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May 10, 2019

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RE: In the Matter of: David P. Antypas Docket No. 12.06-152464J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

IN THE MATTER OF: **APD CASE No. 12.06-152464J**

Tennessee Securities Division, Petitioner v. David P. Antypas, Respondent.

NOTICE OF APPEAL PROCEDURES

REVIEW OF INITIAL ORDER

Attached is the Administrative Judge's decision in your case before the **Commissioner of the Tennessee Department of Commerce & Insurance (the Commissioner)**, called an Initial Order, with an entry date of **May 10, 2019**. The Initial Order is not a Final Order but shall become a Final Order unless:

1. **A Party Files a Petition for Reconsideration of the Initial Order:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and sets forth the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Initial Order, which is no later than **May 28, 2019**. A new 15 day period for the filing of an appeal to the Commissioner (as set forth in paragraph (2), below) starts to run from the entry date of an order disposing of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued.

   The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal. Such an Appeal must be **received** by the APD no later than 15 days after the date of denial of the Petition. *See* TENN. CODE ANN. § 4-5-317 and § 4-5-322.

2. **A Party Files an Appeal of the Initial Order:** You may appeal the decision to the Commissioner. Mail to the APD a document that includes your name and the above APD case number, and states that you want to appeal the decision to the Commissioner, along with the basis for your appeal. The APD must **receive** your written Appeal no later than 15 days after the entry of the Initial Order, which is no later than **May 28, 2019**. The filing of a Petition for Reconsideration is not required before appealing. *See* TENN. CODE ANN. § 4-5-317.

3. **The Commissioner of the Tennessee Department of Commerce & Insurance decides to Review the Initial Order:** In addition, the Commissioner may give written notice of his or her intent to review the Initial Order, within 15 days after the entry of the Initial Order.

If either of the actions set forth in paragraphs (2) or (3) above occurs prior to the Initial Order becoming a Final Order, there is no Final Order until the Commissioner renders a Final Order.

If none of these actions set forth in paragraphs (1), (2), or (3) above are taken, then the Initial Order will become a Final Order. **In that event, YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER.**

STAY

In addition, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Initial Order. A Petition for a stay must be **received** by the APD within 7 days of the date of entry of the Initial Order, which is no later than **May 17, 2019**. *See* TENN. CODE ANN. § 4-5-316.

IN THE MATTER OF: **APD CASE No. 12.06-152464J**

Tennessee Securities Division, Petitioner v. David P. Antypas, Respondent.

REVIEW OF A FINAL ORDER

1. **A Party may file a Petition for Reconsideration of the Final Order:** When an Initial Order becomes a Final Order, a party may file a Petition asking for reconsideration of the Final Order. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and sets forth the specific reasons why you think the Final Order is incorrect. If the Initial Order became a Final Order without an Appeal being filed, and without the Commissioner deciding to modify or overturn the Initial Order, the Administrative Judge will consider the Petition. If the Commissioner rendered a Final Order, the Commissioner will consider the Petition. The APD must **receive** your written Petition for Reconsideration no later than 15 days after: (a) the issuance of a Final Order by the Commissioner; or (b) the date the Initial Order becomes a Final Order. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing the Final Order will be adjusted. If no action is taken within 20 days of filing of the Petition, it is deemed denied. *See* TENN. CODE ANN. § 4-5-317.

2. **A Party Files an Appeal of the Final Order:** A person who is aggrieved by a Final Order in a contested case may seek judicial review of the Final Order by filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," within 60 days of the date of entry of the Final Order. *See* TENN. CODE ANN. § 4-5-322. The filing of a Petition for Reconsideration is not required before appealing. *See* TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. *See* TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

3. **A Party may request a stay of the Final Order:** A party may file a Petition asking for a stay that will delay the effectiveness of the Final Order. If the Initial Order became a Final Order without an Appeal being filed, and without the Commissioner deciding to modify or overturn the Initial Order, the Administrative Judge will consider the Petition. If the Commissioner rendered a Final Order, the Commissioner will consider the Petition. A Petition for a stay of a Final Order must be **received** by the APD within 7 days after the Initial Order becomes a Final Order. *See* TENN. CODE ANN. § 4-5-316.

