premium in the first policy year and declining for each subsequent year, if they are prematurely cancelled, as well as annual M&E and administrative fees.[13] As a result of these complex fee structures, in addition to the array of rider options and charges, variable annuities typically come with a "free look" period of ten or more days, during which a purchaser can terminate the agreement without paying any surrender charge and get back his or her purchase payments in entirety (unless adjusted for charges or poor performance of the investment).

6. Commissions

Broker-dealers are paid a commission by the insurance company for selling variable annuities. The commission is dependent upon the insurer, the relationship between the broker-dealer and the insurer, the type of annuity sold, the amount of money invested, and the manner of payment. Commissions can be paid in full at the time of sale, as is generally the case, over the life of the contract or some other defined period, or as a smaller amount at the time of sale with a trail commission annually for a set number of years. Broker-dealers share some portion of the commission with registered representatives. In total, the commissions earned on the sale of variable annuities can be more than double the 4% typical for mutual fund sales. Other broker-dealer personnel, such as a branch manager, may also receive payment for annuity sales. Lastly, the registered representatives may receive other compensation in the form of travel, lodging, and meals. The variable annuities at issue in this proceeding were marketed to elderly customers by registered representatives of a broker-dealer, and the commissions paid for each were as follows:[14]

Variable Annuity	Prospectus Date	Commission
GE Extra	April 30, 2004	5.5%
GE Commonwealth Extra	May 1, 1999	2.5%

[13] Some insurers now offer other types of variable annuities with different cost structures. A-share variable annuities operate similar to A-share mutual funds in that they have up-front sales charges, instead of surrender charges, which are calculated as a percentage of each premium payment. Additionally, these annuities have breakpoint pricing, decreasing the sales charges based on how much in payments a customer has made, sometimes including other products offered by the same company. These annuities typically have lower M&E fees. C-share variable annuities have no surrender or front-end sales charges, offering annuitants full liquidity; however, as with all annuities, withdrawals prior to age 59 ½ may trigger tax penalties. These annuities also have M&E fees. (The Western Reserve Life Assurance annuity sold to Zita Bell was a C-share annuity. Tr. 2802-03; Div. Ex. 410.) L-share variable annuities have no front-end sales charges and shorter surrender periods (i.e., three to four years), but may have higher M&E and administrative fees. Lastly, X-share variable annuities add an additional amount to the contract value, usually a percentage of the purchase payments, in exchange for higher M&E and administrative fees.

[14] In general, these commissions were maximums; however, many of the prospectuses provided for higher commissions for short periods of time as temporary promotions.

GE Commonwealth Extra	May 1, 2000	5.75%
GE Choice	April 30, 2004	7%
GE Choice	April 29, 2005	8.6%
GE Extra	May 1, 2001	5.5%
Polaris Platinum II, AIG SunAmerica	May 3, 2004	8%
American Express Signature One	May 1, 2000	7%
Keyport Advisor	May 3, 1999	6%
Western Reserve Life Assurance		
WRL Freedom Access	May 1, 2002	1.25% per year
Allianz High Five	April 30, 2004	6%
Hartford Leaders Outlook	August 5, 2002	7%
Hartford Leaders Plus	May 1, 2003	7%
Manulife Venture	May 1, 2003	6.5% + 1% per year
Equitable Accumulator Plus	September 15, 2003	5%
Equitable Accumulator Plus	May 1, 2004	6%
AXA Equitable Accumulator	May 1, 2004	6.5%
AXA Equitable Accumulator	May 1, 2006	7.5%
Jackson National Life Perspective II	October 4, 2004	8%
Jackson National Life Perspective II	May 1, 2003	8%

B. Respondents and Related Individuals

1. Gilman Ciocia, Inc., and Prime Capital Services, Inc.

a. Gilman Ciocia, Inc.

G&C is an income tax preparation business headquartered in Poughkeepsie, New York. Answer of Respondents PCS, G&C, Ryan, Rudden, Collins, and Wells (Resp. Answer) at 2. It also offers financial services in New York, New Jersey, Pennsylvania and Florida through its wholly-owned subsidiaries, PCS, a broker-dealer registered with the Commission, and AFP, an investment adviser registered with the Commission. Resp. Answer at 2. G&C itself was registered with the Commission as an investment adviser from 2000 through 2006. Resp. Answer at 2. All the individual respondents were employees of G&C during the time of the conduct at issue in these proceedings. Resp. Answer at 2. In fiscal year 2007, approximately 90% of G&C's revenue was derived from commissions and fees from financial services, including commissions from sales of variable annuities, and the remaining approximately 10% of revenue was derived from tax preparation and accounting services. Resp. Answer at 2. G&C's common stock is quoted on the OTC Bulletin Board under the symbol "GTAX." Resp. Answer at 2. In its settlement of this proceeding, G&C agreed to various compliance-related undertakings, including a comprehensive review by an Independent Compliance Consultant of its practices related to variable annuities, and to pay a token disgorgement and a $450,000 civil penalty. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010). It was also ordered to cease and desist from violations of the antifraud provisions of the securities laws and censured. Id. The undertakings of G&C, and of PCS, infra, include restrictions on the activities of Wells, Collins, Ryan, and Rudden.

b. Prime Capital Services, Inc.

PCS, a wholly-owned subsidiary of G&C, is a registered broker-dealer and member of the Financial Industry Regulatory Authority (FINRA) (formerly NASD). Resp. Answer at 2. All the individual respondents were associated with PCS during the time of the conduct at issue in these proceedings. Resp. Answer at 2. A significant percentage of the revenue generated by PCS from 1999 through February 2007 came from sales of variable annuities. Resp. Answer at 2. PCS operates under a management agreement with G&C under which PCS remits revenues to G&C, and G&C pays various expenses for PCS including personnel compensation, training, and marketing costs associated with free-lunch seminars that are provided by PCS's registered representatives and used to recruit new customers. Resp. Answer at 2; Div. Exs. 505, 506. PCS and G&C consolidate their financial statements and are under common control. Resp. Answer at 2. PCS has some offices that are Offices of Supervisory Jurisdiction (OSJ), which means that supervision and approval of transactions is done on the premises of that office. Tr. 981, 4588-89. The Boca Raton office, the location of Respondent Wells, is an OSJ. Tr. 4589. The remaining offices where transactions at issue in this proceeding occurred were non-OSJ branch offices, where transactions occur but where there are no compliance supervisory functions. Tr. 4588-89. At a PCS branch office, the branch manager does not have compliance responsibilities and is merely responsible for the administrative activities of that office. Tr. 981, 4589-90. OSJs and branch offices were defined in NASD Conduct Rule 3010, now FINRA Rule 3010.

In its settlement of this proceeding, PCS agreed to various compliance-related undertakings, including a comprehensive review by an Independent Compliance Consultant of its practices related to variable annuities, and to pay a disgorgement of $97,389.05 plus prejudgment interest. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010). It was also ordered to cease and desist from violations of the antifraud and books and records provisions of the securities laws and censured. Id.

On August 11, 2005, PCS settled NASD charges embodied in its Letter of Acceptance, Waiver and Consent (AWC), based on facts that included facts at issue in this proceeding. Div. Ex. 615. As relevant here, the AWC summarized,

> [F]rom June 2, 2002 through July 15, 2003 . . . [PCS] failed to establish, maintain and enforce supervisory procedures that were reasonably designed to achieve compliance with advertising rules, branch office inspections, review and approval of new brokerage and variable annuity applications, and review of principals' customer transactions. . . . [PCS] violated advertising rules by permitting its registered representatives to use seminar materials that included inaccurate, misleading or unwarranted claims. The firm also failed to report customer complaints and registered representative terminations in a timely manner, and neglected to preserve certain required books and records of its registered representatives, including e-mail communications.

Div. Ex. 615 at 3. The AWC specified that it "may be considered in any future actions brought by NASD or any other regulator against us." Div. Ex. 615 at 1. The sanctions for which PCS settled included a censure and a $200,000 fine. Div. Ex. 615 at 6.

During all relevant times of their involvement with the events at issue, Respondents Ryan, Rudden, Collins, Brown, Walsh, and Wells were registered representatives of PCS and employees of G&C, as were David Ginsberg (Ginsberg), Nancy Southard (Southard), and former Respondent Christie A. Andersen (Andersen). Div. Ex. 506 at 2. Ryan, Rudden, Collins, and Wells are currently registered representatives of PCS and employees of G&C. Div. Ex. 506 at 2.

2. G&C and PCS Management

a. Michael P. Ryan

Ryan, of Poughkeepsie, New York, has been the president of PCS and AFP since at least 2000, and the president and chief executive officer of G&C since 2002. Resp. Answer at 2, 3; Tr. 4247. He holds approximately 8% of G&C's shares. Tr. 4270-71. Ryan signed the 2005 AWC as president of PCS. Div. Ex. 615 at 9-10. Since 2000, Ryan has worked with the successive chief compliance officers (CCO) of PCS, who have reported to him. Resp. Answer at 2. Ryan is licensed to sell securities and as a general securities principal. Resp. Answer at 2. In their settlement, PCS and G&C agreed to prohibit Ryan from any involvement in variable annuity marketing, sales, reviews or approvals until the Independent Compliance Consultant has completed its review and new policies and practices are in place. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010).

Prior to Rudden's arrival at the firm, Ryan approved the hiring of several new employees to expand the compliance department. Tr. 1089-93. After appointing Rudden CCO, Ryan considered that his role was to make sure she had all the resources needed. Tr. 4328. Additionally, he reviews the compliance controls of the firm annually with her and speaks at every company compliance meeting to underscore the importance of compliance. Tr. 4330-31.

b. Rose M. Rudden

Rudden, of Hyde Park, New York, started work in PCS's compliance department when she joined the firm in 2001 and has been CCO since April 2005.[15] Tr. 3292-93, 3299; Resp. Ex. 401 at 5. She supervises compliance department employees in Poughkeepsie, and supervisors and registered representatives in offices around the country, including Florida. Resp. Answer at 2. Rudden is licensed to sell securities and as a securities principal. Resp. Answer at 2. She holds the Series 6, 7, 24, 26, and 63 licenses. Tr. 3290. She describes her education as "industry education" and has also completed a compliance specialist program. Tr. 3289-90. She is an employee of G&C and also serves as AFP's CCO. Resp. Answer at 2. In their settlement, PCS and G&C agreed to prohibit Rudden from any involvement in variable annuity marketing, sales, reviews or approvals until the Independent Compliance Consultant has completed its review and new policies and practices are in place. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010).

[15] Preceding her as CCO were Southard (February 1998 to January 2003), Carole Enisman (January 2003 to April 2003, April 2004 to April 2005), and Cynthia LaRosa (April 2003 to April 2004). Tr. 3296-98, 3301-02, 3541-42, 4313-19; Resp. Ex. 401.

Rudden began her career in 1982 as a sales representative for Prudential. Tr. 3290. Within a few years, she moved to a sales management position, and eventually became a general manager on Prudential's corporate side. Tr. 3290. In the late 1990s Rudden moved to Hudson Trader Brokerage, a small firm with six registered representatives, to become its CCO. Tr. 3291. As CCO, she approved transactions, performed examinations, and drafted supervisory procedures. Tr. 3291. After taking time off for personal reasons, she joined PCS's compliance department in 2001 at an entry level. Tr. 3292. During her first year, she performed mostly administrative and clerical duties. Tr. 3294-95. She had no supervisory responsibilities, though one of the reasons she was hired was to help oversee the variable annuity transaction process. Tr. 998, 3293. She then received her Series 24 license, which allowed her to become more involved in the oversight of the investment advisory and financial planning business. Tr. 3295-96. In 2004, Rudden was promoted to compliance director by then-CCO Carole Enisman (Enisman) and tasked with constructing PCS's efforts to remedy the issues set out in the AWC. Tr. 3296-98. Her improvements included an electronic blotter, "web ops," to ensure that all transactions were approved by a registered principal by requiring field offices to sign on daily to list transactions or to confirm there were no transactions; improved monthly reports; expanded branch examinations to review more files; an annuity benefits comparison form to be used for transactions in which one annuity was exchanged for another; an improved complaints procedure; and the requirement that the same, approved script be used by registered representatives at free-lunch seminars. Tr. 3303-06, 3309-25. PCS began integrating these changes in early 2004, but it was an ongoing process. Tr. 3307-08. Rudden's responsibilities increased during the relevant period, and Ryan was impressed with her performance at these and other compliance duties and promoted her to CCO in April 2005. Tr. 3299, 4323-26; Resp. Ex. 401 at 5.

As CCO Rudden could counsel registered representatives, require training, issue training letters, and issue small fines. Tr. 3546-47. On conferring with Ryan, she could issue larger fines, withhold commissions, and fire representatives. Tr. 3547-52. When her title was compliance director, Rudden had similar duties, but less authority; she could recommend fines or changes in compliance procedures to the CCO but not institute them on her own authority. Tr. 4478-82. During the time she was compliance director and CCO Rudden considered that she had sufficient resources to carry out her compliance responsibilities effectively. Tr. 3327.

3. Registered Representatives

a. Eric J. Brown

Brown was employed at PCS from approximately 1998 to 2006. Tr. 1180, 4373-76; Div. Ex. 339. Brown's office was at Delray Beach, Florida. Tr. 1350-51. Brown was one of the largest producers in the firm during the relevant period. Tr. 3161, 3387. He and Collins were the only two registered representatives at Delray Beach at that time. Tr. 1351. In December 2004 their office moved to Boynton Beach, Florida. Tr. 2970. Brown's book of business included variable annuities, fixed annuities, insurance, and mutual funds. Tr. 1355. Brown conducted weekly free-lunch seminars and met with tax clients with an eye to selling them such products for the purpose of reducing their taxes. Tr. 1180.

On December 4, 2003, Brown was prohibited by the State of Florida from selling insurance products, including variable annuities, when his insurance licenses were revoked in Case No. 62399-03-AG. Div. Ex. 607. However, Brown continued to sell variable annuities. Tr. 1192-93, 3774. On April 6, 2004, the revocation was stayed pending appeal on condition that "[w]hile his appeal is pending, Brown shall not market annuities to individuals over the age of 65 years, who are not currently his clients." Div. Ex. 608 at 2-3. That appeal was decided effective May 6, 2005, such that, as alleged in an October 21, 2005, Amended Administrative Complaint in Case No. 62399-03-AG, "[f]rom April 6, 2004, until May 6, 2005 [Brown was] prohibited from marketing insurance products to any individuals over age 65 who were not then [his] clients." Tr. 1181-82, Div. Ex. 609 at 3. However, Brown continued to "market" variable annuities to such persons through presentations at free-lunch seminars. Tr. 1371-75, 3773-74, 3776; Div. Ex. 205 at 2, Div. Ex. 206 at 2, Div. Ex. 207 at 2, Div. Exs. 329, 330. Both Ryan and Rudden were aware that he was doing this and did not believe that Brown's free-lunch seminar presentations concerning variable annuities were "marketing." Tr. 3341, 3797-3800, 4379-80. Brown also continued to make sales to prohibited persons while his license was restricted. Tr. 1184, 1186-87, 3774, 3777-85; Div. Ex. 205 at 4, 6-7, Div. Ex. 206 at 4, Div. Ex. 207 at 7; and as discussed below. The proceeding was finally resolved in a February 2, 2006, Consent Order, which required Brown, inter alia, to surrender his insurance licenses, not to reapply within the next two years, and to pay restitution to: 1. Ilse Reiss - $84,028.25 (surrender penalty), 2. Sylvia Kirschner - $20,000 (diminished death benefit), 3. Maynard Schlager - $13,998 (surrender penalty), 4. Edward Bogan - $16,500 (surrender penalty), and 5. Bernice Rosenberg - $16,500 (surrender penalty). Div. Ex. 610 at 3. A settled claim against PCS by Edward Bogan and Bernice Rosenberg discharged their claims against Brown. Div. Ex. 105. The evidence of record does not indicate whether or not Brown himself paid any of the restitution. Brown left PCS on March 13, 2006, while he was under investigation by PCS for "selling away." Tr. 1205, 3055-57, 3069-71, 4371-76; Div. Ex. 339. FINRA barred Brown from association with a broker-dealer in 2007. Brown's Answer at 3.

b. Matthew J. Collins

Collins, of Boynton Beach, Florida, has been a registered representative associated with PCS in its Delray Beach and Boynton Beach offices since 2001 and was Brown's supervisor from late 2002 until early 2005. Resp. Answer at 2; Tr. 2970-71, 3045-47; Div. Ex. 502. Collins is an employee of G&C and a licensed representative of AFP. Resp. Answer at 2. He also is licensed to sell securities and as a securities principal, in addition to having state insurance licenses. Resp. Answer at 2; Tr. 3046-47. The State of Florida Department of Financial Services placed Collins on probation for one year starting in December 2006 and fined him $5,000 after a settled proceeding in which it alleged Collins made misrepresentations on insurance applications, specifically, that he represented that he was the sales agent on variable annuity transactions that Brown actually had solicited. Resp. Answer at 2; Tr. 3081-85; Div. Exs. 611, 612, 613. Collins was employed by PCS in Boynton Beach at the time of the hearing. Tr. 2965-66. He has not had any other customer complaints or regulatory issues since the events at issue. Tr. 3085-86.

Collins obtains investment clients through referrals, selling investments to tax clients, and free-lunch seminars. Tr. 2971-72. He estimated that free-lunch seminars account for 25% of his business. Tr. 2972. He conducts free-lunch seminars about every two weeks. Tr. 2972-73. The topics covered are taxes, investments, and estate planning. Tr. 2973. He uses a PCS-approved script. Tr. 2974. As is PCS practice, he books follow-up appointments at the seminar, as well as following up with a phone call within a week after the seminar. Tr. 2975-76. A first meeting is devoted to gathering information about the prospective customer. Tr. 2976-78. The customers range from age sixty to eighty. Tr. 2980. At a second or subsequent meeting, he discusses products such as stocks, mutual funds, annuities, insurance, or long-term care insurance. Tr. 2982. He meets with existing clients quarterly, if they are in Florida, and reviews their circumstances and portfolio. Tr. 2982-84. In their settlement, PCS and G&C agreed to prohibit Collins from selling variable annuities to anyone over the age of 59.5 until the Independent Compliance Consultant has completed its review and new policies and practices are in place. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010).

As Brown's supervisor, Collins reviewed his business and filled out a monthly report for the home office stating the clients' names, phone numbers, net worth, reasons for the trades, and suitability issues, so he reviewed Brown's trades for those issues. Tr. 3047-48. Ginsberg eventually replaced him as Brown's supervisor. Tr. 3054.

c. Kevin J. Walsh

Walsh's office was in Melbourne, Florida. Walsh Answer at 3; Tr. 1314-15. He was a registered representative associated with PCS in Melbourne from 1998 to 2007, an employee of G&C, and a representative of AFP. Walsh Answer at 3; Tr. 4396. Walsh left PCS and G&C in approximately June 2007. Div. Ex. 506 at 2. The primary focus of his business was variable annuities and managing the subaccounts in the variable annuities, although he did sell mutual funds from time to time. Tr. 1343-44. He obtained clients from free-lunch seminars, which focused on reducing taxes, and from clients who came to his office to have their tax returns prepared. Tr. 1341, 1343. When the clients came to him he mainly sold them variable annuities. Tr. 1345-47. Walsh received a Letter of Caution from the NASD in 2002 concerning unwarranted and misleading claims in his free-lunch seminar advertisements and materials. Div. Ex. 601.

d. Mark W. Wells

Wells, of Boca Raton, Florida, has been a registered representative associated with PCS in the Boca Raton office since May 2001. Resp. Answer at 2, Tr. 2535, 2540. Wells, an employee of G&C and representative of AFP, is licensed to sell securities. Resp. Answer at 2. He was the biggest producer at the Boca Raton office, which had eighteen registered representatives in 2002. Div. Ex. 215 at 11. In their settlement, PCS and G&C agreed to prohibit Wells from selling variable annuities to anyone over the age of 59.5 until the Independent Compliance Consultant has completed its review and new policies and practices are in place. Prime Capital Servs., Inc., Securities Act Release No. 9113 (Mar. 16, 2010).

