

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FREDERICK DAVID HOLLOWAY
(CRD No. 248814),

Respondent.

Disciplinary Proceeding
No. 2016050025401

Hearing Officer–MJD

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT**

I. Background

The Department of Enforcement's Amended Complaint ("Complaint") contains six causes of action against Respondent Frederick David Holloway ("Respondent" or "Holloway"). Five of the causes of action relate in some manner to Respondent's variable annuity ("VA") business. The most serious allegation is that between 2013 and 2016 Holloway recommended VA exchanges to customers without having a reasonable basis, in violation of FINRA Rules 2330 and 2010.

Respondent filed an Answer denying the allegations and requesting a hearing. He also filed a motion for a more definite statement under FINRA Rule 9215(c) seeking a bill of particulars for the allegations in each cause of action.

After considering the motion and Enforcement's opposition, I grant the motion, in part, and deny it, in part, as set forth below. I order Enforcement to file a Bill of Particulars and Respondent to file an Amended Answer.

II. Legal Standard

FINRA Rule 9212(a) requires that a complaint "specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated." Enforcement satisfies this pleading requirement if the allegations of the complaint provide "a respondent with sufficient notice to

understand the charges and adequate opportunity to plan a defense.”¹ Enforcement need not include evidentiary details in the complaint to meet this standard.² If a complaint, “taken as a whole, fairly apprises the respondent of the charges and affords the respondent an adequate opportunity to plan a defense, a motion for more definite statement will not lie.”³

FINRA Rule 9215(c) permits a respondent to move for a “more definite statement of specified matters of fact or law to be considered or determined” in the matter. This provision allows a respondent to seek clarification where a complaint is ambiguous, confusing, or lacks sufficient specificity and detail to permit the respondent to defend himself.⁴ A motion for a more definite statement may not be used as a discovery device.⁵

The standard is whether the complaint provides sufficient information to enable a respondent to plan a defense. After taking into account all the circumstances, I find that the Complaint fails to provide adequate detail to place Respondent on notice of some of the charges against him and to prepare a defense to those charges, as required by FINRA Rule 9212.

III. Discussion

A. Unsuitable VA Exchanges (Cause One)

Cause one alleges that Holloway recommended 43 VA exchanges to customers without having a reasonable basis, in violation of FINRA Rules 2330⁶ and 2010. The Complaint alleges

¹ OHO Order 16-28 (2014042524301) (Oct. 31, 2016), at 4, http://www.finra.org/sites/default/files/OHO_Order16-28_2014042524301_0.pdf (citing *Dist. Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (NBCC July 28, 1997)).

² OHO Order 09-05 (2008012955301) (Dec. 16, 2009), at 3, http://www.finra.org/sites/default/files/OHODDecision/p121082_0_0_0.pdf.

³ OHO Order 05-23 (C050015) (June 7, 2005), at 2, http://www.finra.org/sites/default/files/OHODDecision/p014437_0_0_0.pdf

⁴ OHO Order 07-28 (2005000323905) (July 2, 2007), at 2, http://www.finra.org/sites/default/files/OHODDecision/p037092_0_0_0.pdf.

⁵ OHO Order 00-06 (C3A990067) (Mar. 10, 2000), at 3, <http://www.finra.org/sites/default/files/OHODDecision/p007878.pdf>. Furthermore, a motion for a more definite statement is disfavored when the particular information sought is within the movant’s own knowledge, which mitigates against granting the motion. *See, e.g.*, OHO Order 10-04 (2008014621701) (July 12, 2010), at 2-3 http://www.finra.org/sites/default/files/OHODDecision/p122653_0_0_0_0.pdf (denying motion for more definite statement where allegations involve information within respondent’s knowledge); *Wheeler v. U.S. Postal Service*, 120 F.R.D. 487, 488 (M.D. Pa. 1987) (motion for more definite statement under Fed. R. Civ. P. 12(e) denied where information about the extent and nature of plaintiffs’ claims are within defendant’s knowledge).

