

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Cecil E. Nivens
(CRD No. 2110613),

Respondent.

DISCIPLINARY PROCEEDING
No. 2014040873501

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. From on or about February 25, 2012 through on or about April 5, 2013 (the "Relevant Period"), while registered with NYLife Securities, LLC ("NYLife" or the "Firm"), Respondent Cecil E. Nivens ("Nivens" or "Respondent") circumvented NYLife's written supervisory procedures (WSPs) by failing to process as replacement trades 15 variable universal life (VUL) purchase transactions, totaling approximately \$439,805 in first year premiums, even though Nivens recommended that each purchase be funded by withdrawals from an existing variable annuity. Also in connection with these transactions, Nivens submitted documents to his Firm and presented documents to his customers that contained misrepresentations and false information. Nivens's actions were in violation of FINRA Rules 4511 and 2010.

RESPONDENT AND JURISDICTION

2. Nivens first entered the securities industry in May 1991 as an Investment Company and Variable Contracts Products Representative of NYLife, a FINRA member firm.
3. Nivens, during all periods mentioned herein, was associated with NYLife and was registered with FINRA under Article V of the By-Laws as an Investment Company and Variable Contracts Products Representative and a Direct Participation Program Representative.
4. Nivens resigned from NYLife on February 1, 2014, and NYLife filed a Uniform Notice of Termination of Securities Industry Registration ("Form U5") on February 28, 2014, reporting that the Firm had requested information from Nivens regarding payments to the Internal Revenue Service, and rather than provide the information, Nivens tendered his resignation.
5. Since his termination, Nivens has not been associated with any other member firm.
6. Although Nivens is no longer associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the Firm filed an amendment to Nivens's Form U5 on June 23, 2015, and (2) the Complaint charges Nivens with misconduct committed while he was registered with a FINRA member.

BACKGROUND

Nivens's Investment Strategy

7. During the Relevant Period, Nivens recommended that 15 customers purchase VULs using funds from existing variable annuities to pay the VUL premiums.
8. In order to persuade his customers to engage in this strategy, Nivens showed his clients a tax chart of the "Historical Maximum Marginal Tax Rate" which showed a 60.67% average rate from 1913 to the present.
9. Nivens would then pose four questions to his customers:
 - Do you think taxes are going to be higher in the future?
 - Do you think that taxes will be way higher?
 - Do you want to pay those taxes?
 - Do you want to make changes after they change the tax law or before they change the tax law?
10. Nivens recommended that his customers withdraw money from their existing variable annuities; deposit the checks from the variable annuity carriers into their personal bank accounts; then write checks to pay the premiums for a new variable life policy. Once the funds were invested in the variable life policies, the customers could access their money on a tax-free basis by taking loans on the life insurance policies. Nivens explained that this would provide them with tax-free supplemental income.

NYLife's Replacement Procedures

11. During the Relevant Period, NYLife's WSPs defined a replacement as "a transaction where a new life insurance or annuity policy is to be purchased and the Agent knows or should have known that an existing life insurance or annuity policy has been or will be affected or changed within 13 months before or after the proposed purchase."
12. The Firm's WSPs listed several specific changes to an existing policy or annuity that would trigger a replacement, including "withdrawal of policy values including using the withdrawn funds to pay for all or part of the proposed policy."
13. The WSPs emphasized the suitability concerns that exist when a customer uses funds from an existing annuity or policy to fund a new product, stating that a registered representative should make sure that the customer understands all of the advantages and disadvantages between the existing product and the new product such as tax ramifications, loss or reduction of benefits, holding period of the existing product, new sales charges or acquisition costs.
14. NYLife's WSPs further required that certain forms be completed as part of the application process for the sale of any variable product.
15. The required VUL application attached a two page Replacement Form. The first question on the Replacement Form asked "Do you own any existing life insurance policies or annuity contracts?" If the box was marked "yes," the applicant was required to complete a series of questions regarding the replacement, including a clear rationale for the replacement.