4. Other Relevant Individuals

a. Christie A. Andersen

Andersen worked at PCS from 1995 to 2006. Tr. 1212-13. She worked in the Poughkeepsie home office until 2002, when she moved to the Boca Raton office. Tr. 1213, 1218. When she started in Poughkeepsie, she did clerical work, and, after a few years, compliance work. Tr. 1212. When she moved to Boca Raton, she did clerical work as a sales assistant to a registered representative, Ed Venezia (Venezia). Tr. 1216-17. Thus, he determined her annual bonus, if any. Tr. 1223. She continued as Venezia's sales assistant when she was appointed compliance officer, also referred to as "OSJ." Tr. 1219-20; Div. Exs. 351, 352. Andersen also considered the branch manager to be her direct supervisor. Tr. 1217, 1273. She understood her responsibilities as compliance officer as making sure that what the representatives, including Venezia, sold was suitable for the customers. Tr. 1220. She was concerned about the conflict of interest in her position and made Rudden aware of this. Tr. 1221-23. She also felt that she did not have sufficient time or resources to carry out her compliance responsibilities and brought this to Rudden's attention. Tr. 1225-28; Div. Exs. 351, 352. Ryan was also made aware of Andersen's concerns. Tr. 4462-64. Thereafter, her sales assistant duties were rremoved, and she had more time for compliance. Tr. 1277-78. Andersen would review the variable annuity applications after the registered representatives submitted them to the annuity company. Tr. 1237-38, 1242-43, 1282. If she found suitability or other problems, she did not have the authority to hold up a transaction or to contact the annuity company to put a hold on it. Tr. 1252, 1282-83. She did not have any authority to enforce compliance procedures against the registered representatives. Tr. 1252.

Andersen settled failure-to-supervise charges in this proceeding. In her settlement, Andersen agreed to undertakings, consisting of cooperation with Commission staff in its investigation and litigation related to matters at issue in this proceeding, to payment of a $10,000 civil penalty, and to be suspended from association in a supervisory capacity with any broker, dealer, or investment adviser for twelve months. Prime Capital Servs., Inc., 97 SEC Docket 23,052 (Nov. 30, 2009).

b. David M. Ginsberg

Ginsberg was, at various times, the supervisor of Walsh, Brown, and Collins. Div. Ex. 502. In testimony, this role is referred to as "OSJ," more correctly, as "OSJ Principal." As relevant to Ginsberg's OSJ function, pursuant to NASD, now FINRA, Rule 3010(g)(1)(E), requires "review and endorsement of customer orders, pursuant to paragraph (d) above." Paragraph (d) provides, **(1) Supervision of Registered Representatives.** Each member shall establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing . . . correspondence of its registered representatives with the public relating to the . . . securities business of such member." Within PCS, as an OSJ principal, Ginsberg had the authority to review transactions for suitability and recommend that they be rejected if he found them unsuitable. Tr. 1313, 1386, 1388-89, 1436. He did not have the authority to withhold commissions or impose fines. Tr. 1363-64.

c. Nancy Southard

Southard served as the CCO at PCS from February 1998 to January 2003. Tr. 974-75; Resp. Ex. 401. While CCO of PCS, she held the Series 7, 24, 55, and 63 licenses. Tr. 970, 1087. In 2000, she attained the NASD's certified regulatory compliance professional certificate, a two-year program consisting of 120 hours of coursework. Tr. 969, 1085-86. She graduated from college in 1983 with a degree in finance and began working with Ryan at AFP. Tr. 969-71. She drafted a procedural manual for the firm in approximately 1986, and then left on maternity leave. Tr. 971-72. She was rehired by the firm in 1994, joining the insurance department and working on special projects. Tr. 972. Shortly thereafter, she began to work in the compliance department, culminating in promotion to CCO. Tr. 973-74. As CCO, Southard was responsible for the written supervisory procedures (WSP) for the firm and training registered representatives; she supervised the registered principals of the firm, made sure that the annual compliance meeting was conducted for all the representatives of the firm, made sure that the registered branch examinations were conducted as specified by the firm's procedures. Tr. 975-76. She had no authority to reverse a transaction, nor could she fine or terminate a registered representative, but she could freeze a representative's commission. Tr. 983-87. She was Brown's supervisor for a time, and discussed him with Ryan on occasion. Tr. 979, 994-97, 1103-04, 1107-08.

d. Nicole Loffredo

Nicole Loffredo (Loffredo) was Wells's sales assistant and an active participant in preparing his customers' applications. Tr. 22427-28, 433-34. She worked for Wells from May 2003 to February 2008. Tr. 2425, 2428. She left PCS in March 2009. Tr. 2427.

C. <u>Transactions at Issue</u>

Until May 2006, the plain language of PCS's WSPs called for registered representatives to obtain review and approval of an OSJ principal before submitting applications and payment for variable annuities to insurance companies.[16] Div. Ex. 306 at 3, Div. Ex. 307 at 3, Div. Ex. 308 at 3, Div. Ex. 309 at 3, Div. Ex. 310 at 3, Div. Ex. 311 at 4, Div. Ex. 313 at 6. However, it is clear that, in practice, the registered representatives sent the applications and the check, if a new investment, directly to the insurance company; any review by an OSJ principal was after the fact. Tr. 1238, 1242-43 (Andersen), Tr. 1359-61 (Ginsberg), Tr. 3527, 3577-3618 (Rudden, also confirming the practice of Collins, Brown, and Wells), Tr. 4426-28 (Ryan). Ryan and Rudden explained the disparity between the language of the WSPs and actual practice as being, as Ryan termed it, a "typo." Tr. 3476-79, 4257-64, 4424-27.

[16] From May 2006 to the end of the relevant period, the WSPs permitted registered representatives to submit applications directly to insurance companies. Div. Ex. 313 at 6, Div. Ex. 314 at 6, Div. Ex. 315 at 6. As of August 2006, registered representatives were required to "promptly" submit applications and account documents to their registered principals, who were required to "promptly review [the paperwork] for accuracy and completeness." Div. Ex. 314 at 6, Div. Ex. 315 at 6.

1. Walsh Customers and Transactions

a. Stanley Hannon

Stanley Hannon (Hannon), 88, and a veteran of World War II, is a retired pilot. Tr. 76-77. His annual income during the time at issue was about $30,000, which was consumed in daily living expenses. Tr. 79-80, 85. In September 2004, he sold his motor home and decided to invest the proceeds with Walsh, from whom he had previously bought some penny stocks.[17] Tr. 80-81, 132-33, 159-60. He spoke with Walsh several times on the telephone before meeting in person; Walsh suggested an annuity, but Hannon told him emphatically that he did not want an annuity "because it ties up your money and at my age at that time I didn't feel like the money should be tied up since it was to be used for emergency funds." Tr. 84-85. His wife, Barbara, was in poor health and has since died. Tr. 80, 87. The Hannons met in person with Walsh and his assistant, Carmen, on September 15, 2004, in the parking lot of an office building where Walsh sometimes rented a room. Tr. 89-91. Walsh suggested an investment that would pay 13%, and Hannon agreed that it sounded good. Tr. 91. Mrs. Hannon, who was not knowledgeable about investing but did the check-writing for the couple, then wrote a check for $100,000 as instructed by Carmen. Tr. 91, 109. Then the Hannons signed some papers but were not provided a prospectus. Tr. 93-94, 136, 139, 145. Hannon acknowledged various signatures on documents related to the purchases as being his and Mrs. Hannon's but noted that additional handwriting was not theirs. Tr. 105-08. He acknowledged signing the papers without reading them at the time he signed, noting that, in contrast to a field with which he was familiar, such as aviation, he had to trust the person, Walsh, who instructed him to sign. Tr. 142-43. The investment was made in Mrs. Hannon's name, at Walsh's suggestion, as she was the younger of the two. Tr. 94. Hannon believed he had invested in a mutual fund. Tr. 96-97. However, the $100,000 investment was in a GE Choice Variable Annuity. Div. Exs. 124, 404, 436. Walsh did not mention the term "annuity" and did not discuss surrender fees or commissions. Tr. 97. The commission paid for selling this annuity was 7% or more. Div. Ex. 404 at 131-32. Walsh received $2,520 of the commission paid. Div. Ex. 510; Resp. Ex. 704C. Hannon first learned that he had bought an annuity when he received the contract in the mail in October, on a date that he believed was beyond the time allowed for cancellation. Tr. 99-100, 154-57. He was furious and attempted to contact Walsh. Tr. 99-100. Carmen told him that Walsh was unavailable, but Hannon persisted and ultimately succeeded in meeting with him in November or December. Tr. 100. Hannon demanded his money back, but Walsh refused saying he would lose "ten grand" if he complied. Tr. 100-01, 156. Hannon persisted in trying to get his money refunded, and, after three years and many setbacks, succeeded and placed the funds with a large broker-dealer. Tr. 101-27; Div. Exs. 130-140.

In addition to complaining to Walsh directly, Hannon complained to, <u>inter alia</u>, GE and the Florida Office of Financial Regulation (OFR). Tr. 112, 123; Div. Exs. 130, 131, 132, 135. Rudden was aware of Hannon's complaints about Walsh's sales practices. Tr. 3699-3703; Div. Exs. 133, 135. However, neither Rudden nor anyone else from PCS or G&C contacted Hannon about his complaint. Tr. 115-20, 122, 158, 3702-03. In responding to the Florida OFR on November 18, 2005, Rudden relied on Walsh's claim that the Hannons specifically asked for a death benefit variable annuity, that they had experience with variable annuities, and that he had explained

[17] Walsh declined on the record to cross-examine Hannon. Tr. 164.

surrender charges and other fees to them. Tr. 3702; Div. Exs. 133, 139. She testified that she considered it unnecessary to contact the Hannons to get their side of the story because she believed their complaint to be about performance, not about Walsh's sales practices. Tr. 3702-03. This belief is not, however, entirely consistent with Hannon's complaint to the Florida OFR that Rudden was answering; Hannon had complained that, instead of investing their money in a mutual fund, Walsh "invested it into an Annuity. This gives us no access to our money in our lifetime (Barbara 82 Stanley 84)." Div. Ex. 132 at 1. Nor is it consistent with Rudden's response to the Florida OFR, which stresses that the Hannons were experienced investors, that they affirmatively desired an annuity with a death benefit, and that Walsh extensively explained alternatives as well as the costs and surrender charges of the annuity in which their money was invested; her response mentions performance only incidentally. Div. Ex. 133 at 1-2. At the time of her November 18, 2005, response concerning the Hannon complaint, Rudden was aware of complaints against Walsh by Harold Koenig (Koenig) and by four other investors. Div. Ex. 119 at 2.

b. Harold Koenig

Koenig, 83, a retired management consultant, runs a philanthropic organization devoted to concerns related to the experiences of his daughter, who is incarcerated. Tr. 415-16, 435. He and his wife, 74, have, for over seven years, been raising their daughter's children, now 8 and 10, one of whom has medical issues. Tr. 417-18, 435. Mrs. Koenig did not testify and was not present at the hearing due to her care-giving duties. Tr. 418. Their annual income from Social Security and his U.S. Navy pension totaled $35,000 plus $10,000 to $50,000 drawn from their IRAs, depending on their needs in a particular year. Tr. 418-19. They met Walsh through a free-lunch seminar.[18] Tr. 419-20. Koenig, who considered himself an experienced investor,[19] wished to find an advisor whom Mrs. Koenig could trust in the event of his death and in light of their family responsibilities. Tr. 419-20, 423. This was necessary because he made all investment decisions on her behalf. Tr. 442, 470. Thereafter, he had several meetings with Walsh, some of which Mrs. Koenig attended. Tr. 421, 439. Her goal was preservation of principal with the hope of some return, without taking risks. Tr. 422, 426. She told Walsh that she did not want to take risks, and he orally agreed with her concern about protecting principal. Tr. 422, 437. Walsh, however, listed her investment objective as "Aggressive Growth" on her client profile, and her risk tolerance as "Concerned," rather than ""Extremely Concerned," which would have been more accurate. Tr. 435-36; Div. Ex. 110 at 2. She felt comfortable that Walsh would understand her needs as he also was raising young children. Tr. 422. In fact, she believed that Walsh would be more risk-averse with her money than Koenig

[18] Walsh declined on the record to cross-examine Koenig. Tr. 463.

[19] In cross-examination, counsel challenged Koenig's credibility by adverting to SEC v. Koenig, 71-CV-5016 (S.D.N.Y. June 20, 1972), in which Koenig and others were enjoined against violating the antifraud provisions based on their actions in approximately 1969, and to United States v. Koenig, 388 F. Supp. 670 (S.D.N.Y. 1974), in which the court entered a judgment of acquittal following the Government's case charging Koenig and others with securities fraud and other crimes based on the same events as SEC v. Koenig. While these long ago events do support Koenig's testimony that he is an experienced investor, they do not impact the credibility of Koenig's testimony concerning his dealings with Walsh, which is essentially unopposed by any other evidence.

was. Tr. 422-23. Walsh urged that Mrs. Koenig buy variable annuities. Tr. 423. Although Koenig considered himself an experienced investor, he knew nothing about variable annuities, nor did his wife. Tr. 423-24. In February 2005, funds from her two retirement accounts were invested in AXA Equitable variable annuities based on Walsh's representation that her principal would be protected and that she would have a guaranteed annual return of about 7%. Tr. 425-26, 434, 439; Div. Exs. 113, 114, 417. The commission paid for selling these annuities was 6.5%. Div. Ex. 417 at 68. Walsh did not disclose withdrawal penalties or the free look period. Tr. 427, 433. He did discuss riders such as the death benefit rider. Tr. 427. After they decided to buy the variable annuity, the Koenigs told Walsh and Carmen that they would return on another day to fill out the necessary documents as they had to pick up the children. Tr. 428. Instead, Carmen quickly fed documents to Mrs. Koenig, who did not fill them out or even read them but signed as fast as she could. Tr. 428-30, 481, 487-88. For example, her non-brokerage new account form contains her genuine signature, as well as information in different handwriting that untruthfully states that she had fifty-eight years of investment experience. Tr. 437; Div. Ex. 112. The Koenigs received copies of the documents two or three weeks later. Tr. 430-31. The variable annuity applications contained a statement that she had received a prospectus, which was false. Tr. 440-41, 445; Div. Ex. 113 at 5, Div. Ex. 114 at 5. After attempting, unsuccessfully, to obtain the prospectus from Walsh and G&C, Koenig obtained a prospectus from the insurance company in or around May 2005. Tr. 431-32, 440-42, 448-49, 491. On reading it, he learned of the free look and the withdrawal penalties, which did not meet the needs they had communicated to Walsh, who had told them that she would be able to make withdrawals without any particular restrictions. Tr. 431-433. They first learned of specific charges and withdrawal penalties after they received the prospectus. Tr. 447. Koenig noted that retirement accounts, such as Mrs. Koenig's, accumulate capital gains and interest no matter what type of investments they contain and are not taxed until sums are withdrawn. Tr. 448. After much effort, Koenig obtained a refund from the insurance company. Tr. 452-55, 485-87; Div. Exs. 117, 118, 119.

Rudden was aware of the Koenig complaint about Walsh's sales practices. Tr. 457-58, 3674-92; Div. Exs. 118, 119, 120. Again, Rudden relied on Walsh's false claim that he had delivered the prospectus when he sold them the variable annuity. Div. Ex. 119 at 2-3; Div. Ex. 121 at 2. Correspondence she sent to the Koenigs, the Florida OFR, and Commission staff falsely stated that the Koenigs had rescinded their complaint about Walsh. Tr. 457-58; Div. Ex. 118 at 4, Div. Ex. 119 at 2, Div. Ex. 120. Rudden considered that Walsh did nothing wrong, based on the information available to her at the time. Tr. 3692. At the time of her response concerning the Koenig complaint, Rudden was aware of complaints against Walsh by four other investors. Div. Ex. 119 at 2.

c. Allen Chambers

Allen Chambers (Chambers), born in 1927, is retired; previously, he owned a printing business in Milwaukee. Tr. 505-06; Div. Ex. 141 at 1. In 2004, when he purchased a variable annuity from Walsh, his income was $30,000 to $35,000, derived from Social Security and investments. Tr. 506-07. He met Walsh at a free-lunch seminar.[20] Tr. 507. He hoped to improve on the investment income he was getting, and Walsh seemed knowledgeable and confident. Tr.

[20] Walsh declined on the record to cross-examine Chambers. Tr. 573.

507. Soon thereafter, he met with Walsh, who recommended a John Hancock (Manulife) annuity; Walsh did not discuss any other type of investments. Tr. 509-10. The commission paid for selling this annuity was 6.5% plus a trail commission of 1% per year. Div. Ex. 414 at 42. Walsh said that it would be a better investment than Chambers's existing investments, and the death benefit was important to him. Tr. 510-11. Chambers knew nothing about variable annuities. Tr. 510. He relied on Walsh, who seemed trustworthy. Tr. 511-12. Chambers was aware of the surrender charges, but Walsh did not mention the amount of his commission or other costs of owning variable annuities, except for a $30 annual fee. Tr. 513, 527, 531-32, 540-41. After his discussion with Walsh, Chambers signed documents that were handed to him by Carmen. Tr. 514-15. Chambers bought the Manulife variable annuity on March 18, 2004. Tr. 520; Div. Exs. 141, 414, 465. He did not receive a prospectus at that time. Tr. 515-16. On June 7, 2005, Chambers signed a switch letter concerning his March 18, 2004, Manulife purchase. Tr. 524; Div. Ex. 142 at 1. The switch letter contains a handwritten "Explanation" for the change that is not in Chambers's handwriting. Tr. 522. The "Explanation" is also inaccurate, referring to "death benefits to protect the spouse" as a reason for the switch; Chambers was unmarried. Tr. 523; Div. Ex. 142 at 1. On June 10, 2005, Walsh sold Chambers a second variable annuity, GE Choice. Tr. 525-26; Div. Exs. 144, 405, 464. The commission paid for selling this annuity was 8.6%. Div. Ex. 405 at 157-159. The switch letter for that transaction contains a handwritten "Explanation" for the change that is not in Chambers's handwriting. Tr. 529; Div. Ex. 144 at 3, Div. Ex. 145 at 1. The record contains two versions of the switch letter: Div. Ex. 144 at 3, Div. Ex. 145 at 1. Examination of the two versions shows that they were created from the same original document signed by Chambers; however, the former (Div. Ex. 144 at 3) contains a lengthier "Explanation," with the additional language, "I have been a market investor for many years and have invested in annuities before. I understand that the benefits require additional expenses in the annuity." Chambers became disillusioned when notified of the withdrawal of hundreds of dollars in expenses from his annuities. Tr. 531. He then studied the annuity contracts carefully and found that Walsh benefitted tremendously from selling them to him. Tr. 532-33. Walsh received $7,712 of the commissions paid for selling the two annuities.[21] Div. Ex. 510; Resp. Ex. 704C. Additionally, Chambers calculated that fees and expenses would diminish the principal drastically over a period of time. Tr. 534, 558-60, 571-72. Chambers surrendered the two annuities in 2006; he received a gain on his original investments after deducting the surrender charges. Tr. 541-43; Div. Ex. 149. Chambers noted that letters from Rudden concerning his complaints about the variable annuities stated that he had extensive investment experience in variable annuities, which was inaccurate. Tr. 537-39, 576; Div. Ex. 150 at 3, Div. Ex. 151 at 4.