⁶ FINRA Rule 2330(b) prohibits a registered representative from recommending the purchase or exchange of a deferred variable annuity unless the representative has a reasonable basis to believe that the purchase or exchange was suitable. In the case of variable annuity exchanges, Rule 2330(b)(1)(B) also requires that the representative consider whether the customer would incur surrender charges, be subject to the commencement of a new surrender period, lose existing benefits, be subject to increased fees or charges, and benefit from product enhancements and improvements.

that Respondent did not compare fees and expenses incurred for the 43 VAs being surrendered to those VAs that he recommended for purchase and did not run income projections comparing future income streams from the products.⁷ Of the 43 VAs exchanged, 31 contained a premium or bonus enhancement, which, according to the Complaint, Respondent improperly treated as a reimbursement for surrender charges incurred by customers, when in fact it was a cost paid by the customer.⁸

In his motion, Respondent argues that he has insufficient information to prepare a defense. The Complaint, he states, fails to identify the customers associated with the 43 allegedly violative VA exchanges, together with the amount, initial premium or deposit, and date of each VA exchange. He asks that Enforcement be compelled to “advise with specificity” each of the 43 VA contracts at issue.⁹ He also asks that Enforcement be required to identify all 166 Transamerica VAs sold.

Respondent also argues that in the case of the 31 out of the 43 exchanges that contained a premium enhancement the Complaint fails to identify the 31 VA contracts and how the customers “were negatively impacted and why Respondent should be sanctioned.”¹⁰ He also asks that Enforcement be required to “set forth the underpinnings” of its claim that Respondent failed to understand the bonus enhancement feature contained in some VA contract.¹¹

Enforcement argues that Holloway knows customers to whom he recommended VA exchanges. Enforcement cites Holloway’s Answer to paragraph 14 of the Complaint in which he states that he recommended all of the exchanges with each customer’s investment profile, time horizon, risk tolerance and financial condition in mind.¹² Enforcement further argues that it is not required to provide Respondent with detailed information about each transaction for Respondent to understand the charges against him.

Resolution: Respondent’s motion is granted, in part, and denied, in part. I find that the Complaint, although factually detailed in many respects, fails to adequately apprise Respondent of which 43 VA customer exchanges are violations and which 31 VA exchanges contain the premium enhancement. Accordingly, I order Enforcement to file a Bill of Particulars identifying the 43 and 31 VA exchanges referenced in paragraphs 14-16 of the Complaint, including the customers, approximate dates of the purchases or exchanges, and the amount of each purchase.¹³

⁷ Complaint (“Compl.”) ¶¶ 14-15.

⁸ Compl. ¶¶ 16-17.

⁹ Respondent’s Motion for a More Definite Statement (“Mot.”), at ¶ 6.

¹⁰ Mot. at ¶ 7.

¹¹ Mot. at ¶ 8.

¹² Enforcement’s Opposition to Motion for More Definite Statement (“Opp.”), at 6.

¹³ I order the Bill of Particulars even though Enforcement identified the 43 customers and provided other information in an Attachment to its Opposition. It did not identify the VA contracts containing a premium enhancement. *See* Opp. at 5-6.

I deny Respondent's request that Enforcement set forth "the underpinnings" of Enforcement's assertion that he did not know how the bonus enhancement feature operated, how his customers "were negatively impacted" by the allegedly unsuitable exchanges, and why he should be sanctioned if found liable for violating Rule 2330. These requests are not relevant to providing Respondent with sufficient notice to understand the charges against him.

B. Use of Pre-Signed VA Documents, Altered Documents and Forged Customer Initials (Cause Two)

Cause two alleges that Respondent had customers sign blank VA applications and related documents, forged customers' initials on documents, and altered VA documents, in violation of FINRA Rules 4511 and 2010.

Respondent asks that Enforcement be compelled to identify the customers who signed blank VA applications and the contracts with the documents he directed his assistants to complete using information contained in the clients' files. He further complains that the Complaint fails to identify the customers' selection of riders or beneficiary information.¹⁴ He also requests that Enforcement identify the VA applications and forms that Respondent altered and which ones he forged (or directed others to forge) customers' initials.¹⁵

Enforcement claims that cause two is intended to allege "a pattern of conduct relating to Respondent's books and records practices, not one or two instances [of] misconduct." It asserts that in his sworn investigative testimony Respondent testified that in "just about all cases" he had customers sign blank forms. Furthermore, Enforcement argues that in his Answer to paragraph 20 of the Complaint, Holloway admits that he "routinely had his clients sign the Transamerica application and other forms before he or his assistant completed the forms." Respondent also admits the allegations in paragraph 22 of the Complaint, which allege that Respondent modified or directed assistants to modify forms associated with VA transactions after getting his customers' permission.¹⁶

Resolution: Respondent's request is granted in part and denied in part. Although the Complaint contains considerable factual detail, cause two fails to adequately identify which customers were involved and which forms were forged or altered. Accordingly, Enforcement is ordered to file a Bill of Particulars that identifies the customers, the VA contracts, and the forms allegedly forged or altered by Respondent or his assistants, as alleged in paragraphs 20 through 23 of the Complaint.

