

**STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of **Mark B. Claiborne**) **AMENDED**
) **PROPOSED ORDER**
) Case No. INS 10-02-005

The Director of the Oregon Department of Consumer and Business Services (director), by and through the Insurance Division (Division), having considered this matter and the Proposed Order issued by the Office of Administrative Hearings (OAH) on June 28, 2011, hereby proposes the following amended findings of fact, conclusions of law, opinion and order:

HISTORY OF CASE

On July 1, 2010, the Division Administrator issued a Notice of Proposed Action (Notice) proposing to revoke the Oregon nonresident individual insurance producer license (license) of Mark B. Claiborne pursuant to ORS 744.074(1). Mr. Claiborne timely requested a hearing challenging the proposed action. On August 3, 2010, the Division referred this matter to the OAH for hearing. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) John Mann.

ALJ Mann held a telephone prehearing conference on September 15, 2010. Senior Assistant Attorney General Kelly Gabliks represented the Division. Kevin Shuba, attorney at law, represented Mr. Claiborne and participated in the conference.

ALJ Mann presided over a hearing on January 25 and 26, February 16 and 18, and March 30, 2011 at the OAH offices in Salem, Oregon. Ms. Gabliks represented the Division. Mr. Shuba represented Mr. Claiborne. The Division presented testimony from Clifford Cummins, John Hardiman, Jane Holmes, Clarence Wood, Crystal Wood, Dean Holloway and Lynda Holloway. Mr. Claiborne testified and presented testimony from Duane Cinnamon, Bill Hermann and Theresa Wade. The record closed on April 8, 2010 after Ms. Gabliks submitted a response to Mr. Shuba's written closing argument.

On June 28, 2011, the ALJ issued a Proposed Order (hereinafter "Proposed Order") recommending that Mr. Claiborne's license be revoked. The Proposed Order concluded that: (1) Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Norma C. Holmes without reasonable grounds to believe that the annuity was not unsuitable; (2) Mr. Claiborne violated OAR 836-080-0090 by recommending an unsuitable annuity to Clarence and Crystal Wood; (3) Mr. Claiborne violated ORS 746-100 by making false or fraudulent statements to the Division regarding Ronald Holloway's insurance application; and (4) the appropriate sanction for these violations is revocation of Mr. Claiborne's license.

The ALJ recommended revocation of Mr. Claiborne's license despite the fact he found

that: (1) Mr. Claiborne did not violate OAR 836-080-0090 when he recommended an annuity to Mr. Holloway; and (2) Mr. Claiborne did not violate ORS 731.296 by failing to promptly respond to the Division's inquiry.

The Proposed Order notified Mr. Claiborne of his right to file exceptions within thirty (30) days from its mailing (June 28, 2011). Mr. Claiborne timely filed his first set of exceptions on June 22, 2011, and those exceptions were considered by the Division in this Amended Proposed Order.

However, on August 8, 2011, after the exceptions deadline had passed, Mr. Claiborne sent a letter to the Division regarding the appropriate sanction, as well as new evidence regarding his personal health condition, including correspondence from his physician. Given the untimely nature of this submission (coupled with the fact that Mr. Claiborne was attempting to submit new evidence despite the closure of the hearing record), the information contained in this letter was not considered by the Division.

In accordance with ORS 183.650(2) & (3) and OAR 137-003-0655(3) & (4), the Division proposes to modify the Proposed Order and identifies and explains herein those modifications to the Proposed Findings of Historical Fact that change the outcome or basis for the proposed final decision in this case from that in the Proposed Order. The Division has made other changes to fully, adequately, or correctly set forth the material evidence in the record, to clarify, correct, or amend the proposed Findings of Fact of the ALJ or to explain the Division's proposed findings, conclusions, and opinion herein. The Division has also made changes to correct spelling, grammar, textual placement and other similar errors.

ISSUES

The Division adopts the issues as set out in the Proposed Order:

1. Whether Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Norma C. Holmes without reasonable grounds to believe that the annuity was not unsuitable.
2. Whether Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Clarence and Crystal Wood without reasonable grounds to believe that the annuity was not unsuitable.
3. Whether Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Ronald Holloway without reasonable grounds to believe that the annuity was not unsuitable.
4. Whether Mr. Claiborne violated ORS 746.100 by making false or fraudulent statements on or relative to an insurance application for Ronald Holloway.
5. Whether Mr. Claiborne violated ORS 731.296 by failing to promptly and truthfully respond to the Division's inquiry.

6. Whether Mr. Claiborne's nonresident individual insurance producer license should be revoked.

EVIDENTIARY RULINGS

The Division adopts the evidentiary rulings made by the ALJ as set out below:

The Division offered Exhibits A1 through A45. Exhibits A1, A4, 7, 12, 13, 16, 17, 18, 19, 21-28, 31, 33, 35-44 were admitted into the record without objection. Exhibits A2, A3, A5, A6, A8 through A11, A14, A15, A20, A29, A30, A32, A34, and A45 were admitted over Mr. Claiborne's objections.

Mr. Claiborne offered Exhibits R1 through R8. Exhibits R1 through R7 were admitted into the record without objection. Exhibit R8 was admitted over the Division's objection.

In addition, the Division adopts the evidentiary ruling made by the ALJ regarding closing arguments that was not set out in the Proposed Order. At the beginning of the hearing, both parties agreed that they would be presenting oral closing arguments. However, at the end of the hearing, Mr. Shuba supplemented his closing with written comments. The Division requested, and was granted, the opportunity to provide a response to the written comments, which were submitted on April 8, 2011. At that time, the hearing record was closed.

On April 21, 2011, Mr. Shuba submitted a reply to the Division's closing arguments. Given that the hearing record was closed, the Division objected. The ALJ agreed, and by email dated April 28, 2011, ruled that he would not consider Mr. Shuba's additional submission. The Division adopts this ruling, and excludes from the record the reply submitted by Mr. Shuba on April 21, 2011.

FINDINGS OF FACT

The Division adopts the Findings of Fact made by the ALJ and sets out additional historical Findings of Fact because the ALJ failed to fully and adequately set forth the material evidence in the record. The additional Findings are set out in *italics*:

1. Mark Claiborne has been licensed by the Division as an Oregon nonresident individual insurance producer since October 1993. (Ex. A1 at 1.) Mr. Claiborne has been an insurance sales representative for Bankers Life and Casualty Company (Bankers Life) for more than 15 years. (Test. of Claiborne.)

2. On January 1, 2005, the Division adopted a rule, OAR 836-080-0090, which required insurance producers in Oregon who sold annuities to make a reasonable inquiry into whether the annuity was suitable in light of a consumer's insurance objectives, age, financial situation and needs. The rule also required producers to consider "other relevant information" that bore on suitability. The Division interprets the phrase "other relevant information" to include such things as the consumer's health and life expectancy, the consumer's liquid assets and cash reserves, the tax consequences of the proposed transaction, and any penalties or fees

that could be incurred as a result of the transaction. (Test. of Cummins.)