In addition to complaining to Walsh, Chambers complained to the two insurance companies about Walsh's sales practices, and the insurance companies contacted PCS for an explanation. Div. Exs. 150, 151. In responding in November 2006, Rudden relied on Walsh's claims that he had

[21] The Division's calculation of commissions received by Respondents is found at Div. Ex. 510. Walsh did not present any evidence or arguments concerning the commissions he received. For completeness, reference is made to Resp. Ex. 407C offered by Respondents Ryan, Rudden, Collins, and Wells, which calculated that Walsh received a similar amount, $7,708. For Respondents Ryan, Rudden, Collins, and Wells, the values in Resp. Ex. 407C will be accepted, in light of the Division's burden of proof. For Brown and Walsh, the values in Div. Ex. 510 will be accepted, since neither presented any evidence or arguments to contest the Division's values.

disclosed all fees to Chambers and that Chambers had previous experience with variable annuities. Tr. 3704, 3712; Div. Ex. 150 at 3, Div. Ex. 151 at 4, Div. Exs. 153, 154. She did not speak to Chambers to get his side of the story. Tr. 3708, 3712. By the time of the Chambers complaint, Rudden was aware of several customer complaints about Walsh. Tr. 3704, 3708.

d. Rodney and Denise Merrill

Rodney and Denise Merrill, born in 1951 and 1961, respectively, purchased variable annuities through Walsh in 2006 after meeting him at a free-lunch seminar.[22] Tr. 665-70; Div. Ex. 198. Rodney Merrill had inherited money from his father and hesitated to invest it because he did not want to risk losing the money for which his father had worked his whole life; he conveyed this sentiment to Walsh. Tr. 670-71, 674. Over the course of several meetings, he came to trust Walsh, who convinced him that he understood his feelings. Tr. 671. At the time they met Walsh, neither Merrill had any investment experience, whether in stocks, bonds, or mutual funds, and they informed Walsh of their inexperience. Tr. 674. Yet their non-brokerage new account form indicates their investment experience as "good," rather than "limited," the correct choice. Tr. 688; Div. Ex. 198. Out of caution, they decided to start by investing one-third of the inheritance. Tr. 673-74. They planned to use the income for living expenses and also advised Walsh that they planned to withdraw a large sum for their daughter's wedding, set for July 2007. Tr. 675-76. Yet their non-brokerage new account form indicates their time horizon as "6-10 years," rather than "0-5 years," the correct choice. Tr. 688, 690; Div. Ex. 198. In recommending an investment, Walsh did not use the term "variable annuity." Tr. 676-77. Walsh did not mention fees, expenses, or surrender charges and did not advise them of the free look period. Tr. 678-79. Rodney Merrill asked repeatedly what compensation Walsh would receive; Walsh evaded answering every time by changing the subject. Tr. 679. In fact, he received a total of $8,400 in commissions for selling variable annuities to them. Div. Ex. 510. Walsh did not tell them of the costs of any riders. Tr. 681-82, 693. Prior to making their first investment, they asked, in vain, for copies of the papers that they would be signing. Tr. 684. The actual signing was conducted hurriedly, with Carmen handing them one paper after another, saying she would fill in the blanks later. Tr. 682-84. Again, they asked for copies, but were not given any. Tr. 684. In fact, they never received copies until they complained to G&C. Tr. 684. They received a prospectus within the following month, from the insurance company. Tr. 685, 690. They made a total of three investments with Walsh – John Hancock, AXA Equitable, and Sun Life. Tr. 686, 695; Div. Exs. 199, 700, 701, 703, 704, 706. The signing process for the second investment, made in February 2006, was similar to the first, with Walsh and Carmen's ignoring Rodney Merrill's request to slow down. Tr. 695-697. The third investment, in Sun Life, was made shortly thereafter. Tr. 700-02. The Merrills did not receive prospectuses from Walsh when he sold them variable annuities; they received them subsequently from the insurance companies. Tr. 685, 690, 733. However, on attempting to read the prospectuses, the Merrills found them incomprehensible. Tr. 733.

Walsh never mentioned the term "variable annuity"; the first time they heard it was in 2008 when Rodney Merrill picked up their income tax returns from Walsh's office. Tr. 686-87, 705-06. Brittany Rider (Rider), who had prepared the returns, observed that they had incurred a tax penalty

[22] Denise Merrill testified, and Walsh cross-examined her at Tr. 742-44. Rodney Merrill, who was hospitalized at the time of the hearing, did not testify. Tr. 666.

due to their withdrawals to pay for their daughter's wedding. Tr. 705-06. They attempted to reach Walsh, several times, to complain, but were repeatedly told he was unavailable. Tr. 706-07, 709. At that point, they obtained a different financial advisor. Tr. 707-08. They eventually discovered Walsh's whereabouts and sent him a letter of complaint. Tr. 709; Div. Ex. 703. They also wrote to PCS, which responded unsympathetically. Tr. 711-13; Div. Ex. 704. Their goal was to obtain a refund of the money they invested in the three variable annuities. Tr. 713. They were successful in obtaining a refund from Sun Life because Rider, falsely, had been listed as the selling agent. Tr. 713-14.

PCS's September 15, 2008, letter, from Rudden's subordinate, Glen McBride, and copied to her, stated, "It is our position that while clients often rely on the recommendation of our advisors, they have a responsibility to educate themselves about the investments they choose and read and understand the documents they sign." Div. Ex. 704 at 1. Recognizing that the Merrills had "little or no prior investment experience," the letter stated, "We understand that you relied on Mr. Walsh for his recommendation. Nonetheless, with all or [sic] the disclosure documents provided to you at the time of the sale, we find it difficult to believe that you had no knowledge of any surrender restrictions or fees." Div. Ex. 704 at 1. Rudden endorsed the quoted language in testimony. Tr. 3723-25.

e. Additional Customers

Walsh sold variable annuities to additional customers who did not testify. Ralph and Eileen Angellilo, born in 1920 and 1922, respectively, purchased variable annuities, totaling $255,000, through Walsh in 2001. Div. Exs. 160, 161, 162. Walsh received $6,158 of the commissions paid for his sale of the annuities. Div. Ex. 510; Resp. Ex. 704C. At the time of purchase, Ralph Angellilo had an estimated net worth of $300,000 and annual income of $60,000. Div. Ex. 159. Retired at the time, he expressed interest in recouping prior investment losses using a more aggressive investment strategy, including replacing investments within his portfolio on a monthly basis, depending on performance. Div. Ex. 155 at 2. He informed Walsh, however, that investment funds with penalties or restrictions on switching would be a factor in selection. Div. Ex. 155 at 2.

2. Supervision of Walsh

Ginsberg became Walsh's "OSJ" in approximately November 2003.[23] Tr. 1315, 1401; Div. Ex. 342. That is, Walsh was to send his business to Ginsberg for review, and Ginsberg was also to oversee his office, his seminars, and his books and records. Tr. 1315-16. For a period of time, Walsh failed to send Ginsberg his cases for review. Tr. 1316-19; Div. Exs. 342, 343, 345, 346. Ginsberg complained to Rudden, who convened a series of conference calls to impress on Walsh that compliance was important and that, for firm oversight, Walsh had to submit his casework for review in a timely manner. Tr. 1319-20, 3425-27, 3430-32. Ginsberg began visiting Walsh's office weekly. Tr. 1321, 1326-27. He soon learned that Walsh had a backlog of business that PCS had not reviewed, going back a year or more. Tr. 1322. Rudden provided Ginsberg with a list of these transactions. Tr. 1322, 1325; Div. Ex. 345. A normal timeframe would be to review a transaction

[23] In testimony, Ginsberg estimated that he began to supervise Walsh in February 2004 or maybe February 2005. Tr. 1315, 1401. However, an April 2004 e-mail from Ginsberg concerning Walsh refers to workflow from Walsh in 2003. Div. 342.

concurrently or within a few days of its taking place. Tr. 1323. During his visits he wished to meet with Walsh and attempted to do so, usually without success; only Carmen would be available. Tr. 1327-28, 1330. Ginsberg wished to meet with Walsh because there were questions that could only be addressed by the person who made the sale, which Ginsberg communicated to Walsh. Tr. 1330-31. As was his practice with complaining customers, Walsh made himself unavailable and never returned Ginsberg's calls despite repeated calls to Carmen asking for Walsh to call when he had an opportunity. Tr. 1381-82; Div. Ex. 346. As a fallback, Ginsberg went through Walsh's paperwork with Carmen and left written questions for Walsh to answer. Tr. 1331-32. Even after he was provided with Walsh's paperwork, Ginsberg found that documents were missing and switch letters contained formulaic explanations. Tr. 1334-35.

Rudden increased supervision over Walsh through Ginsberg's weekly visits and the conference calls. Indeed, Walsh's commissions from selling variable annuities declined after Rudden became CCO. Tr. 4395-96; Resp. Ex. 412. However, when Walsh complained about Ginsberg's supervision, Rudden treated the situation as a human relations problem rather than a problem of resistance by Walsh to any supervision of his activities. Tr. 3441-44, 3452-54, 3460-67, 3474-75; Div. Exs. 347, 348. Ryan presided over an April 2005 conference call devoted to the human relations problem and urged Walsh and Ginsberg to work together. Tr. 3460-63, 4453-54; Div. Ex. 347. Ryan testified that Rudden told him that, by then, Walsh's compliance issues had been remedied. Tr. 4454-55. However, he also told Walsh to "shape up or ship out." Tr. 1339. Nonetheless, concerns with Walsh's unreviewed transactions persisted into 2006. Div. Ex. 345.

A branch examination by Phillip Authier (Authier) as of May 2, 2002, examined only three files, disclosing sales of variable annuities to customers aged 74, 76, 79, and 82, and found no deficiencies. Tr. 1877-78; Div. Ex. 211. His report stated that the branch manager, Walsh, reviews all new accounts and transactions. Tr. 1878-79; Div. Ex. 211 at 13-14. Thus, there was no OSJ review of Walsh's transactions at the time. Tr. 1878-79. The report was submitted to CCO Southard for review, but there is no indication in the record that she actually reviewed it. Tr. 1879; Div. Ex. 211 at 1. An April 2003 branch examination conducted by Authier examined only a handful of files but did find deficiencies such as new account forms not properly completed and switch letters missing. Div. Ex. 212. According to the report, client files were not made available to the examiner. Tr. 1880. Again, the examination report noted that Walsh's transactions were not reviewed by an OSJ. Tr. 1881. The report was submitted to Rudden who reviewed it in October 2003 and noted the need for follow-up. Tr. 1881, 3519-21; Div. Ex. 212 at 1. A December 2004 examination conducted by Jeff Nelson and Ginsberg examined twenty-four files and found numerous deficiencies. Tr. 1885; Div. Ex. 213. At that time, Ginsberg served as the OSJ for the office, so he was ostensibly reviewing his own work. Tr. 1885. The examination noted that the branch had received four customer complaints, and incorrectly noted that the OSJ was receiving daily manager reports from the branch. Tr. 1886-89. The report was submitted to Rudden who reviewed it in February 2005, with follow-up review in August 2005. Tr. 3521-24; Div. Ex. 213 at 1. The next examination, conducted by Ginsberg in August 2006, reviewed seventy-six files and found relatively few deficiencies. Tr. 3524-25; Div. Ex. 214. The risk tolerance selected for all seventy-six files was the same: moderate. Tr. 1891. Yet almost all those clients were sold variable annuities, and many of those assets were invested in equity subaccounts once the variable annuity was purchased, despite the clients' stated moderate risk tolerance. Tr. 1891-94. Again, Ginsberg was the acting OSJ for the branch, and was reviewing his own work. Tr. 1889-90. The report was reviewed by Rudden in October 2006. Tr. 1890; Div. Ex. 214 at 1.

3. Brown Customers and Transactions

a. Claire Elkin

Claire Elkin (Elkin), born in 1931, is a retired secretary with the New York City Board of Education. Tr. 34-35; Div. Ex. 29 at 6. She purchased a GE variable annuity in her IRA from Brown in February 2000.[24] Tr. 35; Div. Ex. 29 at 6-7, Div. Exs. 402, 463. Her annual income then was around $40,000 to $50,000. Tr. 35. At that time, she had a CD in her IRA of about $130,000 that was maturing and believed that she might lose any amount over $100,000 if the bank failed. Tr. 36. Elkin was very risk-averse. Tr. 38. Seeking greater security for her money, she attended a free-lunch seminar at which Brown made a presentation. Tr. 36. Subsequently, she met with Brown and he suggested she invest in a variable annuity. Tr. 38-39. She knew nothing about variable annuities and relied on Brown to tell her what she needed to know. Tr. 39. From his description, she believed there was a guaranteed return; he did not tell her about surrender charges or that the value of the investment could fluctuate downward. Tr. 40-41, 47, 57-58. She did not receive any paperwork and later learned that the value of her investment had decreased. Tr. 41-42, 44-45. Brown received $3,506 of the commission paid for selling Elkin the variable annuity. Div. Ex. 510; Resp. Ex. 704C. During 2001, she complained to Brown's office, to the insurance company, and to the Florida Department of Insurance. Tr. 42, 51-52; Div. Exs. 31, 32, 33, 34, 38, 39. A document, purportedly signed by her, stating that she understood the minimum distribution requirements applicable to her IRA, as well as the surrender charges applicable to the GE annuity, contained a forged signature (that also misspelled her name as "Clare") and was dated on a date when she did not visit Brown's office. Tr. 48-50, 52-53; Div. Exs. 34 at 3, 36, 37. She believed that Brown was responsible for the forgery. Tr. 50. She complained to GE and also filed a complaint with the police about the forgery.[25] Tr. 48, 53; Div. Exs. 33, 35. She filed a complaint with the NASD against PCS and entered a settlement for $24,000 in 2006. Div. Exs. 40, 41.

Rudden became aware of the forgery allegation sometime between April and July 2004. Tr. 3391-93; Div. Ex. 36. Ryan also was aware of it. Tr. 4360-62, 4367; Div. Ex. 36. Rudden engaged a handwriting expert and provided him with samples of Brown's handwriting.[26] Div. Ex. 36. The expert concluded that the signature was not genuine but could not identify who wrote the signature. Div. Ex. 36.

b. Maynard Schlager

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[24] Brown did not appear at the hearing and, thus, did not cross-examine Elkin.

[25] Respondents' suggestion that Elkin's late husband might have signed her name is unconvincing, particularly since her name is misspelled and she complained to the police about the forgery.

[26] In an e-mail to Ryan, Rudden noted that she considered it "quite normal" for registered representatives to complete the forms that the customers signed. Div. Ex. 36.

Maynard Schlager (Schlager), a retired rabbi and psychologist, was born in 1928, and his wife Nathalie was born in 1931. Tr. 578-79; Div. Ex. 8 at 1. The Schlagers met Brown at a free-lunch seminar in 2000.[27] Tr. 579-83. The focus of Brown's presentation was reducing one's tax liability. Tr. 579, 582. Shortly thereafter the Schlagers met with Brown at his office. Tr. 584. Brown advised Schlager to get rid of all his assets. Tr. 585, 630. These consisted of stocks, mutual funds, and a fixed-rate annuity held at a major broker-dealer and some oil stocks. Div. Exs. 6, 18, 26. Brown advised that the money should, instead, be invested in variable annuities. Tr. 585-87. Schlager knew nothing about variable annuities. Tr. 586. Brown told him that this would provide income and the principal was guaranteed against loss. Tr. 587-90. Schlager told him he did not want death benefits; he needed income and assumed he would have to pay extra for death benefits. Tr. 590-91, 635. Schlager asked about fees and Brown's commission; Brown told him that the insurance companies, not the customer, paid these. Tr. 591-92. Brown did not tell him about surrender charges. Tr. 592. The Schlagers transferred their assets from the large broker-dealer and bought a total of six variable annuities from Brown at that time, in the summer of 2000. Tr. 594; Div. Exs. 5, 8, 9, 10, 11, 17, 21, 27. They signed blank applications. Tr. 592-93, 598-600, 613-23, 645-51. Schlager requested copies of the completed applications but did not receive them until almost two years had passed. Tr. 605, 656-57; Div. Exs. 2, 3, 26 at 2-4. Schlager found that the annuities declined in value and did not produce the income Brown had promised. Tr. 600. Brown recommended that he purchase five more variable annuities, stating he would receive a bonus for doing so. Tr. 601-02. The Schlagers did so, funding the purchase through withdrawals from the original six. Tr. 602-04; Div. Exs. 12, 13, 14, 15, 16, 19, 20. Again they signed forms that had not yet been filled out. Tr. 624-32, 662. Brown received a total of $21,639 in commissions for selling the variable annuities to the Schlagers. Div. Ex. 510; Resp. Ex. 704C. In December 2004 Schlager complained to Ryan at PCS but did not receive satisfaction from PCS. Tr. 632-34; Div. Ex. 22. Eventually, the Schlagers filed a claim against PCS with the NASD. Tr. 635-36; Div. Ex. 25. They received about $40,000 as a result. Tr. 636

Rudden was aware of Schlager's complaint about Brown's sales practices. Tr. 3388-90. According to PCS's procedures at the time, complaint letters such as Schlager's December 2004 letter to Ryan were forwarded to her, and she, in fact, received Schlager's complaint. Tr. 3388-90.

Brown sold variable annuities to the next group of customers at times when he was prohibited from doing so, and Collins's name rather than Brown's was entered on the applications as the selling agent. Tr. 1184-87 and as described below.

c. Ria Skiena

Ria Skiena (Skiena), born in 1932, is a retired administrator at the Sewage Authority in East Brunswick, New Jersey. Tr. 167, 176; Div. Ex. 108 at 1. In 2004, when she purchased a variable annuity from Brown, she and her husband, who died in January 2006, had an annual income of about $60,000 from their pensions, Social Security, and dividends from investments. Tr. 167-68. She met Brown at a free-lunch seminar.[28] Tr. 168-69. She owned a Valic variable annuity, which

[27] Brown did not appear at the hearing and, thus, did not cross-examine Schlager.

[28] Brown did not appear at the hearing and, thus, did not cross-examine Skiena.

was in a municipal employee retirement account and wished to change it for an investment that she could track daily through the newspaper and self-direct. Tr. 169-70, 172. She explained that the law governing such retirement accounts had recently been changed such that she could move her assets into any other type of IRA. Tr. 170. About two months after the free-lunch seminar she and her husband met with Brown on a Saturday. Tr. 171. The three of them were alone in the building, which Brown had opened to accommodate them since they were about to leave Florida; her husband had received a diagnosis of a serious illness, and they had an appointment with a specialist in New Jersey. Tr. 171-72. Her husband did not take part in the investment discussion but accompanied her for moral support. Tr. 173. She told Brown that she did not want to be in an annuity and that she wanted to be in a regular stock fund that was traded openly and that she could track in the newspaper, that she wanted to invest in the Wellington fund. Tr. 172-74. When she left the meeting she believed that she had invested in the Wellington fund. Tr. 174-75. In fact, Brown had sold her an AIG SunAmerica annuity. Div. Exs. 407, 425. The commission paid for selling this annuity was 8%. Div. Ex. 407 at 35. She did not receive a prospectus at the meeting. Tr. 174. Pressed for time, she signed, without reading, various forms that had not been filled out. Tr. 176-77. Brown said he would fill them out and send her copies, but he never sent the copies. Tr. 176. Her name as printed on the forms is spelled incorrectly. Tr. 179; Div. Ex. 108 at 2. Later Brown told her she was in "Wellington-like" funds that she could not find in the newspaper. Tr. 183. She did not want another variable annuity or a "Wellington-like" fund. Tr. 191-92. Skiena still has the investment, which she intends to keep until the withdrawal penalties are low enough that she can get out. Tr. 184. Skiena did not complain to PCS. Tr. 188-89, 4388.