I deny the request that Enforcement provide information about customers' selection of riders and beneficiaries. This information is not relevant to providing Respondent with sufficient notice of the charges against him.

¹⁴ Mot. at ¶ 9.

¹⁵ Mot. at ¶ 10.

¹⁶ Compl. ¶ 22; Answer ("Ans."), ¶ 16; Opp. at 8.

C. Impersonation of Employees and Customers (Cause Three)

Cause three charges Respondent with impersonating insurance company employees in telephone calls to medical providers in order get medical information and directing his assistants to impersonate customers in telephone calls with their financial institutions.

Respondent asks that Enforcement be ordered to identify the assistant who allegedly impersonated three customers during telephone calls to their financial institutions and also provide the date and identify the person impersonated, the person called and the substance and result of the call.¹⁷ He further asks that Enforcement identify the medical provider that Respondent called—allegedly while impersonating an insurance company employee to inquire about customer medical records for the purpose of insurance policy sales—together with the date of the call and the substance and result of the conversations.¹⁸

Enforcement argues that Respondent knows the identity of the assistant who impersonated three customers because he identified her during his sworn testimony and the information is within his knowledge because he directed the assistant to engage in the misconduct concerning the customers.¹⁹

As for the medical provider Respondent called, Enforcement claims that the allegations contained in paragraph 28 of the Complaint provide sufficient factual detail to put him on notice about the substance and nature of the claims. Furthermore, because he made the calls impersonating an insurance company employee, the information he seeks is within his knowledge, according to Enforcement.²⁰

Resolution: I grant in part and deny in part Respondent’s motion. Although the Complaint provides considerable detail, I order Enforcement to file a Bill of Particulars for paragraph 27 of the Complaint to identify the assistant and the three customers she allegedly impersonated during calls to their financial institutions.

I further order Enforcement to file a Bill of Particulars for paragraph 28 of the Complaint that identifies the medical providers Holloway contacted and the approximate dates of the call.

I deny the motion insofar as it seeks the “substance” and “result” of Holloway’s and his assistant’s conversations as they are not necessary to provide Respondent with notice of the allegations against him concerning the alleged misconduct.

¹⁷ Mot. at ¶ 11.

¹⁸ Mot. at ¶ 12.

¹⁹ Opp. at 3, 7-8. Enforcement also identified the assistant in its Opposition as the person Respondent named in his investigative testimony. *See* Opp. at 3.

²⁰ Opp. at 8.

D. False Certification of Continuing Education (Cause Four)

Cause four charges Holloway with directing an assistant to complete continuing education courses so that he could meet his Maryland insurance licensing requirements, enabling him to sell VA contracts. It charges that the assistant completed seven on-line credit hours and four self-study continuing education courses that helped Respondent satisfy his licensing obligations.

Respondent asks that Enforcement identify the assistant who allegedly took classes on his behalf in 2012 and 2014, as alleged in the Complaint, including the “name of the class taken,” the “exact date” of the class, the “name of the course,” and “by whom it was taught.”²¹

Enforcement did not respond to Respondent’s request concerning cause four because, it argues, he only attacked the sufficiency of the allegations contained in the summary section of the Complaint (paragraphs 1 through 5) and not the specific allegations made in cause four (paragraphs 30 through 33).²²

Resolution: I grant in part and deny in part these requests. Even though Respondent did not specifically cite paragraphs 30 through 33 of cause four, he did sufficiently challenge the primary allegations of the cause of action. Although cause four contains considerable factual detail, I order Enforcement to file a Bill of Particulars identifying the assistant who took the continuing education courses and the approximate dates that she took the courses, as alleged in paragraph 32.

I deny Respondent’s request that Enforcement provide the “name of the class [or course] taken,” the “exact date” it was taken, and who taught the class or course. These additional details are not necessary to provide Respondent with notice of the nature of the allegations against him in cause four.

