FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRIAN H. BRUNHAVER (CRD No. 2498928), Respondent.	Disciplinary Proceeding No. 2011026852001 Hearing Officer – MC **DEFAULT DECISION** May 14, 2014

Respondent is barred from associating with any FINRA member firm in any capacity for using an unauthorized e-mail account for communications with the public related to his securities business, in violation of NASD Rule 2110 and FINRA Rule 2010. He is also barred for (i) sending communications to the public that were not fair and balanced, and contained false, exaggerated, unwarranted and misleading statements, in violation of NASD Rules 2210(d)(1) and 2110, and FINRA Rule 2010; (ii) engaging in securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, and NASD Rules 2120 and 2110; and (iii) making false statements to customers, in violation of NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010.

Appearances

Mark A. Graves, Esq., San Francisco, California, for the Department of Enforcement.

No appearance by or for Respondent Brian H. Brunhaver.

DECISION

I. Background

Respondent Brian H. Brunhaver used an unauthorized e-mail account to communicate with customers to conduct his securities business. By doing so, Brunhaver prevented his firm from reviewing his business-related e-mail communications. In his e-mails, Brunhaver made false statements and omitted material facts in the course of recommending investments in a real estate investment trust ("REIT") to numerous customers. An attorney representing one of the

customers reported to FINRA that Brunhaver had made misrepresentations to the customer. This precipitated the investigation that led to the filing of the Complaint in this case.

The Department of Enforcement filed and served the attached four-cause Complaint upon Brunhaver. The first cause of action charges him with violating NASD Rule 2110 and FINRA Rule 2010 by using the unauthorized e-mail account to conduct his security business. The second cause of action charges him with violating NASD Rules 2210(d)(1) and 2110, and FINRA Rule 2010, by sending communications to the public that were not fair and balanced, and contained false, exaggerated, unwarranted or misleading statements. The third cause of action charges him with violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Securities and Exchange Commission ("SEC") Rule 10b-5, and NASD Rules 2120 and 2110, by engaging in fraudulent sales of securities. The fourth cause of action charges him with violating NASD Rules 2120 and 2110, and FINRA Rule 2010, by making false statements to customers regarding the REIT.[1]

Brunhaver did not file an Answer or otherwise respond to the Complaint. Consequently, Enforcement filed and served a Second Notice of Complaint. Because it, too, went unanswered, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions ("Motion") supported by a Memorandum of Law ("Memorandum"), the Declaration of David Utevsky ("Utevsky Decl.") and ten exhibits. Brunhaver did not respond to the Motion.

Respondent's failure to file an Answer to the Complaint constitutes a default.[2] Accordingly, for the reasons set forth below, Enforcement's Motion is granted.[3]

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[1] NASD consolidated with the regulatory arm of the New York Stock Exchange in July 2007. A new Consolidated Rulebook was adopted on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). The conduct rules applied in this case are those existing at the time of the conduct at issue. Because the conduct at issue began before the consolidation, and continued after the consolidation, both former NASD Rules and current FINRA Rules are implicated. The relevant By-Laws have remained unchanged. FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

[2] *Dep't of Enforcement v. Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003).

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Brunhaver was registered with FINRA through LPL Financial, LLC ("LPL") from May 1995 until June 2011.[4] On June 2, 2011, LPL filed a Uniform Termination Notice for Securities Industry Termination ("Form U5") stating that it had discharged Brunhaver on May 3, 2011.[5] Brunhaver then registered through another FINRA member firm from August 2, 2011, until December 31, 2011.[6]

On February 25, 2013, less than two years after filing its first Form U5, LPL filed an Amended Form U5, revealing that customers had alleged that Brunhaver recommended unsuitable investments in REITs while he worked at LPL.[7]

Enforcement filed the Complaint on December 11, 2013, less than two years after LPL filed its Amended Form U5. The misconduct described in the Complaint occurred while Brunhaver was registered through LPL. Thus, Brunhaver is subject to FINRA's jurisdiction for the purposes of this proceeding pursuant to Article V, Section 4(a) of FINRA's By-Laws because (i) Brunhaver's misconduct occurred before LPL terminated his registration; (ii) Enforcement filed the Complaint within two years after LPL's Amended Form U5; and (iii) LPL filed its Amended Form U5 less than two years after it filed the original Form U5.