Collins was not present at the meeting Skiena had with Brown, and, as far as she knows, she never had any contact with him. Tr. 172-73, 177-78, 186. Brown's name, signature, and representative number were originally on the forms pertaining to Skiena's transaction; they were crossed out and Collins's were substituted. Div. Exs. 108, 108-3-A. A color version of Skiena's switch letter shows Skiena's and Brown's signature in the same blue ink; Collins used black ink to overwrite Brown's signature with his own. Div. Ex. 108-3-A. As Collins acknowledged, except for the signatures of Skiena and Collins, the handwritten information in Skiena's paperwork is in Brown's handwriting. Tr. 3131-32; Div. Ex. 108. Collins, who inherited hundreds of Brown's customers, is currently listed as her agent on the policy. Tr. 3021-22, 3247.

Collins claims that he met with Skiena along with Brown and that they discussed the Valic annuity. Tr. 3018. This claim is rejected in light of Skiena's testimony to the contrary. She had a clear recollection of meeting on a Saturday with Brown, when his office was deserted, and only she, Brown, and her late husband were present; further, Skiena has no motive to testify incorrectly, while Collins does. Collins received $1,310 of the commission paid for Brown's sale of the variable annuity. Div. Ex. 510; Resp. Ex. 704C.

d. Lenore and Morton Jaye

Lenore Jaye, born in 1933, is a retired customer service representative. Tr. 193, 201; Div. Ex. 107 at 1. Morton Jaye, born in 1928, is a retired electrician. Tr. 210, 218; Div. Ex. 106 at 4. In 2004, when they met with Brown, who sold Morton Jaye a variable annuity, their annual income was about $75,000 from Social Security, his pension from his union, and some investments. Tr.

194, 211-12. They met Brown at a free-lunch seminar.[29] Tr. 194-95, 211-12. Shortly thereafter, they met with Brown at his office. Tr. 195, 212. They met Collins, but only briefly; he did not discuss variable annuities. Tr. 196, 203, 213, 227. Brown recommended a Jackson National variable annuity. Tr. 198, 213-14, 218, 223. Brown illustrated his recommendation with a drawing. Tr. 203-04, 220-21; Div Ex. 106 at 11-12, Div. Ex. 107 at 9-10. Both Jayes signed applications for the Jackson National Perspective II annuity for their IRAs on February 6, 2004. Div. Exs. 106, 107, 420, 440, 441. The commission paid for selling this annuity was 8% or more. Div. Ex. 420 at 46. They did not receive a prospectus at that time. Tr. 216. Lenore Jaye changed her mind after a few days because she was uninterested in the death benefit and because the investment was in an IRA; she saw no point in making a tax-advantaged investment in the IRA that was itself tax-advantaged. Tr. 199, 202. The Jayes did not have any contact with PCS about variable annuities.[30] Tr. 204-05, 222.

Collins signed Morton Jaye's application; Lenore Jaye's was originally signed by Brown and overwritten by Collins. Div. Ex. 106 at 7, Div. Ex. 107 at 4. Sketches in their files that explain variable annuities were made by Brown. Tr. 3116, 3122, 3227-28; Div. Ex. 106 at 9-12, Div. Ex. 107 at 9-10. Collins claims that he, not Brown, recommended and discussed the Jackson National variable annuity with the Jayes. Tr. 3025-38. This claim is rejected. Both Jayes were clear that they met Collins briefly and that their discussions about the annuity were with Brown, as is shown by Brown's explanatory sketches. Again, unlike Collins, they have no motive to testify untruthfully. Collins testified that Brown's involvement was limited to helping out with the paperwork while Collins solicited the sale. Tr. 3031. Collins also explains his crossing out Brown's name and number and substituting his own by saying that the forms on which Brown had written his information were at hand and it was convenient to do so. Tr. 3030-31. This explanation is inherently incredible. Collins received $1,605 of the commission paid for Brown's sale of the variable annuity. Div. Ex. 510; Resp. Ex. 704C.

[29] Brown did not appear at the hearing and, thus, did not cross-examine the Jayes.

[30] The Jayes did have contact with PCS when they complained about Brown's mutual fund sales practices, which are not at issue in this proceeding. Tr. 227, 3672-74, 4388-89; Resp. Ex. 904.

e. Bernice Rosenberg and Edward Bogan

Bernice Rosenberg (Rosenberg), born in 1924, is a retired "headhunter." Tr. 821-22, 841. Edward Bogan (Bogan), whom the undersigned observed to be a similar age, is retired from the printing business. Tr. 903-04. The two are close friends and owned some identical investments, including variable annuities. Tr. 823, 864, 908-09. Bogan met Brown at a free-lunch seminar.[31] Sometime thereafter, Rosenberg expressed concern about an Allianz variable annuity they both owned, and Bogan suggested they meet with Brown to obtain an opinion about it.[32] Tr. 823-25, 909. They did so, one or more times. The meeting or meetings were always with Brown; another man was present briefly. Tr. 847, 866-67, 918. Collins claims that he also was present when variable annuities were discussed because Brown "could not sell them at the time." Tr. 2987-88. Whether or not Collins was briefly present, it is found that the meetings were essentially with Brown. Rosenberg and Bogan's testimony to this effect is consistent with the evidence of other customers' experiences described above. Although they had come to discuss the Allianz annuity, Brown quickly turned his attention to the Scudder (also called Allmerica) variable annuity which each owned. Tr. 825-26, 836. Although neither recalls affirmatively consenting to switching their funds from the Scudder annuity to Jackson National, this was done. Tr. 835-46, 925; Div. Exs. 77, 89. They did not receive a prospectus. Tr. 844. Rosenberg acknowledged signing blank papers and acknowledged her signature on various documents. Tr. 831-32. For example, a note in Brown's handwriting signed by Rosenberg that requested her representative to be changed to Collins was faxed to Allianz on February 9, 2005. Tr. 2988-89; Div. Ex. 88. She asked for copies of the completed documents but Brown said they had to be sent to the home office and did not provide copies. Tr. 831-32. Bogan acknowledged that signatures on various documents (including a complaint letter and endorsement of a check) looked like his but did not acknowledge that he actually signed the signatures. Tr. 927-33.

As with Skiena and the Jayes, Collins conceded that Brown was present during the sales by stating that he witnessed Brown filling in the information on the customers' forms. Tr. 3087-3107, 3247-50. In one instance, "Agent's Name" was changed from "Eric J. Brown" to "Matt Collins" after Bogan's signature was placed on the document. Tr. 3100; Div. Ex. 69 at 10, Div. Ex. 70. After realizing what had occurred, on consulting their previous financial advisor, Bogan and Rosenberg free looked the Jackson National annuities. Tr. 852-54. They were not able to return to the Scudder annuities as the insurance company was no longer offering the legacy contract. Tr. 852-53, 941. Bogan and Rosenberg filed a claim against PCS based on Brown's sales practices with the NASD on December 28, 2005. Div. Ex. 104. The Bogan/Rosenberg claim was resolved on September 20, 2006, with a total payout of $125,000. Div. Ex. 105; Resp. Ex. 704C. Of that sum, Collins paid $25,000. Tr. 3015; Resp. Ex. 704C. He had received $2,126 of the commissions paid for Brown's sale of variable annuities to Bogan and Rosenberg. Div. Ex. 510; Resp. Ex. 704C. The settlement also discharged any claims against Brown and Collins and provided that the

[31] Bogan and Rosenberg had also attended a G&C free-lunch seminar together in 2001. Resp. Ex. 502. Collins testified that it was he who met with them at that time. Tr. 2986.

[32] Brown did not appear at the hearing and, thus, did not cross-examine Bogan or Rosenberg.

settlement also satisfied the restitution required to be paid by Brown to Bogan and Rosenberg pursuant to the February 2, 2006, Florida Consent Order. Div. Exs. 105, 610.

Brown and Collins coordinated their responses to the Bogan/Rosenberg complaint so that Collins included himself in meetings that Brown had held. Tr. 1197-98. However, Brown's testimony to this effect was completely inconsistent with his investigative testimony on this point. Tr. 1200-02. Additionally, Brown was potentially biased against Collins, who decided not to testify on his behalf in the Florida proceeding at which he lost his insurance licenses. Tr. 1207-08. Nonetheless, Brown's testimony at the hearing is accepted because it accords with evidence from customers described above. When Ryan was notified of the Bogan/Rosenberg complaint, Ryan noted that their financial advisor, Rafael Golan, had been terminated for cause from G&C a few years earlier and speculated that he had concocted the allegation as revenge. Tr. 4382-84. Ryan dispatched Rudden and the firm's general counsel, Chris Kelly, to investigate. Tr. 3652-53, 4384-85.

Brown testified that Collins shared, by means of cash payments, commissions that he received as a result of placing his name on Brown's transactions. Tr. 1186-89. Collins denies this. Tr. 3135. While it is more likely than not that Brown demanded compensation for the sales he made, the record does not establish the amount and circumstances. Brown also claims that he discussed the kickbacks with Ryan but does not remember any details. Tr. 1189-91, 1194-95. Ryan denies being informed by Brown about the cash payments. Tr. 4367-69. It is found that Ryan did not know about the payments; it was in Brown's (and Collins's) interest to keep their questionable arrangement confidential between themselves.

f. Additional Customers

Brown sold variable annuities to additional customers who did not testify at the hearing. Ilse Reiss (Reiss), an 82 year-old widow, is a retired real estate agent. Div. Ex. 56 at 1-2. Reiss met Brown in the fall of 1999 at a lunch seminar during which Brown spoke about reducing taxes, annuities, and endowments. Div. Ex. 56 at 2. Prior to meeting Brown, Reiss maintained a conservative portfolio valued at over $900,000, comprised primarily of municipal and corporate bonds. Div. Ex. 56 at 3. Reiss lived off of the income generated by her bond portfolio, and to a lesser extent, Social Security benefits. Div. Ex. 56 at 2. Reiss explained this to Brown and told him that she did not require a large death benefit. Div. Ex. 55 at 2. At Brown's direction, between January and May 2000, Reiss sold her entire portfolio and invested the proceeds in a number of variable annuity products. Div. Ex. 56 at 4. Brown also purchased two annuities using approximately $450,000 of inheritance proceeds that Reiss explicitly instructed Brown not to invest in annuities. Div. Ex. 56 at 4. By the middle of 2001, the value of the annuities, linked largely to aggressive, equity-based mutual funds, had declined sharply. Div. Ex. 56 at 4. At one point, Brown advised Reiss to liquidate one of the portfolio's underperforming annuities and invest the proceeds in an alternative annuity. Div. Ex. 56 at 4. This switch required Reiss to pay approximately $20,000 as a surrender fee, in addition to the significant commissions paid to Brown. Div. Ex. 56 at 4. At no time did Brown disclose the amount of commissions received from the sale of the annuities to Reiss. Div. Ex. 56 at 5. Brown received $16,277 of the commissions paid for his sale of the annuities to Reiss. Div. Ex. 510; Resp. Ex. 704C.

Sylvia and Norman Kirshner, born in 1922 and 1920, respectively, were introduced to Brown after picking up their tax returns, prepared by G&C. Div. Exs. 57, 58; Div. Ex. 63 at 1. In October 2001, the Kirshners met with Brown who suggested that they transfer funds currently held in a GE annuity to an Allmerica annuity offered through Brown. Div. Ex. 63 at 2. Brown did not inquire as to their investment objectives, short term and/or longer term fiscal needs, or risk tolerance. Div. Ex. 63 at 2. At the time of the initial meeting with Brown, Norman Kirshner was 80 years old and in failing health. Div. Ex. 63 at 2. The Kirshners were persuaded by the promise of a 5% bonus from Allmerica, as well as the belief that if they left $1,000 in the GE annuity, the associated death benefit would remain intact. Div. Ex. 63 at 2. Shortly after the withdrawal from GE, the Kirshners noticed that the death benefit was no longer in place and met with Brown to discuss the situation. Div. Ex. 63 at 2. They and Brown held a conference call with representatives from GE who explained to them that the Allmerica annuity had a "free look" option and that the Kirshners could transfer the funds back to their GE annuity and recover the forfeited death benefit. Div. Ex. 63 at 2. After the call, Brown promised that he would effectuate the transfer of funds back to GE. Div. Ex. 63 at 3. Despite numerous follow-up calls over the next two months, Brown failed to take or return the Kirshners' calls. Div. Ex. 63 at 3. In January 2002, the funds were returned to the GE annuity. Div. Ex. 63 at 3. However, they soon learned that in order to restore the death benefit to its original amount, the funds were required to be transferred back within 30 days. Div. Ex. 63 at 3. As a result, the death benefit in the GE annuity decreased by over $20,000, and upon Norman Kirshner's death, Sylvia Kirshner received $32,364 or $20,000 less than she was otherwise entitled to. Div. Ex. 63 at 3; Div. Ex. 64. She then filed a complaint regarding Brown and G&C with the Florida Department of Financial Services, Division of Insurance Consumer Services in September 2003. Div. Ex. 60. She also entered a settlement agreement with PCS regarding her statement of claim brought in arbitration with the NASD. Div. Ex. 64 at 10-16. Brown was left with $1,020 of the commission paid for his sale of the annuity. Div. Ex. 510; Resp. Ex. 704C.

4. Supervision of Brown/Collins

a. Supervision of Brown

As noted above, during part of the time that Southard was CCO at PCS, through 2001, she also was the direct supervisor of Brown. Tr. 979, 1010; Div. Ex. 502. However, both she and Brown recall little, if any, interaction. Tr. 1028-29, 1182-84.

Collins was Brown's supervisor from September 30, 2002, until Ginsberg became the supervisor. Tr. 3047-48; Divs. Ex. 325, 502. In approximately February 2004, Collins became aware that Brown was restricted from selling any insurance products; and in April 2004, that Brown was restricted from selling annuities to people over 65 who were not his existing clients. Tr. 3048-49, 3066-68. Thereafter, Collins believed that the home office in Poughkeepsie was supervising and monitoring Brown's business for compliance with that restriction. Tr. 3256-57. While that restriction was in effect, according to Collins, if a customer expressed interest in variable annuities, Brown would summon Collins to explain the features of the annuity with Brown remaining in the room with the customer. Tr. 3052-54. In the two-representative office, Brown's sales production greatly exceeded Collins's: for the first four months of 2004, Brown's production (gross commissions) was $875,292, and Collins's, $200,199. Div. Ex. 203 at 4.

Collins testified that he had not observed any red flags concerning Brown before February 2004. Tr. 3049-50. Yet by December 2003 Collins knew that Brown had a problem with his Massachusetts insurance license, which Collins did not investigate because Brown assured him that it was a minor problem. Tr. 3232-33. At the same time, the compliance department informed Collins that he should review, if he had not already done so, Brown's sale of $2 million in variable annuities to a single customer. Tr. 3233-34; Div. Ex. 327. Even though Collins knew in February 2004 that Brown had no insurance license in Florida, his reports as Brown's OSJ principal showed that Brown continued to hold seminars and sell variable annuities during February and March. Tr. 3231-32, 3237-41; Div. Exs. 206, 207. In March 2006, when Collins was no longer Brown's supervisor, he learned of indications of Brown's selling away, immediately reported this to the compliance department, and soon, after Brown's hasty departure from the firm, inherited hundreds of Brown's customers. Tr. 3241-47.

PCS learned of Florida's revocation of Brown's insurance license in December 2003. Tr. 3330-31; Div. Ex. 603 at 1-2, Div. Ex. 607. Ryan was aware of the revocation. Tr. 4335-36. However, he was relatively unconcerned because the revocation was based on Brown's failure to reply to Florida's August 2003 administrative complaint rather than any underlying misconduct. Tr. 4441; Div. Ex. 603 at 1. Based on purported telephone conversations with Florida regulators, then-CCO Cynthia LaRosa (LaRosa) considered that the matter was essentially cleared up and that Brown could continue selling variable annuities. Tr. 4336-40; Div. Ex. 603. LaRosa briefed Ryan to this effect, telling him that her understanding was based on telephone conversations with the regulator. Tr. 4336-39. Ryan understood that the revocation had been stayed but told her to obtain confirmation in writing. Tr. 4339. Ryan accepted responsibility for the decision to allow Brown to continue selling annuities during this period. Tr. 4440. During January 2004 Rudden attempted to reach Florida regulators by telephone to ascertain the status of Brown's license but did not stop Brown from selling insurance products. Tr. 3334-36; Div. Ex. 603 at 2. Eventually, in a telephone conversation she was advised that Brown's license was indeed revoked, pursuant to the December 2003 Order of Revocation. Tr. 3335-36; Div. Ex. 603 at 2, Div. Ex. 607. She immediately told Ryan, Enisman, Collins, and Brown that Brown must stop selling variable annuities. Tr. 3336-37. She also took steps to stop the payment of commissions to Brown on sales that he should not have made. Tr. 3336-38, 3349, 4342-53; Div. Ex. 605. Compliance as to Brown's sales took place in the home office; after Brown was permitted to resume selling variable annuities on a restricted basis, web ops was programmed to check any Brown annuity transaction for a customer over 65 against his existing client list. Tr. 4357.

As noted above, "[f]rom April 6, 2004, until May 6, 2005 [Brown was] prohibited from marketing insurance products to any individuals over age 65 who were not then [his] clients." Div. Ex. 608, Div. Ex. 609 at 3. On Ryan's instruction, to determine what Brown could and could not do, Rudden consulted PCS's outside counsel, who told her that "marketing" meant "selling."[33] Tr. 3341, 3797-3800, 4379-81, 4442-51. In Rudden's own judgment, "market" is broader than "sell," but she set her judgment aside and relied on counsel's advice. Tr. 3798. Ryan was noncommittal concerning his own understanding of whether there was a difference between "market" and "sell." Tr. 4442-43. However, for the purpose of Brown's "prohibit[ion] from marketing," on the advice of

[33] There is no evidence in the record outside Rudden's and Ryan's testimony concerning the consultation with counsel.

counsel, he considered "market" to mean "sell." Tr. 4355-57, 4379-81, 4442-52. Thus, he believed it permissible for Brown to discuss annuities at his free-lunch seminars and even for Brown to be present while another representative sold an annuity to a customer. Tr. 4379-80, 4450, 4452. Ryan considered that the web ops program would ensure that any violative sale by Brown would be stopped at the home office. Tr. 4380-81. However, as found above, Brown easily circumvented this with the assistance of Collins.

Brown gave a seminar on November 16, 2004, at which he discussed variable annuities. Tr. 1371; Div. Ex. 329. While he indicated that variable annuities were not appropriate for everyone, he stressed their benefits without discussing the associated costs; also he did not differentiate between tax-free and tax-deferred income. Div. Ex. 329. Ginsberg, who was tasked with attending and reviewing the seminar, had not been made aware of Brown's state restrictions at that time. Tr. 1371-73.