16. The Replacement Form also required certification by the registered representative as to whether a replacement was involved.
17. The Replacement Form ended with a list of concerns that the customer should discuss with the registered representative in the event of a replacement.
18. The VUL application also asked questions regarding the source of funds, specifically asking whether the source of funds was an annuity. Where the source of funds was an annuity, the VUL application required completion of several additional questions regarding the replacement. These questions were in addition to questions posed on the Replacement Form.
19. The Firm's WSPs required that each transaction identified as a replacement in the application be manually reviewed for suitability by a registered principal.
20. In addition, NYLife had surveillance systems that monitored for problematic patterns of exchange on the part of individual registered representatives. These monitoring systems were triggered by the identification of the transaction as a replacement in the VUL application and Replacement Form.

FIRST CAUSE OF ACTION
Unethical Conduct – Circumvention of
Firm Procedures/Concealment of Replacements
(Violation of FINRA Rule 2010)

21. The Department realleges and incorporates by reference paragraphs 1 through 20 above.
22. Nivens circumvented NYLife's supervisory and compliance procedures by failing to identify and process 15 VUL purchases as replacements (totaling approximately \$439,805 in first year premiums), even though each purchase of a VUL was funded

by a withdrawal from a variable annuity. The variable product replacements and associated customers are listed on Exhibit A attached to this Complaint and incorporated herein by reference.

Nivens was Aware that the Firm Intensively Scrutinized Replacements

23. From 2010 to Nivens's departure from the Firm in 2014, he was subject to heightened supervision by the Firm.
24. The heightened supervision review included a review of the number of replacement transactions processed by Nivens and the suitability of those transactions.
25. As part of the heightened supervision plan, the Firm reviewed Nivens's replacement rate on variable products on a quarterly basis.
26. For the third quarter of 2010, the Firm's replacement report flagged Nivens for having a 56.25% replacement rate.
27. For the fourth quarter of 2010, the Firm's replacement report flagged Nivens for having a 41.67% replacement rate.
28. For the second quarter of 2011, the Firm's replacement report flagged Nivens for having a 46.15% replacement rate.
29. Because of the replacement rate issues, several variable annuity transactions submitted by Nivens were put on hold, pending further review with Nivens. These replacements involved replacement of a variable annuity with another variable annuity. The Firm eventually approved the replacements due to lack of surrender charges associated with the transactions.
30. In addition, the Firm contacted a number of customers to ask questions related to suitability of the investments.

31. Nivens was aware of the additional degree of scrutiny that the Firm applied to his replacements under the heightened supervision plan.
32. Avoidance of this additional supervision provided motivation for Nivens to conceal that the transactions in 2012 and 2013 for his customers were replacements.
33. Nivens's actions in circumventing Firm procedures and concealing replacements allowed him to continue his pattern of frequently recommending exchanges to reap the benefit of a new commission without being subject to the Firm's heightened level of supervisory review associated with such transactions.
34. Each of the VULs was reviewed by a NYLife supervisor who was unaware that the purchase transaction was part of a replacement. As a result of Nivens's concealment, the NYLife supervisor reviewing the transaction did not know to perform the heightened review required for replacements.
35. As a result of the 15 transactions at issue, Nivens received \$185,737.00 in commissions on the VULs. These commissions were in addition to commissions he had already received on the purchases of the variable annuities that he sold to the same customers.

Nivens's Conduct Caused Harm to his Customers

36. To avoid detection by NYLife of the source of the annual premiums for the VULs, Nivens did not process the withdrawals from the variable annuities used to fund the VULs as exchanges under 26 U.S. Code §1035 ("1035 exchanges").
37. By failing to process the replacements as 1035 exchanges, Nivens caused the 15 customers to pay taxes on the variable annuity withdrawals. If Nivens had properly

characterized the exchanges, the customers could have avoided significant tax consequences.