FILING

To file documents with the Administrative Procedures Division, use this address:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue, 8th Floor
Nashville, TN 37243-1102
Fax: (615) 741-4472

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF: **TENNESSEE SECURITIES DIVISION,** ***Petitioner,*** ***v.*** **DAVID P. ANTYPAS** ***Respondent.***	**DOCKET NO: 12.06-152464J**

INITIAL ORDER

This matter was heard on November 19, 2018, in Nashville, Tennessee, before Leonard Pogue, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Commerce and Insurance. Virginia Smith and Robyn Ryan, staff attorneys for the Department of Commerce and Insurance, represented the Petitioner. Matthew White and Nicole Berkowitz represented Respondent. The matter became ready for consideration upon the submission of proposed findings of fact and conclusions of law filed by the parties on January 31, 2019, and responses to proposed findings of fact and conclusions of law filed on February 8, 2019, (Respondent) and February 14, 2019, (Petitioner).

FINDINGS OF FACT

1. Respondent has been working in the securities industry for twenty-three years. Prior to December 2017, Respondent did not have any substantiated regulatory disclosures.

2. From 2008 to December 6, 2017, LPL Financial (LPL), a registered broker-dealer and investment adviser, employed Respondent as an independently contracted branch office manager, investment adviser representative, and broker-dealer agent.

3. During this time period, Respondent provided financial advisory services to his client, Helen McGee, a Tennessee resident with a high school education who never worked in the securities industry. As of June 2018, Ms. McGee was capable of reading, understanding, and signing a legal document prepared by someone else. In 2014, Ms. McGee was approximately 88 years old and, at the time of the hearing, she was 92 years old.

4. Under Respondent's management Ms. McGee's portfolio increased in value. Any decrease in the balance of Ms. McGee's investment accounts can be largely attributed to gifts made to her grandchildren.

5. On February 8, 2010, Ms. McGee signed a form approving the payment of 3% annual management fees for LPL account nos. xxxx 7095 and xxxx 2849.

6. As of February 8, 2010, Respondent was permitted by LPL's policies to charge annual management fees of up to 3%. When LPL changed its policies to permit charging management fees of up to 2.5%, Respondent reduced the annual management fee charged to Ms. McGee to 2.5% for LPL account nos. xxxx 7095 and xxxx 2849.

7. Respondent admitted that the management fee he charged Ms. McGee was higher than what he charged his other clients which was typically 1.5%. Respondent testified that the annual management fees charged to Ms. McGee were appropriate based on the time he spent researching bond positions for her accounts and additional work he performed for her accounts. He indicated that the extra work consisted of structuring a gift for a grandchild and helping set-up a loan for another grandchild.

8. All management fees charged by its advisors are reviewed and approved by LPL; LPL never notified Respondent that his management fee was too high prior to December 2017.

9. Between March 31, 2010, and September 30, 2017, Respondent charged $82,569.43 to Ms. McGee's LPL account nos. xxxx 7095 and xxxx 2849 for his advisory fees which reflected 3% to 2.5% of the assets under management. Had Respondent charged Ms. McGee his standard advisory fee of 1.5%, he would have charged her $44,782.28, instead of the $82,569.43 he charged, which equals a difference of $37,787.15.

10. Respondent charged these higher advisory fees to Ms. McGee when his activity in, and rebalancing of, her accounts, following 2014, became much less frequent and eventually decreased to almost no activity.