Ginsberg succeeded Collins as Brown's supervisor in approximately January 2005. Resp. Answer at 2; Tr. 1350-51, 3054-55; Div. Ex. 502; Resp. Ex. 407 at 6. Previously, Ginsberg had performed a branch examination on May 5, 2004, with follow-up visits in July and October, which he documented in a memo to Rudden. Tr. 1352-57; Div. Ex. 204. Ginsberg concluded, "there was complete lack of supervision and evidence of OSJ review by Matt Collins" and "[t]he overriding statement regarding . . . Eric Brown's cases is 'Money in Motion'." Div. Ex. 204 at 1. By simply looking at Brown's paperwork, which was available to Collins, Ginsberg noted exchanges of variable annuities, resulting in death benefit losses and surrender charges, and improper mutual fund sales practices, with in some cases the purchased mutual funds being sold a year or two later for annuities. Tr. 1355-57; Div. Ex. 204 at 1. It goes without saying that "Money in Motion" resulted in commissions for Brown and PCS. In reviewing the Bogan and Rosenberg transactions, in which Collins was listed on the forms as the representative, Ginsberg was not sure whether Collins or Brown was really the representative, and added "EB" next to Collins's name to indicate this. Tr. 1435-36; Div. Exs. 73, 91.

After appointing Ginsberg to be Brown's supervisor in January 2005, Rudden placed Brown on heightened supervision in March 2005, with Ginsberg as the supervising principal. Resp. Ex. 407 at 6-7. This required Brown to submit variable annuity transactions to the home office for processing and to use a "Compare the Benefits" form for all exchanges between products; Ginsberg was to visit Brown's office at least weekly; and a compliance department registered principal was to review transactions and release commissions on a case-by-case basis on approval of the transactions. Resp. Ex. 407 at 7. Ryan was aware of, and satisfied with, the steps Rudden took to place Brown on heightened supervision. Tr. 4358-64.

b. Supervision of Collins

Ginsberg was Collins's supervisor from May 2004 to February 2007. Tr. 3167; Div. Ex. 502. From December 2002 to May 2004 Collins supervised himself, that is, had no supervisor. Tr. 3167; Div. Ex. 502. A September 2003 branch examination report and forms that Collins signed during 2004, as late as May 2004, and submitted to the compliance department stated that, as a producing registered principal, he sent all his business to the PCS home office for review, but the statements were false. Tr. 3171-78; Div. Ex. 202 at 7, Div. Ex. 205 at 1, Div. Ex. 206 at 1, Div. Ex.

207 at 1. Additionally, branch examinations showed deficiencies in his documentation for sales of variable annuities. Tr. 3178-98, 3205-25; Div. Exs. 202, 203, 204, 208, 210. A June 2007 branch examination, for a period when Brown was no longer associated with the office, disclosed numerous deficiencies in documentation for Collins's sales of variable annuities; twenty-five cases, mostly of variable annuity transactions, were examined. Div. Ex. 210. Collins paid a total of $30,000 related to the events in question - $5,000 pursuant to his 2006 Florida Consent Order and $25,000 in settlement of the Bogan/Rosenberg complaint. Tr. 3203. During his one-year probationary period pursuant to the 2006 Florida Consent Order, he was not on any heightened supervision and did not receive any re-training. Tr. 3202-03.

c. Branch Examinations

A branch examination conducted by Authier as of September 30, 2002, examined only two variable annuity files and noted missing documents, though the branch generated the vast majority of its $1 million in annual sales via variable annuities. Tr. 1808-09; Div. Ex. 201. Authier served as the OSJ for the branch, so as the examiner he was required to review his own work. Tr. 1806-07. The report stated that the branch manager, Brown, reviews all new accounts and transactions. Div. Ex. 201 at 14. Because Brown produced approximately two-thirds of the branch's sales, he was reviewing and approving his own transactions. Tr. 1812. The report was submitted to CCO Southard for review, but there is no indication in the record that she actually reviewed it. Tr. 1048, 1813; Div. Ex. 201 at 1. A branch examination conducted by Authier on September 8, 2003, was reviewed by Rudden on October 8, 2003. Tr. 1815; Div. Ex. 202 at 1. He only examined three client files. Tr. 1817. He told Brown that, based on his examination, the branch's business was conducted in accordance with PCS and NASD rules. Tr. 1818-19; Div. Ex. 201 at 1. Confusingly, Authier's examination report stated that the manager (Brown) reviews all transactions while the principal's (Collins) transactions are reviewed by PCS compliance. Div. Ex. 202 at 7. As a result of the report, Rudden issued a letter of training to Brown reminding him that all accounts must have a New Account Form, that an Explanation of Investment disclosure form must be used for the sale of variable annuities, and that switch letters are required. Div. Ex. 202 at 14. The next examination was conducted by Ginsberg on May 5, 2004, with follow-up ordered by Rudden in July 2004. Div. Ex. 203 at 1. Rudden was present for the examination, and Collins was now the branch OSJ. Tr. 1823-24. Ginsberg reviewed nineteen Brown accounts and seven more accounts ascribed to Collins and found much missing documentation. Div. Ex. 203. The examination report makes no mention of supervisory review of either Brown's or Collins's transactions. Tr. 1826-27. Neither does the examination report mention Brown's issues with the State of Florida. Tr. 1828-29. A subsequent examination by Ginsberg, in December 2005, was not reviewed by Rudden until May 2006. Tr. 1830; Div. Ex. 208 at 2. Ginsberg reviewed thirty files, twenty-six of which were sales of variable annuities to senior citizens, all of which were ascribed to Collins, and found numerous deficiencies. Div. Ex. 208. At this time, Ginsberg had been named OSJ for the branch, and as examiner was reviewing his own work. Tr. 1832. The examination report noted no detail of Brown's duties though he was on heightened supervision. Tr. 1834-38. The examination report noted four new customer complaints. Tr. 1839. Though the examination report noted that no paperwork was available for one client, it marked no problems or concerns for that client review. Tr. 1839-40.

Ginsberg conducted another branch examination on August 7, 2006, which was reviewed by Rudden on October 12, 2006. Tr. 1844. Ginsberg was carrying out a duel role as OSJ and branch examiner, continuing to review his own work. Tr. 1844. He selected sixteen cases to review, finding multiple deficiencies. Tr. 1845, 1849-50. The examination report noted two new customer complaints, but fails to note the resolution of Brown's issues with the State of Florida. Tr. 1850-52. Ginsberg conducted another branch examination June 26, 2007, along with Charles Atkins. Tr. 1853. The examination report continued to note deficiencies, and did not address whether any registered representative at the branch was under heightened supervision. Tr. 1853-55, 1857-58; Div. Ex. 210. There is no indication that PCS's compliance department reviewed this examination report. Tr. 1853.

5. Wells Customers and Transactions

During the time at issue, Wells obtained most clients from free-lunch seminars or from referrals by accountants who prepared their tax returns. Tr. 2550. At the free-lunch seminars, Wells talked about investing from the point of view of minimizing one's liability for taxes. Tr. 2545-46. Wells's office would contact attendees to schedule a follow-up meeting. Tr. 2549-50. If a prospect was interested, he would be told to bring legal documents related to trusts and wills, financial statements and information concerning expenses, and tax returns for the past three years. Tr. 2552-53. The first meeting would last one hour and be devoted to gathering information. Tr. 2556-57, 2560. A lawyer and an accountant working with Wells would analyze the legal documents and the tax returns. Tr. 2551-55. Before a second meeting, Wells would analyze the prospect's financial information and integrate the analysis from the lawyer and accountant. Tr. 2563-64. At the second meeting, which would last two hours, Wells would discuss that information with the prospect. Tr. 2564. Then, the prospect might decide to become a client and transfer his accounts to PCS. Tr. 2565. Wells commented that about 30% of clients decide to become a client after the second meeting, about 50% after a third meeting, and the remainder after one or more additional meetings. Tr. 2566. Only then did Wells start recommending changes in a client's holdings. Tr. 2567. Additionally Wells would hold quarterly meetings, including telephone meetings for clients away from Florida. Tr. 2431, 2569-71.

Although Wells receives some compensation in the form of advisory fees from AFP, the bulk of his compensation is sales commissions. Tr. 2839, 2842. In 2005, he received 70% of the gross commissions on the sale of variable annuities; in 2006, he received 70% for the first three months, and 52% thereafter. Tr. 2868-69. His payout was 52% at the time of the hearing. Tr. 2820. The customers at issue in this proceeding were not advisory clients. Tr. 2843. During the time at issue, Wells did not routinely disclose to customers the commissions he would receive for the products that he was selling. Tr. 2845-47, 2870. Wells believed that the customers knew that commissions on annuities were higher than on other financial products. Tr. 2872-73. He acknowledged that there are no breakpoints in the sale of variable annuities. Tr. 2875. The largest amount of his compensation, perhaps 60%, is from variable annuity commissions. Tr. 2875-76. He did not inform customers of this. Tr. 2876-77. When a client is referred to him by the in-house accountant, as was the case with Zita Bell (Bell), he shares the commission with him. Tr. 2878-79. He did not provide customers with copies of their paperwork unless requested. Tr. 2883-84. He did not recommend one way or the other as to whether to obtain a form that compared a customer's existing investment with the investment he proposed. Tr. 2884-87. He acknowledged that, for a long time, he included variable annuities as liquid assets on the new account forms, and that this inaccuracy would affect suitability review of the transaction. Tr. 2887-92; Div. Ex. 165 at 1, Div. Ex. 170, Div. Ex. 181 at 1, Div. Ex. 186 at 1, Div. Ex. 189 at 1.

Wells no longer sells variable annuities. Tr. 2824. He considers that the products now offered do not offer desirable benefits and the costs are higher. Tr. 2578, 2824.

Wells acknowledged that he was present, in and out of the room, when his assistant, Loffredo, was helping customers fill out applications. Tr. 2857-59. He said he did not notice that she was placing the customers' initials on the documents. Tr. 2858-59. He was not paying close attention because he had already explained all the relevant information before the customer filled out the paperwork. Tr. 2862-66. Noting that Loffredo testified that she read the information on the forms to customers before initialing, he differentiated between reading and explaining. Tr. 2865-66. Nonetheless, Wells was responsible for the paperwork. Additionally, Ruth Arndt's (Arndt), Bell's, and Esther Firpo's (Firpo) initials on the forms discussed below are strikingly dissimilar to their signatures and similar to the remaining handwriting on the pages. It is difficult to understand how Wells could have failed to notice this by glancing at the forms.

Loffredo was Wells's sales assistant from May 2003 to February 2008. Tr. 2425, 2428. During that time she assisted customers, including Arndt, Bell, and Firpo, discussed below, with their variable annuity applications. Tr. 2433-34. She wrote the customers' initials on forms in spaces calling for the customers to initial various acknowledgements. Tr. 2434, 2437-42, 2444, 2451-52. She testified that she read the material to the customers as she was writing their initials. Tr. 2434, 2437-42, 2445, 2451-52. However, as discussed below, the customers do not recall this; instead, they recall hurrying through a process of signing various documents. At some point Loffredo discontinued the practice of writing customers' initials.[34] Tr. 2505-23.

a. Ruth Arndt

Arndt, born in 1933, retired as a claims analyst with Allstate Insurance. Tr. 243-44, 259; Div. Ex. 165 at 1. In October 2004, when she purchased a variable annuity from Wells, she and her husband, who died in March 2005, had an annual income of about $28,000 from Social Security and dividends from investments. Tr. 245, 248-49. They met Wells at a free-lunch seminar. Tr. 245-49, 2711. She sized him up as knowledgeable and trustworthy. Tr. 247. Her husband's poor health was quite apparent when they met with Wells shortly thereafter. Tr. 249. Arndt's finances were strained, in part due to the cost of hiring respite care. Tr. 250. She advised Wells that she could not afford to take risks, although she hoped for more income. Tr. 246, 250-51. Wells recommended a Jackson National variable annuity for her IRA, leaving her with the impression that it would increase in value sufficient to cover $700 a month that she planned to withdraw. Tr. 251-55, 258, 301; Div. Ex. 419. The commission paid for selling this annuity was 8%. Div. Ex. 419 at 39. Arndt trusted Wells because she reasoned that he knew more than she. Tr. 252, 269-70. On a

[34] The record does not establish when this occurred. Andersen testified that she discussed with Wells that the practice should be discontinued and that, when it continued, she gave Loffredo a written warning. Tr. 1249-50, 2505. However, as found above, Wells claimed not to have known about it, and Loffredo testified that it was Ginsberg who told her to stop. Tr. 2508-10, 2517-21.

subsequent visit she signed the papers to complete the transaction. Tr. 255-57; Div. Ex. 165. She was somewhat rushed for time because of her husband's condition. Tr. 306. Wells told her that he or his assistant, Loffredo, would finish filling the papers out after she signed them. Tr. 256-57. She received a prospectus in the office then. Tr. 257. Arndt found it impossible to read the 164-page prospectus, however, because of its length and "legalese." Tr. 257. Arndt was aware of surrender charges. Tr. 283-84. On her new account form, her investment objective is specified as "capital appreciation" instead of "income," which would have been correct. Tr. 260. Although the signature on these documents is hers, her initials, "RA," acknowledging various warnings, were not written by her. Tr. 262-63, 268; Div. Ex. 165, passim. They were written by Loffredo. Tr. 2443-44. Additional handwritten explanations are not in her handwriting, either. Tr. 263. To fund the purchase of the variable annuity, which was in her IRA, she sold the mutual funds and stocks, such as Microsoft and Sun MicroSystems, that were in her IRA. Tr. 267; Div. Ex. 165 at 10-12. Some of the stocks were technology stocks, which had declined significantly between 2000 and 2004. Tr. 282, 287-88. A short while later she added to her Jackson National investment by switching out of another variable annuity. Tr. 267-72; Div. Ex. 166. The fact that she signed forms that she was told would be completed later is shown by the switch letter for this transaction; the explanation for the change was never even added. Div. Ex. 166 at 1, Div. Ex. 166-1-A. Again, Loffredo placed Arndt's initials by various acknowledgements. Div. Ex. 166. Arndt did initial "No," as instructed, on the Notice to Applicants Regarding Replacement of Life Insurance and/or Annuities to decline a Comparative Information form comparing her existing and proposed policies. Tr. 270; Div. Ex. 166 at 2. She incurred a small surrender charge on the switch. Tr. 269, 272, 298. A few months later she signed an application for an Allianz annuity but did not complete the transaction. Tr. 273-75; Div Ex. 167. After a few months, in August 2005, she left Wells as a financial advisor. Tr. 275; Resp. Ex. 603 at 13. However, Wells has always answered her phone calls. Tr. 300. During those few months, Arndt's annuity had net positive returns. Tr. 275, 2735-36; Resp. Ex. 602L at 2. Arndt still has the annuity and is planning to sell it at the end of its surrender period. Tr. 275-76. She has never invested in variable annuities or anything else except as recommended by a broker. Tr. 303-04. Wells received $6,609 of the commissions paid for selling variable annuities to Arndt. Div. Ex. 510; Resp. Ex. 704C.

b. Zita Bell

Bell, born in 1926, owns an antiques business. Tr. 318, 354, 368, 385. During the time she was a customer of Wells her annual income was around $75,000, from her work, stock dividends, and Social Security. Tr. 319. She and her husband were recommended to Wells by their accountant, and they transferred their assets to his office in approximately 2000. Tr. 319-23. Wells first sold her a variable annuity shortly after her husband's September 2002 death. Tr. 322, 336-37. As she was still working, she did not need income at that time but wanted to secure and increase the value of her portfolio for future needs.[35] Tr. 323-24. She conveyed to Wells that she did not want to incur risk, however. Tr. 324. Over time, she sold stocks, some at her initiative, and some on his advice, and, on his advice, invested the proceeds into variable annuities. Tr. 324-27. Wells maintains that he met with Bell to explain the fees and surrender charges associated with each annuity and that she received a prospectus for each. Tr. 2812-13. However, her understanding of

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[35] Wells's analysis of her financial situation is that she was living beyond her means and, thus, did need income. Tr. 2780, 2792, 2799-2801, 2809-11; Resp. Ex. 603 at 18-19.

the product was that her principal would likely grow over time, but her original investment was guaranteed and that her only risk was in the amount of interest, if any, that she would receive over time. Tr. 327-28. This understanding came from Wells, who was her only source of information about variable annuities. Tr. 326-28. She was presented with documents to sign with only the bottom corner exposed for her signature. Tr. 331. She did not read the documents. Tr. 330. Wells and his assistant were present. Tr. Tr. 330-31. She trusted Wells and his knowledge and relied on him to tell her what she needed to know. Tr. 331-32, 335, 380, 389, 407-08. If she did not understand what was happening, she blamed herself. Tr. 332. She never received a prospectus at the office; she received a prospectus in the mail some time later after deciding to invest. Tr. 334, 382. She noted that it was about an inch thick; she did not attempt to read it; it would take a professional to analyze, that is why she went to a professional. Tr. 334-35. She was aware that Wells was receiving a good commission on his sales of variable annuities. Tr. 335.

On Wells's recommendation, Bell bought a Hartford variable annuity in September 2002 with a $50,000 death benefit paid from a Scudder product shortly after her husband's death. Tr. 336-39; Div. Exs. 178, 412. The commission paid for selling this Hartford annuity was 7%. Div. Ex. 412 at 33. Again, it was her understanding that the interest might be variable but the principal was secure. Tr. 338-39. Over time she added to the Hartford product on Wells's recommendation. Tr. 340. In October 2002, she bought a Western Reserve Life variable annuity from Wells for $30,000. Tr. 341, 346; Div. Exs. 179, 410. The handwritten entries on the application are not in her handwriting and contain incorrect information, specifying her late husband's date of birth and Social Security number rather than hers. Tr. 341-42; Div. Ex. 179 at 2. Wells did not discuss the specific features of the contract; he merely summarized that this would be a good product for her. Tr. 342-43. As always, she did not read the documents she signed. Tr. 345, 386-88. As always, she was not given a prospectus at that time. Tr. 344. The documents contain her signature but are otherwise not in her handwriting. Tr. 345-46. No one explained the contents to her or read the documents to her. Tr. 345-46. In January 2005 she purchased a Jackson National variable annuity from Wells for $20,000. Tr. 347-50; Div. Exs. 180, 419. The commission paid for selling this annuity was 8%. Div. Ex. 419 at 39. Wells suggested that she purchase the Jackson National annuity rather than add funds to the Hartford product. Tr. 351. Although she told him that she did not want this, he told her that she was required to withdraw $126 per month from the Jackson National annuity. Tr. 349-50. In 2006, on Wells's recommendation, she sold the Hartford annuity and bought a Genworth annuity. Tr. 351-65; Divs. Ex. 181, 405. The commission paid for selling this annuity was 8.6%. Div. Ex. 405 at 158. As with the other transactions, she signed documents without reading them, and Loffredo placed Bell's initials on the documents. By this time, Bell was 80, yet her time horizon was listed as six to ten years. Tr. 354-55. Div. Ex. 181 at 1. Among the documents she signed was a "Replacement Notice" which advised her of her right to see a comparison between her existing policy and the proposed policy; as instructed she initialed "No" to decline this, but Wells did not explain to her her right to receive such a comparison, of which she was totally unaware. Tr. 362-63; Div. Ex. 181 at 12. Eventually she studied the documents she had signed and realized she had made a mistake and became extremely dissatisfied with Wells. Tr. 354-55, 364-66, 370-71; Resp. Ex. 603 at 18. At the time she left Wells in 2006, her annuities had positive returns. Tr. 2809-13; Resp. Exs. 602R, 602S, 602T. Eventually, she received a settlement from PCS of approximately $20,000 to cover surrender charges but did not surrender the annuities because their value had declined drastically. Tr. 402-03, 409-10. Wells contributed $10,000 to the settlement. Tr. 2801, 2833; Resp. Ex. 704C. He had received $5,649 of the commissions paid for selling variable annuities to Bell. Div. Ex. 510; Resp. Ex. 704C.

c. Esther Firpo

Firpo, born in 1936, is a retired bookkeeper. Tr. 745, 765. In 2003, when she bought a variable annuity from Wells, her annual income was about $40,000. Tr. 746. She met Wells at a free-lunch seminar. Tr. 746-49, 2736. He was personable and seemed knowledgeable and trustworthy. Tr. 749. She was interested in obtaining a new investment adviser as she had moved and also was concerned that her assets were dwindling. Tr. 747-48. When she met with Wells, she told him that she had no investment experience and always relied on others, including her late husband, for investment decisions and that she would rely on him. Tr. 751, 767. She told him that she could not afford to lose any money, that she required income but also safety. Tr. 751-52. She told him her greatest fear was that she would outlive her money and have to rely on her children. Tr. 752. Her son-in-law, whom she considered more knowledgeable about business than she, accompanied her to a meeting with Wells and commented that Wells's presentation sounded good. Tr. 754-55. Prior to that meeting, the son-in-law had telephoned Wells and asked questions about the investments Wells was proposing. Tr. 2737-40; Resp. Ex. 603 at 35. Wells did not tell her about surrender charges. Tr. 758-59. Her understanding was that she would never lose her principal. Tr. 757. She did not recall his discussing fees. Tr. 758.

