STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
AND FINANCIAL REGULATION
BUREAU OF INSURANCE
34 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0034

Paul R. LePage
GOVERNOR

Mila Kofman
SUPERINTENDENT

***In re:* BANKERS LIFE & CASUALTY CO. (License LHF127, NAIC code 61263);**	]	
TIMOTHY E. FARREN (License PRR65556, NIPR No. 3683162);	]	
MATTHEW F. JULIANO (License PRR62443, NIPR No. 3862104); *and*	]	**DECISION AND ORDER**
L. EUGENE GAGNON (License PRR3170, NIPR No. 2900347)	]	
DOCKET Nos. INS-09-212, -09-201, -09-213, *and* -10-203 (consolidated)	]	

The Staff of the Bureau of Insurance has requested that the Superintendent impose disciplinary sanctions on Bankers Life and Casualty Company, Bankers Life producers Matthew Juliano and Timothy Farren, and their branch manager Lawrence (Gene) Gagnon, for a series of transactions involving L.B., a senior citizen, now deceased, who purchased several Bankers Life annuities from Mr. Juliano and Mr. Farren. The Staff alleges that Mr. Juliano and Mr. Farren engaged in dishonest conduct and recommended unsuitable transactions without proper review of L.B.'s needs, and that Mr. Juliano misused his producer-client relationship for personal gain when he persuaded L.B. to advance him the funds to buy and insure a snowmobile. The Staff alleges further that Mr. Gagnon failed to conduct a proper suitability review, and that Bankers Life is accountable for the actions of all three of the individual Respondents.

Mr. Juliano has demonstrated dishonest conduct in both his sales activities and the snowmobile transaction. His insurance producer license is revoked, and he is ordered to pay a civil penalty of $10,000. Because Bankers Life is responsible for the conduct of its agents, Bankers Life is ordered to return L.B.'s annuity surrender charge to L.B.'s estate, with interest. In addition, the record shows significant problems with the company's suitability review process, which allowed a series of transaction causing significant financial harm to go undetected. Bankers Life is therefore ordered to pay a civil penalty of $100,000. Finally, the record also raises concerns with

Mr. Farren's stock sale recommendation, which have been referred for review by securities regulators.

Procedural History

The Staff filed Petitions for Enforcement against Respondents Juliano, Farren, and Bankers Life on September 28, 2009, and filed a Petition for Enforcement against Respondent Gagnon on April 16, 2010. The four Petitions were consolidated by order of the Superintendent issued June 25, 2010. The hearing was scheduled to commence on November 30, 2010, with a session at which L.B. was to testify by videoconference from Presque Isle. However, she died on November 17, 2010, and the hearing was postponed. A public adjudicatory hearing, with the Staff participating pursuant to 5 M.R.S.A. § 9054(5), began on January 27, 2011, resumed on January 28 and 29, and concluded on January 31, 2011. Written closing arguments were filed on February 23, 2011, and the record closed with the submission of Bankers Life's Reply to Bureau Staff's Response to the Objection to Bureau Staff's Closing Argument on March 10, 2011. An order pursuant to 24-A M.R.S.A, § 235(2), extending the time for the issuance of the decision in this case, was entered on April 11, 2011.

Factual Background

Mr. Juliano is affiliated with the Bangor office of Bankers Life, but lives and works in Aroostook County, in the northern tip of Maine. He moved there in 2001 because he enjoys winter sports and a rural environment. *(I Tr. 34–35, 40)*[1] His home is approximately a three-hour drive from Bangor. *(I Tr. 228)* During the relevant time period, Mr. Gagnon was the branch sales manager of the Bangor office, and Mr. Farren was the unit sales manager. Mr. Juliano reported to Jamie Kennison, who is not a party to this proceeding. Mr. Kennison was one of three USVs[2] who reported to Mr. Farren, and Mr. Farren reported to Mr. Gagnon. *(I Tr. 335–36; II Tr. 78, 80)*

Due to the distance, Mr. Juliano was not in close contact with the office. Mr. Gagnon testified that he "tried to have him come down a minimum of once a month. Now, sometimes he didn't come down once a month due to snowstorms.... [I]f we had a meeting of any sort, I reviewed

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[1] Citations to the record, abbreviated as follows, are to the January 27, 28, 29, and 31 hearing transcripts *(I through IV Tr.)*; to the exhibits admitted into evidence at the hearing that were offered by the Staff, by Mr. Juliano, and jointly by Bankers Life, Mr. Gagnon, and Mr. Farren *(Staff, Juliano, and Bankers Exh.)*, as paginated in the exhibit books supplied by the parties; and to the briefs submitted as closing argument by the Staff, by Mr. Juliano, and jointly by Bankers Life, Mr. Gagnon, and Mr. Farren *(Staff, Juliano, and Bankers Br.)*.

[2] There was no testimony clarifying the meaning of that abbreviation.

that stuff on the phone with him. If there was any special material, we made sure we ship it up to him." *(II Tr. 79–80)* Mr. Juliano did not have a clear picture of the office's organizational structure. He testified that Mr. Farren "was a manager, but I don't know if he was my manager. I don't know whose unit I was in. I think I was in Jamie Kennison's unit.... Jamie Kennison is another manager at that branch." *(I Tr. 43)*

Mr. Juliano testified that in the fall of 2007, the daughter of one of his customers told him about a friend, L.B., who was "an older woman that had a situation going on where she didn't understand her finances, was very upset with her health insurance and wanted Medicare supplement, was wondering about nursing homes and was upset with her stock market account.... [S]he thought I could help her because I had helped her mom, and she recommended me" to L.B. *(I Tr. 70–71)* After talking with L.B. on the phone, he made an appointment to visit her, and met with her in her home. *(IV Tr. 31; Staff Exh. 30a at 290)* In a written statement that Mr. Juliano prepared at the request of Bankers Life in or around January of 2009 *(Staff Exh. 30 at 289; I Tr. 72–74),* he stated that "After a lengthy chat and warm up," he asked L.B. for information about her financial situation and objectives, and that "She mentioned that her only expenses were her living, car, charities, and AMEX card. She said she owned her house." *(Staff Exh. 30 at 289; Staff Exh. 30a at 290)*

That meeting took place on October 31, 2007. *(Staff Exh. 30a at 290)* According to Mr. Juliano's written statement, this was his first meeting with L.B. The initial phone call with L.B. was "near the middle of October," and L.B. "said she could not see me for two weeks." *(Id.)* According to Mr. Juliano's 2011 hearing testimony, there was a meeting in September. *(I Tr. 68, 70)* He was not sure of the date, but "It was after my birthday, which was the 14th. I do remember that, it was after my birthday." *(I Tr. 70)* Mr. Juliano testified that the first meeting did not explore L.B.'s finances or discuss annuities, because "At the time I didn't want to overwhelm her, so I ... limited the conversation to the Medicare, the health and the prescription, and told her that she could discuss the finances at a later time."[3] *(IV Tr. 4)* When questioned about the discrepancies, he testified that there was one meeting, it must have been on October 31 *(I Tr. 75),* and that "although I focused primarily on the Medicare, she kept steering into the finances. I explained to her that Bankers does have stuff that we would be able to help her with, but I didn't want to do that that day." *(IV Tr. 65–66)*

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[3] Beginning on October 1, 2007, Maine law has prohibited the cross-solicitation of annuities at appointments made to solicit Medicare products, except at the customer's prior request. 24-A M.R.S.A. § 2152-A(2)(B) *(enacted by P.L. 2007, ch. 53).* Later in the hearing, after testifying that he had discussed general financial matters from the beginning, Mr. Juliano testified that although the home visit was limited to discussions of Medicare products, he had already had more extensive discussions over the phone.