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[3] The factual determinations in this Decision are based on the allegations in the Complaint, which are deemed admitted pursuant to FINRA Rule 9269(a)(2), Enforcement's Motion, Memorandum, the Declaration of David Utevsky ("Utevsky Decl."), the Supplement to Declaration in Support of Enforcement's Motion for Entry of Default Decision ("Supplemental Decl."), and Enforcement's exhibits CX-1 through CX-10.

[4] Utevsky Decl. ¶ 7.

[5] CX-2.

[6] Utevsky Decl. ¶ 9.

[7] *Id.* ¶ 10.

B. Respondent's Default

Enforcement served the Complaint and Notice of Complaint on Brunhaver by certified and first-class mail at two addresses, his last known residential address shown in the Central Registration Depository ("CRD") and a second address FINRA staff obtained through a LEXIS public records search.[8] The Postal Service returned the certified mailing to Brunhaver's CRD address, with the envelope marked "returned to sender, unable to forward." The first-class mailing to the CRD address was not returned. The Postal Service confirmed that the certified mailing to the second address was delivered on December 12, 2013, but the signature of the recipient was illegible. The first-class mailing to the second address was not returned.[9]

When Brunhaver failed to file an Answer by the deadline set in the Notice of Complaint, Enforcement served a Second Notice of Complaint and Complaint by certified and first-class mail to both addresses.[10] The Postal Service returned the certified mailing to the CRD address marked "moved left no address, unable to forward, return to sender." The first-class mailing to the CRD address was not returned. However, the Postal Service confirmed that the certified mailing of the Second Notice of Complaint to the second address was delivered on January 14, 2014. As with the first certified mailing, the signature of the recipient was illegible.[11] Brunhaver has not filed an Answer or responded to the Complaint in any manner.[12]

Enforcement complied with FINRA Rule 9134 by mailing the Complaint and Notices of Complaint to Brunhaver's CRD address, thereby giving him constructive notice of this

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[8] Utevsky Decl. ¶¶ 12-13.

[9] *Id.* ¶ 14.

[10] *Id.* ¶¶ 15-16.

[11] *Id.* ¶ 17.

[12] *Id.* ¶ 18.

proceeding. By failing to file an Answer, Brunhaver defaulted. Accordingly, pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

C. Violations

1. Use of Unapproved E-mail Account

In August 2006, LPL issued a directive to all of the firm's representatives, including Brunhaver, that beginning in October 2006, the firm would require them to restrict their business e-mail communications to their LPL e-mail accounts or, alternatively, to use only e-mail accounts with vendors approved by the firm. LPL informed its representatives that those who were using other e-mail addresses for business purposes would need to discontinue doing so.[13] Brunhaver had been using both his LPL account and a personal e-mail account for his business communications. In violation of LPL's directive, Brunhaver continued to use his personal account after October 2006.[14]

When Brunhaver provided on-the-record testimony, he testified that he did not "see a need to" seek LPL's approval to use his personal e-mail account for business after the firm's change in policy.[15]

From October 2006 to April 19, 2011, Brunhaver sent numerous business-related e-mails through his personal account, and received messages from customers through it.[16] Brunhaver sent one customer, MMT, twelve e-mails through his personal account from June 2 through December 5, 2008. Five of these, from September 10 to November 10, related to Brunhaver's recommendation for investing in the Inland American Real Estate Trust ("Inland REIT"). In

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[13] Compl. ¶ 9.