Wells sold Firpo a total of four annuities – a Hartford Leaders Plus in her Roth IRA, a Jackson National in her IRA, an Equitable Accumulator Plus, and a second Hartford, with her daughter. Div. Exs. 189, 190, 191, 192, 413, 415, 421. The commission paid for selling the Hartford annuity was 7%, the Equitable, 5%, and the Jackson National, 8%. Div. Ex. 413 at 39, Div. Ex. 415 at 58, Div. Ex. 421 at 44. Wells received a total of $14,947 of the commissions paid for selling the annuities to Firpo. Div. Ex. 510; Resp. Ex. 704C. Firpo relied on Wells to tell her everything she needed to know about the investment and trusted him to do what was in her financial interest. Tr. 764, 772. She signed documents as instructed by Loffredo, but she did not read them. Tr. 761. Again, Loffredo placed Firpo's initials on the documents, which also contain Wells's handwriting. Tr. 769-70, 774-79, 1259, 2437-42. While Loffredo says that she read items aloud to Firpo before placing Firpo's initials on documents, Firpo does not recall this. Tr. 761. The signing always proceeded quickly. Tr. 762. It is found that Firpo did not knowingly acknowledge the items that Loffredo initialed. Firpo did initial "No," as instructed by Loffredo in writing, on the Important Notice to Applicants Regarding Replacement of Life Insurance" to decline a Comparative Information form comparing her existing and proposed policies. Tr. 777, 806-07; Div. Ex. 191 at 12. In March 2004, she added money to the Jackson National annuity she had purchased from Wells; he did not tell her that this would extend the period when there would be surrender charges. Tr. 773.

The fact that alterations were made after Firpo signed documents is shown by the switch letter for her original Jackson National purchase. Two versions, dated August 1 and August 12, are in her file; the August 12 version contains a different date, initials placed differently, and additional information indicating that she was selling bonds as well as stocks and mutual funds. In both versions "Jackson National," "Prime Capital," and Firpo's and Wells's signatures are identical. Div. Ex. 190 at 1, 2; Div. Exs. 190-1-A, 190-2-A.

Firpo received prospectuses, but as to reading them, "It went over my head." Tr. 763-64, 804. Eventually, a family friend who was a stockbroker advised Firpo that the annuities were unsuitable for her, and he accompanied Firpo to a meeting with Wells where this was discussed. Tr. 781-84. Eventually, she transferred her business to the friend. Tr. 785. The friend noted that Firpo's annuities were in an IRA and that there was no point in paying the extra costs of a tax-deferred annuity that was held in an IRA, which was tax-advantaged itself. Tr. 784. Firpo consulted an attorney. Tr. 784-85, 787-88; Div. Ex. 194. In formulating a reply to the attorney's letter, Rudden consulted Wells but did not contact Firpo.[36] Tr. 792; Div. Exs. 195, 196. Wells contributed $15,750 to PCS's settlement with Firpo. Tr. 2801, 2833; Resp. Ex. 704C. At the time she left Wells in 2006, her annuities had positive returns (which she ascribed to market conditions), but they were wiped out by surrender charges. Tr. 814, 2754-58; Resp. Exs. 602M, 602N, 602O, 602P, 602Q, 603 at 32.

d. Additional Customers

Wells sold variable annuities to additional customers, who did not testify at the hearing. Orrin Adler (Adler), born in 1939, entered into a series of six transactions in which Adler transferred assets in his IRA accounts (with the exception of one non-qualified investment account which subjected Adler to an additional withdrawal penalty [Div. Ex. 176]) into several variable annuities recommended by Wells. In three instances during May and June of 2004, Adler transferred assets in his accounts to Equitable variable annuities. Div. Exs. 171, 174, 176. In November 2004, Adler effected two separate transfers in his IRA accounts into Allianz variable annuities. Div. Exs. 172, 175. In March 2005, Adler transferred assets in his IRA into a Jackson National variable annuity. Div. Ex. 173. All of the variable annuities recommended by Wells contained an initial 8% surrender fee, and the total paid for them was about $350,000. Div. Exs. 171, 172, 173, 174, 175, 176. Wells received $16,131 of the commissions paid for selling the variable annuities. Div. Ex. 510; Resp. Ex. 704C. Wells generally stated the rationale for the transfers as providing a "safeguard for protection" and "market upside potential." Div. Ex. 173.

Raymonde and Sarkis Donnakanian (Donnakanian), born in 1936 and 1933, respectively, purchased an Equitable variable annuity on February 20, 2007, in the amount of $100,000. Div. Ex. 186. The annuity contained a 7% surrender fee. Div. Ex. 186 at 2. Wells received $3,640 of the commission paid for selling the variable annuity. Div. Ex. 510; Resp. Ex. 704C. At the time of investment, Donnakanian had approximately $148,000 and $190,000 of liquid assets and net worth, respectively, and earned approximately $40,000 annually. Div. Ex. 186 at 1. In addition, Wells became the agent of record with respect to Donnakanian's previously purchased John Hancock annuity. Tr. 2671.

[36] Not contacting Firpo is understandable, given that she was represented by counsel.

6. Supervision of Wells

For a period of about three years, ending with her departure from PCS in approximately October 2006, Andersen was the compliance officer for the Boca Raton office. Tr. 1213, 1218. Her function was to ensure that what the registered representatives sold was suitable for the customers. Tr. 1220. However, at the same time, for at least a year, she was the sales assistant to one of the registered representatives, Venezia. Tr. 1220-21. Ryan did not have an understanding of this dual function. Tr. 4463-64. By the time she left, she was performing only compliance work. Tr. 1225. She felt that she did not have enough time to carry out compliance work effectively and communicated this to Rudden. Tr. 1228-29, 1233, 3951-60; Div. Exs. 351, 352. Ryan also learned of this. Tr. 4462-63. In reviewing transactions, she recognized that Loffredo was writing customers' initials on documents because she recognized Loffredo's handwriting. Tr. 1245-46, 1250. As found above, while Andersen recalled discussing this with Wells and warning Loffredo, neither recalls this, and Loffredo testified that it was Ginsberg who warned her to stop. These differing recollections indicate that Andersen was not perceived as having much authority in the office.

Authier conducted a branch examination in November 2002 and examined five accounts. Div. Ex. 215. His report was submitted to CCO Southard for review, but there is no indication in the record that she actually reviewed it. Tr. 1897-98; Div. Ex. 215 at 1. The report indicated that the office had seventeen registered representatives and that Southard was the OSJ principal. Div. Ex. 215 at 6. The report stated that Venezia required special supervision. Div. Ex. 215 at 7. The report noted that four customer complaints concerning sales practices were received during the twelve months. Tr. 1899; Div. Ex. 215 at 9. Authier conducted another examination in October 2003. Div. Ex. 216. The report did not identify an OSJ for the branch and Andersen signed it as branch manager. Tr. 1902-03. The report was submitted to Southard and reviewed by Bernadette Thompson in March 2004. Tr. 3964; Div. Ex. 216 at 3. The report did not state the number of accounts examined but stated there was missing documentation. Div. Ex. 216. Training for the office was ordered in March 2004. Tr. 1903-04; Div. Ex. 216 at 2-3. The report stated that the manager reviews all new accounts and transactions and identifies Andersen as the manager. Div. Ex. 216 at 5-7. Ginsberg conducted the next examination, in November 2004. Div. Ex. 217. Andersen was identified as the OSJ principal. Div. Ex. 217 at 1. Thirty-six files were reviewed, and five new account forms were found to be missing. Tr. 1907-08. Deficiencies were noted as to several representatives, including Wells, Venezia, and the branch manager, Rick Vogel. Div. Ex. 217 at 7-9. More training occurred. Tr. 3965-66; Div. Ex. 217. Ginsberg conducted the next examination, in December 2005, and examined 80 files. Div. Ex. 218 at 91. Andersen was identified as the OSJ principal. Div. Ex. 218 at 91. Some deficiencies were found, such as missing or deficient new account forms or missing client files. Tr. 1912-15; Div. Ex. 218. Rudden reviewed the report in January 2006. Tr. 3967-69; Div. Ex. 218 at 91. Ginsberg conducted the next examination in November 2006 and examined 107 files. Div. Ex. 219 at 3. Rudden reviewed it in March 2007. Div. Ex. 219 at 3. The examination report continued to note missing new account forms. Tr. 1919.

D. Expert Testimony

John Duval (Duval) testified for the Division. He was accepted, over objection, as an expert in variable annuity sales, variable products, and supervision. Tr. 1516-17. Duval had a lengthy history with Merrill Lynch as a registered representative and principal; he started selling variable annuities in 1984 and became a variable annuity specialist in the Merrill Lynch headquarters in 1997, a job which included supervision and training of approximately 700 brokers within Merrill Lynch's New York City district. Tr. 1481-89, 1493-94. After his 1999 retirement from Merrill Lynch, he became an arbitrator with the New York Stock Exchange and the NASD and is currently an arbitrator with the combined FINRA. Tr. 1489-91. Duval observed, "annuities are not bought, they're sold." Tr. 1529. That is, a person does not come to a broker-dealer's office and ask to buy a variable annuity; rather, a salesman recommends, and then sells a variable annuity to a prospect. Tr. 1529. Concerning elderly investors, Duval opined that it is not suitable to tie them up in long-term illiquid contracts unless there is a really good reason for doing so. Tr. 1527-29. In analyzing the transactions at issue, Duval noted that a replacement of one annuity for another raises a red flag; the new product must be better and the customer must gain for a replacement to be justifiable, especially in light of a new, longer surrender period; a replacement can indicate churning; since the commission is so high, such a transaction is tempting for the salesman. Tr. 1523-24. Further, a bonus added to deposits of the premium amount (that is, with a 4% bonus, the client pays $100,000 and is credited with an investment of $104,000) is a catalyst for misconduct because it can be used to entice clients to believe they are offsetting the surrender penalty of the product they are surrendering. Tr. 1533-34. However, the bonus is essentially a loan, and the customer repays it in higher fees. Tr. 1534-35.

Duval opined that the transactions at issue were unsuitable, for various reasons, and identified supervisory shortfalls in connection with some. Tr. 1676-1797, 1945-1999; Div. Exs. 513-536, 538. He also opined that there were deficiencies in the branch examinations. Tr. 1797-1939; Div. Exs. 537, 539-542.

John P. Huggard (Huggard) testified for the Respondents. He was accepted as an expert in variable annuities and their suitability for investors. Tr. 4012. He has a lengthy history in teaching business courses at North Carolina State University, law practice, including estate planning, and writing and teaching continuing education courses on topics that include variable annuities. Tr. 3994-4008; Resp. Ex. 926. He opined that, 98% of the time, an investor aged 60 to 80 would be better off investing in variable annuities than in mutual funds, stocks, or bonds. Tr. 4012-72. He also opined that the transactions at issue were suitable. Tr. 4093-4186. He based his opinion on the paper records of the transactions and conversations with Collins, Walsh, and Wells. Tr. 4198-4215.

David Paulukaitis (Paulukaitis) testified for the Respondents. He was accepted as an expert in broker-dealer supervision and compliance. Tr. 4528. He is currently employed at a compliance consulting firm; previously, for many years he was employed by the NASD, rising to the position of associate district director in its Atlanta office. Tr. 4500-28; Resp. Ex. 921. Paulukaitis opined that Ryan's and Rudden's supervision was reasonable. Tr. 4575-4647.

III. CONCLUSIONS OF LAW

The OIP charges that Brown, Collins, Walsh, and Wells willfully violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Further, the OIP charges books and records violations: that Brown, Collins, Walsh, and Wells aided and abetted and caused violations by PCS of Exchange Act Section 17(a) and Rule 17a-3. Finally, the OIP charges that Ryan, Rudden, and Collins failed reasonably to supervise, pursuant to Exchange Act Section 15(b)(6), with a view to preventing and detecting violations of the securities laws by Brown, Collins, Walsh, and Wells.

As discussed below, it is concluded that Brown, Collins, Walsh, and Wells willfully violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Further, Brown, Collins, and Walsh willfully aided and abetted and caused violations by PCS of Exchange Act Section 17(a) and Rule 17a-3, and Wells caused such violations. Finally, Ryan and Rudden failed reasonably to supervise Brown, Collins, Walsh, and Wells (and Collins failed reasonably to supervise Brown) with a view to preventing and detecting their violations.

A. Antifraud Provisions

Brown, Collins, Walsh, and Wells are charged with willfully violating the antifraud provisions of the Securities and Exchange Acts – Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 – which prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4 & 778 (1979); SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 469 (S.D.N.Y. 2004).

Section 17(a) of the Securities Act makes it unlawful "in the offer or sale of" securities, by jurisdictional means, to:

> 1) employ any device, scheme, or artifice to defraud;
>
> 2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statement made not misleading; or
>
> 3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Similar proscriptions are contained in Exchange Act Section 10(b) and Rule 10b-5.

Scienter is required to establish violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5. SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); see also Aaron v. SEC, 446 U.S. 680, 686 n.5, 695-97 (1980); SEC v. Steadman, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. See David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); see also SEC v. Steadman, 967 F.2d at 641-42;

Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990). Reckless conduct is conduct which is "'highly unreasonable' and . . . represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Sections 17(a)(2) or 17(a)(3) of the Securities Act; a showing of negligence is adequate. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v. Steadman, 967 F.2d at 643 & n.5; Steadman v. SEC, 603 F.2d 1126, 1132-34 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

Material misrepresentations and omissions violate Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5. The standard of materiality is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); SEC v. Steadman, 967 F.2d at 643.

1. Suitability

The Division alleges that most, if not all, of the transactions at issue were unsuitable for the customers. The term "unsuitable recommendations" derives from FINRA Conduct Rule 2310:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

Unsuitable recommendations may be part of a course of fraudulent conduct that violates the antifraud provisions but are not violative taken by themselves. Clark v. John Lamula Investors, Inc., 583 F.2d 594, 600 (2d Cir. 1978); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1237 (S.D.N.Y. 1983). Unsuitable recommendations may include actual misrepresentations and omissions so as to violate the antifraud provisions. Joseph J. Barbato, 53 S.E.C. 1259, 1275-76 (1999) (recommendations made in disregard of investors' professed investment objectives coupled with misrepresentations and omissions concerning the securities, unwarranted price predictions, and investors' new account cards falsely changed to show increased tolerance for risk); Martin Herer Engelman, 52 S.E.C. 271, 282-83 & n.40 (1995), aff'd sub nom. Isen v. SEC, 87 F.3d 1319 (9th Cir. 1996) (recommendations made in disregard of investment objectives coupled with false representations that the securities met those objectives).

2. Willfulness

In addition to requesting cease-and-desist orders pursuant to Section 8A of the Securities Act and Section 21B of the Exchange Act, the Division requests sanctions pursuant to Sections 15(b) and 21B of the Exchange Act and Sections 203(f), (i), and (j) of the Advisers Act. The Commission must find willful violations to impose sanctions pursuant to Sections 15(b) and 21B of the Exchange Act and Sections 203(f), (i), and (j) of the Advisers Act. A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

B. Antifraud Violations

The record shows material misrepresentations and/or omissions by Brown, Collins, Walsh, and Wells and the scienter of each. No customer approached any of them asking to buy a variable annuity. Rather, each transaction at issue was recommended by the registered representative, and each customer relied on the registered representative to tell him or her about the product being recommended. None of the registered representatives disclosed the higher commissions he would receive for selling the variable annuities he recommended as compared with other products that he could sell or that might be suitable for the customers. Each of the customers was rushed into signing, without reading, documents, including blank forms, that were filled in by the registered representative or his assistant. No customer was allowed to take the documents home for study or even to fill them in himself or herself. To the extent that the registered representatives' recommendations were arguably reasonable when compared to the risk tolerance, time horizon, net worth, and liquid assets noted in customers' new account forms, they were also unreasonable insofar as these notations inaccurately reflected the customers' true financial situation and risk tolerance but were instead entered to justify the sale of variable annuities.

1. Walsh

Except for selling mutual funds from time to time, Walsh exclusively sold variable annuities. He recommended these products to customers or even sold them when the customer indicated he did not want an annuity. His misrepresentations and material omissions were made with scienter. In dealing with the Hannons, the Koenigs, Chambers, and the Merrills, Walsh made misrepresentations and omitted to state material facts and concealed this by having the customers sign documents without reading them and listing investment experience, risk tolerance, and time horizons in a manner to justify his sales, rather than describing the customers' circumstances accurately.

Hannon told Walsh that he did not want an annuity and believed he had invested in a mutual fund. Walsh concealed the nature of the product sold to Hannon by not providing a prospectus and allowing the Hannons to sign without reading documents related to the purchase based on trust in him. Walsh's attitude toward the Koenigs was indicated by his listing her investment objective as "Aggressive Growth" when he knew she was most concerned about protecting principal. He recommended tax-deferred variable annuities for Mrs. Koenig's tax-deferred IRA accounts. As with others, he rushed the Koenigs to sign documents when they were pressed for time and did not provide a prospectus although the documents she signed contained a statement that she had received a prospectus. Chambers also was not provided a prospectus. Documents were altered after he signed them – there are two versions of one switch letter that were created from the same original document he signed. The lengthier version falsely states that he had invested in annuities previously and understood that the benefits required additional expenses. Another switch letter contains an explanation for the change that is not in his handwriting and is false – "death benefits to protect the spouse" – when Chambers was unmarried. Walsh did not mention the term "variable annuity" to the Merrills, and they did not receive a prospectus from him. Again, the signing was conducted hurriedly, with Walsh's assistant saying she would fill in the blanks later. They asked for copies but were not given any, and Walsh evaded their repeated questions as to the amount of commission he was receiving for the sale. Again, Walsh exaggerated their investment experience and time horizon on the new account form. Walsh also displayed a consciousness of guilt by attempting to make himself unavailable to customers with complaints as well as to his supervisor. Angellilo did not testify at the hearing, but the record contains sufficient evidence (Div. Ex. 155) on which to conclude that Walsh made material misrepresentations and omissions to him as well.

It is concluded that Walsh violated the antifraud provisions of the Securities and Exchange Acts by his material misrepresentations and omissions in his dealings with customers. Likewise, the false entries on forms that PCS required were material misrepresentations in connection with the transactions. The acts that constituted his violations were clearly intentional. Thus, his violations were willful.