11. Beginning in 2013, Respondent began charging Ms. McGee to perform hourly consulting. He stated that he charged Ms. McGee for assisting her in setting up her estate plan and facilitating gifts to her grandchildren. Respondent's statements for hourly consulting show he charged Ms. McGee consulting fees from $300-$350 per hour for services such as budgeting, structuring a possible loan to her granddaughter, and reviewing cash flow implications of an annuity to her grandson.

12. LPL's Hourly Consulting Guide permitted advisors to charge hourly consulting fees as high as $400 per hour. According to Respondent, LPL did not provide him any other guidance on the appropriate rate for hourly consulting work.

13. Hourly consulting profile forms are sent to LPL for review and approval before funds are released from the client's account for the hourly consulting engagement. LPL never rejected an hourly consulting profile form submitted by Respondent nor told him he was charging too much. Respondent was audited several times by LPL and was never reprimanded for inappropriate consulting agreements or excessive fees charged under consulting agreements.

14. Between December 16, 2013, and August 22, 2017, Respondent charged $12,187.00 to Ms. McGee's LPL account nos. xxxx 4091 and xxxx 7095 for hourly consulting fees.

15. Respondent created a margin account where Ms. McGee borrowed money against her securities to make withdrawals and paid margin interest to do so. Cole Conner, assistant vice-president of compliance for LPL, testified that a portion of that margin interest went to Respondent, although Respondent disputes this. Beginning in 2014, Ms. McGee was charged $21,965.83 in margin interest from her account.

16. Respondent, while associated with LPL Financial from 2010 to 2017, charged Ms. McGee about $116,000 in fees and margin interest (hourly consulting fees total: $12,187.00; advisory fees total: $82,569.43; margin interest total: $21,965.83), a portion of which was paid to Respondent. Ms. McGee's approximate net worth in 2014 was $590,000.

17. Prior to July 14, 2014, the people listed as beneficiaries on Ms. McGee's accounts were all family members except a non-profit on one account. Respondent testified that Ms. McGee told him he had been good to her and her husband and she wanted to "leave something for you." In a telephone conversation between Ms. McGee and Mr. Connor on November 30, 2017, Ms. McGee acknowledged that she intended to have Respondent as the beneficiary of two accounts.

18. On July 14, 2014, Respondent presented to Ms. McGee a change of beneficiary form that changed Ms. McGee's former beneficiaries to Gwen Antypas, Respondent's wife at the time, on Ms. McGee's Transfer on Death (TOD) account with LPL, account number ending in 4901. The account value in 2014 approximated $50,000.

19. On February 3, 2015, Respondent presented to Ms. McGee a second change of beneficiary form, changing Ms. McGee's original beneficiaries to Gwen Antypas on Ms. McGee's American General Life Insurance policy, account number ending in 6643. The account value in 2014 approximated $30,000.

20. Respondent testified that he knew he could not be the beneficiary on her accounts[1] but he did permit Ms. McGee to list his wife as a beneficiary on the two accounts because he did not believe this practice was prohibited by LPL's policies.

21. In 2014 and 2015, the LPL Advisor Compliance Manual did not specifically state that investment advisor's spouse could not be listed as a beneficiary on a client's account. The

[1] LPL policies and procedures as of May 16, 2014, Ex. 15 at 4.5. Fiduciary Capacities and Custody, Policy: Advisors should not be beneficiaries of a securities client's estate unless an immediate family member, even if a written client request is provided. Advisors should not be listed on a (non-family) transfer-on-death account.

policy in effect on July 14, 2014, provided that an advisor could not himself be beneficiary of a nonfamily member client's transfer-on-death account.

22. LPL's Advisor Compliance Manual was revised on September 16, 2016. This version specifically stated that an advisor not "directly or indirectly share[ing] the profits or losses of a customer's account. This prohibition included being listed as beneficiary on a client's account, annuity, insurance policy, or other client asset, or listing as beneficiary another person associated with you (spouse, assistant, etc.) in your place unless the client is also an immediate family member."