[14] *Id.* ¶ 10. Brunhaver permitted his assistant to use her personal e-mail account for business as well.

[15] Utevsky Decl. ¶ 21(c).

[16] *Id.* at ¶ 21(g).

addition, on January 10, 2009, Brunhaver sent a "blast" e-mail to numerous customers through his personal account, about the Inland REIT.[17] Before sending it, Brunhaver had sold approximately 253 investments in the Inland REIT to approximately 208 customers, for almost $8 million. From these sales he earned gross commissions of over $190,000.[18]

In April 2011, an LPL compliance examiner discovered business e-mails sent from Brunhaver's personal e-mail account. The compliance examiner told FINRA staff that Brunhaver seemed to be fully aware that he was using his personal e-mail account to conduct business.[19] Brunhaver's use of his personal e-mail account for business violated the firm's policies and the directive it had given to its representatives.[20]

By sending and receiving business-related e-mail communications on his personal e-mail account, Brunhaver frustrated LPL's efforts to fulfill its supervisory obligations pursuant to NASD Rule 3010, and its obligation to maintain and preserve business-related communications under SEC Rule 17a-3.[21] By engaging in this conduct, Brunhaver violated NASD Rule 2110 prior to December 15, 2008, and FINRA Rule 2010 thereafter, as alleged in the first cause of action.

2. Communications with the Public

The Inland REIT was a risky investment. The prospectus described the Inland REIT as involving "significant risks," warned investors that they "may lose some or all" of their investments, and that they "may not be able to sell" their shares for the price they paid. The prospectus described a repurchase program designed to enable investors to sell their shares back

[17] *Id.* ¶¶ 21(e)-(f).

[18] *Id.* ¶¶ 21(j)-(k).

[19] *Id.* ¶ 21(n).

[20] *Id.* ¶¶ 21(d)(i)-(ii).

[21] Compl. ¶¶ 11-12.

to the company, but stated that the company's ability to repurchase shares depended on the availability of funds, and that the company reserved the right to terminate the program at any time.[22] The company did not guarantee the return of investors' principal.

Brunhaver sent five e-mail messages to customer MMT from September 10 to November 10, 2008, containing false statements about the Inland REIT. He falsely assured MMT that her invested principal was guaranteed, that the investment held no risk, and that she could not lose her money. Relying on Brunhaver's representations, MMT invested $114,300 in the Inland REIT on November 11, 2008.[23] In e-mails to her, Brunhaver made repeated statements about "the principle [sic]" being guaranteed, and stressed that "There is NO RISK" with the Inland REIT. In response to MMT's query, "is there any way I could lose this money????" he answered, "No."[24]

Brunhaver's blast e-mail to other customers contained similar false statements, emphasizing that the Inland REIT guaranteed investors' principal.[25] The messages, to MMT and other customers, did not disclose the substantial risks of investing in the Inland REIT.

In his on-the-record interview, Brunhaver denied that he told customers that the Inland REIT investments were guaranteed. To the contrary, he insisted that he "had to correct clients" and told them "it's not guaranteed."[26] The e-mails, with their repeated assurances that investments were guaranteed, contradict his denial.

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[22] Utevsky Decl. ¶ 21(o).

[23] Compl. ¶¶ 14-15.

[24] CX-9.

[25] Compl. ¶ 16.

[26] Utevsky Decl. ¶ 21(t).

Brunhaver's e-mails were communications with the public.[27] NASD Rule 2210(d)(1), which applied at the time of Brunhaver's e-mails, required communications with the public to be "fair and balanced," to give investors a "sound basis for evaluating" a recommended security.[28] The rule also required that communications not omit any material fact which, if undisclosed, would make the communications misleading, and it barred "false, exaggerated, unwarranted or misleading" claims. The claims Brunhaver made in the e-mails contravened these standards. Brunhaver violated NASD Rules 2210(d)(1) and 2110 in the messages he sent prior to December 15, 2008, and FINRA Rule 2010 in those he sent on and after December 15, 2008.