2. Brown and Collins

Misrepresenting Collins as the sales agent for the sales to Skiena, the Jayes, Rosenberg, and Bogan to conceal the fact that Brown had made the sales at a time when it was illegal for him to do so was, without more, a material misrepresentation and shows Brown's and Collins's scienter. Any reasonable investor would have considered it important to know that it was illegal for their salesman, Brown, to sell variable annuities, and that he and Collins covered up the fact that he was the salesman by falsely stating on documents to be submitted to the insurance companies and to PCS that Collins was the salesman. Additionally, Brown made material misrepresentations to Elkin and the Schlagers in order to receive a total of $25,000 in commissions from sales to them. Elkin, who was very risk-averse, believed from Brown's description that there was a guaranteed return, and he did not tell her that the value of her investment could fluctuate downward. He sold her an annuity for her IRA but omitted to tell her about surrender charges, an important consideration in view of the minimum required distribution of the IRA. She did not receive a prospectus from him and, even if the handwriting was not Brown's, someone forged her signature to a selling document. Brown also omitted to tell the Schlagers about the surrender charges and, after having them sign blank applications, failed to provide them with copies of the completed applications for a lengthy period. His conduct toward Elkin and the Schlagers showed scienter.

It is concluded that Brown and Collins violated the antifraud provisions of the Securities and Exchange Acts by their material misrepresentations and omissions in connection with the sales to Skiena, the Jayes, Rosenberg, and Bogan. The collusion between Brown and Collins in this regard was also a scheme to defraud. Brown also violated the antifraud provisions by his material misrepresentations and omissions in his dealings with Elkin and the Schlagers and the false entries on their documentation, and by his material misrepresentations and omissions in his dealings with Reiss and Kirschner. The acts that constituted Brown's and Collins's violations were clearly intentional. Thus, their violations were willful.

3. Wells

Wells also made material misrepresentations and omissions with scienter. His allowing Loffredo to place customers' initials on documents was at least reckless – highly unreasonable and an extreme departure from the standards of ordinary care. The practice indicates that the warnings that PCS expected customers to read and acknowledge by initialing were, in practice, intentionally concealed from customers. Loffredo's initialing created a false impression that customers had actually read the initialed text while ensuring that they did not.

Wells sold Arndt variable annuities for her IRA and led her to believe that the annuities would generate income of $700 a month without drawing on principal, which was incorrect. Arndt was rushed for time because of her husband's medical condition when she hurriedly signed the papers and was told that Wells's assistant would fill them out later. Loffredo placed Arndt's initials on documents, falsely indicating that Arndt actually read and acknowledged various warnings. Bell also relied on Wells, signed, without reading, documents that were filled out by someone else, and was not furnished prospectuses. Loffredo placed Bell's initials on documents, falsely indicating that Bell actually read and acknowledged various warnings. Firpo told Wells that she had no investment experience and would rely on him. Wells did not tell her about surrender charges. She signed documents as instructed by Loffredo, and again, Loffredo placed Firpo's initials on documents, falsely indicating that Firpo actually read and acknowledged various warnings. Two versions of a switch letter that were created from the same signed original document show that Firpo signed documents that were altered after she signed. It was Wells's practice during the relevant period to include variable annuities as liquid assets on a customer's new account form, thus creating a distorted picture of the customer's financial situation for a suitability review.

It is concluded that Wells violated the antifraud provisions of the Securities and Exchange Acts by his material misrepresentations and omissions in his dealings with customers. His permitting Loffredo to place customers' initials on documents, which he denies noticing at the time, was at least reckless – highly unreasonable and an extreme departure from the standards of ordinary care. The acts that constituted his violations were clearly intentional. Thus, his violations were willful.

C. Books and Records Violations

The OIP charged Brown, Collins, Walsh, and Wells with aiding and abetting and causing violations by PCS of Exchange Act Section 17(a) and Rule 17a-3, based on false information on account records that they created and that are required to be kept by Exchange Act Rule 17a-3(17)(i)(A).

1. Books and Records Provisions

Section 17(a)(1) of the Exchange Act provides that brokers and dealers "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." The requirement that records be kept embodies the requirement that they be accurate. James F. Novak, 47 S.E.C. 892, 897 (1983).

The Commission has emphasized the importance of the records required by the record keeping rules as "the basic source documents and transaction records of a broker-dealer." Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers, 4 SEC Docket 195, 195 (Apr. 26, 1974). The "record keeping rules are a keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies." Edward J. Mawod & Co., 46 S.E.C. 865, 873 n.39 (1977) (citation omitted), aff'd, 591 F.2d 588 (10th Cir. 1979). Scienter is not required to prove a violation of Section 17(a)(1) of the Exchange Act and the rules thereunder. Stead v. SEC, 444 F.2d 713, 716-17 (10th Cir. 1971); SEC v. Drexel Burnham Lambert Inc., 837 F. Supp. 587, 610 (S.D.N.Y. 1993), aff'd sub nom. SEC v. Posner, 16 F.3d 520 (2d Cir. 1994).

Rule 17a-3 requires brokers and dealers to make and keep current certain books and records, including, for each account with a natural person as a customer, "[a]n account record [including various personal information, such as] annual income, net worth . . . and the account's investment objectives [and that indicates] whether it has been signed by the associated person responsible for the account." Rule 17a-3(17)(i)(A).

2. Aiding and Abetting; Causing

The OIP charges that Brown, Collins, Walsh, and Wells "aided and abetted" and "caused" violations by PCS of Exchange Act Section 17(a) and Rule 17a-3. For "aiding and abetting" liability under the federal securities laws, three elements must be established: (1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation. See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000); Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985); Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir. 1980); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-97 (5th Cir. 1975); SEC v. Coffey, 493 F.2d 1304, 1316-17 (6th Cir. 1974); Russo Sec. Inc., 53 S.E.C. 271, 278 & n.16 (1997); Donald T. Sheldon, 51 S.E.C. 59, 66 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995); William R. Carter, 47 S.E.C. 471, 502-03 (1981). A person cannot escape aiding and abetting liability by claiming ignorance of the securities laws. See Sharon M. Graham, 53 S.E.C. 1072, 1084 n.33 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant. See Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990); Cornfeld, 619 F.2d at 923, 925; Rolf, 570 F.2d at 47-48; Woodward, 522 F.2d at 97. That is, it must be established that a respondent either acted with knowledge or that he "encountered 'red flags' or 'suspicious events creating reason for doubt' that should have alerted him to the improper conduct of the primary violator," or if there was a danger so obvious that he must have been aware of it. Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004).

For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. Robert M. Fuller, 56 S.E.C. 976, 984 (2003), pet. denied, No. 03-1334 (D.C. Cir. 2004). A respondent who aids and abets a violation also is a cause of the violation under the federal securities laws. See Graham, 53 S.E.C. at 1085 n.35. Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), reh'g en banc denied, 2002 U.S. App. Lexis 14543 (July 16, 2002).

3. Secondary Violations by Brown, Collins, Walsh, and Wells

PCS violated Exchange Act Section 17(a) and Rule 17a-3(17)(1)(A) in that the account records (new account forms) of Brown customers Skiena, Morton Jaye, Bogan, and Rosenberg were signed by Collins, falsely indicating that he, not Brown, was "the associated person responsible for the account."[37] Brown and Collins knowingly and substantially assisted the conduct that constituted the violation and were aware that their role was part of an overall activity that was improper in that they were covering up the fact that Brown was selling variable annuities when it was illegal for him to do so. PCS also violated those provisions in that the account records of Walsh customer Mrs. Koenig specified her account objective as "Aggressive Growth" when her goal was preservation of principal with the hope of some return, without taking risks.[38] Walsh knowingly and substantially assisted the conduct that constituted the violation and was aware that his role was part of an overall activity that was improper in that he was providing a paper record to cover up the fact that he was selling her an investment that was not in accord with her investment objective and risk tolerance. Thus, Brown, Collins, and Walsh aided and abetted and caused PCS's violations.

Wells inclusion of several customers' variable annuities as liquid assets on their new account forms[39] was erroneous and created a distorted picture of their financial situation. Wells's conduct was a cause of a violation by PCS of Exchange Act Section 17(a) and Rule 17a-3(17)(1)(A), and he should have known that his conduct would contribute to the violation. There is no evidence in the record that he was aware that his role was part of an overall activity that was improper. Accordingly, while he caused PCS's violation, he did not aid and abet it.

While other types of documents created by Brown, Collins, Walsh, and Wells, contained false information, none were records required to be kept by Exchange Act Section 17(a) and Rule 17a-3.

D. Failure to Supervise

Sections 15(b)(4)(E) and 15(b)(6)(A) of the Exchange Act authorize sanctions against a broker-dealer or any associated person who "has failed reasonably to supervise, with a view to preventing [securities] violations . . . , another person who commits such a violation, if such other

[37] These new account forms are found in Div. Exs. 66, 89, 106, and 108.

[38] Her new account form is found in Div. Ex. 110.

[39] These new account forms are found in Div. Exs. 165, 170, 181, 186, and 189.

person is subject to his supervision." Ryan, Rudden, and Collins are charged with having failed reasonably to supervise, variously, Brown, Collins, Walsh, and Wells.

1. Collins

Collins was charged with failure to supervise Brown. Although appointed as the OSJ principal responsible for reviewing Brown's transactions, Collins abdicated supervision. Instead, he joined Brown in wrongdoing by placing his name and signature on Brown's transactions in an attempt to disguise Brown's role in selling variable annuities when it was illegal for him to do so. Thus, rather than supervising Brown with a view to preventing violations, Collins assisted Brown in violating the antifraud provisions and in attempting to cover up the misconduct. Accordingly, he "failed reasonably to supervise" Brown within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6)(A).

2. Ryan and Rudden

The Commission has held that

> (1) one who exercises compliance responsibilities in a brokerage firm may be subject to liability under Section 15(b) of the Exchange Act for failing reasonably to supervise the activities of the firm's employees, and (2) determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. [citations omitted.]

Patricia Ann Bellows, 67 SEC Docket 2910, 2912 (Sept. 8, 1998).[40]

"Ultimately, it is the broker-dealer's president who is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient." Sheldon, 51 S.E.C. at 79. The Commission distinguishes between persons who are clearly direct, line supervisors, for example, a category that includes Ryan as president of PCS, and employees of brokerage firms, who, like Rudden, have legal or compliance responsibilities. A direct supervisor is presumed to be a supervisor for the purpose of a failure to

[40] The settlement and Report of Investigation Pursuant to Section 21(a) of the Exchange Act reported at John H. Gutfreund, 51 S.E.C. 93, 113 (Dec. 3, 1992) in which the "responsibility, ability, or authority" test was articulated has been referenced many times by the Commission in litigated cases -- both in administrative proceedings and in review of NASD disciplinary proceedings for violation of the broader NASD (now FINRA) Conduct Rule 3010. See administrative proceedings George J. Kolar, 55 S.E.C. 1009, 1016-17 (2002), James J. Pasztor, 54 S.E.C. 398, 407-10 & nn.27-28 (1999), Bellows, supra, C. James Padgett, 52 S.E.C. 1257, 1266 n.32 (1997); review of NASD disciplinary proceedings Steven P. Sanders, 53 S.E.C. 889, 904 & n.30 (1998), Conrad C. Lysiak, 51 S.E.C. 841, 844 & n.13 (1993), Douglas Conrad Black, 51 S.E.C. 791, 795 n.13 (1993).

supervise charge, while a compliance officer must be shown to have the responsibility, ability, and authority to affect the conduct of an employee who has violated the securities laws in order to be considered his supervisor. Compare James J. Pasztor, 54 S.E.C. 398, 409-10 & nn.27-28 (1999) with Bellows, 67 SEC Docket at 2912; John H. Gutfreund, 51 S.E.C. 93, 113 (Dec. 3, 1992). The fact that an individual's responsibility is shared with others or subject to countermand at a higher level does not in itself relieve him from liability for supervisory failure. George J. Kolar, 55 S.E.C. 1009 (2002), 1018; Robert J. Check, 49 S.E.C. 1004, 1008 (1988); see also Louis J. Trujillo, 49 S.E.C. 1106 (1989) (finding that an individual whose authority was limited to investigation and recommendation was a supervisor within the meaning of Exchange Act 15(b) and that he had executed his responsibilities reasonably under the attendant circumstances). The record shows that Rudden had the responsibility, ability, and authority to affect the conduct of Brown, Collins, Walsh, and Wells since at least early 2004, when she was appointed compliance director and tasked with upgrading PCS's compliance following the 2003 NASD examination.

Supervision of an associated person must be reasonable under the attendant circumstances. Clarence Z. Wurtz, 54 S.E.C. 1121, 1130 (2001) (quoting Arthur James Huff, 50 S.E.C. 524, 528-29 (1991)); see also Trujillo, 49 S.E.C. at 1110 (supervision must be reasonable under all the circumstances). The Commission has warned broker-dealers of "the so-called 'big producer' who, despite a myriad of warnings to management, is allowed to continue his depredations to the detriment of public investors." Albert Vincent O'Neal, 51 S.E.C. 1128, 1136 (1994). The Commission has frequently stated that "[s]upervisors cannot rely on the unverified representations of their subordinates" and that "it may be necessary for a supervisor to contact a salesman's customers after being alerted to possible misconduct on the part of the salesman." Kolar, 55 S.E.C. at 1019 (citations omitted). Further, "supervisors must act decisively when an indication of irregularity is brought to their attention. That irregularity need not be a violation of the securities laws." Kolar, 55 S.E.C. at 1015-16. For example, the irregularity could be a violation of firm policies, Quest Capital Strategies, Inc., 55 S.E.C. 362 (2001), or a FINRA complaint not involving securities violations, Consolidated Inv., Servs., Inc., 52 S.E.C. 582, 587-89 (1996). "Moreover, once a supervisor learns that a registered representative has engaged in misconduct, the representative cannot be retained unless he or she is subjected to enhanced supervision." Quest, 55 S.E.C. at 371 (citing Consolidated, 52 S.E.C. at 588 and cases cited in n.27 thereof). See also James Harvey Thornton, 53 S.E.C. 1210, 1213-14 (1999), aff'd 199 F.3d 440 (5th Cir. 1999).

Ryan and Rudden were located at PCS's home office in Poughkeepsie, far from the Florida locations of Brown, Collins, Walsh, and Wells. "This Commission and the [NASD] have underscored the challenge of effectively supervising registered representatives in remote locations." Thornton, 53 S.E.C. at 1216. The Commission considers that surprise inspections should be among the methods used in supervising registered representatives in such situations. Quest, 55 S.E.C. at 372, Thornton, 53 S.E.C. at 1216, Consolidated, 52 S.E.C. 586-87. In one situation involving a broker-dealer with many small offices at remote locations at which mutual funds were sold, the Commission found its president's supervision to be reasonable in view of procedures that included, in addition to memos, compliance alerts, and inspections, review by a principal in the home office of every transaction. If the review principal had a concern about a transaction, it was referred to the compliance department. IFG Network Sec., Inc., 88 SEC Docket 1372 (July 11, 2006). These safeguards were missing in the supervision of Brown, Collins, Walsh, and Wells.

Both Ryan and Rudden upgraded compliance at PCS during the relevant period. Ryan hired several new employees to expand the compliance department prior to Rudden's arrival. At Ryan's instruction, Rudden strengthened compliance procedures, such as requiring a much larger number of case files to be reviewed during annual branch examinations than in the earlier years of the relevant period. While these steps were commendable, nonetheless, each failed reasonably to supervise the registered representatives at issue in this proceeding so as to prevent their violations of the securities laws. Although Ryan had delegated compliance functions to Rudden and previous CCOs, he was aware of irregularities and involved in dealing with them. While Rudden's authority increased during the relevant period, with her promotion to compliance director in early 2004 and to CCO in April 2005, the record does not contain evidence that any of her recommendations were ignored or refused.

There were indications of irregularity in the form of complaints known to Rudden and Ryan as well as deficiencies found in branch examinations. Additional red flags would have been seen if PCS's own written supervisory procedures regarding review of registered representatives' transactions had been followed.[41] As Respondents point out, after-the-fact review that was said to be PCS's practice, was consistent with NASD rules at the time, which did not require that a variable annuity application be reviewed and approved by a registered principal prior to being sent to the insurance company. However, there was no meaningful after-the-fact review of transactions at issue in this proceeding. There was no review of Walsh's transactions until long after Ginsberg became his OSJ principal in November 2003 and commenced a lengthy struggle to obtain his files. Likewise, there was no meaningful review of Brown's transactions until at least May 2005, as Collins and Southard performed no supervision of Brown. Additionally, it is questionable whether there was meaningful review of Wells's transactions, given that a sales assistant was OSJ principal for the office. Clearly, given the distance from the home office in Poughkeepsie of the branch offices in Florida, a stronger supervisory regime was called for.

It goes without saying that sending the applications to the insurance companies as soon as possible without waiting for approval by a principal expedited receipt of commissions by PCS and

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[41] A FINRA rule relating to variable annuity transactions now requires, inter alia, review and approval by a registered principal before a customer's application is transmitted to the insurance company. Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a/ Financial Industry Regulatory Authority, Inc.); Notice of Filing of Amendment Nos. 3 and 4 and Order Granting Accelerated Approval of the Proposed Rule, as Amended, Related to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities, 72 Fed. Reg. 52403 (Sept. 13, 2007). As Respondents point out, the rule became effective subsequent to the events at issue. However, the NASD's examinations and enforcement actions over the years clearly demonstrated an entrenched problem in the sales culture for these products. Id. at 52412. The NASD had attempted over the previous few years to address problematic and unsuitable sales through non-rulemaking means, but had not found that approach to be successful. While it issued a number of Notices to Members and Regulatory and Compliance Alerts regarding the suitability of variable annuities, it continued to encounter numerous questionable sales practices through its examinations as well as through its investigation and informal discussions with its members. Id. Indeed, the NASD had examined PCS's variable annuity sales practices in 2003, resulting in the AWC, yet questionable sales practices continued after the examination.

the registered representatives. This philosophy animated the registered representatives at issue, as well. Every customer testified that he or she was rushed through signing documents without being given a chance to read them, much less fill them out.

a. Supervision of Walsh

There was no OSJ review of Walsh's transactions prior to Ginsberg's assignment as his OSJ principal in November 2003. The May 2002 branch examination report stated that the branch manager – Walsh – reviews all transactions. That report was submitted to then-CCO Southard but was never reviewed. The report of the April 2003 examination again indicated that Walsh's transactions were not reviewed by an OSJ principal and found other deficiencies. That report was submitted to Rudden, who did not review it until October 2003, but noted the need for follow-up. When Ginsberg became Walsh's OSJ principal, he received from Rudden a list of unreviewed transactions, going back a year or more. As he informed Rudden, he experienced difficulty in reviewing the transactions because Walsh refused to meet with him or return his phone calls. Instead, Walsh complained to Rudden about Ginsberg's supervision, and she treated the situation as a human relations problem between Ginsberg and Walsh, rather than disciplining Walsh for his refusal to submit to any supervision from PCS. Subsequent branch examinations were conducted by Ginsberg, who was, in effect, examining his own work. The final branch examination in the record, conducted in August 2006, reviewed seventy-six files, found few documentation deficiencies, but found indications of unsuitable recommendations. Rudden's response to investor complaints about Walsh's sales practices did not include contacting the investor to obtain his or her side of the story. Rather, in every case, she uncritically accepted Walsh's version of events. Even at the hearing, she endorsed the language in her subordinate's letter to the Merrills that in effect told them that Walsh's misrepresentations were excused by disclosures in the prospectus and other selling documents that they should have scrutinized. The record contains such unsatisfactory responses to complaints during 2005, 2006, and as late as September 15, 2008, in the case of the Merrills.