Holmes Transaction

3. On September 13, 2005, Mr. Claiborne met with Edward and Norma Holmes. (Test. of Claiborne.) At the time, Ms. Holmes was 76-years-old. Mr. Holmes was 84. (Test. of Holmes.) Mr. Claiborne sold a long term care insurance policy to Ms. Holmes in 1998. Mr. Holmes did not have long term care insurance coverage. (Test. of Claiborne.)

4. At the September 13, 2005 meeting, Norma Holmes signed an Application for Insurance prepared for her by Mr. Claiborne. (Ex. A4.) The Application was for the purchase of a fixed annuity from Bankers Life, in Ms. Holmes's name only, in the amount of \$180,947.05, an amount equal to approximately 90 percent of the Holmes's total liquid net worth. (Exs. A2 and A4; test. of Cummins.) The first page of the Application listed a payment amount of \$180,947.05. (Ex. A4 at 1.) At the time he prepared Ms. Holmes's application, Mr. Claiborne also completed a Bankers Life Annuity Suitability Questionnaire. Mr. Claiborne listed the value of Ms. Holmes's CDs at \$170,000 and listed the value of her money market investments at \$16,000. (Ex. A4 at 27.) The actual value of the CDs at that time was \$165,950.49. The actual value of the money market accounts was \$18,539.36. (Ex. A2 at 1.) Mr. Claiborne indicated on the form that Ms. Holmes would pay for the annuity from her CDs and from money in her "Checking/Savings Account." (Ex. A4 at 27.) In answer to a question that asked about any penalties associated with withdrawing the funds used to pay for the annuity, Mr. Claiborne wrote "\$800.00." (*Id.*) In a section of the form for "Remarks," Mr. Claiborne wrote "Large part of the decision is to consolidate + simplify savings." (*Id.*)

5. Prior to investing in the annuity, the Holmes had most of their money invested in seven CDs and two money market accounts at three separate financial institutions. (Test. of Cummins; Exs. A2 and A5.) Ms. Holmes previously told her daughter, Jane Holmes, that she kept her money in several banks because she wanted to diversify her investments and did not want to keep all of her "eggs in one basket." (Test. of Holmes; Ex. A6 at 1.)

6. After completing the Application, Mr. and Ms. Holmes executed documents authorizing two banks (Bank of America and Columbia River Bank) to liquidate their CDs and transfer those funds to Bankers Life. (Ex. R1 at 2-5.) Mr. and Ms. Holmes also signed a power of attorney authorizing Mr. Claiborne to go to Bank of America to withdraw all of their money from two CDs. (Test. of Claiborne; Ex. R1 at 11, 12, and 30.) Later on September 13, 2005, Mr. Claiborne went to each of the three banks where he closed out all of the Holmes's CDs. (Test. of Claiborne.) Ms. Holmes also wrote two personal checks, from her money market accounts, to Mr. Claiborne. One was for \$9,245.49. The other was for \$7,293.56. (Ex. A2 at 1; Ex. R1 at 30.) As a result of all of the transactions, the Holmes had no money remaining in their CDs and were left with a total balance of \$2,000.31 in their money market accounts. They had an additional \$11,822.14 in their checking account and owned stocks worth approximately \$6,700. (Ex. A2; test. of Cummins.)

7. Four of the Holmes's CDs, with a total value of \$125,315.65, paid interest rates of between 2.92424 and 3.53 percent annually. The interest rate on the other three CDs, with a total

value of \$40,634.84, is unknown. The Holmes paid total penalties of \$2,017.08 for canceling four of the CDs. The penalties were as follows:

Value of CD	Bank	Interest Rate	Penalty
\$20,264.92	Columbia River	3.53 Percent	\$342.25
\$25,000.81	Columbia River	3.35 Percent	\$406.82
\$60,048.39	Bank of America	3.1522 Percent	\$918.01
\$20,500	US Bank	Unknown	\$350

(Ex. A2 at 1.)

8. Bankers Life issued Ms. Holmes a single premium deferred annuity effective September 15, 2005. The annuity paid a guaranteed minimum interest rate of 2.5 percent, plus a bonus of 3.0 percent, for a total first year guaranteed minimum rate of 5.5 percent. The annuity paid a guaranteed minimum interest rate of 2.5 percent for the next nine years. Thereafter, the annuity paid a guaranteed minimum interest rate of 3 percent annually. (Ex. R1 at 18.) If the first year bonus interest is amortized over the ten year period of the annuity, the effective annual guaranteed minimum interest rate was 2.8 percent annually, a rate lower than the interest paid on the four CDs whose interest rates were known. (Ex. A2.)

9. The Bankers Life annuity allowed Ms. Holmes to withdraw up to 10 percent of the annuity's "accumulation value" each year without restriction. The accumulation value included the initial purchase price of the annuity, plus any accrued interest, less any previous withdrawals. In addition, the annuity allowed Ms. Holmes to withdraw up to 20 percent of the annuity's accumulation value if she did not take a withdrawal in the previous year. However, any withdrawals above these limits were subject to a withdrawal charge for the first nine years of the annuity. The withdrawal charge was eight percent for the first two years then declined one percent each year thereafter. (Ex. A4 at 11, 14-15.)

10. On July 6, 2006, the Division received a complaint from Jane Holmes regarding Mr. Claiborne's sale of the Bankers Life Annuity to her parents. Ms. Holmes wrote that Mr. Claiborne recommended the annuity to the Holmes as a way to protect assets in the event that Mr. Holmes had to enter a nursing home and required Medicaid benefits. In addition, according to the letter, Mr. Claiborne told Norma Holmes that she would not have to pay any penalties for canceling her CDs. (Ex. A3.)

11. On July 10, 2006, Dennis Kuckhartz, a Division Consumer Advocate, sent a letter to Mr. Claiborne asking for a written report concerning the allegations in Ms. Holmes's complaint. (Ex. R1 at 13.) Mr. Claiborne responded by letter dated August 4, 2006. In the letter, Mr. Claiborne wrote that the Bankers Life annuity had more liquidity than was typical in most single premium deferred annuities, allowing for regular withdrawals without penalty. He also wrote that such annuities were widely accepted as a method to protect a spouse's assets

should the other spouse require long term care. Mr. Claiborne asserted that he had recently consulted with two attorneys and a CPA, all of whom agreed that it was appropriate for Mr. Claiborne to recommend the sale of the Bankers Life annuity to Norma Holmes as a method of protecting assets in case Mr. Holmes required Medicaid assistance if he entered a nursing home. Mr. Claiborne also asserted that Ms. Holmes also wanted to purchase the annuity in order to consolidate and simplify her savings. (Ex. R1 at 14-15.) Finally, Mr. Claiborne wrote:

As to the early withdrawal penalties, I recall very distinctly calling each bank one by one while at Norma Holmes' kitchen table and obtaining the early withdrawal penalty amounts on each C.D. and discussing them with Mrs. Holmes. That one bank waived the early withdrawal penalties was an unexpected plus and I explained it as such to Mrs. Holmes.