3. Fraud

Section 10(b) of the Exchange Act and SEC Rule 10b-5 prohibit securities fraud committed by any means or instrumentality of interstate commerce. Rule 10b-5 makes it unlawful for a person, knowingly or recklessly, by use of the mails or other means of interstate commerce:

> (a) To employ "any device, scheme or artifice to defraud; (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances ... not misleading; or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

NASD Rule 2120, applicable when Brunhaver engaged in the activity described in the Complaint, prohibits inducing the purchase of any security "by means of any manipulative, deceptive or other fraudulent device or contrivance." The elements required to prove a violation of NASD Rule 2120 are identical to those required to establish a violation of SEC Rule 10b-5,

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[27] NASD Rule 2211(a) described correspondence, including "any written letter or electronic mail message" sent by a member to retail customers, as communication with the public.

[28] FINRA Rule 2210 replaced NASD Rule 2210 on February 4, 2013.

with the exception that Rule 10b-5 requires proof of the use of an instrumentality of interstate commerce.

Brunhaver's e-mail representations to customer MMT met all of the elements of fraud under Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rule 2120. The representations that investments were risk-free and guaranteed were false.[29] By sending the e-mails, Brunhaver utilized an instrumentality of interstate commerce.[30] Furthermore, Brunhaver was engaging in a "device, scheme or artifice to defraud," because he made false representations of material fact in a fraudulent course of conduct in connection with the sales of a security. Brunhaver's representations to customer MMT were clearly intended to persuade her to invest in the Inland REIT. His false assertions that the investment was without risk were also material;[31] a reasonable investor would consider it important to assess risk prior to making an investment decision.[32]

Brunhaver made the misrepresentations either knowing they were false, or in reckless disregard of their falsity.[33] As noted above, at his on-the-record interview Brunhaver testified that the Inland REIT did not guarantee investors' principal, implicitly acknowledging that he knew there was no guarantee. He therefore possessed the required knowledge, or scienter, that his representations were untrue.

Based upon these facts, as alleged in the third cause of action, Brunhaver's conduct violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Conduct Rule 2120

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[29] Compl. ¶ 22.

[30] *United States v. Barlow*, 568 F.3d 215, 220-21 (5th Cir. 2009) (e-mail and the Internet are facilities or means of interstate commerce).

[31] *SEC v. Hasho*, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992)

[32] *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

[33] Compl. ¶ 22.

when he intentionally or recklessly made false statements of material fact to MMT, by means of an instrumentality of interstate commerce, to induce her to purchase a security, in a course of conduct that constituted a manipulative, deceptive or fraudulent device. This conduct also was inconsistent with the high standards of commercial honor and just and equitable principles of trade required by NASD Rule 2110.

4. Misrepresentations

FINRA Rule 2020, identical in language to NASD Rule 2120, replaced NASD Rule 2120 and became effective on December 15, 2008. As noted above, a violation of these rules occurs when a respondent knowingly makes a material misrepresentation in connection with the purchase or sale of a security.[34]

Brunhaver met with customers MMT and SAT on October 6 and December 15, 2008, about investing in the Inland REIT. In those meetings, he personally represented, as he had in his e-mails, that the company guaranteed investments, and that investors could not lose money.[35] These representations were important factors in MMT's decision to invest in the Inland REIT.[36] Like the representations Brunhaver made in the e-mails, these representations were knowingly false, material, and made to induce MMT to invest in a security.

Based on these facts, Brunhaver violated NASD Rules 2120 and 2110 on October 6, 2008, and FINRA Rules 2020 and 2010 on December 15, 2008, as charged in the Complaint's fourth cause of action.

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[34] *Dane S. Faber*, 57 S.E.C. 297, 305-06 (2004).

[35] Compl. ¶ 26.

[36] Utevsky Decl. ¶ 21(w).