23. On October 26, 2016, Respondent presented two change of beneficiary forms to Ms. McGee, changing Ms. McGee's beneficiary from Gwen Antypas to Melina Antypas, Respondent's sister, on the same TOD account ending in 4901 and American General Life Insurance policy, account number ending in 6643.

24. While Respondent's family members were listed as beneficiary on Ms. McGee's accounts, Respondent continued managing and charging fees to those accounts.

25. Respondent did not receive written authorization from LPL to name his family members as beneficiary on any of these change of beneficiary forms nor did Ms. McGee submit a written client request to LPL to name Respondent's family members as beneficiaries on her accounts. According to Mr. Connor, Respondent did not disclose the changes of beneficiary to LPL.

26. Respondent certified in 2014, 2015, 2016, and 2017, in his answers to LPL's annual questionnaires, that: he had not shared in any of the profits or losses in any of his client accounts; he was not currently in violation of any firm policies and procedures or any laws, rules or

regulations applicable to his investment-related activities; and he had no knowledge of being a beneficiary in any client's trusts or wills, insurance policies, IRA etc., excluding clients who are immediate family members. Respondent testified that when he made these certifications in 2014, 2015, 2016, and 2017, he was not in compliance with all federal and other regulations.

27. Even though Gwen and Melina Antypas were listed as beneficiaries, Respondent expected to receive the funds on Ms. McGee's passing, and told this to Mr. Conner and Elizabeth Bowling, Director of Registration for the Division. Neither Gwen Antypas nor Melina Antypas ever received any payment as beneficiaries.

28. Around late October or early November of 2017, Barbara Brewer, Respondent's former assistant, initiated a whistleblower escalation at LPL regarding Respondent and concerns of potential fraud being committed due to familial beneficiary designations on Ms. McGee's accounts.

29. Mr. Conner, apprised of the whistleblower escalation, initiated an investigation into Respondent which ultimately led to Respondent's termination from LPL on December 6, 2017.

30. Prior to Respondent's termination, Mr. Conner spoke with Respondent about Respondent's fees on Ms. McGee's accounts. When Mr. Conner asked Respondent about the higher advisory percentage fees he charged Ms. McGee, Respondent asserted that Ms. McGee wanted him to charge these higher fees as a thank you for all of his services. Mr. Connor rejected such justification for charging higher advisory percentage fees. Respondent acknowledged he probably would not have applied the same hourly consulting fees, which he charged Ms. McGee, to another similarly situated client.

31. Mr. Connor also questioned Respondent about Respondent's familial beneficiary designations on Ms. McGee's accounts. Mr. Connor testified that Respondent said Ms. McGee wanted to list him as beneficiary, that he knew it was wrong to suggest adding his wife and sister as beneficiaries, and Respondent added that he had probably gotten a little greedy.

32. Mr. Conner also called Ms. McGee to discuss Respondent. During the phone conversation, Ms. McGee told Mr. Connor she intended to name Respondent as a beneficiary, did not care that Respondent was getting extra money, but did not remember how Melina came to be listed as beneficiary on her account, adding that she thought Melina Antypas was the Respondent's mother.

33. By letter dated April 2, 2018, to Ms. McGee, Mr. Connor, on behalf of LPL, offered to return fees Respondent charged Ms. McGee. Specifically, LPL offered to return all of the hourly consulting fees to Ms. McGee's accounts which totaled $12,187.00, advisory fees in the amount of $37,787.15 (had Respondent charged Ms. McGee his standard advisory fee of 1.5%, he would have charged her $44,782.28, instead of the $82,569.43 he charged, which equals a difference of $37,787.15), and Mr. Conner offered to return half of the margin interest the Respondent charged Ms. McGee, which totaled $10,982.92.

34. Respondent met Ms. McGee and her late husband, Fred McGee, when Respondent appeared at their home prospecting for clients and was hired as a financial advisor soon thereafter. While Mr. McGee was alive, he oversaw the investment accounts that the McGees entrusted with Respondent and Ms. McGee never reviewed the accounts. After Mr. McGee died in 2004, Ms. McGee took on the responsibility of reviewing her investment accounts and signing the paperwork.