(*Id.* at 16.)

12. Mr. Claiborne sent another letter to the Division on August 7, 2006. In that letter Mr. Claiborne wrote:

Medicaid planning was only a minor factor in the Holmes' decision. The biggest reason they placed most of their money with us was to simplify matters and consolidate the bulk of their savings with a company and agent they know, trust, and like.

(Ex. R1 at 17.)

13. On September 22, 2006, the Division received a letter, signed by Norma Holmes, responding to Mr. Claiborne's letters. (Ex. A6.) Jane Holmes assisted her mother in writing the letter. (Test. of Holmes.) The letter asserted that Mr. Claiborne told the Holmes that the banks were waiving all penalties for closing the CDs. Norma Holmes also asserted that Mr. Claiborne told her that the Bankers Life annuity would operate "just like a savings account" and that he did not explain that the Holmes would have restricted access to withdrawals for ten years. (Ex. A6 at 1.) Ms. Holmes also asserted that Mr. Claiborne did not explain that she would need to annuitize¹ the annuity in order to shield the money from creditors should Mr. Holmes enter a nursing home. Furthermore, Ms. Holmes wrote that she did not have any "dealings" with Mr. Claiborne between the time he sold her a long term care insurance policy and the day he sold her the annuity. (*Id.*) Ms. Holmes wrote that the Holmes' did not desire to make changes in their investments and felt more secure having their money in three banks, rather than having "all of our eggs in one basket." (*Id.*)

14. Mr. Claiborne wrote a letter, dated October 20, 2006, to Bankers Life Consumer Relations in response to Ms. Holmes's September 22, 2006 letter. He reiterated his assertion that he called "each bank" at the time he sold Ms. Holmes the annuity and "wrote down the penalties

¹ To "annuitize" an annuity means to convert it to a regular stream of payments either for life or for a fixed period of years. (Test. of Claiborne.) Under the Medicaid rules in effect in September 2005, an annuity would need to be irrevocably annuitized in order to protect the value of the annuity from being considered for Medicaid eligibility purposes. (Test. of Wade.)

quoted to [him] on the phone by Mrs. Holmes' bank representatives." (Ex. R1 at 24.) He further asserted that Ms. Holmes was present when he made the calls. (*Id.*)

15. On December 4, 2007, Bankers Life *reached a settlement with Ms. Holmes which included the surrender of the annuity, without penalty. In addition, Bankers Life agreed to reimburse Ms. Holmes for all bank penalties associated with surrendering her CDs. Edward Holmes died in September 2009. Norma Holmes died in April 2010. (Test. of Holmes.)*

Proposed Wood Transaction

16. Mr. Claiborne met with Clarence and Crystal Wood on June 28, 2007 to discuss long term care insurance and annuities. At the time, the couple were living in a motor home parked on their son's property. (Test. of Clarence Wood.) Mr. Wood was 77 years old. Ms. Wood was 76. During the meeting, Mr. Claiborne assisted Mr. Wood in completing a questionnaire form about the couple's finances. The first page of the form had the Wood's names, birthdates, and address listed. A section of the form labeled "Medical Expenses" had six questions, all of which were unanswered. (Ex. A38 at 1.) Page two of the form has a section labeled "Long-Term Care" that asks for information regarding any current insurance coverage and three numbered questions. (*Id.* at 2.) The entire section was left blank. The next section was labeled "Final Expenses/Survivor's Income." (*Id.*) The section asked for detailed information regarding life insurance and four separately numbered questions. That section was also left blank.

17. The next section of the form was labeled "Retirement Income/Savings." (*Id.*) The first question stated:

Many people are concerned about outliving their money. What concerns do you have?

(*Id.*) A line for the answer was left blank. In response to a question about monthly Social Security benefits, Mr. Claiborne indicated \$1,353 for Mr. Wood and \$611 for Ms. Wood and indicated that the couple had \$1,200 in monthly pension income. On a line asking about pension survivor benefits, Mr. Claiborne wrote "+ R.E. Note [\$]266, Interest \$800/month +/-." (*Id.*)

18. The next two questions on the form asked about the Wood's monthly expenses and whether they needed all of their income for living expenses. There were no answers to either question. The next section asked about savings. Mr. Claiborne wrote "'some' wnd" on a line referring to savings accounts. (*Id.* at 3.) Mr. Claiborne used the letters "wnd" to indicate "would not disclose." (Test. of Claiborne.) Mr. Claiborne wrote \$215,000 next to a line asking about CDs. He wrote "Defined Benefit Pension" on a line labeled IRAs. (Ex. A38 at 3.) In a blank next to a line labeled "Real Estate" Mr. Claiborne wrote "Motor Home 15,000 equity." (*Id.*) On the line labeled "Other" Mr. Claiborne wrote "High Interest Checking - 'some' wnd." (*Id.*) Mr. Claiborne left lines labeled "Annuities," "Life Insurance Cash Value," "Money Markets," "Stocks/bonds," and "Mutual Funds" blank. (*Id.*) Mr. Claiborne did not write any responses to the remaining six questions in the section which asked about risk tolerance, concerns about savings and retirement income, returns on investments in the past, liquidity needs, and whether the applicant was paying income tax. (*Id.*)

19. In the last section on the form, labeled “Additional Information and Follow-Up Notes,” Mr. Claiborne wrote information regarding possible options for a long-term care policy. (Ex. A38 at 3.) Mr. Wood signed the form and dated it June 28, 2007. A preprinted statement above his signature stated, in part:

To the best of my knowledge, the information I have provided in this Fact Finder represents an accurate picture of my current situation and beliefs. *
* * I understand that any recommendations made by the agent are based on these responses.

(*Id.*)

20. Mr. Claiborne also completed an “Annuity Suitability Questionnaire” for Mr. Wood who signed it on June 28, 2007. (Ex. R2 at 1.) In a section of the form asking about current investments, Mr. Claiborne wrote \$215,000 in a box for the value of CDs. He left all other lines blank, including lines marked “Savings Account,” “Real Estate,” “Stocks,” “Bonds,” “Money Market,” and “IRA’s.” (*Id.*) He checked a box on the form to indicate that the primary reason for purchasing the annuity was for tax savings. (*Id.*)

21. Also on June 28, 2007, Mr. Wood signed and dated an application for long-term care insurance and for an annuity. (Ex. A13.) Mr. Wood then gave Mr. Claiborne a check for \$200,648.75 for the annuity. He asked Mr. Claiborne not to submit the check to Bankers Life until he was able to transfer sufficient funds to cover the check. Mr. Wood had earlier requested that Mr. Claiborne provide him with a brochure regarding the annuity. Mr. Claiborne told Mr. Wood that he did not have a brochure with him, but promised to bring one later in the day. (Test. of Clarence Wood.)