III. Sanctions

Because Enforcement views Brunhaver's misconduct as egregious, it seeks imposition of a bar for the misconduct described in the first cause of action, and a second bar for the misconduct described in the second, third, and fourth causes of action.[37] Enforcement's recommendations are appropriate.[38]

The first cause of action focuses on Brunhaver's violation of LPL's policy directive and its impact on the firm's ability to review and supervise business communications. Enforcement treats it separately from the other causes of action in its sanction analysis.[39]

The Sanction Guidelines do not provide recommendations that specifically address the use of an unauthorized e-mail account for securities business. It has been recognized, however, that the practical effect of resorting to this practice is to enable a person improperly to evade a firm's review and oversight of his correspondence with customers, and that use of an unauthorized e-mail account is evidence of an intent to conceal misconduct from a firm.[40] An intent to conceal misconduct, in turn, is recognized generally as an aggravating factor in considering sanctions.[41]

Because use of an unauthorized e-mail account deprives a firm of records to review and properly exercise supervision, it is logical that adjudicators have previously looked to Guidelines focused on recordkeeping violations for guidance.[42] For recordkeeping violations, the Guidelines

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[37] Memorandum 14-15.

[38] Enforcement is not seeking restitution because customer MMT recovered her losses resulting from investing in the Inland REIT through Brunhaver when LPL settled an arbitration claim she filed. Supplemental Decl. ¶¶ 2-4.

[39] Memorandum 14.

[40] *Dep't of Enforcement v. Zaragoza*, No. E8A2002109804, 2008 FINRA Discip. LEXIS 28, at *35 & n.32 (N.A.C. Aug. 20, 2008).

[41] *FINRA Sanction Guidelines* at 6 (2013) (Principal Considerations in Determining Sanctions No. 10).

[42] *Zaragoza*, 2008 FINRA Discip. LEXIS 28, at *31.

recommend a fine of $1,000 to $10,000, and consideration of a suspension for up to 30 days; in egregious cases, the recommendation is for a fine ranging from $10,000 to $100,000, and consideration of a two-year suspension, or a bar.[43]

Brunhaver used his unauthorized personal e-mail account for more than two years after LPL promulgated its policy forbidding the practice. Thus, his misconduct involved numerous separate improper acts in a pattern that extended for a lengthy period, factors the Guidelines recognize as aggravating.[44] Brunhaver's choice to contravene LPL's policy was clearly intentional, and may be deemed to have been designed to conceal his fraudulent sales practices and misleading communications with the public from LPL. If LPL had been able to review Brunhaver's e-mails, it might well have prevented him from misrepresenting the Inland REIT and causing harm to investors. For these reasons, Brunhaver's unapproved use of his outside e-mail account was egregious.

The second cause of action, charging Brunhaver with sending misleading communications to the public, and the third cause of action, charging fraud, both focus on the false statements Brunhaver made in his unauthorized e-mail correspondence. The fourth cause of action describes separate instances of misconduct, oral misrepresentations Brunhaver made in personal meetings, but the misrepresentations were essentially identical to those in the e-mails. Enforcement persuasively argues that it is appropriate to impose a single sanction for these three causes of action.[45]

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[43] *Guidelines* at 29.

[44] *Id.* at 6 (Principal Considerations in Determining Sanctions Nos. 8, 9).

[45] Memorandum 15.

The gravamen of Brunhaver's misconduct is securities fraud. There are no Sanction Guidelines for fraud. There are, however, guidelines for sending misleading communications to the public and making misrepresentations of fact.

For misleading communications to the public, the Guidelines recommend a fine of $10,000 to $100,000, consideration of suspension for up to two years in all capacities and, in cases involving numerous intentional acts over an extended period, a bar.[46] A Principal Consideration is whether the misleading communications were circulated widely.[47] The evidence establishes that Brunhaver sold investments in the Inland REIT to more than 200 customers, and his use of a blast e-mail suggests that he sent his false and misleading representations to a large number of people.