At the October 31 meeting, according to Mr. Juliano's written statement, he determined that she already had suitable health coverage from her prior employment and did not need life insurance. *(Staff Exh. 30a at 290–91)* He "did offer to show her what Banker's *[sic]* had for annuities in regards to her IRA's and CD's. I did the Banker's approved Flip chart presentation." *(Id. at 291)* He also "told her she had an account that I could not help her with, but I worked with another agent (Tim Farren) who is licensed in that department." *(Id. at 290)* Mr. Juliano also believed "that Long Term Care Insurance would be a viable tool for her" *(Id.)*, but L.B. had breast cancer surgery on March 16, 2007 *(Bankers Exh. 8 at 269)*, with followup treatment in April, and she would not meet Bankers Life's underwriting guidelines for long-term care insurance until a year after her last cancer treatment. *(Staff Exh. 30a at 291; Staff Exh. 48 at 502; I Tr. 249–51)*

Mr. Juliano did not offer to sell L.B. any annuities at the October 31 meeting: "I told her I wanted to talk to Tim first, to explain the annuities regarding the bank IRA and bank CD and also to inform him of the stock account that I was unable to help her with." *(Id. at 291)* The annuity sales Mr. Juliano was considering, as discussed more fully below, involved selling approximately $150,000 worth of General Electric stock, liquidating three certificates of deposit, and rolling over two Individual Retirement Accounts which contained an annuity issued by Jackson National Life Insurance Company and a fourth certificate of deposit. Mr. Farren's involvement was necessary because recommending a stock sale required a securities license, which Mr. Juliano does not hold. *(I Tr. 45; IV Tr. 6)*

Mr. Juliano sent Mr. Farren a fax message on November 2 to set up a meeting with L.B., telling him that "She doesn't want to be in the market." *(Staff Exh. 10 at 37)* Mr. Juliano and Mr. Farren met at L.B.'s home on November 8 and made plans to go forward with the annuity purchases. *(Staff Exh. 30a at 292)* This was approximately a 400-mile round trip for Mr. Farren, so Mr. Juliano agreed to split the commissions equally with him for his sales to L.B. *(I Tr. 178–81, 228)* However, Mr. Juliano had been counseled for failing to meet production quotas. *(Staff Exh. 27)* In order to maximize his reported sales figures, Mr. Farren agreed to structure the split as an "after-commission split," under which Mr. Juliano would get full credit for the sales in 2007 and an adjustment would be made in 2008. *(Staff Exh. 27; Staff Exh. 29a at 288; I Tr. 181–82, 235, 357)*

Mr. Juliano met with L.B. again on November 13, at which time she liquidated the three CDs, requested the rollover of the two IRAs, and applied for two Bankers Life ten-year single-premium deferred annuities. *(Staff Exh. 12, 15, 19–22; Bankers Exh. 4, 6)*

The first annuity will be referred to as the CD Proceeds Annuity. It was purchased for a premium of $37,530 with the proceeds from the CDs, and Bankers Life issued it on November 14. *(Staff Exh. 12 at 60)*

The second annuity will be referred to as the IRA Rollover Annuity. Initially, L.B. applied to roll two IRAs over, for a total anticipated premium of $48,000. *(Bankers Exh. 6 at 231)* However, one of her IRAs, held at TD Banknorth, was inherited from her sister. The inherited and personal IRAs could not be merged, so the IRA Rollover Annuity was limited to the proceeds from the surrender of the Jackson National annuity, and was issued on December 3 for a premium of $17,352.06. *(Staff Exh. 15 at 118; I Tr. 150; IV Tr. 10)* Mr. Juliano worked with Mr. Farren to try to roll over the inherited IRAs, but they learned that this would not be possible. *(I Tr. 164–68, 256; II Tr. 276; IV Tr. 10; Staff Exh. 31b)* According to Mr. Juliano, "once I found out that we couldn't do it, I opted not to do it, and I forgot about it." *(I Tr. 168)* According to L.B., Mr. Juliano went with her to TD Banknorth on March 28 and April 16, 2008 to make two additional attempts to roll over the inherited IRA. *(Staff Exh. 48 at 502)*

L.B. also applied for a third annuity, which will be referred to as the Stock Proceeds Annuity. *(Staff Exh. 12; Bankers Exh. 5)* L.B. did not yet have the funds to purchase that annuity when she applied, because she had not yet sold her GE stock. *(Staff Exh. 30a at 292)* The anticipated premium in the application was $130,000. *(Bankers Exh. 5 at 208)* L.B. sold the GE stock on November 29 for $150,253. *(Staff Exh. 18; Bankers Exh. 1 at 3, 7)* She kept approximately $15,000 for taxes and for her own expenses *(Staff Exh. 30a at 293; Staff Exh. 48 at 500),* and sent Bankers Life a check for $135,000 dated December 11. *(Bankers Exh. 5 at 206)* The annuity was issued on December 13. *(Staff Exh. 16 at 140)*

According to Mr. Juliano's written statement, he took all three applications on November 13, L.B. called him on November 14 because "she had some paperwork she did not understand," and he made another visit to her home on November 15. Mr. Juliano stated that L.B.'s questions were about another annuity she held that she was not happy with, that he recommended against replacing it with a Bankers Life annuity because of the surrender penalties, and that he stayed for coffee and they talked about their pets and made an appointment for Mr. Juliano to visit again with his dog Nacho. *(Staff Exh. 30a at 292–93)* However, L.B. remembered the timing differently *(Staff Exh. 49 at 514),* and the application date demonstrates that the purpose of the November 15 visit was to take the application for the Stock Proceeds Annuity. *(Bankers Exh. 5 at 217)*

Before Mr. Juliano sold L.B. the annuities, he completed a Fact Finder *(Staff Exh. 12 at 41–43; Staff Exh. 30a at 290),* which is one of a series of questionnaires developed by Bankers Life for its producers to use to assess "Prospect concerns and needs" and the appropriateness and affordability of the coverage the producer is considering. *(Bankers Exh. 12 at 489)* Mr. Juliano used a three-page Fact Finder entitled "Financial Realities Affecting Your Retirement," which collected information on medical expenses, long-term care, retirement income, and final expenses. *(Id. at 500–02)* L.B. was a retired teacher with no spouse or children *(Staff Exh. 30a*

at 290), and she had a pension of $46,000 from her teaching career, and $10,000 in Social Security benefits. *(Id.; Staff Exh. 12 at 42)* Mr. Juliano listed "Living/Car/Charity/Amex" as her expenses, without providing any dollar figures. *(Staff Exh. 12 at 43)* The Fact Finder submitted with the first two applications, which was dated November 13, 2007, listed assets of approximately $50,000 in IRAs, $37,000 in CDs, $18,000 in annuities, $10,000 each in savings accounts and mutual funds, and $5000 to $7000 in stocks. The signature line had the notation "Client did not feel the need to sign file." *(Id.)* An updated version was attached to the application for the Stock Proceeds Annuity. The date on the Fact Finder was not changed, but L.B. added her signature at the bottom of the page, and the value of her stock holdings was changed to $175,000. *(Bankers Exh. 5 at 227)*

Each application included two suitability questionnaires and a replacement questionnaire, signed by Mr. Juliano and L.B. The information on the questionnaires included a summary of the applicant's assets, whether the annuity was replacing an existing annuity or life insurance policy, why the applicant wanted to buy the annuity, why the producer believed that issuing the annuity was in the best interest of the applicant, and verification that the applicant understood the applicable Maine premium tax and any early withdrawal or surrender penalties on the existing assets that were being used to pay for the annuities. *(e.g., Bankers Exh. 6 at 241, 245–46, 254)*

As part of Bankers Life's suitability review process, all applications were reviewed by Mr. Gagnon. After a preliminary screening by his staff, Mr. Gagnon reviews the application materials and the Fact Finder and talks with the producer, making notes on an outline he calls his "cheat sheet." *(III Tr. 14–15, 19)* Mr. Gagnon followed this process with Mr. Juliano, calling him to discuss the sales and filling out a cheat sheet. *(Staff Exh. 14 at 94)* Mr. Gagnon signed or initialed Mr. Juliano's Fact Finders and suitability questionnaires. *(e.g., Bankers Exh. 6 at 241, 253, 254).* He signed off on the November 13 applications on November 14 *(Bankers Exh. 6 at 254),* and signed off on the November 15 application on November 26 *(Bankers Exh. 5 at 228).* Mr. Gagnon occasionally made spot checks to verify the information with the applicants. Although he did not personally talk with the applicants as a routine matter *(III Tr. 15),* he performed spot checks with some of Mr. Juliano's other clients *(III Tr. 34–35).*

The next transaction between Mr. Juliano and L.B. was not an insurance transaction. In December, they agreed that L.B. would advance the funds so that Mr. Juliano could have a new snowmobile. Mr. Juliano and L.B. disagreed about many of the circumstances of the transaction, but both of them considered it a loan from L.B. to Mr. Juliano. *(Staff Exh. 30a at 294–95; Staff Exh. 49 at 514–15)*