22. Later, Mr. Claiborne took Mr. Wood’s applications, the questionnaires, and the check back to his office. His administrative assistant submitted the check to Bankers Life and electronically submitted all of the documents to the company the same day. (Test. of Claiborne.) Mr. Claiborne returned to the Wood’s home approximately one hour later. (Test. of Clarence Wood.) Mr. Claiborne provided the brochure to the Woods and engaged in a brief conversation not related to finances or the transaction. (Test. of Clarence Wood and Crystal Wood.)

23. After reading the brochure, the Woods decided not to purchase the annuity. They believed that Mr. Claiborne either misrepresented, or failed to disclose, several important details about the annuity. Most significantly, the Woods did not understand that the annuity would pay a bonus interest rate during the first year, but would be substantially less for the remaining nine years of the annuity. (Test. of Clarence Wood.) In fact, the annuity would pay a total guaranteed minimum rate of seven percent annually for the first year, and 2.5 percent annually for the next nine years. Mr. Wood’s existing CDs paid five percent per year. (Ex. A11.) Mr. Wood went to Mr. Claiborne’s office sometime the next day and told him to cancel the sale. Mr. Claiborne agreed, but told them that he could not locate the check. The Woods therefore put a stop payment on the check with their credit union so that it would not be honored. Neither Mr. Claiborne nor Bankers Life ever returned the check to the Woods. (Test. of Clarence Wood.)

24. At 10:08 a.m., on June 29, 2007, a Bankers Life employee sent an e-mail to Mr. Claiborne stating:

[Branch Service Manager] must initial suitability and remark on why this annuity is in client[']s best interest.

Asset portion (1) of suitability form indicates entire savings being used for this transaction.

Please scan updated form to home office before cutoff.

(Ex. R2 at 4.) Mr. Claiborne sent a response e-mail at 2:57 p.m. the same date stating that Mr. Wood had cancelled the transaction that morning. Mr. Claiborne also wrote "Please send the check back to BO5083 in pouch mail ASAP!" (*Id.*)

25. Mr. Claiborne later provided a copy of the Needs Assessment Questionnaire to the Division with substantially more information than was on the form as originally signed by Mr. Wood and submitted to Bankers Life. The section labeled "Medical Expenses" included six handwritten answers that were on the form as submitted to Bankers Life. The new entries stated that Mr. Wood was receiving health insurance through his retirement plan and that both of the Woods were in "very good" health. (Ex. A12 at 2.) A new entry stated that Mr. Wood was taking "normal" medications which were described as "minimal." (*Id.*) Another new entry stated that Mr. Wood was interested in "L.T.C." and that his only concern about his future health was "ageing." [*sic.*]

26. In the section labeled "Long-Term Care," Mr. Claiborne added new entries to indicate that Mr. Wood did not have long-term care insurance, but that he was interested in it. A new entry stated that Mr. Wood knew "a few people" who had needed long-term care. (Ex. A12 at 3.) Mr. Claiborne circled language on the form to indicate that Mr. Wood was interested in long-term care insurance to protect his assets. In response to a question about the role of Mr. Wood's children for his long-term care needs, Mr. Claiborne wrote "Lives in motor home next door to son, but do not want to be too much of a burden." (*Id.*)

27. In the section was labeled "Final Expenses/Survivor's Income," Mr. Claiborne wrote "wnd" in answer to a question about existing life insurance. (Ex. A12 at 3.) In response to a question that asked if Mr. Wood had a will, Mr. Claiborne wrote "Referred to Sam Tucker for update." (*Id.*)

28. In the section of the form labeled "Retirement Income/Savings," Mr. Claiborne added an answer to a question that asked if Mr. Wood was concerned about "outliving" his money. (Ex. A12 at 3.) Mr. Claiborne wrote "Having the [b]ackup money intact so a home can be purchased later, maybe in 10-15 years." (*Id.*) The couple had been living in their motor home for approximately 10 years and wanted to purchase a home within the next few years. They did not want to wait another 10 to 15 years. (Test. of Clarence Wood.)

29. Mr. Claiborne also added more information to the answers previously submitted

regarding Mr. Wood's savings. On a line referring to savings accounts, Mr. Claiborne inserted the word "substantial" under his previous entry of "'some' wnd." (Ex. A12 at 4.) Mr. Claiborne added the words "interested in" on a line referring to annuities. (*Id.*) On a line labeled "Other" Mr. Claiborne added the words "again – substantial" underneath his previous entry of "High Interest Checking – 'some' wnd." (*Id.*) In answer to a question about risk tolerance, Mr. Claiborne wrote "Not in risky things." (*Id.*) In answer to a question about returns on savings in past years, Mr. Claiborne wrote "Not so good." (*Id.*) Mr. Claiborne added a new entry to state that Mr. Wood was paying income tax and that he wanted to lower his taxes. (*Id.*)

30. Mr. Claiborne did not show the altered questionnaire to Mr. Wood and did not ask him to initial the changes or to resign the document. (Test. of Clarence Wood.) Mr. Claiborne did not submit the altered questionnaire to Bankers Life because Mr. Wood cancelled the transaction. (Test. of Claiborne.)

31. Mr. Claiborne was interviewed about the proposed Wood transaction, under oath, by Division investigators on March 4, 2008. Mr. Claiborne's attorney was present for the interview. Mr. Claiborne initially stated that he added answers to the Needs Assessment Questionnaire "after he got the memo from * * * the home office that they wanted a more complete assessment." (Ex. A42 at 32.) Mr. Claiborne asserted that he did so based on information he received during his conversation with the Woods. Mr. Claiborne admitted that he did not have Mr. Wood sign the form after he made the insertions. Mr. Claiborne asserted that he "was going to do that but they said they wanted to stop the process." (*Id.* at 33.) Mr. Claiborne stated that he stopped by the Wood's home, but that they did not "want to have any further dealings with me." (*Id.*) Later, in the same interview, Mr. Claiborne asserted that he added the answers to the form when he returned to the Wood's home on June 28, 2007 to drop off the brochure. (*Id.* at 37.) When asked about the contradiction, Mr. Claiborne stated that he could not remember whether he "fill[ed] in * * * a couple of blanks here and there" on June 28, 2007 or the following day. (*Id.* at 39.)