38. Nivens further concealed the variable annuity replacements from NYLife's supervisory review by directing the customers to write a personal check to fund the annual premium and to fund the check by withdrawing funds from the variable annuity either before or after issuance of the check.
39. Nivens's failure to characterize the transactions as replacements also made the warnings accompanying the VUL applications appear irrelevant to the customers. Each variable annuity application contained a required two-page document entitled "IMPORTANT NOTICE: REPLACEMENT OF LIFE INSURANCE OR ANNUITIES" that included warnings, explanations, and important factors to consider in an exchange, including a situation in which the customer kept both policies. However, because Nivens certified on page one of the documents that the transactions did not involve replacements, he made it appear that the considerations on this two page disclosure did not apply to the VUL purchases.
40. Additionally, eight of the customers unnecessarily incurred surrender charges on the variable annuity withdrawals in the total amount of \$4,258.19.
41. Fourteen of the fifteen VUL's at issue were surrendered by the customers or rescinded by NYLife as a result of customer complaints and settlement agreements entered into between NYLife and the customers in 2013 to 2015.
42. NYLife has paid \$558,848 in settlement of customer complaints associated with Nivens's sales of VULs.
43. By reason of the foregoing, Nivens violated FINRA Rule 2010.

SECOND CAUSE OF ACTION
Falsification of Records
(Violation of FINRA Rules 4511 and 2010)

44. The Department realleges and incorporates by reference paragraphs 1 through 43 above.
45. For each of the VULs, Nivens submitted to the Firm annuity documents containing misrepresentations and false information that further disguised the fact that these transactions were replacements and prevented the Firm from performing its heightened supervisory review.
46. The documents in question were prepared by Nivens and signed by him prior to submission to the Firm.

Falsification of the Client Profile

47. Each VUL application was accompanied by a Client Profile that requested suitability information including the source of funds for the purchase of the VUL.
48. Specifically, the Client Profile asked "What source of funds are you using to purchase this product?" The Client Profile further directed "Check all that apply."
49. The available choices for source of funds were checking/savings, income, stocks/bonds, certificates of deposit, sale of business or property, death benefit proceeds, inheritance/gift, life insurance, mutual funds, pension or retirements accounts, annuities, or other.
50. If the annuity choice was marked, the Client Profile warned that using annuity funds to purchase the VUL could subject the customer to surrender charges, tax consequences, or other penalties. Where withdrawals from an annuity constituted a

source of funds, the Client Profile required provision of details regarding the affected annuity.

51. In all fifteen instances at issue, Nivens failed to disclose that an annuity was a source of the funds for purchase of the VULs. Although all of the fifteen customers funded their purchases of the VULs with withdrawals from a variable annuity, in each instance, Nivens chose other sources of funding, such as “checking/savings” or “inheritance/gift”, rather than “annuity.”

52. In six instances the Firm contacted Nivens regarding the ability of the customer to pay the annual premiums due to a low ratio of annual income to premium payments. In each instance, rather than disclose that the customer planned to pay the premiums through the use of withdrawals from a variable annuity, Nivens stated that the customer had adequate liquid net worth to pay the premiums.

False Statements During Compliance Reviews of the Transactions

53. The Firm suspended approval of six of the VUL applications, pending resolution of red flags regarding the financials of the customers. In each instance, Firm compliance personnel contacted Nivens to discuss whether the application should be approved given the high annual premiums and the annual income of the customer.

54. Rather than disclose to Compliance that the customer planned to pay the VUL premiums using withdrawals from the variable annuities, Nivens directed compliance to the customer’s liquid net worth as a source of funds to pay the premiums.

Falsification of the Replacement Form

55. Each VUL application was also accompanied by a Replacement Form required to be submitted with each VUL application.

56. For each Replacement Form at issue, Nivens completed the Replacement Form himself, and presented the completed Replacement Form to the customer for the customer to sign.
57. The Replacement Form required the signature of both the customer and Nivens.
58. The Replacement Form stated "You are contemplating the purchase of a life insurance policy In some cases the purchase may involve . . . changing an existing . . . annuity contract. If so, a replacement is occurring. Financed purchases are also considered replacements."
59. The Replacement Form made clear that withdrawals from a variable annuity to fund the premiums on a VUL met the definition of a financed purchase, stating "A financed purchase occurs when the purchase of a new life insurance policy involves the use of funds obtained by the withdrawal . . . of . . . some or all of the policy values . . . of an existing policy, to pay all or part of any premium or payment due on the new policy. A financed purchase is a replacement."
60. Question 1 on the Replacement Form directly asked "Do you own any existing life insurance policies or annuity contracts?" In eight of the fifteen instances listed on Exhibit A, Nivens falsely answered "No," despite the fact that all fifteen customers listed on Exhibit A also owned variable annuities. Answering "No" to Question 1, meant that Questions 2, 3, and 4 did not need to be answered.
61. In the other seven instances, Nivens correctly answered "Yes," to Question 1, properly acknowledging that the customer owned a variable annuity. However, Nivens falsified a related question regarding premium payments. Question 3 on the form asked "Are you considering using funds from your existing policies or annuity

