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**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

Respondent 2

and

Respondent 3

Respondents.

Disciplinary Proceeding

No. CAF040002

Hearing Officer—Andrew H. Perkins

**ORDER DENYING RESPONDENTS' MOTION IN LIMINE TO PRECLUDE  
COMPLAINANT FROM USING NEW SIMULATION MODEL**

On March 8, 2005, the Respondents moved for entry of an order precluding the Department of Enforcement from using its revised mathematical simulation model as evidence in the hearing in this proceeding. The Respondents argued that the new model impermissibly and materially altered the Complaint and the evidence upon which the Department relies. The Respondents further argued that it received the new model with insufficient time remaining to analyze the model and prepare for the hearing, which difficulties were exacerbated by the fact that the Department failed to provide the Respondents with an explanation of the new model when it was first produced.

The Department opposed the Respondents' motion. The Department contended that it intended to introduce the new model for two purposes: (1) to support the Department's suitability

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charge, and (2) to support the Department's sanction analysis. In direct contrast to the Respondents' view of the model, the Department characterized the model as a single piece of evidence supporting the Department's underlying theory that the Respondents failed to have a reasonable basis for the recommended annuity exchanges, as evidenced by the fact that the Respondents failed to perform a sufficient analysis of the exchanges and the firm failed to provide its registered representatives with sufficient tools to perform such an analysis. Thus, the Department disputed the Respondents' argument that the new model altered the theory of the case.

On March 14, 2005, the Hearing Officer issued an order directing the Department to provide the Respondents with an expert report written by the developer of the new model. The report was to provide sufficient detail to permit the Respondents to understand all of the various categories of information contained in the numerous spreadsheets that are the model's output. The Department filed the report on March 21, 2005.

The Hearing Officer also scheduled an evidentiary hearing on the Respondents' motion, which was held on March 24, 2005. At this hearing, the Respondents questioned BP, the developer of both the original and the new mathematical models.

The Hearing Officer concludes that the new model is materially different from the model the Department employed at the time it filed the Complaint. The Hearing Officer also concludes that the Department was dilatory in providing the Respondents with both a copy of the new model and an explanation of the information it did ultimately provide. The new model was complete no later than October 2004, but the Department continued to withhold producing it

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until February 2005. The Department excused its delay because it continued to stress test the model between October 2004 and February 2005. None of the modifications that resulted during that period were significant, however, and the Department offered no logical explanation for its refusal to provide the spreadsheets at an earlier date. Indeed, the Hearing Officer notes that the Department resisted providing the Respondents with this information at every stage of the proceeding. As early as June 2003, the Department refused the Respondents' request for the original model that supported the Complaint.

Despite the Department's intransigence, however, the Hearing Officer finds that the resulting prejudice to the Respondents is not so great as to warrant the relief the Respondents request. First, the Hearing Officer finds that the new model does not alter the legal theories underlying the Complaint. Second, the Hearing Officer finds that the Respondents have ample time to analyze the new model and that the Department has now provided the Respondents with adequate disclosure of the evidence the Department intends to introduce at the hearing. Accordingly, the Respondents' motion in limine to preclude the Department from introducing the new model at the hearing is denied.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

April 4, 2005