35. Beth Smith is Ms. McGee's granddaughter and power of attorney. Ms. Smith reviewed Ms. McGee's investment accounts after Respondent was no longer acting as a financial

advisor for Ms. McGee. While doing so, Ms. Smith found a note that Respondent wrote and left with Ms. McGee. Ms. Smith testified that the note seemed weird to her and made her feel as if Respondent took advantage of Ms. McGee. The note states "FINRA Gov't entity – Helen's idea to have my wife, Gwen, and my sister, Melina, as beneficiary." According to Respondent, he wrote the note in December of 2017, which is the time when LPL terminated him. Respondent testified that Ms. McGee was asking him who regulates the whole thing or what is FINRA, and she just wanted it written down.

36. Once LPL terminated its association with Respondent, Respondent could neither act as a broker-dealer agent, nor an investment adviser representative, as his registration ended simultaneously with his termination from LPL. In order for him to continue working in the securities industry, he needed to apply to register through another firm.

37. In early February of 2018, Sandlapper Securities applied on behalf of Respondent to register him as both a broker-dealer agent and investment adviser representative in Tennessee. Sandlapper Securities withdrew those applications soon thereafter.

38. On February 7, 2018, the broker-dealer CFD Investments, Inc., and the investment adviser firm Creative Financial Designs (collectively CFD), submitted two applications for registration on behalf of Respondent to register Respondent as a broker-dealer agent and investment adviser representative in Tennessee.

39. That same day, Perry Warden, Securities Examiner for the Division, issued a letter to CFD requesting a narrative explaining the circumstances surrounding Respondent's termination from LPL.

40. CFD responded to Mr. Warden's letter on February 14, 2018, and affixed a signed statement from the Respondent. In his signed statement, Respondent stated the following:

> The client has been a family friend for over 20 years. She wanted to name my wife or myself as beneficiary on a minor account. Both of her children have passed away. After looking up the definitions of relatives, the client named my sister as beneficiary. Unfortunately, the definition I had looked up was under LPL new account requirements and not beneficiary requirements and I didn't realize the designation of beneficiary requirements do not allow a sister to be named. I mistakenly forgot to disclose the information.

41. After receiving this statement, the Division scheduled an in-person meeting with Respondent to ask additional questions; this meeting occurred on March 20, 2018. The following individuals attended: Respondent; Respondent's attorney; Perry Warden; attorneys for the Division; and Ms. Bowling. Matthew Bahrenburg, the Chief Compliance Officer at CFD, attended the meeting telephonically.

42. At this meeting the Division learned that, unbeknownst to LPL, after Respondent was terminated on December 6, 2017, he accessed Ms. McGee's accounts through Ms. Brewer and obtained performance numbers. Respondent testified that Ms. McGee had requested the performance information. At the meeting Respondent stated that he presented LPL forms to Ms. McGee to execute a change of beneficiary back to her original beneficiaries. Respondent also retained materials bearing LPL's name, including LPL change of beneficiary forms and LPL envelopes.[2]

43. Soon after the March 20, 2018, meeting, Mr. Warden checked the Central Registration Depository (CRD)[3] and learned that CFD permitted Respondent to resign for

[2] Pursuant section 6.d. of the Branch Officer Manager Agreement, and section 6(C) of the Representative Agreement that Respondent entered into with LPL, on termination, LPL required Respondent to cease using LPL's name, to no longer hold himself out as a registered representative or an investment adviser representative of LPL, and return all materials bearing the LPL name to the firm.

[3] The CRD is the system through which a firm files an application online and is a large database that all 50 states use. FINRA, a self-regulatory organization, administers the CRD and regulates the securities industry at the federal level. FINRA establishes requirements for compliance for a broker-dealer and their agents and FINRA's rules apply to Respondent.

receiving documents from LPL after his termination from that firm without CFD's knowledge or consent. CFD then attempted to withdraw its applications for registration on behalf of Respondent.