On December 20, 2007, L.B. bought, insured,[4] and financed the snowmobile in her own name with her own funds. *(Staff Exh. 33–37)* It was the previous year's model, on sale for a substantial discount. *(Staff Exh. 30a at 294–95; I Tr. 239–40)* According to the Dealer's Certificate, the price was $6550, plus sales tax of $327.50. *(Staff Exh. 34)* However, L.B. signed a loan application representing that the price of the snowmobile was $9499, plus taxes and fees of $768.95, and that she had made a cash down payment of $3,096.45. *(Staff Exh. 33)* Mr. Juliano testified that the reason he did not borrow the money himself or cosign L.B.'s loan was that he "had no credit," as a result of an unpaid debt of $12,000 that he owed to reimburse MaineCare for the birth of his twin sons 21 years earlier, after he and his wife had separated. *(I Tr. 191–92)* Although L.B.'s insurance application listed her as the first driver *(Staff Exh. 35 at 358),* Mr. Juliano immediately took possession and testified that L.B. "never rode the sled" *(I Tr. 195).* He testified that he "purchased a receipt book for the payments, I did a contract with her letting her know that if the sled was stolen, the sled was wrecked, that I would pay the sled.... And at any time if she didn't feel comfortable with the payments, let me know, and I'd have the sled paid off in full." *(I Tr. 193)* They agreed that he would reimburse L.B. for all loan and expense payments she made, until the snowmobile was fully paid for in about three years. *(Staff Exh. 30a at 294–95; I Tr. 198)*

In the spring of 2008, L.B. told Mr. Juliano that her roof was leaking and she needed money for a new roof. According to Mr. Juliano, she said the bank would not lend her the money unless she paid off her American Express Card, so he "helped her with the paperwork to request a free partial withdrawal from her annuity." *(Staff Exh. 30a at 295)*

Mr. Juliano sold L.B. a long-term care policy shortly thereafter. *(Staff Exh. 30a at 296; Staff Exh. 48 at 506–07)* According to his testimony at the hearing, he had told her in the fall that she would not be eligible for at least another six months, and she initiated the conversation by calling him six months later. *(IV Tr. 16–17)* However, Mr. Juliano had previously stated in his written statement that he was the one who "called [L.] to see if she was still interested in the Long Term Care Insurance to help protect her estate. She said yes." *(Staff Exh. 30a at 296)* On April 16, 2008, she submitted an application, stating that her cancer surgery was day surgery on March 16, 2007, that her recovery period was one day, and that all checkups since then had been cancer-free.[5] *(Bankers Exh. 8 at 269, 272)* The original Fact Finder was used to support the application.

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[4] The annual premium was $725. *(Staff Exh. 35 at 359)* Mr. Juliano reimbursed L.B. for the initial insurance payment of $290 and for one subsequent payment of $11. *(Juliano Exh. 2)* The policy was cancelled for nonpayment of premium effective March 18, 2008. *(Staff Exh. 35 at 357)*

[5] According to one of L.B.'s written statements, she told Mr. Juliano that she did not finish her radiation treatments until the end of June. *(Staff Exh. 48 at 501–02)*

The financial information was not changed to reflect her annuity purchases with Bankers Life. *(Bankers Exh. 9 at 310)* Bankers Life issued the policy on May 8, 2008. *(Bankers Exh. 9 at 319)*

According to Mr. Juliano, after she bought the long-term care policy she "voiced her concern regarding the cost of the long term care insurance and didn't feel she could afford it. I reminded her about using some of the interest from her annuity" to pay for it. *(Staff Exh. 30a at 296)* L.B. cancelled the long-term care policy on July 28, 2008. *(Bankers Exh. 9 at 355)* According to Mr. Juliano, he learned in August of 2008 that she was also attempting to surrender all three of her Bankers Life annuities. *(Staff Exh. 30a at 298)* On August 1, in response to her request, Bankers Life sent L.B. surrender request forms to L.B. *(Staff Exh. 12 at 87)*

According to Mr. Juliano, he visited L.B. on September 9, and "She started to list all the problems she was having. She had too many bills and was broke; she couldn't even put aside money for her taxes on her house. She had the roof loan, and her hearing aide *[sic]* loan, and the snowmobile loan." *(Staff Exh. 30a at 299)* The same day, she requested the surrender of the Stock Proceeds Annuity. *(Staff Exh. 12 at 88–90)* On October 10, after deducting a surrender charge of $2801.60, Bankers Life sent L.B. a check for $36,109.45. *(Staff Exh. 12 at 91; Bankers Exh. 2 at 22)* She did not surrender the Stock Proceeds Annuity or the IRA Rollover Annuity. *(Bankers Exh. 2 at 18, 23–24)* L.B. stated that she was "reluctant to cash the large annuity because of the 8% penalty." *(Staff Exh. 48 at 505)*

On September 12, Mr. Juliano went to L.B.'s home to make a payment on the snowmobile. He was accompanied by his girlfriend, and L.B. was accompanied by D.H., a friend who assisted her in financial matters. The meeting turned contentious, people were shouting, and D.H. told Mr. Juliano that he had taken advantage of L.B. *(Staff Exh. 30a at 299–300; Staff Exh. 50 at 539–40)* After he left, Mr. Juliano made arrangements with his father to get the funds to pay off the balance. Mr. Juliano testified that his father "has a safe in his cellar" and that "he had $5000 of my money that he was holding for me." He was asked whether "that money belonged to you and your father or your father or you or who?" and he testified: "It's complicated .... I save money through my father by giving him money, and he holds money for me for purposes — for where I've been with the finances with the child support and all that, my parents help me a lot." *(I Tr. 199)* On September 15, Mr. Juliano's father wrote a check for $5801.50. *(Staff Exh. 38 at 368)* Mr. Juliano testified that his father (who lives in a suburb of Portland) went to Caribou to deliver the check to L.B. and D.H., because L.B. "wasn't speaking to me anymore." *(I Tr. 201)* In return, L.B. signed a receipt stating that the check was for the balance of the loan for purchase of a 2007 Artic *[sic]* Cat F-8. *(Juliano Exh. 2)* On November 6, 2008, L.B. signed a bill of sale transferring ownership of the snowmobile to Mr. Juliano. *(Staff Exh. 39 at 369)*

Allegations of Prosecutorial Misconduct

As a threshold matter, Respondents Bankers Life, Gagnon, and Farren allege misconduct by the Staff in prosecuting this action and request that the Petitions against them be dismissed. *(Bankers Br. 21–25)* Respondent Juliano also alleges that the Staff failed to conduct "a full, complete and unbiased investigation." *(Juliano Br. 15)*

The Maine Supreme Judicial Court has stated: "It has long been the case that public prosecutors carry special ethical duties: they have an obligation to seek justice, not just to convict. Prosecutors face ethical obligations not shared by other lawyers, due to their dual role of advocate and government official." *Maine Rules of Professional Conduct, Comment 3 to Rule 3.8.* As a public official, a prosecutor has the obligation to be fair and thorough, but a prosecutor remains an advocate, and does not have the obligation to be neutral or dispassionate. The Respondents have not provided any information that would suggest that the Staff suppressed or fabricated evidence, filed groundless charges for improper purposes, or otherwise deprived them of a fair hearing process. The charges against each Respondent are appropriately addressed on the merits, on the basis of the evidence presented by the parties at the hearing.

In addition to their general allegations of bias, the Respondents raise five specific points in support of their motion to dismiss. First, they assert, without any citation to the record, that "The Securities Division *[sic]* did not find sufficient basis to proceed with charges against anyone." *(Bankers Br. 22)* Although the Office of Securities has not at this time filed any charges against any Respondent to this proceeding, that does not necessarily prove that the Office has determined that there is no basis for filing such charges. Mr. Farren, the only Respondent to testify about any investigation by the Office, specifically acknowledged that the Office has not told him that all charges or allegations have been dropped. *(II Tr. 301–02)* Furthermore, even if there had been an affirmative finding that none of the Respondents violated any securities laws, the limited relevance would relate to the sale of the GE stock. Potential findings of securities violations are separate from Insurance Code violations.

The other asserted grounds for dismissal relate to a report prepared by Dale Doughty, enrolled agent, *d/b/a* The Tax Guy, in connection with a consumer complaint by L.B. to the Bureau of Insurance. At the Bureau's request, Bankers Life agreed to pay for the services of an independent financial planner or accountant, selected by L.B., to analyze the impact of her transactions with Bankers Life in order to determine whether she had suffered a financial loss.