For making misrepresentations of fact, FINRA's Sanction Guidelines recommend a fine in the range of $10,000 to $100,000 and suspension in any or all capacities for 10 business days to two years; in egregious cases, the Guidelines recommend consideration of a bar.[48] Brunhaver's misrepresentations were clearly intentional, an aggravating factor recognized by the Guidelines.[49] Brunhaver's misrepresentations constituted a pattern of misconduct, and involved monetary gain, which are also aggravating factors under the Guidelines.[50]

IV. ORDER

Respondent Brian H. Brunhaver is barred from associating with any FINRA member firm in any capacity for using an unauthorized e-mail account for communications with the public

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[46] *Guidelines* at 80. As previously noted, FINRA Rule 2210 replaced NASD Rule 2210 in 2013. However, it retained the same substantive requirements for fairness and balance and providing investors with a "sound basis" for assessing recommendations. *See* FINRA Rule 2210(d)(1).

[47] *Guidelines* at 79.

[48] *Id.* at 88.

[49] *Id.* at 7 (Principal Considerations in Determining Sanctions No. 13).

[50] *Id.* at 6-7 (Principal Considerations in Determining Sanctions Nos. 8, 17).

related to his securities business, in violation of NASD Rule 2110 and FINRA Rule 2010, as charged in the Complaint's first cause of action.

Brunhaver is also barred from associating with any FINRA member firm in any capacity for sending communications to the public that were not fair and balanced, and contained false, exaggerated, unwarranted and misleading statements, in violation of NASD Rules 2210(d)(1) and 2110, and FINRA Rule 2010, as charged in Complaint's second cause of action; for engaging in securities fraud, in violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, as well as NASD Rules 2120 and 2110, as charged in the Complaint's third cause of action; and for making false representations to customers, in violation of NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010, as charged in the Complaint's fourth cause of action.

The bars will be effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.

Matthew Campbell
Hearing Officer

Copies to:

Brian H. Brunhaver (via overnight courier and first-class mail)
Mark A. Graves, Esq. (via electronic and first-class mail)
Jeffrey D. Pariser, Esq. (via electronic mail)

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRIAN H. BRUNHAVER (CRD No. 2498928), Respondent.	Disciplinary Proceeding No. 2011026852001 Hearing Officer – MC

ADDENDUM TO DEFAULT DECISION

Customer MMT: Marilyne M. Tweit

Customer SAT: Stephen A. Tweit

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement, Complainant, v. Brian H. Brunhaver (CRD No. 2498928, Respondent.	DISCIPLINARY PROCEEDING No. 2011026852001

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent Brian H. Brunhaver used an unauthorized e-mail account for communications related to his securities business and made oral and written misrepresentations to customers regarding a non-traded REIT.

RESPONDENT AND JURISDICTION

2. Brian H. Brunhaver entered the securities industry in May 1994 as an associated person of a member firm. He became registered as an Investment Company / Variable Contracts Representative in June 1994. From May 1995 until June 2011, he was registered through LPL Financial, LLC ("the Firm"), initially as an Investment Company / Variable Contracts Representative; beginning in October 1996, as a General Securities Representative; beginning in August 1998, as a General Securities

Principal; and, beginning in November 2004, as a Municipal Fund Securities Limited Principal.

3. On or about June 2, 2011, the Firm filed a Uniform Termination Notice for Securities Industry Termination (Form U5) on behalf of Respondent Brunhaver, which disclosed that he had been discharged on May 3, 2011.

4. From August 2011 until December, 2011, Respondent Brunhaver was registered through another member firm as a General Securities Principal, General Securities Representative, and Investment Company / Variable Contracts Representative.

5. On or about February 25, 2013, within two years after the Firm filed its original Form U5 on behalf of Respondent Brunhaver, the Firm filed an Amended Form U5, disclosing the receipt of a Statement of Claim in which certain customers of Respondent Brunhaver alleged that he had recommended unsuitable investments in REITs and had made misrepresentations to them while employed by the Firm.