E. False ADV Form (Cause Five)

Cause five alleges that Respondent made false statements about his investment advisory firm on a Form ADV (Uniform Application for Investment Adviser Registration) that he submitted to FINRA on September 7, 2011. It charges that in the Form ADV filing Respondent “creat[ed] the false appearance that he maintained an active business of providing financial planning services” to 101-250 individual and other clients in the prior fiscal year and similar services to 26-50 advisory clients. Enforcement alleges that the statements were false because he had no investment advisory clients and provided no fee-based financial planning services in the five years before he made the filing.

Respondent claims that the Complaint contains insufficient information about the allegedly false information he submitted to FINRA about his investment advisory. He complains

²¹ Mot. at ¶ 4.

²² Opp. at 1, 3.

that a copy of the Form ADV he filed was not attached to the Complaint and the Complaint did not identify the false information he submitted on the form.²³

As with cause four, Enforcement did not respond to this specific request because, it argues, Holloway only attacked the sufficiency of the allegations contained in the summary section of the Complaint (paragraphs 1 through 5) and not the allegations made in paragraphs 40 through 46 of cause five.²⁴

Resolution: I deny Respondent’s motion as to cause five. I find that the Complaint alleges sufficient detail to apprise Respondent of the nature of the allegations against him.

F. Incomplete and Altered Responses to Document Requests (Cause Six)

Cause six charges Respondent with failing to produce documents and altering documents that Enforcement requested in June 2016 about his customers’ VA exchanges before he submitted them to FINRA, in violation of FINRA Rules 8210 and 2010. According to the Complaint, Respondent’s assistant initially collected 4,400 pages of material responsive to FINRA’s request but Respondent produced only a fraction of the material to Enforcement—approximately 750 pages. A few months later, during an unannounced on-site visit of Respondent’s offices, Enforcement staff confronted Respondent about suspected missing material. Respondent then produced through counsel another 3,773 pages of responsive documents, which, according to the Complaint, constituted the “entire client files.”

Cause six also alleges that in producing customer files, Respondent added check marks to the investment time horizon on VA application forms of eight customers that previously had been left blank.

Respondent asks that Enforcement identify the eight customers to whose VA forms he allegedly added check marks, the “specific name” of the form or document that was allegedly altered, and whether the changes were made with the client’s prior knowledge and approval.²⁵

²³ Mot. at ¶ 4.

²⁴ Opp. at 1, 3.

²⁵ Mot. at ¶¶ 5, 13.

He further argues that Enforcement should identify which documents Respondent initially withheld from the over 4,000 pages that he ultimately produced.²⁶

Enforcement argues that its staff identified the documents associated with the eight customers during Respondent's investigative testimony. The forms were also discussed with Respondent's counsel in connection with a Rule 8210 request for information, according to Enforcement.²⁷

Enforcement also disputes that it is required to identify which documents Respondent withheld from production and which of the over 4,000 pages he produced in total. According to Enforcement, Respondent already knows which material this is because he Bates-stamped the documents he produced untimely, in October 2016.²⁸

Resolution: I grant in part and deny in part Respondent's request as to cause six. Although cause six provides considerable factual detail about the eight customers, I order Enforcement to file a Bill of Particulars concerning paragraph 43 of the Complaint identifying the eight customers and reasonably identifying the VA forms and documents that Respondent allegedly marked. I deny the request that Enforcement state whether customers gave their prior approval of Respondent's alleged changes to the forms because that information is not necessary to fairly apprise him of the charges against him alleged in cause six.

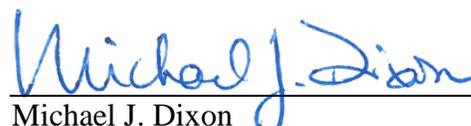
I also deny Respondent's request that Enforcement identify which documents he produced untimely. It is plainly evident which ones he produced in October 2016, and not earlier, because he Bates-stamped his production of documents, according to Enforcement.

IV. Conclusion

For the reasons discussed above, Enforcement is ordered to file and serve a Bill of Particulars, and Holloway is order to file and serve an Amended Answer.

The Department of Enforcement must file its Bill of Particulars no later than **July 27, 2018**, and Respondent Frederick Holloway must file an Amended Answer no later than **August 3, 2018**.

SO ORDERED.


Michael J. Dixon
Hearing Officer

Dated: July 17, 2018

²⁶ Mot. at ¶ 5.

²⁷ Opp. at 9

²⁸ Opp. at 4.

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