One ground is that "Bureau Staff refused to produce the Doughty Report until forced to do so by the Superintendent." *(Bankers Br. 23)* That is not misconduct. The Staff objected to Bankers Life's discovery request, citing its confidentiality obligations under 24-A M.R.S.A. § 216 and

raising significant legal questions of first impression. When I granted Bankers Life's motion to compel and ordered production subject to a protective order, the Staff complied. *(II Tr. 196–99)* There is no basis for imposing discovery sanctions, or the extreme sanction of dismissal, for filing a good faith objection to a discovery request.

Finally, the Respondents claim that "Mr. Doughty clearly and unequivocally concluded that the annuity sales were suitable" *(Bankers Br. 22),* and that the Staff improperly failed in several ways to address that allegedly exculpatory conclusion. *(Bankers Br. 22–24)* The Doughty Report, however, is not binding on the Staff. It reflects one person's conclusions after reviewing a set of facts that was available – along with other facts – to all the parties in this proceeding and to the hearing officer. Therefore, even if Mr. Doughty had concluded that the Respondents had done nothing wrong in recommending the annuity sales and reviewing their suitability, that would not make it improper for the Staff to advocate for a different conclusion, as Bankers Life did with regard to some of Mr. Doughty's conclusions. *(Bankers Reply Br. 8–9)*

Furthermore, that was not Mr. Doughty's conclusion, and there was no conflict between the Doughty Report and the case the Staff has presented. Mr. Doughty expressly declined to "address any issues of ethical or professional conduct," limiting the scope of his inquiry to two issues: "issues of suitability of these annuities as an investment and the consequences, both past and future, of these transactions." *(Bankers Exh. 1 at 1)* With regard to those consequences, Mr. Doughty concluded that L.B.'s sale of her General Electric stock "was indeed a fortuitous event," because her GE holdings "declined from more than $150,000 to just over $66,500" during the two years between the sale and the report. *(Id. at 4)* In hindsight, rather than being harmed by that sale, L.B. benefited significantly by moving her investments from stocks to annuities shortly before the market crashed. For that reason, an attorney at Legal Services for the Elderly who was assisting L.B. found no basis to pursue an action for damages. *(Id. at 16)* Nevertheless, Mr. Doughty warned that L.B. "continues to have unresolved financial issues and should seek the services of a competent financial advisor." *(Id. at 1)*

On the other issue, suitability, Mr. Doughty's conclusions are not "clear and unequivocal" as the Respondents claim. The only section of the Doughty Report that might be viewed as exculpatory is his statement that "[m]ost investment advisors would agree (myself included)" that an investor in L.B.'s position should not have so much of her portfolio invested in the stock market, especially in a single company, and that a fixed annuity is "an entirely appropriate investment alternative for this client." *(Bankers Exh. 1 at 4)* The Staff does not disagree with those premises: "The problem with this transaction was not the recommendation to move assets from stock to annuities. Annuities are a less risky investment than stock and the reduction in risk offered by such a transaction may be appropriate in many circumstances." *(Staff Br. 31)* With regard to the particular transactions at issue in this proceeding, contrary to the Respondents'

claim that he concluded that "the annuity sales" were suitable *(Bankers Br. 22),* Mr. Doughty questioned the choice of the particular annuity L.B. was sold to replace the GE stock *(Id. at 4–5),* and criticized the other annuity sales, stating that "there was less of a compelling argument here for placing those funds in annuities" and that there "was probably sufficient reason to weigh the balance in favor of allowing those funds to remain invested in CDs."[6] *(Bankers Exh. 1 at 5)*

The motion to dismiss the charges for prosecutorial misconduct is therefore denied.

Statements by L.B.

At the hearing, the Staff offered four exhibits containing statements by L.B. Staff Exhibit 47 is a letter to the Bureau of Insurance by a Legal Services for the Elderly staff attorney summarizing L.B.'s complaint, Staff Exhibit 48 is a statement by L.B. summarizing her recollection of her dealings with Mr. Juliano, Staff Exhibit 49 is L.B.'s response to Staff Exhibit 30a, Mr. Juliano's written statement, and Staff Exhibit 50 is the transcript of an interview of L.B. and D.H., her friend who assisted her in financial matters, conducted by representatives of the Attorney General, Bureau Staff, the Office of Securities, and Legal Services for the Elderly.

The Respondents objected, stating that their inability to cross-examine L.B. meant that admitting her statements would violate their due process rights. *(II Tr. 121–22)* I ruled that "Exhibits 47 through 50 will be admitted for limited purposes of background and identifying facts that are in dispute. Without corroboration, any hearsay statements in the exhibits will not be relied on as the sole basis for making findings of fact." *(II Tr. 135)*

The Respondents have filed objections to the Staff's closing argument, arguing that the Staff has cited these exhibits for purposes outside the limited scope for which they were admitted, and requesting that I disregard the statements cited by the Staff. I have disregarded the statements in these exhibits except for the limited purposes for which they were admitted.

The Snowmobile Transaction

Mr. Juliano said the snowmobile transaction was a "mistake." *(I Tr. 186, 193))* L.B. called it her "dumb loan." *(Staff Exh. 49 at 515)*

According to Mr. Juliano's written statement, he and his girlfriend were having coffee with L.B. at her invitation, when she asked them about their plans for the winter. He said he normally went snowmobiling but his sled had a blown motor, and she offered some money for a new one.

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6 Apparently he was not aware that the IRA Rollover Annuity replaced another annuity.

When he declined, she offered to help him get a loan. *(Staff Exh. 30a at 294)* At the hearing, he testified that her initial offer was to lend him the money, but he declined that offer because he knew it would be unethical to accept money from a client as a personal loan. *(I Tr. 186–87)*[7]

Persuading L.B. to take personal responsibility for buying, insuring, and financing the snowmobile did not make it ethical but made it worse. Mr. Juliano testified that he could not enter into these transactions in his own name because of his unpaid MaineCare debt. *(I Tr. 191–92)* Mr. Juliano involved L.B. in a transaction under which she was the only individual in debt to the finance company. She was the registered owner of the snowmobile if it caused any damage, and he allowed the insurance on the vehicle to lapse.

Mr. Juliano testified that the transaction was L.B.'s idea. *(I Tr. 186)* That testimony is not credible. His further descriptions of the transaction are contradicted by the documentary evidence. He testified that L.B. raised the idea at a social visit the preceding day that was unrelated to their customer relationship. *(IV Tr. 46)* However, the snowmobile purchase was on December 20, 2007. *(Staff Exh. 33–34)* His visit the preceding day was to deliver the Stock Proceeds Annuity. *(Staff Exh. 30a at 294)*

His failure to keep accurate records of what he owed made matters worse. He testified that he signed a "contract" outlining his obligations to L.B., but he did not keep a copy for his own records. *(I Tr. 193)* He testified that he maintained a payment book to keep track of how much he owed L.B. *(I Tr. 189, 241)* However, he subsequently acknowledged that his records only kept track of what he had paid. *(IV Tr. 46–47; Juliano Exh. 2)* He testified that "She did not give me statements showing me what was left on the loan. That would have been up to her to do." *(IV Tr. 47)*

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[7] The relevant portion of Mr. Juliano's examination by the Staff follows *(I Tr. 186–87)*:

Q) Okay. So I just want to get — I just want to get the terms of this agreement you had with [L.B.].
A) Okay.
Q) She was going to either lend you the money to purchase it —
A) She offered, I said no.
Q) You said no. Okay. Why did you say no to that?
A) Because we can't take money from clients, can't take cash from clients.
Q) Okay. And who told you that?
A) It's part of training. It's in the law book. It's in the — it's in the ethics rules.
Q) Okay.
A) It's everywhere.

Mr. Juliano argues that "The loan had nothing to do with the conduct of the insurance business and was personal in nature." *(Juliano Br. at 11)* To the contrary, Mr. Juliano abused L.B.'s trust that arose from the business relationship, and used his knowledge of L.B.'s finances and interests when he borrowed from her. I conclude that Mr. Juliano used knowledge gained from his client relationship for personal gain, in violation of 24-A M.R.S.A. § 1445(2)(A), and that he engaged in dishonest practices and demonstrated untrustworthiness in the conduct of his business, in violation of 24-A M.R.S.A. § 1420-K(1)(H).