32. Later in the interview, Mr. Claiborne stated that he was interrupted during his initial meeting with the Woods by a police officer who asserted that the Wood's motor home was illegally parked. Mr. Claiborne claimed that he then returned to his office and gave "the paperwork to [his] secretary to process." (Ex. A42 at 41.) He then asserted that he returned to the Wood's home to drop off the brochure and to "finish our conversation." (*Id.*) Afterward, Mr. Claiborne told the investigators, he completed the questionnaire and gave it to his secretary to copy and have it ready for processing the following day. (*Id.* at 43.)

33. When the investigators asked Mr. Claiborne why the incomplete version of the Needs Assessment was submitted to Bankers Life, he initially stated that he did not know. (Ex. A42 at 36.) He later told the investigators that he had given the Needs Assessment to his secretary after his first meeting with the Woods so that she could order medical records and "log everything in." (*Id.* at 44.) He then told investigators that he was "not at all certain that he instructed" his secretary to begin processing the application. (*Id.*) Instead, Mr. Claiborne asserted, "she may have been really, really efficient and just grabbed it off my desk while I was getting some lunch and grabbing the brochure." (*Id.* at 44-45.) Mr. Claiborne then claimed that he "may have put [Mr. Wood's application documents] on [his secretary's] desk * * * with

instructions to order the medical records and – and log it in” while he was at lunch. (*Id.* at 45.)

Holloway Transaction

34. Mr. Claiborne met with Ronald Holloway, and his wife Lynda Holloway, in August 2008 *after the Holloways responded to a direct mail solicitation by Bankers Life promoting health care insurance.* At the time, Mr. Holloway was 69 years old. Ms. Holloway was 59. Mr. Claiborne discussed the couple’s finances and suggested that they might want to secure long-term care insurance *by purchasing an annuity and utilizing the earnings to fund long term care insurance.* Mr. Holloway told Mr. Claiborne about the couple’s savings and investments, including IRAs, a paid-up life insurance policy, a money market account, and a variable annuity from Prudential. The Holloways did not elect to purchase any insurance products from Mr. Claiborne at that time. Mr. Claiborne stopped by to meet with the Holloways a number of times during the next two months. (Test. of R. Holloway; test. of L. Holloway.)

35. Mr. Claiborne again met with the Holloways on September 23, 2008. Mr. Holloway, who had recently turned 70, again discussed his finances, including his concern that the value of his current variable annuity was declining. (Test. of R. Holloway.) *Mr. Holloway had initially invested \$100,000 in the variable annuity. The variable annuity had several unique features, which Mr. Holloway had paid an additional amount to obtain. One such feature was the “Lifetime Five” guarantee. The Lifetime Five feature guaranteed that Mr. Holloway would receive no less than a 5% annual income stream of withdrawals based on the “Protected Withdrawal Value” of his account for the rest of his life. (Ex. A26 at 2.) The Protected Withdrawal Value for his account is the highest of three values – Mr. Holloway’s initial investment; the highest anniversary date value his account had attained; or the account value at the time of Mr. Holloway’s first withdrawal. This feature ensured that Mr. Holloway would never lose his initial investment, while at the same time providing an opportunity for an even higher return. (Id.)*

36. Mr. Claiborne asked to see a copy of the variable annuity contract, but the Holloways could not locate it. However, they were able to show Mr. Claiborne a copy of their most recent quarterly statement which showed a value which was less than the original value of the investment. *Mr. Holloway forgot that he had already elected to begin making withdrawals from this account. At the time of his first withdrawal, Mr. Holloway’s account was worth over \$105,000, which became the Protected Withdrawal Value. Therefore, Mr. Holloway was entitled to receive, for life, a 5% income stream of withdrawals based on \$105,000, for a payment of over \$5000 per year. (Test. of R. Holloway; Test. of Hardiman.)*

37. *Another important feature of Mr. Holloway’s variable annuity contract was the guaranteed Minimum Death Benefit. This feature guaranteed that Mr. Holloway’s beneficiaries would receive the initial investment (\$100,000) less any withdrawals regardless of the value of the account at the time of Mr. Holloway’s death. (Test. of Hardiman; Ex. A25 at 16.) All of these features would be lost once Mr. Holloway terminated this annuity.*

38. Mr. Claiborne recommended that the Holloways purchase a fixed annuity from Bankers Life to avoid future losses in value. (Test. of R. Holloway.) *However, Mr. Claiborne*

made this recommendation despite never reviewing the account contract, which set out the account's unique features. Additionally, Mr. Claiborne's recommendation failed to take into consideration that the reduction in the account was due to Mr. Holloway's decision to begin taking withdrawals or that Mr. Holloway would lose the guaranteed Minimum Death Benefit. (Test. of Hardiman; Test. of R. Holloway.)

39. Mr. Holloway called Prudential at 4:26 p.m. on September 23, 2008. During the phone conversation, Mr. Holloway told the representative, Nicole Bloom, that he wanted to withdraw all of his money from the variable annuity. At Mr. Holloway's request, Ms. Bloom told Mr. Holloway that the current value of the account was \$88,593.33 which was approximately \$7,000 less than the value of the annuity as of June 30, 2008. Ms. Bloom asked Mr. Holloway if he wanted her to give him a breakdown of his investments with Prudential. Mr. Holloway declined. Mr. Holloway asked Ms. Bloom if he was going to be penalized for canceling the annuity. Ms. Bloom told him that there would be no surrender charges. Ms. Holloway also spoke with Ms. Bloom and told her that she also wanted to withdraw money from her own account. Ms. Bloom took Ms. Holloway's Social Security number then transferred the couple to an account specialist to assist with the withdrawal. Mr. Claiborne *was present but* did not speak with Ms. Bloom during that conversation. (Ex. A28; Ex. A30; Test. of L. Holloway; Test. of R. Holloway.)

40. During a subsequent conversation with a Prudential representative on September 23, 2008, the Holloways learned that Ms. Holloway would be penalized if she closed out her Prudential IRA account. The account representative also told Ms. Holloway that she had a feature on the IRA, known as Lifetime Five, which would allow her to receive a monthly payment, for life, equal to a five percent annual rate of return on the value of IRA. The Holloways, following Mr. Claiborne's advice, elected not to cancel Ms. Holloway's IRA. (Test. of L. Holloway.)

41. At approximately 5:04 p.m. on September 23, 2008, the Holloways spoke on the phone with Konna Gallagher, a Prudential annuity services representative. Mr. Holloway again stated that he wanted to withdraw the full value of the annuity. Ms. Gallagher told Mr. Holloway that he could not do that over the phone, but offered to e-mail or fax the necessary forms to him. Mr. Holloway then asked Ms. Gallagher if he could start drawing payments from his Prudential IRA. Ms. Gallagher told Mr. Holloway that his IRA also had the Lifetime Five feature and explained the monthly payment amounts Mr. Holloway could receive if he exercised various withdrawal options. At Mr. Holloway's request, Ms. Gallagher promised to mail Mr. Holloway the forms he would need to begin systematic withdrawals, and the information about the value of such withdrawals under the Lifetime Five option, and under fixed withdrawal periods of 10 years and 14.2 years. Ms. Gallagher did not remind Mr. Holloway that his variable annuity also had the Lifetime Five feature. Mr. Claiborne *was present but* did not speak with Ms. Gallagher during this phone conversation, *so he heard Mr. Holloway discuss the Lifetime Five feature of his IRA with Prudential. Mr. Claiborne did not ask Mr. Holloway if his variable annuity had this same feature.* (Ex. A29; Ex. A30; Test. of L. Holloway; Test. of R. Holloway.)