44. The Division then recommended the issuance of an Order of Denial on CFD's applications for registration on behalf of Respondent. According to Mr. Warden, the Division contended that Respondent used his position of trust to take advantage of an elderly client by overcharging her fees, in addition to allowing her to name Respondent's family members as beneficiaries of her accounts.

45. On April 24, 2018, an Order of Denial was issued by the Assistant Commissioner for Securities on behalf of the Commissioner of the Department denying the Respondent's applications for registration through CFD based on violations of Tenn. Code Ann. § 48-1-112. The Order of Denial found that Respondent had permitted Ms. McGee to name Respondent's wife, and later his sister, as beneficiaries on two of her accounts. The Order of Denial also found that after his termination Respondent accessed Ms. McGee's account and presented Ms. McGee with LPL paperwork for the purpose of executing a change of beneficiary. The Order of Denial did not identify excessive fees as a basis for the denial of Respondent's applications.

46. On May 3, 2018, Respondent requested a hearing regarding the Order of Denial. A Notice of Hearing and Charges was filed On May 15, 2018. By Order entered on July 24, 2018, by Administrative Judge Steve R. Darnell, Petitioner was granted leave to amend it Notice of Hearing and Charges. On July 25, 2018, Petitioner filed an Amended Notice of Hearing and Charges, wherein the Division added the allegations relating to Respondent fees/charges.

47. IFS Securities has submitted applications for registration on behalf of the Respondent. The Division currently holds the Respondent's applications through IFS Securities in a pending status. The decision remains on hold until the results of this hearing are finalized.

48. The Division has permitted representatives to be licensed or to remain licensed regardless of whether they were previously the subject of a customer dispute or previously had been terminated by a firm.

CONCLUSIONS OF LAW

1. The Tennessee Securities Act of 1980, as amended, Tenn. Code Ann. §§ 48-1-101 to 48-1-201 (Act), places the responsibility for the administration of the Act on the Commissioner of the Tennessee Department of Commerce and Insurance.

2. The Division is the lawful agent through which the Commissioner administers the Act pursuant to Tenn. Code Ann. § 48-1-115, and is authorized to bring this action based on the finding that such action is in the public interest, necessary for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the Act, pursuant to Tenn. Code Ann. §§ 48-1-112 and 48-1-116.

3. Tenn. Code Ann. § 48-1-112 provides:

> (a) The commissioner may by order deny, suspend, or revoke any registration under this part if the commissioner finds that:
>
> (1) The order is in the public interest and necessary for the protection of investors; and
>
> (2) The applicant or, in the case of a broker-dealer or investment adviser, any affiliate, partner, officer, director, or any person occupying a similar status or performing similar functions:
>
> ....
>
> (G) Has engaged in dishonest or unethical practices in the securities business;

(d) In any case in which the commissioner is authorized to deny, revoke, or suspend the registration of a broker-dealer, agent, investment adviser, investment adviser representative, or applicant for broker-dealer, agent, investment adviser, or investment adviser representative registration, the commissioner may, in lieu of or in addition to such disciplinary action, impose a civil penalty in an amount not to exceed five thousand dollars ($5,000) for all violations for any single transaction, or in an amount not to exceed ten thousand dollars ($10,000) per violation if an individual who is a designated adult is a victim.

Tenn. Code Ann. § 48-1-102(9)(A) defines a "designated adult" as: "[a]n individual sixty-five (65) years of age or older. . . "

4. Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(b)5 and 17 provide:

(b) The following are deemed "dishonest or unethical business practices" by an agent under T.C.A. § 48-1-112(a)(2)(G), without limiting those terms to the practices specified herein:

...

5. Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;

...