The 2002 and 2003 branch examinations examined only a handful of files, and the 2002 examination report went unreviewed in the home office. The April 2003 examination report was reviewed in October 2003 by Rudden, who recommended follow-up. Ginsberg was appointed OSJ principal soon thereafter. While Rudden commendably assigned Ginsberg to supervise Walsh, she failed to back him up in the face of Walsh's evasive tactics and even handled Walsh's intransigence as an interpersonal problem between Walsh and Ginsberg, without insisting that he make himself and his transactions available for review. When faced with Walsh's misconduct in refusing to make his transactions available for inspection, Rudden should have enforced heightened supervision or recommended to Ryan that he be fired. Failure to take such decisive steps allowed Walsh to continue his violative conduct into 2006. Ryan was aware of the problem of bringing Walsh under control by April 2005 but agreed with Rudden's handling of the matter.

b. Supervision of Brown

During the time during the relevant period that Southard was Brown's supervisor through 2001, there was very little interaction between her and Brown. Collins's period of supervision was between September 2002 and January 2005. As discussed above, his supervision was deficient.

Ginsberg discovered this when he performed a branch examination in May 2004, with follow-up visits in July and October. In his October 2004 memo to Rudden, Ginsberg stated that there was "complete lack of supervision and evidence of OSJ review by Matt Collins." Further, he described Brown's business as "Money in Motion," with frequent exchanges of variable annuities and improper mutual fund sales practices. Indeed, Brown was one of PCS's biggest producers, and Ryan's and Rudden's shortfalls in supervision allowed him to continue generating commissions.

When Ryan and Rudden learned of Brown's Florida license revocation in December 2003 and early 2004, their reaction was to allow him to continue selling variable annuities until they found out definitively, in writing, that his license was actually revoked; a more prudent course would have been to halt his sales until receiving definitive word that his license was in good standing. Ryan has accepted responsibility for the decision to allow him to continue selling variable annuities during this period. A similar attitude is shown between April 2004 and May 2005 in their invoking the advice of an attorney to parse the term "marketing" in order to allow Brown to continue conducting free-lunch seminars at which he discussed variable annuities with the intention of attracting the attendees to his office to buy variable annuities. Further, their plan to prevent Brown from selling variable annuities in violation of the Florida restrictions during that time period was fatally flawed. It consisted of preventing commissions being paid to him after sales were made, and thus was easily evaded with the assistance of Collins. Heightened supervision of Brown, with review and approval in the home office of applications before submitting them to the insurance companies would have been more effective in obtaining compliance. Surprise inspections might have detected Brown's illegal sales. A similar attitude of Ryan and Rudden is in their reaction to complaints about Brown's sales practices. Both were aware of Elkin's allegation that Brown had forged her signature on a selling document. When they received the opinion of a handwriting expert that neither Elkin nor Brown had written the signature, they considered Brown vindicated since he had not actually written it himself, instead of considering this information a red flag about Brown's sales practices. They failed to consider that Brown might have procured the signature from a third person. When notified of the Bogan/Rosenberg complaint, Ryan believed that it might have been fabricated, but dispatched Rudden and the firm's general counsel to investigate. He retains this belief, although this may not be reasonable when considered in the context of the other complaints about Brown's variable annuity sales practices and the Jayes' complaint about his mutual fund sales practices.

Branch examinations in 2002 and 2003 reviewed only a handful of case files, and the 2002 report went unreviewed in the home office. However, in October 2003, Rudden sent Brown a letter of training concerning documentation PCS required for variable annuity transactions. The next, more comprehensive examination, under Rudden's leadership, was performed by Ginsberg in May 2004, with follow-up visits in July and October, which he documented in a memo to Rudden, listing deficiencies. Thereafter, in January 2005, Rudden replaced Collins as OSJ principal with Ginsberg and placed Brown on heightened supervision in March 2005, with Ginsberg as supervising principal and a requirement that Brown submit variable annuity transactions to the home office for review and other requirements. Ryan was aware of and satisfied with these measures. These steps were an improvement in the supervision of Brown but should have occurred at least one year earlier.

c. Supervision of Collins

From December 2002 to May 2004, when Ginsberg was appointed his OSJ principal, Collins was unsupervised. Thus, the CCOs during that time period, who appointed OSJ principals, failed reasonably to supervise him. During 2004, as late as May 2004, Collins signed forms that he submitted to the compliance department that stated that, as a producing registered principal, he sent all his business to the home office for review. The same representation was made in a 2003 branch examination. The statement was false, yet it went undetected, or at least unsanctioned, by the compliance department. To the extent that Collins's name was on Brown's sales, supervision of him was not reasonable.

During his one-year probationary period pursuant to the 2006 Florida Consent Order, Collins was not on any heightened supervision and did not receive any re-training. A June 2007 branch examination disclosed numerous deficiencies in documentation for Collins's sales of variable annuities.

d. Supervision of Wells

Appointing a sales assistant to be OSJ principal showed the lack of importance PCS placed on compliance. No matter how knowledgeable and well-qualified Andersen was for that position, her status in the office communicated the lack of importance of compliance to the registered representatives in the office. To make matters worse, the registered representative for whom she worked as sales assistant required special supervision.

The fact that Loffredo's practice of writing customers' initials to indicate their acknowledgement of various warnings continued for some time shows a lack of reasonable supervision since the dissimilarity of the handwriting of the initials to the customers' signatures (and similarity to the remaining handwritten entries on the forms) can be ascertained at a glance.

As with other branches, the 2002 branch examination reviewed only a handful of files and went unreviewed in the home office. An October 2003 branch examination found missing documentation, and after a March 2004 review in the home office, training was ordered. The next examination, in November 2004 found missing documentation and deficiencies as to several registered representatives, including Wells. More training occurred. Examinations by Ginsberg in December 2005, reviewed in January 2006, and November 2006, reviewed in March 2007, continued to note missing new account forms.

IV. SANCTIONS

The Division requests cease-and-desist orders against Brown, Collins, Walsh, and Wells.[42] It also requests disgorgement of ill-gotten gains by Brown, Collins, Walsh, and Wells. As to all six Respondents, it requests third-tier civil money penalties in unspecified amounts. It requests that Brown, Collins, Walsh, and Wells be barred from association with any broker, dealer, or investment adviser and that Ryan and Rudden be barred from association in a supervisory capacity with any broker, dealer, or investment adviser. As discussed below, these sanctions will be ordered:

> Brown, Collins, Walsh, and Wells will be ordered to cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a) and Exchange Act Sections 10(b) and 17(a) and Rules 10b-5 and 17a-3 thereunder;
>
> disgorgement of ill-gotten gains will be ordered against Brown ($41,992), Collins ($2,915), Walsh ($24,790), and Wells ($6,609);
>
> Brown, Collins, Walsh, and Wells will each be ordered to pay third-tier civil money penalties of $130,000, and Ryan and Rudden will each be ordered to pay second-tier civil money penalties of $65,000; and
>
> Brown, Collins, Walsh, and Wells will be barred from association with any broker, dealer, or investment adviser, and Ryan and Rudden will be barred from association in a supervisory capacity with any broker, dealer, or investment adviser with the right to reapply after one year.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> 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 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a

[42] The Division also requests that Ryan and Rudden be ordered to cease and desist from committing or causing violations of Exchange Act Section 15(b)(4)(E). However, that provision authorizes the Commission to impose sanctions on individuals and broker-dealers. Thus, by its own terms, it cannot be violated. See Arthur James Huff, 50 S.E.C. at 529.

deterrent effect. Schield Mgmt. Co., 87 SEC Docket 848, 862 & n.46 (Jan. 31, 2006). The Commission also considers the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

B. Sanctions

1. Cease and Desist

Sections 8A of the Securities Act, 21C of the Exchange Act, and 203(k) of the Advisers Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of the Acts or rules thereunder. Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, 54 S.E.C. at 1185. Such a showing is "significantly less than that required for an injunction." Id. at 1183-91. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors, and the combination of sanctions against the respondent. See id. at 1192. See also WHX Corp. v. SEC, 362 F.3d 854, 859-860 (D.C. Cir. 2004).

As concluded above, Brown, Collins, Walsh, and Wells each violated the antifraud provisions over a period of time in their sales of variable annuities, and Brown, Collins, and Walsh aided and abetted, and they and Wells caused, violations by PCS of books and records provisions. These violations were egregious. All four Respondents' violations were part of a pattern and were also flagrant and deliberate, involving a high degree of scienter. Even the books-and-records violations were in aid of evading legal requirements regarding the sale of variable annuities. None of the four made assurances against future violations. Consistent with a vigorous defense of the charges, Collins and Wells did not admit wrongdoing. The business of the four registered representatives will present opportunities to violate the law in the future. The degree of harm to investors cannot be quantified but clearly exceeds the amount of ill-gotten gains each received. Thus, Brown, Collins, Walsh, and Wells will be ordered to cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a) and Exchange Act Sections 10(b) and 17(a) and Rules 10b-5 and 17a-3.

2. Disgorgement

Sections 8A(e) of the Securities Act, 21C(e) of the Exchange Act, and 203(j) of the Advisers Act authorize disgorgement of ill-gotten gains from Brown, Collins, Walsh, and Wells. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity.

The Division requests disgorgement of the commissions Brown, Collins, Walsh, and Wells received from the sales described in the Findings of Fact. Respondents point to payments by Collins and Wells toward settlement of customers' claims that reduce or exceed any gain received. Disgorgement will be ordered as to ill-gotten gains in the form of commissions received from sales to customers who testified at the hearing. Disgorgement as to an individual customer will be offset by any payments a Respondent made toward settlement of a claim by that customer. Additionally, since the evidence as to non-testifying Brown customers Reiss and Kirschner and Walsh customer Angelillo shows that Brown and Walsh violated the antifraud provisions in their dealings with those customers, disgorgement of commissions each received from sales to them will be ordered as well. Evidence as to the remaining non-testifying customers, of Wells, is limited to account documents that, standing alone, are an insufficient basis for a conclusion of violation. Accordingly, disgorgement of commissions received for sales to Adler and the Donnakanians will not be ordered. See Laurie Jones Canady, 54 S.E.C. 65, 84 (1999), recon. denied, 54 S.E.C. 255 (1999), pet. for review denied, 230 F.3d 362 (2000) (disgorgement amount to reflect only clearly proven ill-gotten gains from churning accounts of several customers who testified about their dealings with Respondent; no disgorgement of commissions from unsolicited trades and from accounts of similar customers who did not testify absent supporting evidence concerning the element of "control" to establish churning; such evidence could include testimony by the customer, salesperson or other personnel, customer affidavits, or even customer correspondence).

Accordingly, Brown will be ordered to disgorge $41,992, the total of commissions received from sales to Elkin, Kirschner, Reiss, and Schlager. Collins will be ordered to disgorge $2,915, the total of commissions received from Jaye and Skiena; commissions ($2,126) received from Bogan and Rosenberg were offset by $25,000 he paid toward settlement of their complaint against PCS. Walsh will be ordered to disgorge $24,790, the total of commissions received from sales to Angelillo, Chambers, Hannon, and the Merrills. Wells will be ordered to disgorge $6,609 in commissions received from sales to Arndt. Commissions received from sales to Bell ($5,649) and Firpo ($14,947) were offset by payments of $10,000 and $15,750, respectively, he made toward settlement of their claims.

3. Civil Money Penalty

Sections 21B of the Exchange Act and 203(i) of the Advisers Act authorize the Commission to impose civil money penalties for willful violations of the Securities, Exchange, or Advisers Acts or rules thereunder or for failure reasonably to supervise another person who has committed such violations. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Section 21B(c) of the Exchange Act; New Allied Dev. Corp., 52 S.E.C. 1119, 1130 n.33 (1996); First Sec. Transfer Sys., Inc., 52 S.E.C. 392, 395-96 (1995); see also Jay Houston Meadows, 52 S.E.C. at 787-88; Consolidated, 52 S.E.C. at 590-91.

As to Brown, Collins, Walsh, and Wells, there are no mitigating factors, and there are several aggravating factors. They violated the antifraud provisions, so their violative actions "involved fraud [and] reckless disregard of a regulatory requirement" within the meaning of

Sections 21B(c)(1) of the Exchange Act and 203(i)(2) of the Advisers Act. While the commissions each received from his violative transactions and the perceived losses of the elderly customers were not monumental by Wall Street standards, they were substantial in their context. Deterrence requires substantial penalties against the registered representatives because of the flagrant and deliberate nature of the violations and the vulnerability of the customers. As to Ryan and Rudden, each made an effort toward strengthening compliance. However, their efforts were insufficient to prevent or detect the registered representatives' continuing violations for a lengthy period. Deterrence also requires that penalties be ordered against Ryan and Rudden.

Penalties are in the public interest in this case. Penalties in addition to the other sanctions ordered are necessary for the purpose of deterrence. See Sections 21B(c)(5) of the Exchange Act and 203(i)(3)(E) of the Advisers Act; see also H.R. Rep. No. 101-616 (1990). The Division requests that each Respondent be ordered to pay third-tier penalties without specifying dollar amounts or units of violation. In addition to arguing that there were no violations, Respondents Ryan, Rudden, Collins, and Wells argue that civil penalties are not warranted, much less third-tier penalties. They argue that Ryan and Rudden received no pecuniary gain from the events in question, that Collins and Wells received less than substantial pecuniary gain, and that there were no substantial losses, especially if surrender charges are disregarded. Third-tier penalties, as the Division requests, are appropriate for Brown, Collins, Walsh, and Wells because their violative acts involved fraud and resulted in the risk of substantial losses to other persons as well as pecuniary gain to the violators. See Sections 21B(b)(3) of the Exchange Act and 203(i)(2)(C) of the Advisers Act. Second-tier penalties are appropriate for Ryan and Rudden; their deficient supervision "allowed and [was] responsible, in part, for the success and duration of [the registered representatives'] fraudulent conduct" and thus "involved" fraud. Kolar, 55 S.E.C. at 1022; Consolidated, 52 S.E.C. at 1090.

Under Sections 21B(b) of the Exchange Act and 203(i)(2) of the Advisers Act, for each violative act or omission after February 14, 2005, the maximum third-tier penalty is $130,000 for a natural person; for those from June 30, 2004, up to that date, $120,000; the maximum second-tier penalty for those dates is $65,000 and $60,000, respectively; the maximum first-tier penalty is $6,500 for the entire period. 17 C.F.R. §§ 201.1002, .1003. Sections 21B of the Exchange Act and 203(i) of the Advisers Act, like most civil penalty statutes, leave the precise unit of violation undefined. See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 COLUM. L. REV. 1435, 1440-41 (1979).

For each Respondent, the events at issue will be considered as one course of action resulting in one unit of violation. Third-tier penalty amounts of $130,000 will be ordered against Brown, Collins, Walsh, and Wells, and second-tier penalty amounts of $65,000 will be ordered against Ryan and Rudden.

4. Bar and Suspension

The Division requests that Brown, Collins, Walsh, and Wells be barred from association with any broker, dealer, or investment adviser, and that Ryan and Rudden be barred from association in a supervisory capacity with any broker, dealer, or investment adviser. These remedies are authorized pursuant to Sections 15(b) of the Exchange Act and 203(f) of the

Advisers Act. As the Division requests, Brown, Collins, Walsh, and Wells will be barred from association with any broker, dealer, or investment adviser. Combined with other sanctions ordered, bars are in the public interest and appropriate deterrents. The violations involved scienter. These Respondents' business provides them with the opportunity to commit violations of the securities laws in the future. The record shows a lack of recognition of the wrongful nature of their conduct. In the case of Brown and Collins, their substitution of Collins's name and signature on customer documents with an eye to enabling Brown to continue selling variable annuities when it was illegal for him to do so is particularly reprehensible. Walsh's history of attempts to evade supervision makes it particularly essential to bar him from association with any broker, dealer, or investment adviser. Rather than a permanent supervisory bar for Ryan and Rudden, a bar from association in a supervisory capacity with any broker, dealer, or investment adviser with the right to reapply after one year will be ordered. In light of the combination of other sanctions and their efforts, although insufficient, to improve compliance at PCS, supervisory bars with the right to reapply after one year are appropriate.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on June 7, 2010, and, additionally, Division Exhibits 700, 701, 702, 703, 704, 705, and 706, documents related to the Merrills' transactions, which were admitted on December 3, 2009.

VI. ORDER

IT IS ORDERED that, pursuant to Sections 8A of the Securities Act, 21C of the Exchange Act, and 203(k) of the Advisers Act,

> Eric J. Brown CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Sections 10(b) and 17(a) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder;
>
> Matthew J. Collins CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Sections 10(b) and 17(a) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder;
>
> Kevin J. Walsh CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder; and
>
> Mark W. Wells CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Sections 10(b) and 17(a) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Sections 8A(e) of the Securities Act, 21C(e) of the Exchange Act, 203(j) of the Advisers Act, Eric J. Brown DISGORGE $41,992 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Pursuant to 17 C.F.R. § 201.600, prejudgment interest is due from November 1, 2001, through the last day of the month preceding which payment is made;

Matthew J. Collins DISGORGE $2,915 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Pursuant to 17 C.F.R. § 201.600, prejudgment interest is due from March 1, 2005, through the last day of the month preceding which payment is made;

Kevin J. Walsh DISGORGE $24,790 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Pursuant to 17 C.F.R. § 201.600, prejudgment interest is due from March 1, 2006, through the last day of the month preceding which payment is made; and

Mark W. Wells DISGORGE $6,609 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600. Pursuant to 17 C.F.R. § 201.600, prejudgment interest is due from June 1, 2006, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Sections 21B of the Exchange Act and 203(i) of the Advisers Act,

Michael P. Ryan PAY A CIVIL MONEY PENALTY of $65,000;

Rose M. Rudden PAY A CIVIL MONEY PENALTY of $65,000;

Eric J. Brown PAY A CIVIL MONEY PENALTY of $130,000;

Matthew J. Collins PAY A CIVIL MONEY PENALTY of $130,000;

Kevin J. Walsh PAY A CIVIL MONEY PENALTY of $130,000; and

Mark W. Wells PAY A CIVIL MONEY PENALTY of $130,000.

IT IS FURTHER ORDERED that, pursuant to Sections 15(b) of the Exchange Act and 203(f) of the Advisers Act,

Michael P. Ryan IS BARRED from association in a supervisory capacity with any broker, dealer, or investment adviser WITH THE RIGHT TO REAPPLY after one year;

Rose M. Rudden IS BARRED from association in a supervisory capacity with any broker, dealer, or investment adviser WITH THE RIGHT TO REAPPLY after one year;

Eric J. Brown IS BARRED from association with any broker, dealer, or investment adviser;

Matthew J. Collins IS BARRED from association with any broker, dealer, or investment adviser;

Kevin J. Walsh IS BARRED from association with any broker, dealer, or investment adviser; and

Mark W. Wells IS BARRED from association with any broker, dealer, or investment adviser.

Payment of disgorgement and penalties shall be made on the first day following the day this initial decision becomes final by certified check, U.S. Postal money order, bank cashier's check, or bank money order payable to the Securities and Exchange Commission. The check[s] and a cover letter identifying the Respondent[s] and Administrative Proceeding No. 3-13532 should be delivered by hand or courier to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter should be sent to the Commission's Division of Enforcement at the same address.

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.

Carol Fox Foelak
Administrative Law Judge