6. Although Respondent is no longer registered or 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 filing of the Amended Form U5 on February 25, 2013, which disclosed that Respondent Brunhaver may have engaged in conduct actionable under an applicable statute, rule or regulation, and which was filed within two years after the filing of his original Form U5 on June 2, 2011; and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

FIRST CAUSE OF ACTION

(Unapproved Use of Outside E-mail Account
(NASD Conduct Rule 2110 and FINRA Rule 2010))

7. The Department realleges and incorporates by reference paragraphs 1 through 6 above.

8. During a period beginning no later than October 4, 2006, and continuing until at least April 19, 2011, Brian H. Brunhaver used an unauthorized e-mail account to communicate with customers and with his assistant, SLB, regarding his securities business.

9. In August 2006, the Firm issued an Advisor Alert to its registered representatives, informing them that, effective October 1, 2006, they would be required to adhere to the policies and procedures in the Firm's Electronic Communications Policy Guide. The Electronic Communications Policy Guide stated that all of the Firm's financial advisors and associated persons must use either the e-mail address provided by the Firm or a compliance-approved proprietary Doing Business As ("DBA") address hosted with a Firm-approved e-mail host vendor for all business communications. The Advisor Alert further stated that registered representatives who used a "generic" e-mail address would be required to discontinue use of that address and either replace it with a Firm e-mail address or establish a "DBA" e-mail address with a Firm-approved e-mail host vendor.

10. Before August 2006, Respondent Brunhaver used both his Firm-provided e-mail address and a personal e-mail account with AOL.com for business communications. Following the Advisor Alert, he continued to use both e-mail addresses for his

securities business, without obtaining the Firm's permission or informing the Firm that he was doing so. He also permitted his assistant, SLB, to use her personal AOL account for business communications. Respondent Brunhaver thereby violated the Firm's policies.

11. Because messages sent from and received by his personal AOL account were not transmitted to the Firm, Respondent Brunhaver prevented the Firm from reviewing his business-related e-mail communications and thus from satisfying its supervision obligations under NASD Conduct Rule 3010(d) and its obligation to maintain and preserve business-related communications under SEC Rule 17a-4.

12. During the period before December 15, 2008, such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 by Respondent Brunhaver. During the period on and after December 15, 2008, such acts, practices and conduct constitute separate and distinct violations of FINRA Rule 2010.

SECOND CAUSE OF ACTION

(Communications with the Public (NASD Conduct Rules 2210(d)(1) and 2110 and FINRA Rule 2010))

13. The Department realleges and incorporates by reference paragraphs 1 through 6 and 8 through 12 above.

14. During the period from on or about September 10, 2008, until on or about November 10, 2008, Respondent Brunhaver made false statements in approximately five e-mail messages to customer MMT regarding the Inland American Real Estate Trust, a non-traded REIT ("the Inland REIT"). In those messages, sent from his personal

AOL account, Respondent Brunhaver falsely informed MMT that her principal investment in the Inland REIT would be guaranteed, that the investment involved no risk, and that she could not possibly lose her money if she invested.

15. On or about November 11, 2008, MMT invested $114,300 in the Inland REIT. She incurred a loss as a result of that investment.

16. On or about January 7, 2009, Respondent Brunhaver sent a "blast" e-mail message to an unknown number of existing retail customers from his personal AOL account. In that message, he made false statements regarding the Inland REIT. Respondent Brunhaver falsely stated that the REIT had a "guarantee of principle [sic]" and that there was "no fundamental default of principle [sic] risk" in the Inland REIT.

17. Respondent Brunhaver's e-mail messages to MMT and his "blast" e-mail to retail customers were "correspondence" within the meaning of NASD Conduct Rules 2210(a)(3) and 2211(a)(1). The messages provided information regarding the Inland REIT, but did not disclose the substantial risks of the investment. They were not fair and balanced and they contained false, exaggerated, unwarranted or misleading statements.

18. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2210(d)(1) by Respondent Brunhaver. During the period before December 15, 2008, such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110. During the period on and after December 15, 2008, such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of FINRA Rule 2010.

THIRD CAUSE OF ACTION

(Fraud (NASD Conduct Rules 2120 and 2110, Section 10(b) of the Securities Exchange Act of 1934, and Securities and Exchange Commission Rule 10b-5 promulgated thereunder))

19. The Department realleges and incorporates by reference paragraphs 1 through 6, 8 through 12, and 14 through 18 above.

20. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder are broad anti-fraud provisions. Exchange Act Rule 10b-5 makes it unlawful, among other things, "for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange," to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" in connection with the purchase or sale of any security.

21. NASD Conduct Rule 2120 stated that "[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."

22. As described in paragraphs 14 and 15 above, Respondent Brunhaver intentionally or recklessly made untrue statements of material facts to MMT when he wrote to her in e-mail messages that her principal investment in the Inland REIT would be guaranteed, that the investment involved no risk, and that she could not possibly lose her money if she invested. He made those untrue statements by the use of a means or instrumentality of interstate commerce in connection with purchases or sales of a security.

23. As described in paragraphs 14 and 15 above, Respondent Brunhaver effected transactions in, or induced the purchase of, a security by means of a manipulative, deceptive or other fraudulent device when he wrote to MMT in e-mail messages that her principal investment in the Inland REIT would be guaranteed, that the investment involved no risk, and that she could not possibly lose her money if she invested.

24. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2120. As a result of the foregoing conduct, Respondent Brunhaver willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 promulgated thereunder. Such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110.

FOURTH CAUSE OF ACTION

(Misrepresentations (NASD Conduct Rules 2120 and 2110 and FINRA Rules 2020 and 2010))

25. The Department realleges and incorporates by reference paragraphs 1 through 6, 8 through 12, 14 through 18, and 20 through 24 above.

26. During the period from on or about October 6, 2008, until on or about December 15, 2008, Respondent Brunhaver made false statements to customers MMT and SAT regarding the Inland REIT. In meetings with the customers, he falsely informed them that their principal investment in the Inland REIT would be guaranteed and that there was "no way" they could lose their money if they invested.

27. When he made those false statements to MMT and SAT, Respondent Brunhaver induced the purchase of a security by means of a manipulative, deceptive or other fraudulent device.

28. During the period before December 15, 2008, such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2120 by Respondent Brunhaver. Such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of NASD Conduct Rule 2110. On December 15, 2008, such acts, practices and conduct constitute separate and distinct violations of FINRA Rule 2020. Such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of FINRA Rule 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), other than monetary sanctions, be imposed; and

C. make specific findings that Respondent willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 promulgated thereunder.

FINRA DEPARTMENT OF ENFORCEMENT

Date: December 11, 2013

David Utevsky

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Index to Initials

Department of Enforcement v. Brunhaver,
Disciplinary Proceeding No. 20110268520001

SLB = Stacey L. Brunhaver

MMT = Marilyne M. Tweit

SAT = Stephen A. Tweit

FINRA
OFFICE OF HEARING OFFICERS

Department of Enforcement, Complainant, v. Brian H. Brunhaver (CRD No. 2498928), Respondent.	Disciplinary Proceeding No. 20110268520-01 Hearing Officer: CERTIFICATE OF SERVICE Date: December 11, 2013

I hereby certify that on this 11th day of December, 2013, I caused copies of the foregoing Complaint, Notice of Complaint and Index to Initials to be sent as follows:

Via First Class Mail, Certified Mail and Electronic Mail

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Snohomish, WA 98296

Brian H. Brunhaver
989 112th Ave. N.E., Apt 807
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