17. Violating any rule of a national securities exchange or national securities dealers association of which the agent is an associated person with respect to any customer, transaction, or business in this state;

5. Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(c)23 provides:

(c) The following are deemed "dishonest or unethical business practices" by an investment adviser or an investment adviser representative under T.C.A. § 48-1-112(a)(2)(G), to the extent permitted under Section 203A of the Investment Advisers Act, without limiting those terms to the practices specified herein:

...

23. Engaging in conduct or any act, indirectly or through or by another person, which would be unlawful for such person to do directly under the provisions of the Act or these Rules;

6. FINRA Rule 2150(c)(1)(A)(i) – (iii), Improper Use of Customers' Securities or Funds; Prohibition Against . . . Sharing in Accounts, provides:

Except as provided in paragraph (c)(2), no member or person associated with a member shall share directly or indirectly in the profits or losses in any account of a customer carried by the member or any other member;

provided, however, that a member or person associated with a member may share in the profits or losses in such an account if:

(i) such person associated with a member obtains prior written authorization from the member employing the associated person;

(ii) such member or person associated with a member obtains prior written authorization from the customer; and

(iii) such member or person associated with a member shares in the profits or losses in any account of such customer only in direct proportion to the financial contributions made to such account by either the member or person associated with a member.

7. FINRA Rule 2150(c)(2)(A)-(C) provides:

Notwithstanding the prohibition of paragraph (c)(1), a member or person associated with a member that is acting as an investment adviser may receive compensation based on a share in profits or gains in an account if:

(A) such person associated with a member seeking such compensation obtains prior written authorization from the member employing the associated person;

(B) such member or person associated with a member seeking such compensation obtains prior written authorization from the customer; and

(C) all of the conditions in Rule 205-3 of the Investment Advisers Act (as the same may be amended from time to time) are satisfied.

8. FINRA Rule 2010 Standards of Commercial Honor and Trade provides:

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

9. FINRA Rule 0140(a) Applicability provides:

(a) The Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under the Rules.

10. Tenn. Comp. R. & Regs. 0780-04-03-.01(2)(e) provides, in pertinent part:

> (e) ...[A]n application for registration as an agent shall be subject to denial proceedings even though the applicant has filed to withdraw his or her application. The commissioner may institute a revocation or denial proceeding under T.C.A. § 48-1-112 within thirty (30) days after the filing date of an application to terminate or withdraw on Form U5 by a registrant or an applicant and enter a revocation order as of the last date on which registration was effective or a denial order as of the filing date of the request to withdraw an application....

11. Tenn. Comp. R. & Regs. 0780-04-03-.01(9)(e) provides, in pertinent part:

> (e) ...[A]n application for registration as an investment adviser representative shall be subject to denial proceedings even though the applicant has filed to withdraw his or her application. The commissioner may institute a revocation or denial proceeding under T.C.A. § 48-1-112 within thirty (30) days after the filing date of an application to terminate or withdraw on Form U5 by a registrant or an applicant and enter a revocation order as of the last date on which registration was effective or a denial order as of the filing date of the request to withdraw an application....

12. Tenn. Code Ann. § 56-1-110(b)(1) provides:

> (b)(1) The Commissioner may, against any person . . . assess the actual and reasonable costs of the investigation, prosecution, and hearing of any disciplinary action held in accordance with the contested case provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, art 3, in which sanctions of any kind are imposed on that person . . . These costs may include, but are not limited to, those incurred and assessed for the time of the prosecuting attorneys, investigators, expert witnesses, administrative judges, and any other persons involved in the investigation, prosecution, and hearing of the action.