The Annuity Transactions – Questions Presented

All of the charges in the four Petitions, with the exception of those relating to the snowmobile purchase, are based on the same common pattern of operative facts.[8] The Staff alleges: (1) that Mr. Juliano violated multiple insurance laws when he advised L.B. to replace certain investments with Bankers Life deferred annuities, represented to her that the transactions were in her best financial interest, and then facilitated the purchase of the annuities, without reasonable grounds to believe that the transaction was suitable and without making reasonable efforts to obtain information about L.B.'s financial situation and needs; (2) that Mr. Farren was liable, on a similar basis, for the sale of L.B.'s General Electric stock and the purchase of the Stock Proceeds Annuity; (3) that Bankers Life is responsible, pursuant to 24-A M.R.S.A. § 1445(1)(D), for all of the violations allegedly committed by Mr. Juliano and Mr. Farren; and (4) that Mr. Gagnon violated multiple insurance laws when he determined that the annuity sales by Mr. Juliano and Mr. Farren were suitable and approved those sales.

The Staff's allegations present the following basic questions about the various sales transactions, singly and in the aggregate:

1. Were the transactions unsuitable for L.B.?
2. Did Mr. Juliano (and where applicable Mr. Farren) make reasonable efforts to obtain the information they needed and have reasonable grounds to believe that their recommendations were suitable?
3. Was L.B. misled?
4. Did Mr. Gagnon conduct a reasonable supervisory review on behalf of Bankers Life?

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[8] Neither the Petition nor the Staff's closing argument alleges that the sale of the long-term care policy or Bankers Life's supervisory review of that sale violated any laws.

Suitability of the Annuity Sales

The Staff identifies six substantive concerns with the transactions. According to the Staff: (1) the CD Proceeds Annuity was an inferior replacement for the CDs *(Staff Br. 19–21);* (2) the IRA Rollover Annuity was an inferior replacement for the Jackson National Annuity *(Staff Br. 26–29);* (3) the timing of the stock sale caused L.B. to pay higher taxes and Medicare B premiums *(Staff Br. 32–33)*; (4) the aggregate effect was to leave too much of L.B.'s assets in annuities *(Staff Br. 34);* (5) L.B.'s life expectancy was too short for these annuities to be appropriate *(Staff Br. 35, 39);* and (6) her annuities should have been "laddered" as multiple contracts with different maturity dates *(Staff Br. 35, 37).*

The timing of the stock sale was questionable. It generated capital gains of approximately $39,000, which constituted a one-time increase to her reported annual income. Specifically, it raised her 2007 Modified Adjusted Gross Income (MAGI) from approximately $69,000 to $108,063. *(Bankers Exh. 1 at 3; Staff Exh. 32 at 345)* This placed her two income brackets higher for purposes of calculating her 2009 premium for Medicare Part B, resulting in a monthly premium adjustment of $96.30, which is $1155.60 for the year. *(Staff Exh. 32 at 345)* If her MAGI for 2007 had been only $1063 less, the monthly premium adjustment would have been only $38.50, which would have saved her $693.60 over the course of the year ($57.80 per month for 12 months). *(Id.)* This means that if she had held onto approximately $4000 worth of her GE stock for one additional month, selling it in 2008,[9] she would have saved approximately $700 in Medicare premiums alone.

Selling some of the stock in 2008 would also, at a minimum, have postponed the payment of some of L.B.'s income taxes. The Respondents point out that capital gains taxes are the inevitable consequence of capital gains, and that it is better to sell at a higher price and pay more taxes than to sell at a lower price and pay less taxes. *(Bankers Br. 13–14; Bankers Reply Br. 6; II Tr. 232)* However, it is even better to sell at a higher price and pay less taxes, by paying at a lower rate. This can be accomplished if postponing part of the sale allows more income to be taxed in a lower bracket, or if there is a reduction in the tax rates, as happened for the lowest bracket between 2007 and 2008.[10] Although the record does not contain sufficient information to

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[9] This was calculated by multiplying $150,000 by the ratio of $1063 to $39,000.

[10] For example, for single taxpayers, 2007 capital gains were taxed at 15% to the extent that they represented taxable income in excess of $31,850, and below that threshold were taxed at 5%. For 2008, the threshold for the 15% bracket was raised to $32,550 and the tax on the lower bracket was eliminated. *See* Internal Revenue Service tax computation worksheets at http://www.irs.gov/pub/irs-prior/i1040gi--2007.pdf and at http://www.irs.gov/pub/irs-prior/i1040gi--2008.pdf. Although L.B.'s MAGI was well above those thresholds, there

determine whether L.B. was in a position to take advantage of that opportunity, it is a possibility that ought to have been considered.

In his defense, Mr. Farren argues that providing tax advice "would have been outside of the scope of Mr. Farren's field and licensure." *(Bankers Br. 18–19)* Mr. Farren testified that he is "not a licensed tax professional." *(I Tr. 350–51)* However, in Maine there is no license for a "tax professional." Maine law expressly provides that irrespective of licensure, "Anyone may ... engage in services which involve accounting or auditing skills, including ... the preparation of tax returns and the furnishing of advice on tax matters."[11] 32 M.R.S.A. § 12202. Furthermore, insurers that issue annuities and producers that sell them offer advice on the tax benefits of deferred annuities, and this is part of the standard Bankers Life sales presentation. *(Staff Exh. 30b at 319–324)* Mr. Juliano advised L.B. that tax deferral was one of the benefits of buying an annuity. *(I Tr. 117, 208–09, 213)* The Bankers Life suitability questionnaire includes "Tax Savings" as one of the boxes to check as possible reasons for buying the annuity, and this box was checked for both the CD Proceeds Annuity, which replaced a fully taxable investment, and for the Stock Proceeds Annuity, which replaced an investment for which the dividends were taxable.[12] *(Bankers Exh. 4 at 186; Bankers Exh. 5 at 218)*

Although Mr. Farren was not qualified to develop a detailed tax strategy addressing factors such as the timing of the stock sale and the acceleration or deferral of charitable contributions, that does not necessarily mean that he fulfilled his suitability responsibilities simply by recommending that L.B. seek tax advice, without taking any steps to verify that she had consulted a qualified tax professional or asked the necessary questions. Mr. Farren testified that when he met with L.B., "I did ask her if there was someone that did her taxes, and she said there was a lady, a friend of hers, a lady if I remember right that was a friend that helped her with her

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are a number of differences between gross and taxable income that could result in substantially lower taxable income, especially for a taxpayer with a high level of charitable contributions.

[11] With limited exceptions, only credentialed "tax practitioners" may represent a taxpayer before the Internal Revenue Service, but giving tax advice or preparing tax returns does not constitute prohibited representation under IRS Circular 230, 31 C.F.R. Subtitle A, Part 10.

[12] The Respondents argue that because L.B. was receiving taxable dividends of $4000 a year on the GE stock and taxable interest on the CDs, she saved "$4,000 in taxes in just the first two years after she purchased the annuities." *(Bankers Br. 13)* They cite Mr. Farren's testimony *(III Tr. 96)*, but Mr. Farren only testified that there were savings, not that the savings were $2000 per year. It should also be noted that the tax advice involved in comparing stocks with deferred annuities is not as simple as "current or deferred." Although dividends are taxed when earned, capital appreciation of stocks is tax-deferred, and different rates may apply.

taxes. And I said, well, you need to see a tax professional to — you know, so you can ascertain what the tax ramifications are going to be if you decide to move forward with this." *(I Tr. 349)* His followup was limited to confirming with Mr. Juliano that L.B. had "talked to her friend that does her taxes, and she was going to withhold $15,000 for tax purposes." *(I Tr. 362)*

However, although these issues deserve further scrutiny, primary jurisdiction in this area would appear to be vested in securities regulators. The questions arise out of the recommendation to sell L.B.'s General Electric stock, and the questions would be the same regardless of the purpose for which the sale was recommended. Furthermore, it is likely to be a recurring issue, for which securities regulators may have had the opportunity to develop specific standards. As in prior cases where allegations of misconduct triggered the jurisdiction of another agency, I am referring the allegations against Mr. Farren with regard to the stock sale to the Office of Securities and the Financial Industry Regulatory Authority. The only charges in the Petition against Mr. Farren relate to the stock sale and the purchase of the Stock Proceeds Annuity.[13] The Staff "does not challenged *[sic]* the wisdom of selling a large portion of the GE stock or even to invest a significant portion of the proceeds in annuities." *(Staff Br. 34)* The Staff's concern with Mr. Farren's role in the annuity recommendation is with the timing of the purchase, and the concerns with the annuity purchase arise entirely out of concerns with the timing of the stock sale. Accordingly, I am dismissing the Petition against Mr. Farren, without prejudice to the Staff's right to reinstate the Petition if the Office or FINRA takes disciplinary action or if the Office or FINRA makes findings or conclusions tending to show probable cause that Mr. Farren may have violated any insurance law.

