**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-06 (CLI050016).**

## NASD OFFICE OF HEARING OFFICERS

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| DEPARTMENT OF ENFORCEMENT,<br><br>Complainant,<br><br>v.<br><br>Respondent. | Disciplinary Proceeding<br>No. CLI050016<br><br>Hearing Officer – DMF |

## ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY HEARING PANELIST

On January 9, 2006, Respondent filed a motion to disqualify one of the Hearing Panelists appointed in this proceeding. Pursuant to Rule 9234(c), the Hearing Officer has investigated whether disqualification is required and has concluded that it is not.

The Complaint charges that Respondent violated Rule 2110 by falsifying the customers' addresses on 21 variable annuity applications that he submitted to his then-employer, MONY Securities Corporation during the period May 1999 to May 2002. More specifically, the Complaint alleges that Respondent listed false Connecticut addresses for customers who actually lived in New York, so that he could sell them annuities that were approved for sale in Connecticut, but not in New York.

One of the Panelists, _____, a member of the District 11 Committee, is Executive _____ and _____ of Advest, Inc. in _____.[1] In December 2005, Advest became a wholly-owned subsidiary of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Mr. _____ has advised the Hearing Officer that from July 2004 until

[1] Although District 10 is the primary district in this case, Panelists were appointed from other districts because no District 10 members volunteered to serve on the Panel.

December 2005, Advest was a wholly-owned subsidiary of AXA Financial, Inc., which also owns MONY, and from January 2001 until July 2004, Advest was a wholly-owned subsidiary of MONY. Mr. _____ also advises that during the period that it was owned by AXA and MONY, Advest was an independently run organization; that Mr. _____ reported to the CEO of Advest, not to the General Counsel or anyone else at AXA or MONY; and that Mr. _____ neither supervised nor reported to any MONY staff, and was not responsible for, and had no knowledge of, the supervision of MONY representatives.

Rule 9234(b) provides that a party may move for disqualification of a Panelist "based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned." Respondent does not contend that the above circumstances establish that Mr. _____ has a conflict of interest, and he has offered no evidence that Mr. _____ harbors any bias against Respondent, but he argues that because of Advest's former relationship with AXA and MONY, Mr. _____'s fairness as an adjudicator in this proceeding may reasonably be questioned.

The NASD has explained that "the [Rule 9234(b)] standard borrows heavily from the conflict of interest standard applicable to federal judges," stating:

> The Association intends to rely on [the] judicial interpretation of the clause "in which his impartiality might reasonably be questioned" in 28 U.S.C. 455(a), in interpreting the proposed clause, "if circumstances exist where . . . [the Adjudicator's] fairness might reasonably be questioned." The notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.

62 Fed. Reg. 25255-56 (May 8, 1997).

In Pepsico, Inc. v. McMillan, 764 F.2d 458, 460 (7th Cir. 1985), the court explained: "The test for an appearance of partiality [under 28 U.S.C. 455(a)] is . . . whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was

sought would entertain a significant doubt that justice would be done in the case." In applying this standard, the Hearing Officer "must ask how these facts would appear to a 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.'" Sensley v. Albritton, 385 F.3d 591, 599 (5th Cir. 2004), quoting United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995).

In this case, Mr. _____ was not an employee of MONY or AXA, did not report to anyone at MONY or AXA, did not supervise anyone at MONY, and did not have any responsibility for or even knowledge of MONY's supervision of its representatives. Furthermore, although his employer was formerly an independent subsidiary or sister company of MONY, and a subsidiary of MONY's current parent, AXA, those relationships no longer exist.

Respondent points out that one page of Advest's website still indicates that it is a subsidiary of AXA. But the "newsroom" section of the website discloses Merrill Lynch's acquisition of Advest, and provides a link to Merrill Lynch's website, which confirms that firm's acquisition of Advest. Further, the acquisition was widely reported in the financial press last Fall, when it was announced. That Advest's website may include out of date information about its relationship to AXA and MONY does not establish a basis for disqualifying Mr. _____.

Next Respondent argues that a disinterested observer would be concerned because MONY and AXA, as its parent, have been "repeatedly hostile to [Respondent's] discovery demands," and during the course of trying to resolve discovery disputes, Respondent's counsel has dealt directly with AXA inside counsel. In fact, there is no evidence that AXA and MONY have been hostile to Respondent's discovery demands; on the contrary, the record of this proceeding reflects, and the Hearing Officer has held in denying Respondent's motion for

discovery under Rule 9252, that they have attempted to accommodate Respondent's requests for documents. More importantly, as explained above, Mr. _____ never had any reporting relationship with AXA counsel, and neither he nor his firm has any connection to AXA or MONY at present. The Hearing Officer also notes that, pursuant to Rule 9235(a)(4), the consideration and resolution of discovery disputes is the responsibility of the Hearing Officer, not the Hearing Panelists. Accordingly, the Hearing Officer has resolved all such issues in this case independently, without input from the Panelists.

Respondent argues that the Hearing Officer's inquiry to Mr. _____ regarding his and his firm's relationship with MONY and AXA may, in itself, have prejudiced Mr. _____ against Respondent. The Hearing Officer, however, initiated the inquiry with Mr. _____ even before Respondent filed his motion, in keeping with the Hearing Officer's own responsibility to ensure that the Panelists are able to judge the case fairly, and without suggesting to Mr. _____ that either party had raised an objection to his service on the Panel. Moreover, a party cannot simply by filing a disqualification motion establish the grounds to support such relief.

Finally, Respondent simply asserts that "Mr. _____'s involvement with AXA and MONY is likely to naturally make him biased in evaluating the nature of the alleged conduct and respondent Grasso's related defenses." But as explained above, Mr. _____ had no personal "involvement" with AXA and MONY, and his employer no longer has any such involvement. As a result, there would be no reason for any objective outside observer to question Mr. _____'s impartiality in adjudicating this proceeding. And in fact, at no point has Mr. _____ expressed any personal knowledge, bias or pre-judgment regarding Respondent or any of the factual issues raised by the parties in this proceeding; if he were to do so, the Hearing Officer would disqualify him sua sponte.

The Hearing Officer, therefore, finds that disqualification of Mr. _____ is not required under Rule 9234(b).[2] Accordingly, Respondent's motion is denied.

**SO ORDERED.**

_____
David M. FitzGerald
Hearing Officer

Dated: January 10, 2006

[2] Respondent has cited no decision requiring disqualification of a federal judge in similar circumstances under the analogous provisions of 28 U.S.C. 455(a). Although the Hearing Officer has found no case under that provision that is precisely on point, a review of the case law strongly indicates that disqualification would not be required. See Sensley, 385 F.3d at 599-600; In re Doninton Investments, N.V., 97 B.R. 112, 1988 Bankr. LEXIS 1998 (Oct. 13, 1988) (reviewing the relevant case law).