contracts to pay premiums due on the new policy or annuity contract?" In these seven instances, Nivens answered "No," despite the fact that he had advised all of the customers to finance the premiums with variable annuity withdrawals.

62. The bottom of the Replacement Form contained the statement "I certify that the responses herein are, to the best of my knowledge, accurate" and a space for Nivens to sign. In addition, the certification contained a producer acknowledgment in bold that asked "By reason of this transaction, is a replacement involved? yes no"
63. In each instance, Nivens signed the Replacement Form certifying that it was accurate, when it was not. In each instance, Nivens also checked the "No" box representing that the transactions were not replacements, when the Replacement Form clearly defined financed purchases as replacements.
64. By reason of the foregoing, Nivens violated FINRA Rules 4511 and 2010.

RELIEF REQUESTED

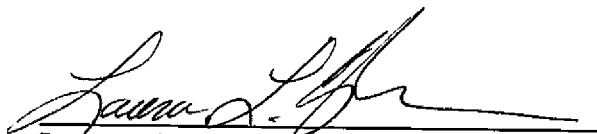
WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest; and
- C. order that Respondent bears such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date:

March 1, 2017



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**Exhibit A to Complaint
DOE v. Cecil E. Nivens
Case No. 2014040873501**

2012-2014 Exchanges that Nivens Falsely Certified as Non-Exchanges

Case No.	Exchange	Date	Value	Amount	Date	Value	Amount
1.	BW	5/23/2012	\$15,000	\$290	5/18/2012	\$15,852	\$15,852
2.	DM	4/24/2013	\$15,852				
		6/12/2012	\$17,568		2/25/2012	\$17,658	\$17,658
		3/18/2013	\$17,568				
3.	DC	11/15/2012	\$30,000	\$207.58	11/13/2012	\$36,000	\$36,000
		11/11/2013	\$30,000				
4.	EM	9/26/2012	\$22,688.67	\$632.55	7/28/2012	\$51,999	\$51,999
		9/26/2012	\$25,000				
5.	JG	4/10/2012	\$2,500		5/11/2012	\$7,561	\$7,561
		5/10/2012	\$2,500				
		6/11/2012	\$2,500				
6.	JH	4/8/2013	\$19,200		3/26/2013	\$39,999	\$39,999
		5/22/2013	\$14,150				
7.	KM	5/8/2012	\$13,950		3/5/2012	\$14,100	\$14,100
8.	LE	6/27/2012	\$20,254		6/13/2012	\$22,100	\$22,100
		6/10/2013	\$22,100				
9.	LF	7/18/2012	\$32,250	\$260.59	5/2/2012	\$32,250	\$32,250
		5/9/2013	\$24,739.41				
		5/16/2013	\$5,000				
10.	PP	5/31/2012	\$25,000	\$17.31	5/25/12	\$32,097	\$32,097
		6/1/2012	\$6,000				
11.	RR	7/17/2012	\$58,500	\$1,398.14	7/6/2012	\$58,093	\$58,093
		7/12/2013	\$49,045.56				
12.	SM	4/16/2013	\$25,000		4/5/2013	\$25,988	\$25,988

13.	SP	██████████	4/18/2013	\$988					
			7/27/2012	\$10,000					
			7/15/2013	\$10,000					7/16/2012
14.	ST	██████████	10/23/2013	\$24,409.55					
15.	TH	██████████	7/9/2012	\$25,000					10/8/2012
			7/11/2012	\$14,215			\$77.47		
			6/20/2013	\$25,000					6/27/2012
			6/24/2013	\$17,780			\$485.52		
									Total
									\$439,805