Another issue raising significant suitability concerns is the replacement of a competing insurer's annuity and some certificates of deposit with lower-yielding annuities. The IRA Rollover Annuity had a base interest rate of 3.25% at the time of issue, with a 3% one-time bonus interest payment increasing the first-year rate to 6.25%, and a guaranteed interest rate of 2.50%, increasing to 3.00% after ten years. *(Staff Exh. 15 at 104)* The existing Jackson National annuity that it replaced had a base interest rate of 3.45% at the time of issue, and a guaranteed rate of 3.00%. *(Staff Exh. 17a at 189; Staff Exh. 17b at 207)* In addition, the Jackson National Annuity could be accessed in full without surrender penalties in one more year, on November 20, 2008, while the IRA Rollover Annuity had limits on penalty-free withdrawals until ten years after purchase. *(Staff Exh. 17a at 177, 189)*

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[13] The Staff argues that Mr. Farren is also responsible for the suitability of the CD Proceeds Annuity and the IRA Rollover Annuity, because he co-signed the application and shared in Mr. Juliano's commissions for those sales, and also collected an override commission as Unit Sales Manager. *(Staff Br. 23, 30)* However, violations with respect to those sales are not charged in the Petition against Mr. Farren.

Thus, in return for a one-time credit to her account, L.B. exchanged her previous annuity for one with a lower current rate, a lower guaranteed rate, and substantially increased limits on withdrawal rights. According to the Respondents, that does not prove that the replacement was unsuitable, because L.B. was dissatisfied with the service provided by Jackson National, and was willing to accept somewhat lower returns as a tradeoff for better service. *(Bankers Br. 6)* For that reason, the suitability question is not as clear-cut as it might otherwise appear, which highlights the importance of a meaningful and effective suitability review process. The issues raised by this transaction, and similar concerns with respect to the CD Proceeds Annuity, will be discussed more fully in subsequent sections of this Decision and Order.

Next, the Staff argues that that the annuities L.B. purchased are unsuitable because they "would not mature and begin to pay out full annuitized benefits for 10 years. Thus, at time of sale, L.B. could not have expected to live long enough to receive a full payout of these annuitized benefits." *(Staff Br. 35)* Furthermore, L.B.'s health history made it likely that she had a relatively low life expectancy for her age. In addition to making it even less likely that she would live to the maturity date of the contract, it would also reduce the value of the income stream from annuitization by reducing the number of monthly payments she could expect to receive if she annuitized. However, although the right to annuitize the contract is of little value to a consumer in L.B.'s situation, the investment features of the annuity contract are often the decisive factor in an annuity purchase. Therefore, the suitability .analysis must be based on the totality of the circumstances.

The Staff also questions "whether it was suitable to transfer such a large majority of her assets into a single type of investment — the ten-year deferred annuity, particularly since L.B. had voiced a desire to have access to her funds. Security and tax deferral are the hallmarks of a deferred annuity, not accessibility." *(Staff Br. 34)* Limited accessibility is an inherent characteristic of any long-term investment. Penalty-free withdrawals from annuities are subject to limitations. However, annuities provide flexibility that traditional CDs do not; withdrawals are not limited to a scheduled maturity date. Therefore, it was not necessarily unsuitable to recommend that substantially all of L.B.'s long-term investments be placed in annuities rather than in other investments such as stocks or CDs. However, adequate consideration must also be given to L.B.'s needs for cash and liquidity. As discussed more fully in subsequent sections of this Decision and Order, neither Mr. Juliano nor Bankers Life did so.

Finally, the Staff argues that "The choice of only 10-year deferred annuities as opposed to a series of annuities with varying maturity dates is particularly questionable." *(Staff Br. 35)* There was no testimony at the hearing about that suggested approach. When the Staff cross-examined the Respondents' expert about laddering, the questioning was limited to the laddering of certificates of deposit, not the laddering of annuities. *(III Tr. 232–33)* When the maturity dates

of CDs are staggered, the investor can obtain penalty-free access to a portion of the invested funds at more frequent intervals than would otherwise be possible without buying shorter-term CDs with lower interest rates. With the type of deferred annuities L.B. bought, there is even greater flexibility because withdrawals are not tied to any specific anniversary date. Thus, laddering is less useful for annuities than for CDs, and there is no evidence that annuity laddering is common practice. The only mention in the record was in Mr. Doughty's report, when he wrote that "Safety should be the primary issue in determining investment alternatives for an investor in this age group and circumstances. However, given this client's objection to the surrender periods, a laddered approach may have been more appropriate." *(Bankers Exh. 1 at 5,* quoted in *Staff Br. 37)* Although the Respondents did not exercise due care in evaluating L.B.s liquidity needs, as noted above, the evidence in this record does not prove that a laddering approach would have been any more suitable.

Suitability Analysis by Mr. Juliano

Pursuant to Bureau of Insurance Rule 917, §§ 6(A) & (B), an insurance producer recommending the purchase of an annuity "must have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer," and before the sale is executed, must "make reasonable efforts to obtain information" about the consumer's financial status, tax status, investment objectives, and other information considered by the producer to be reasonable or used in making the recommendations.

Despite Mr. Juliano's testimony that he "had nothing to do with" the recommendation to buy the Stock Proceeds Annuity, which he described as "entirely the doing of Mr. Farren" *(I Tr. 135, 143),* the record as a whole supports Mr. Farren's testimony that his own role was limited to evaluating the suitability of the stock sale. *(I Tr. 356)* The Fact Finder and the suitability questionnaires were filled out and signed entirely by Mr. Juliano. *(Staff Exh. 12 at 41–43; Staff Exh. 30a at 290; Bankers Exh. 4–6)* Although there was an agreement between Mr. Juliano and Mr. Farren to split the sales commission equally, Mr. Juliano testified that the purpose of the commission split was to compensate Mr. Farren for the inconvenience of traveling to Caribou, not because Mr. Farren had an equal role in the sales process. *(I Tr. 178–81)* L.B. was Mr. Juliano's client. Mr. Juliano made all three annuity purchase recommendations, and was therefore responsible for determining that they were suitable for L.B.

Under Mr. Juliano's own analysis, the Stock Proceeds Annuity was not suitable. In the Fact Finder, L.B. stated that she believed that $20,000 needed "to be totally liquid and accessible." *(Staff Exh. 12 at 43)* Instead, the entire CD proceeds and all but $15,000 of the stock proceeds were invested in annuities, and L.B. had to use approximately $9000 of that amount to pay

federal and state income taxes. *(Bankers Exh. 1 at 3)* The failure to hold back sufficient liquid assets led to significant financial stress within a few months.

Furthermore, Mr. Juliano's suitability analysis was inadequate in several regards. First of all, the Fact Finder asks for information about the consumer's income and expenses. Although Mr. Juliano provided dollar figures for L.B.'s income *(Staff Exh. 12 at 42),* all the expense information he provided was a general reference to "Living/Car/Charity/Amex" *(Id. at 43).* Mr. Juliano testified that despite his awareness that L.B. carried a credit card balance and made monthly payments, he made no effort to find out how much her monthly payments were or how much she owed on the card. *(IV Tr. 50–51)* Mr. Juliano wrote that L.B. had $10,000 in a savings account. *(Staff Exh. 12 at 43)* That figure ought to be questioned carefully when she reported ongoing credit card debts at the same time.