42. Later on September 23, 2008, after speaking with Ms. Gallagher, Mr. Holloway signed an Application for Insurance prepared by Mr. Claiborne. (Ex. A16; test. of L. Holloway.)

The Application was for a fixed annuity from Bankers Life. (Ex. A16.) Mr. Claiborne recommended that the Holloways leave their IRAs with Prudential, but recommended that Mr. Holloway withdraw all of his money from the Prudential variable annuity and put it into the Bankers Life fixed annuity. The Holloways believed that Mr. Claiborne was also selling them a long-term care insurance policy and believed that they would be able to pay the premiums for the policy out of proceeds from the Bankers Life annuity. However, *Mr. Claiborne* did not complete an application for long-term care insurance *for the Holloways*. (Test. of L. Holloway; test. of R. Holloway.)

43. Mr. Claiborne recommended that the Holloways withdraw \$25,000 from their money market account to fund the annuity. *This left only \$23,877.41 in that account and became the Holloway's only liquid asset.* (Ex. A15 at 1.) He also recommended that they deposit additional money from the Prudential variable annuity after they received those proceeds. The Holloways agreed *without understanding the benefits they were giving up by terminating the variable annuity account.* (Test. of R. Holloway.)

44. A question on the Application asked:

Is the annuity now applied for intended to, or likely to, replace or change any existing life of annuity coverage?

(Ex. A16 at 3.) Mr. Claiborne filled in a circle marked “No” despite his recommendation to Mr. Holloway to terminate this account and put all of the money into a Bankers Life annuity. (*Id.* at 7.)

45. Mr. Holloway also signed a document on September 23, 2008 labeled “Important Notice: Replacement of Life Insurance or Annuities” prepared by Mr. Claiborne. (Ex. A16 at 10.) Mr. Claiborne checked boxes marked “no” in answer to the following two questions:

1. Are you considering * * * surrendering, forfeiting, * * *, or otherwise terminating your existing policy or contract?
2. Are you considering using funds from your existing policies or contracts to pay premiums due on the new policy or contract?

(*Id.*) Mr. Claiborne also signed the document and submitted it to Bankers Life as part of the Application. (*Id.*; test. of Claiborne.)

46. On September 30, 2008, Mr. Claiborne went to the Holloway's home and called Prudential's annuity services department. Both Mr. and Ms. Holloway were present. Mr. Claiborne spoke with Prudential representative Mary Gahagan. During the call, Mr. Claiborne told Ms. Gahagan that Mr. Holloway wanted to convert his IRA into a fixed payout over a 10 year period. Mr. Claiborne told Ms. Gahagan that he did not believe that Prudential sent Mr. Holloway an appropriate form to exercise that option. Ms. Gahagan confirmed that Mr. Holloway did not have the right form. Mr. Claiborne then stated:

Well, what's frustrating is, is he called and I was here, uh, a little over a week and asked for the form to convert this to a 10-year payout and this is what was received by him in the mail. So what are we supposed to do with this?

(Ex. A30 at 3.) Ms. Gahagan offered to send Mr. Holloway the correct forms. Mr. Claiborne then asked Ms. Gahagan to explain Mr. Holloway's options under the Lifetime Five feature of the IRA. After a brief explanation of various payout options, Mr. Claiborne asked Ms. Gahagan to send Mr. Holloway paperwork to explain his options under a five, seven, and 10 year fixed payout plan. Ms. Gahagan placed Mr. Claiborne on hold to verify whether a seven year payout was available. When she returned to the call, Mr. Claiborne informed her that Mr. Holloway had decided to elect the 14.2 year payout option. (*Id.* at 3-6.)

47. Mr. Claiborne then asked Ms. Gahagan about an issue that was "a little more distressing." (Ex. A30 at 6.) Mr. Claiborne, referring to Mr. Holloway's Prudential variable annuity, stated:

Well, what he asked for, uh, last week was a total liquidation and he wanted to do it immediately before the market went down and they said, no, we've got to send you some forms. So we've got forms but we don't see anything on here that would instruct Prudential to immediately sell his assets and put it all into his money market account for him.

(*Id.* at 7.) Mr. Claiborne also asserted that Mr. Holloway "was pretty unhappy that he couldn't do it with just a phone request before[.] * * * And especially since your people sent him the wrong form when his instructions were very clear." (*Id.*) Ms. Gahagan apologized, and then transferred Mr. Claiborne to Lisa Clark, a Prudential representative in the company's disbursements section. Ms. Clark took Mr. Holloway's fax number, and then offered to fax him the correct form. (*Id.* at 7-8.) Neither Ms. Clark nor Ms. Gahagan explained that Mr. Holloway had the Lifetime Five option available under his variable annuity *and Mr. Claiborne never asked whether the variable annuity had such a feature.* (*Id.* at 1-10.)

48. Mr. Holloway subsequently received the correct form and returned it to Prudential for the full surrender of his variable annuity on October 1, 2008. (Ex. A19.) *Mr. Holloway received a check from Prudential for about \$84,000 and on October 7, 2008, consistent with Mr. Claiborne's recommendation, Mr. Holloway gave Mr. Claiborne a check for \$80,000 for an additional deposit into the Bankers Life fixed annuity. Bankers Life credited that deposit to the annuity on October 8, 2008.* (Test. of R. Holloway; Ex. A18.)

49. On December 17, 2008, Mr. Holloway filed a complaint with the Division concerning Mr. Claiborne's sale of the annuity. (Ex. A14.) Later on that same day, Mr. Kuckhartz (Division Consumer Advocate), wrote a letter to Mr. Claiborne asking for a detailed report in response to Mr. Holloway's complaint. The letter stated, in bold print:

You must respond no later than 21 days from receipt of this letter.

(Ex. A21.)

50. On January 27, 2009, the Division received a letter from Mr. Claiborne dated January 16, 2009. Mr. Claiborne wrote that he received the letter on December 24, 2008. Mr. Claiborne asserted that he had not seen the Prudential variable annuity, but that Mr. Holloway had informed him that it was worth \$95,000 and that he thought he could convert it to an income based upon his original contract value at a rate of five percent interest. With regard to the Prudential annuity, Mr. Claiborne wrote:

Of [Mr. Holloway's] own volition and with his own decision he contacted Prudential after attempting to convert these to an income and asked them for a refund or cash out of his account. Again, I did not see the Prudential contract, I did not know exactly how much money he had in it, and I was not present at the time he made this request. * * * I also would assume that the people at Prudential would have tried to make him aware of his options before having him cash his policy in.