13. Respondent asserts that his management and consulting fees were all in compliance with LPL policies, and his actions relative to management and consulting fees did not violate any FINRA rule or rise to the level of dishonest or unethical business practice. It does appear that the percentage of management fees and hourly rates charged by Respondent were within the LPL guidelines. However, LPL launched an investigation and subsequently more was learned about the management fees and hourly consulting charges and Respondent's practices relating to Ms. McGee's accounts. As a result of the investigation, it was discovered that Respondent charged Ms. McGee a higher management fee than he charged any of his other clients. Respondent contended

that the higher fee was justified because of extra work he performed for Respondent. An example of this additional work was a gift to a grandchild which was also one of the same reasons he attempted to justify the need to charge Ms. McGee an hourly consulting fee. Respondent further claimed that Ms. McGee wanted him to charge a higher fee as a thank-you for all of his services. Mr. Connor rejected this explanation as a basis for charging a higher fee. Following its investigation, LPL determined that Respondent should be terminated and that LPL should return all of Respondent's hourly fee consulting charges, approximately half of his management fees, and half of the margin interest. The total amount returned to Ms. McGee was $60,957. Respondent's conduct and actions relating to his management and hourly consulting fees are found to be dishonest and unethical practices in violation of Tenn. Code Ann. § 48-1-112(2)(G), and Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(b) 17-by violating FINRA Rule 2010.

14. Respondent argues that he did not clearly violate any LPL policy when Ms. McGee's beneficiary designations were changed to his wife and later changed to his sister or when he accessed Ms. McGee's account after his termination, and that his actions in this regard did not violate any FINRA rule or rise to the level of dishonest or unethical business practice. The LPL policy at the time the change was made to Respondent's wife did not specifically prohibit this designation. The LPL policy was later revised and prohibited the "listing as beneficiary another person associated with you (spouse, assistant, etc.) in your place…." Respondent then presented forms to Ms. McGee to change the beneficiaries on the two accounts from his wife to sister. Certainly his sister could be deemed as "associated with" him. LPL's investigation included the issue of the beneficiary designation. LPL ultimately found that Respondent should not have facilitated the beneficiary change to his relatives since it does not permit its financial advisers to be the recipient (directly or otherwise) of the assets of a customer unless an immediate family

member of the financial advisor. Both Ms. McGee and Respondent indicated that Ms. McGee intended that Respondent be listed as beneficiary. Respondent knew he couldn't list himself as a beneficiary and told Mr. Connor he knew it was wrong to suggest adding his wife and sister as beneficiaries and added that he had probably gotten a little greedy. More important, Respondent admitted to Mr. Connor that he expected to receive the funds himself upon Ms. McGee's passing. Thus, Respondent was indirectly sharing profits in a customer's account. Respondent's actions relating to the change of beneficiaries are found to be in violation of Tenn. Code Ann. § 48-1-112(2)(G), Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(b) 5 and 17, Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(c)23, FINRA Rule 2150(c)(1)(A), and FINRA Rule 2010. LPL's Branch Officer Manager Agreement and the Representative Agreement do not appear to have been violated when Respondent accessed Ms. McGee's account after his termination; nonetheless, Respondent should have known that to do so was improper even if Ms. McGee had requested information from him. Respondent did violate those agreements when he continued to use LPL materials. Respondent's actions relating to use of LPL materials and accessing Ms. McGee's account after his termination are found to be dishonest and unethical practices in violation of Tenn. Code Ann. § 48-1-112(2)(G), and Tenn. Comp. R. & Regs. 0780-04-03-.02(6)(b) 17-by violating FINRA Rule 2010.

15. It is determined that Respondent's applications for registration through CFD should be denied based on violations of Tenn. Code Ann. § 48-1-112.

It is therefore **ORDERED** that the CFD Investments, Inc., and Creative Financial Designs applications for registration on behalf of Respondent to register Respondent as a broker-dealer agent and investment adviser representative in Tennessee shall be **DENIED**. Costs of this action are assessed to Respondent in an amount not to exceed $5,000.00

This Initial Order entered and effective this 10TH day of May, 2019.

Leonard Pogue
Administrative Judge

Filed in the Administrative Procedures Division, this 10TH day of May, 2019.

J. Richard Collier, Director
Administrative Procedures Division