Mr. Juliano testified that L.B.'s income was sufficient to meet her expenses, and that she had no need to touch her assets. *(IV Tr. 11)* However, Mr. Juliano knew that L.B.'s charitable activities were important to her, particularly Caribou Pet Rescue (CPR). *(Staff Exh. 12 at 42; I Tr. 76; IV Tr. 19; Staff Exh. 30a at 291)* L.B. later wrote that in addition to "support[ing] many animal charities with small donations," CPR was an activity that she "considered a priority and was trying desperately to keep it alive.... I needed money to pay off Amex which was in large part due to my contributions to CPR." *(Staff Exh. 49 at 512)* It cannot be known whether she would have told this to Mr. Juliano if he had asked, but his failure to inquire made certain that he would be left with an inaccurate picture of L.B.'s finances. That was the picture he drew for Mr. Gagnon, who understood that "there was not a lot of expenses. With her number of 5,500 a month, I believe it was, there was no real problem. She didn't have a need for the money at that time." *(III Tr. 100)*

Mr. Juliano also failed to gather adequate information about the early withdrawal penalties for the CDs. In one suitability questionnaire he filled out, he stated that the penalties would be "$250±." *(Bankers Exh. 4 at 195)* Another questionnaire submitted with the same application stated that the penalties would be "$400±." *(Bankers Exh. 4 at 195)* The actual amount was $574.92. *(Staff Exh. 19 at 221; Staff Exh. 20 at 226–27)*

In general, whether intentional or not, Mr. Juliano failed to complete critical information accurately. While the November 13 suitability questionnaire listed L.B.'s stock holdings as approximately $200,000 *(Bankers Exh. 4 at 186),* the Fact Finder submitted with the same application listed her stock holdings as only $5000 to $7000, and did not have L.B.'s signature *(Staff Exh. 12 at 43).* Instead, Mr. Juliano noted: "Client did not feel the need to sign file." *(Id.)* He testified that "The first time I asked her to sign it, she refused to sign it." *(I Tr. 86)* Although that would be within her rights, and Rule 917 recognizes that the consumer has no obligation to

participate in the suitability analysis, Mr. Juliano's testimony is not plausible. As noted by the Staff, L.B. was willing to sign 22 other documents that day, including four suitability questionnaires. *(Staff Br. 24)* Furthermore, she was also willing to sign the same Fact Finder, slightly updated, two days later when she applied for the Stock Proceeds Annuity. *(Bankers Exh. 5 at 227)* That version of the Fact Finder, and the corresponding suitability questionnaire, corrected the stock holdings to approximately $175,000, but they continued to list $37,000 in CDs and $18,000 in annuities despite the liquidation of the CDs and purchase of the CD Proceeds Annuity. *(Id. at 218, 227)* Additionally, the statement that L.B.'s health in the past three years had been "Great" and she "Beat Cancer Many Years Ago" contradicts the fact that *(Staff Exh. 12 at 41)* her cancer surgery was within eight months of the Fact Finder. *(Bankers Exh. 8 at 269)* In his written statement, Mr. Juliano explained the discrepancy by claiming that L.B. had given him the inaccurate information, but he also acknowledged that he became aware of the inaccuracy at their initial meeting, two weeks before he signed and dated the first version of the Fact Finder. *(Staff Exh. 30a at 290–91; Staff Exh. 12 at 43)* Furthermore, that erroneous description of her health history remained on the version of the Fact Finder that was submitted with L.B.'s long-term care application in April of 2008 *(Bankers Exh. 9 at 308),* and the information on her stock, CD, and annuity holdings was never updated to reflect the asset sales and annuity purchases in 2007. That Fact Finder also stated that her income had increased by more than 40%, to approximately $80,000 per year, which was inaccurate because that figure was based on the capital gain from the stock sale and did not reflect any actual improvement in her actual income. *(Bankers Exh. 9 at 310)*

I conclude that Mr. Juliano violated Rule 917, both by failing to make reasonable efforts to obtain the information necessary to evaluate the suitability of his recommendations, and also by failing to make a reasonable suitability evaluation based on the information he had obtained.

Deceptive Sales Practices

Mr. Juliano also made misleading comparisons between L.B.'s existing investments and the annuities they replaced. On one of his suitability questionnaires for the IRA rollover annuity, Mr. Juliano asserted that the replacement was in L.B.'s best interest because "Client wants better interest rate. Does not like the service from Jackson National Life." *(Bankers Exh. 6 at 254)* He testified that in order to show L.B. that Bankers Life would provide the better rate that L.B. wanted, he "would have used our guaranteed interest rate against the interest rate that she's getting at the time." *(I Tr. 154)* He clarified his terminology as follows: "We had a guaranteed interest rate for that product. You're confusing that with the minimum. I would have used our guaranteed interest rate for what she would have gotten for that year." *(Id.)* In other words, he used the term "guaranteed rate" to refer to the bonus rate that was guaranteed for a single year. Because of the 3% bonus, that "guaranteed" rate was 2.8% higher than the rate she was then

receiving from Jackson National. However, after deducting the Jackson National surrender charge, that amounted to a one-time account credit of only $256.32.[14] After that first year, the Bankers Life annuity had a lower guaranteed rate. Changes to the base rate depend on future events and depend in part on company-specific decisions, so long-term base rate comparisons are not reliable, but at the time of issue, the base rate on the Jackson National annuity was 0.2% higher than the base rate on the Bankers Life annuity. As required by law, Bankers Life provides annuity disclosure statements when the annuity is issued, showing the growth of the account over time based on both guaranteed and current rates, with disclaimers. *(Staff Exh. 15 at 103)* Mr. Juliano testified that he did not furnish anything comparable during his sales presentations, and did not make any direct comparisons between the Bankers Life and Jackson National base rates. *(IV Tr. 52–54)* Although Mr. Juliano testified that the difference in interest rates was not important to L.B. because she was dissatisfied with the service Jackson National was providing *(IV Tr. 53–54),* he had a duty to give L.B. all the information she needed to make that decision for herself on a fully informed basis. Instead, he gave a misleading description of the first-year bonus, and failed to disclose that lower base rates were already in effect.

For the CDs, the comparison is more complicated, because L.B. had three CDs paying different rates with different maturities. The highest rate, 4.75%, was for a CD that matured on February 26, 2008, with a value at the time of liquidation of $19,369.46 and an early withdrawal penalty of $226.51. *(Staff Exh. 19 at 223)* The other two CDs were paying lower rates than the Bankers Life base rate, 2.72% and 2.47% respectively. *(Staff Exh. 21 at 228–29)* The Staff does not dispute the suitability of replacing the CD with the lowest rate, which did not mature until August of 2009. *(Staff Br. 21)* However, the other two replacements raise significant concerns. Because the CD Replacement Annuity was subject to a 2% premium tax, the credit actually realized from the 3% first-year bonus was only 1%, minus the applicable early withdrawal penalties. For each of the CDs, the early withdrawal penalty was more than 1%. Although there were a variety of considerations that might possibly have made the annuity sales suitable at that time, despite the upfront cost,[15] that was a decision that L.B. needed to be able to make for herself on an informed basis, carefully weighing the advantages and disadvantages.

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[14] This was calculated by taking 3% of the annuity premium of $17,352.06, and subtracting the surrender penalty of $264.24. *(Staff Exh. 17c at 209)* There was no premium tax because the replacement transaction was an IRA rollover. *(Staff Exh. 15 at 104)*

[15] Both Mr. Juliano and Mr. Gagnon highlighted, for example, the benefits of one-stop shopping. *(III Tr. 25; IV Tr. 7–8)* However, one way to achieve those benefits, which would have dovetailed with a tax strategy that divided the stock sale over two years, would have been to purchase a single annuity with the stock and CD proceeds after the highest-yielding CD (and possibly also the other CD maturing a few weeks later) matured in early 2008.

Mr. Juliano's presentation failed to present and collect all of the essential data. Although he testified that he obtained the information on the early withdrawal penalties from L.B.'s phone calls to the banks *(I Tr. 114–15; IV Tr. 7),* the figures he used significantly underestimated the banks' actual penalties. And he described the way he performed the comparison as follows: "I didn't look at the CD. She read from her bank statements what the interest rate was, what the maturity date was, and gave me that information. I would have done that on a scrap piece of paper just to figure out and done a comparison to see which way was best. And some of it's — some of it is common sense. I mean, if someone's getting three percent, and you're offering them nine percent, it doesn't take a rocket scientist to figure out that nine percent is better than the two percent. I'm very fast with math and numbers." *(IV Tr. 73–74)* If he performed those calculations at all, he should have shown them to L.B., retained them in his files, and made them available for Mr. Gagnon's suitability reviews, and his statement implying that the financial comparison for these investments was obvious to anyone who is good with numbers demonstrates that he was once again improperly relying on the first-year bonus rate as the basis for comparison.

I therefore conclude that Mr. Juliano engaged in dishonest practices and demonstrated incompetence, untrustworthiness, and financial irresponsibility in the conduct of his business, in violation of 24-A M.R.S.A. § 1420-K(1)(H). In addition, when he recommended the replacement of the Jackson National annuity with the IRA Rollover Annuity, Mr. Juliano used a misleading comparison between the terms of the contracts, in violation of 24-A M.R.S.A. § 2155.