(Ex. A22 at 1.)

51. Mr. Claiborne submitted another letter to the Division on or about April 13, 2009. In that letter, Mr. Claiborne again asserted that Mr. Holloway had informed him that he had the right to convert his Prudential annuity into a stream of payments equivalent to a five percent rate of return on his original investment. Mr. Claiborne wrote that he encouraged Mr. Holloway to take advantage of that option. Mr. Claiborne further asserted that Mr. Holloway later became frustrated with Prudential when they did not provide him an annuitization schedule. As a result, according to Mr. Claiborne:

[Mr. Holloway] decided on his own, in my absence, to simply cash it in and roll it into a Bankers Life and Casualty annuity, while retaining some portion to pay off other bills[.]

(Ex. A23 at 2.) Mr. Claiborne reiterated the same point later in the letter:

I will state here again, that after I made my suggestions and recommendations, including the recommendation that Mr. Holloway simply annuitize his existing annuity if in fact he would be able to get his original princip[le] out with some amount of interest. Mr. Holloway on his own, with conversations with Prudential **in my absence**, made these decisions on his own.

(*Id.*; emphasis added.)

52. Division investigators interviewed Mr. Claiborne, under oath, about the Holloway transaction on August 24, 2009. Mr. Claiborne's attorney was present for the interview. (Ex. A33.) When an investigator asked Mr. Claiborne whether he reviewed Mr. Holloway's Prudential annuity, Mr. Claiborne replied "I was not trying to undo his Prudential annuity." (*Id.*

at 33.) The investigator asked Mr. Claiborne “So, at no time did you recommend that he get out of the Prudential annuity?” Mr. Claiborne answered “No. I never did.” (*Id.* at 34.)

CONCLUSIONS OF LAW

1. Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Norma C. Holmes without reasonable grounds to believe that the annuity was not unsuitable.
2. Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Clarence and Crystal Wood without reasonable grounds to believe that the annuity was not unsuitable.
3. Mr. Claiborne violated OAR 836-080-0090 by recommending an annuity to Ronald Holloway without reasonable grounds to believe that the annuity was not unsuitable.
4. Mr. Claiborne violated ORS 746.100 by making false or fraudulent statements on or relative to an insurance application for Ronald Holloway.
5. Mr. Claiborne violated ORS 731.296 by failing to truthfully respond to the Division’s inquiry.
6. Mr. Claiborne violated ORS 731.296 by failing to promptly respond to the Division’s inquiry.
7. Mr. Claiborne’s nonresident individual insurance producer license should be revoked.

OPINION

The Division seeks to revoke Mr. Claiborne’s insurance producer license based on his alleged violations of OAR 836-080-0090, ORS, 746.100, and ORS 731.296. The Division has the burden of proving these allegations. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.). The Division must prove the allegations by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Mr. Claiborne argued during the hearing and in his Exceptions filed July 22, 2011, that the Division is precluded from finding any violations in this case because all of the alleged violations were subject to a Stipulation and Final Order (Order) entered into by the Division and Bankers Life. (Ex. R8.) Under the terms of that Order, Bankers Life agreed to pay a civil penalty of \$150,000 for violations of OAR 836-080-0090 that occurred from January 28, 2005 through October 28, 2008, the effective date of the Order. In exchange, the Division agreed that it would not take any enforcement action against Bankers Life for violations of OAR 836-080-

0090 that occurred prior to October 28, 2008.

Mr. Claiborne asserts that the Order precludes the Division from taking any enforcement action against him because he was a captive agent of Bankers Life and, as such, was covered by the terms of the Order. The ALJ concluded, and the Division agrees, that Mr. Claiborne is incorrect. Section 32 of the Order specifically provides:

Nothing in this Corrective Action Plan absolves the responsibility of any appointed producer of Bankers Life.

(Ex. R8 at 13.) The Stipulation and Final Order thus expressly applies to Bankers Life as an entity. It expressly does *not* apply to Bankers Life agents who may have independent and personal liability for their own violations of OAR 836-080-0090.

1. Violations of OAR 836-080-0090

OAR 836-080-0090 requires Oregon insurance producers to conduct a reasonable inquiry into a consumer's needs and objectives in recommending a life insurance policy or annuity to the consumer. The rule also requires that the producer recommend only products that are suitable for that consumer. Specifically, OAR 836-080-0090 provides:

A person may not recommend to a consumer the purchase, sale or replacement of a life insurance policy or annuity, or any rider, endorsement or amendment to the policy or annuity, without reasonable grounds to believe that the recommendation or transaction is not unsuitable for the consumer based upon reasonable inquiry concerning the consumer's insurance objectives, financial situation and needs, age and other relevant information known by the person. For the purpose of this rule, when a person recommends a group life insurance policy or annuity, "consumer" refers to the intended group policyholder.

(Emphasis added.)

The Division asserts that Mr. Claiborne violated the above rule on three separate occasions. A review of facts of each transaction at issue in this matter indicates that Mr. Claiborne violated the rule on all three occasions. Each of those allegations is discussed separately below.

A. Holmes Transaction

On September 13, 2005, Norma Holmes signed an Application for Insurance prepared for her by Mr. Claiborne. The Application was for the purchase of a fixed annuity from Bankers Life in the amount of \$180,947.05, an amount equal to approximately 90 percent of Mr. and Ms. Holmes's total liquid net worth. Prior to investing in the annuity, the Holmes had the bulk of their money invested in four CDs in three separate financial institutions; a practice consistent with Ms. Holmes's previously stated goal of diversification.

The Division contends that Mr. Claiborne's recommendation was unsuitable. In support of that allegation the Division notes that the transaction, as proposed, would result in a financial loss, both from withdrawal penalties and from the loss of future earnings. The ALJ found, and the Division agrees, that the evidence supports this allegation.

As part of the transaction, Mr. Claiborne completed an Annuity Suitability Questionnaire for Ms. Holmes. On the form, Mr. Claiborne checked a box to indicate that Ms. Holmes wanted to buy the annuity for purposes of estate planning. He wrote that Ms. Holmes would incur penalties of \$800 by withdrawing funds from her CDs. Under a section for "Remarks" Mr. Claiborne wrote "Large Part of the decision is to consolidate + simplify savings."

Mr. Claiborne testified that when he completed the Suitability Questionnaire, he had information with regard to only one of Ms. Holmes's CDs. Consequently, he asserts, the penalties listed on the form were with regard to that CD alone. But if that was the case, then the assertion that the transaction was intended to consolidate and simplify savings would make no sense. The ALJ found, and the Division agrees, that there is no reason to believe that transferring a single CD from a bank into a 10-year fixed annuity would result in any simplification and could not, by definition, result in consolidation.