Mr. Gagnon's Suitability Review

Pursuant to Rule 917, §§ 6(D)(1), an insurer that issues annuities must have a system to supervise annuity sales recommendations "that is reasonably designed to achieve compliance with this regulation ... including, but not limited to: (a) Maintaining written procedures; and (b) Conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this regulation." Bankers Life repeatedly failed to identify multiple warning signs with this account, to an extent that demonstrates that its procedures were not reasonably designed to achieve compliance.

Bankers Life had a prior history of suitability violations, and entered into a Consent Agreement in Maine on April 14, 2005, which provided, among other remedies, for a thorough and ongoing review of suitability training and compliance procedures in the Maine offices by Bankers Life's Regional Director and by an independent reviewer, with periodic reports submitted to the Superintendent. *(Staff Exh. 44 at 462–63)*

One of the independent monitor's quarterly reports to the Superintendent, for the second quarter of 2006, was offered into evidence by the Staff. The examination included the review of a sampling of policy files. *(Staff Exh. 46 at 488–97)* In that report, the independent monitor had noted concerns with the level of detail with which the Fact Finders were filled out, and rated 30% of the files reviewed as "Failed." *(Staff Exh. 46 at 491)* In light of that warning, Mr. Gagnon should have paid particular attention to the shortcomings and internal inconsistencies in the documentation that Mr. Juliano submitted. Although Mr. Gagnon testified that he "was sure" that he noticed the difference between the $5000 to $7000 in stocks listed on the Fact Finder submitted with the November 13 applications and the $200,000 listed on the suitability questionnaire for the same applications, and that he "would have verified that in my conversation" *(II Tr. 83),* his interview notes are silent on that point *(Staff Exh. 14 at 94).* Mr. Gagnon had additional opportunities to identify problems with this account that warranted further inquiry the following spring, when Mr. Juliano submitted a long-term care application with information that was both materially inaccurate and inconsistent with the transaction history.

Bankers Life's criteria for suitability explicitly note that "In a replacement situation, it also means that proposed new coverage is better for the prospect, considering benefits offered, benefits lost by canceling the inforce insurance policy, and cost." *(Bankers Exh. 12 at 499)* The documentation submitted by Mr. Juliano and Mr. Gagnon's testimony and interview notes provide no indication that Mr. Gagnon inquired into the terms of the Jackson National annuity. *(Staff Exh. 14 at 94; II Tr. 42–43)* Mr. Gagnon testified that customer service was the major consideration in this replacement, so the annuity replacement might have been suitable despite the unfavorable terms when "there wasn't a big difference in loss." *(II Tr. 41–42; III Tr. 25–26)* However, without understanding what the difference in terms was, or exploring how clearly it was explained to L.B., Mr. Gagnon could not have been able to reach an informed conclusion on the suitability of the replacement.

In the order issued June 25, 2010, I determined that Bankers Life is responsible for Mr. Juliano's actions, pursuant to 24-A M.R.S.A. § 1445(1)(D), "to the extent and to the degree that Staff demonstrates a factual and legal basis for holding Bankers Life responsible." By failing to conduct adequate supervision and failing to follow its own suitability review processes in an effective manner, Bankers Life is responsible for Mr. Juliano's suitability violations and deceptive sales practices. This appears to be a systemic problem with the company that warrants

further examination, and in the circumstances of this case, should not be treated as a violation of the Insurance Code by Mr. Gagnon in his individual capacity as a licensed producer.[16]

Remedies

Mr. Juliano took advantage of a vulnerable senior citizen's trust for his personal benefit, and engaged in deceptive sales practices with respect to multiple transactions. Although he ultimately paid off the snowmobile loan, he exposed L.B. to significant financial risk over a period of time, and his efforts to sell L.B. as large an annuity investment as possible, without adequately considering her expenses and debts, left L.B.'s finances in disorder. This calls for revocation of his license, pursuant to 24-A M.R.S.A. § 1420-K(1)(H). and at least thirteen distinct violations deserve civil penalties:

- misuse of customer information for personal gain in inducing L.B. to buy the snowmobile, in violation of 24-A M.R.S.A. § 24-A M.R.S.A. § 1445(2)(A);
- dishonest practices, and demonstrating untrustworthiness and financial irresponsibility in inducing L.B. to buy the snowmobile, in violation of 24-A M.R.S.A. § 1420-K(1)(H);
- demonstrating untrustworthiness and financial irresponsibility in failing to keep accurate records of the snowmobile transaction, in violation of 24-A M.R.S.A. § 1420-K(1)(H);
- an unsuitable annuity sales recommendation that failed to reserve sufficient stock proceeds to meet L.B.'s stated liquidity needs, in violation of Rule 917, § 6(A);
- a misleading comparison of L.B.'s existing Jackson National annuity with the IRA Rollover Annuity, in violation of 24-A M.R.S.A. § 2155;
- dishonest practices in using the first-year bonus to make a misleading comparison of the yields of the IRA Rollover Annuity and the CD Proceeds Annuity with the yields of L.B.'s existing investments, in violation of 24-A M.R.S.A. § 1420-K(1)(H);
- dishonest practices in submitting unsigned Fact Finders with the first two annuity purchases and misrepresenting that the client refused to sign, in violation of 24-A M.R.S.A. § 1420-K(1)(H);
- failure to make reasonable inquiries to gather suitability information in connection with each of the three annuity applications, constituting three separate violations of Rule 917, § 6(A); and

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[16] The charges against Mr. Gagnon include making unsuitable recommendations to a customer in violation of Rule 917, §§ 6(A) & (B), but Mr. Gagnon was not involved in recommending the sales, only in conducting the management review required by Subsection 6(D).

- demonstrating incompetence or untrustworthiness in the submission of materially inaccurate information about L.B.'s financial situation in each of the three annuity applications, constituting three separate violations of 24-A M.R.S.A. § 1420-K(1)(H).

Consistent with 10 M.R.S.A. § 8003(5)(A-1)(3), which authorizes a civil penalty of up to $1500 per violation, I am imposing a total civil penalty of $10,000 against Mr. Juliano.

Mr. Juliano engaged in the improper replacements of L.B.'s CDs and L.B.'s Jackson Life annuity in his capacity as an agent of Bankers Life, which is therefore accountable for his misconduct and may be penalized for that misconduct pursuant to 24-A M.R.S.A. § 1445(1)(D). Bankers Life failed to make any meaningful effort to prevent the improper sales or take timely corrective action. Therefore, pursuant to 24-A M.R.S.A. § 12-A(1), I am imposing a civil penalty of $10,000 for each of Mr. Juliano's ten suitability and sales practices violations, for a total of $100,000. In addition, in the circumstances of these sales, Bankers Life should have waived the surrender penalty for the CD Proceeds Annuity, and therefore, pursuant to 24-A M.R.S.A. § 12-A(6), I am ordering the restitution of that surrender penalty with interest.

Order and Notice of Appeal Rights

It is therefore *ORDERED:*

1. The license of Matthew F. Juliano to act as a resident insurance producer is *REVOKED,* effective immediately.

2. No later than June 1, 2011, or on a payment schedule satisfactory to the Attorney General, Matthew F. Juliano shall pay a civil penalty of $10,000 to the Treasurer of State.

3. No later than June 1, 2011, Bankers Life and Casualty Company shall pay a civil penalty of $100,000 to the Treasurer of State.

4. No later than June 1, 2011, Bankers Life and Casualty Company shall pay to the Treasurer of State, as restitution for the benefit of the estate of L.B., the amount of $2801.60 plus interest at the statutory pre-judgment rate.

5. A copy of this Decision and Order shall be sent to the Maine Office of Securities and to the Financial Industry Regulatory Authority, with a request to consider the allegation that Timothy E. Farren failed to consider the suitability of the timing of the stock sale that he recommended.

6. The Petition for Enforcement against Timothy E. Farren is *DISMISSED,* without prejudice to the Staff's right to reinstate the Petition if the Maine Office of Securities and to the

Financial Industry Regulatory Authority takes disciplinary action or if either of them makes findings or conclusions tending to show probable cause that Mr. Farren may have violated any insurance law.

7. No penalties are imposed against L. Eugene Gagnon.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before June 21, 2011. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF

MAY 12, 2011

MILA KOFMAN
SUPERINTENDENT OF INSURANCE