In addition, Mr. Claiborne's testimony that he had information about only one of the CDs is in stark conflict with his earlier assertions. In two letters the he wrote in 2006, Mr. Claiborne asserted that he called "each" of Ms. Holmes's banks, in her presence, and wrote down the various penalties quoted to him. Furthermore, *none* of the banks charged Ms. Holmes a penalty of \$800. Columbia River Bank charged total penalties of \$749.07. Bank of America charged penalties of \$918.01. US Bank charged a penalty of \$350. If, as asserted by Mr. Claiborne, he wrote down the precise figures quoted to him by "each" of Ms. Holmes's banks, he could not have arrived at a figure of \$800.

As a result of the transaction, Ms. Holmes actually incurred withdrawal penalties of \$2,017.08. In addition, because the CDs with the bulk of the Holmes's money paid an interest rate higher than the expected effective rate of return on the annuity, Ms. Holmes stood to lose additional earnings on her money for the next ten years. Furthermore, under the terms of the annuity, Ms. Holmes would be unable to withdraw most of her money for the next nine years without paying a penalty.

Mr. Claiborne told Ms. Holmes that transferring money into the annuity would shield it from creditors in the event her husband, who was then 84 years old, had to move into a nursing home. However, Ms. Holmes did not understand that she would need to annuitize the investment, thereby foregoing the principal balance of the investment, in order to receive this benefit.

Nevertheless, Mr. Claiborne later told the Division that Medicaid planning was only a "small part" of the decision to purchase the annuity. The primary purpose, according to Mr. Claiborne, was simplification and consolidation of investments. However, the Holmes's investments, while somewhat diverse, were not especially complex. Prior to the transaction, Ms. Holmes had 90 per cent of her money invested in four CDs in three different banks. Mr.

Claiborne, acting on Ms. Holmes's behalf, was able to convert all of the CDs to cash in a single day. But even if Ms. Holmes wanted to consolidate her savings, the ALJ found, and the Division agrees, that it made no economic sense for her to do so by purchasing the Bankers Life annuity. She could have accomplished the same goal by simply consolidating her investments into one bank as her CDs matured. Her purchase of the annuity resulted in an immediate financial loss and a potential loss of future interest earnings. It also placed restrictions on her access to her investments for a significant period of time. It made little economic sense for an elderly couple, one of whom was 84, the other 76, to place their money into an annuity that placed limits on their access for nearly a decade.

The evidence therefore established that Mr. Claiborne failed to conduct a reasonable inquiry and did not, indeed could not, have reasonable grounds to believe that the annuity he recommended to Ms. Holmes was suitable for her. As such, the Division concludes (as did the ALJ), that Mr. Claiborne violated OAR 836-080-0090.

B. Proposed Wood Transaction

Mr. Claiborne met with Clarence and Crystal Wood twice on June 28, 2007. During the first meeting, Mr. Claiborne assisted Mr. Wood in completing a questionnaire about the couple's finances. At the end of that first meeting, all of the questions related to medical expenses, long-term care, and final expenses and survivor's income were left blank. Most of the questions regarding retirement income and savings were also unanswered. The form listed monthly income of \$1,964 in Social Security benefits, \$1,200 per month in pension benefits, income from a real estate note of \$266, and interest of \$800 per month. The source of the interest payment was not listed. Under a section asking about current investments, Mr. Claiborne wrote "'some' wnd [would not disclose]." He listed \$215,000 as the value of CDs, under IRA he wrote "Defined Benefit Pension." Under real estate he listed the couple's motor home with equity of \$15,000. The only other investment listed was a checking account, stated to be "High Interest" but with an undisclosed value. None of the questions regarding risk tolerance or performance of current investments were answered. A section of the form for additional information has some notes regarding various long-term care insurance options. Mr. Wood then signed and dated the document and provided it to Mr. Claiborne. He also signed and dated an application for long-term care insurance and for an annuity.

At the end of the first meeting, Mr. Wood gave Mr. Claiborne a check for \$200,648.75 for the annuity and long term care insurance. However, he asked Mr. Claiborne not to submit the check to Bankers Life until he was able to transfer sufficient funds to cover the check. Nevertheless, Mr. Claiborne took the applications, the questionnaire, and the check back to his office. His administrative assistant submitted the check to Bankers Life and electronically submitted all of the documents to the company the same day. The answers on the questionnaire were so incomplete that Bankers Life sent an e-mail to Mr. Claiborne asking for more information.

Mr. Claiborne later provided a copy of the Needs Assessment to the Insurance Division with substantially more information than existed on the form as originally signed by Mr. Wood. A number of questions regarding medical expenses, long-term care, and final expenses and

survivor's income were now completed. More information was also included in the section of the form regarding retirement income and savings, including a statement that the Woods would like to purchase a home in 10 to 15 years. The word "substantial" was included under the answer regarding a savings account. The words "interested in" were added next to a question about annuities. The words "again – substantial" were written below the answer about a checking account. Answers were also provided to questions about risk tolerance and returns on savings in past years. The form also states that Mr. Wood was more interested in lowering his taxes than in increasing his income. None of the additions are initialed and the altered version of the Needs Assessment was never provided to the insurance company.

Mr. Claiborne testified that the additional information was added during a second meeting with the Woods. According to Mr. Claiborne, he had to leave their home prior to completing the form because they were interrupted by someone from the county. He claimed that when he returned later, he gathered additional information for the Needs Assessment.

The ALJ found, and the Division agrees, that Mr. Claiborne's explanation was not credible. At the time Mr. Claiborne left the first meeting, he had a check for over \$200,000 and a signed Needs Assessment. Both of those actions are consistent with a completed transaction. It would have made little sense for Mr. Wood to have signed a statement attesting to the accuracy of an incomplete form. It also would make little sense for Mr. Wood to have provided a check for over \$200,000 to Mr. Claiborne if the transaction was interrupted mid-stream. Furthermore, after Ms. Wood signed the form, Mr. Claiborne inserted a statement that the Woods wanted to have money available to purchase a home in 10 to 15 years. The Woods testified that they were considering purchasing a home, but denied saying that they planned to do so in 10 to 15 years. Given their ages (76 and 77), it is unlikely that they would express a desire to continue living in a motor home until they were nearly 90 years old. It is also implausible that they would suggest such a long delay in purchasing a home given that they had just had a confrontation with a County official about where they were parking their motor home.

In addition, Mr. Claiborne's testimony was again inconsistent with sworn statements he gave to Division investigators. During an interview with the investigators, he initially stated the he completed the Needs Assessment in response to the e-mail from Bankers Life. (Exhibit A42 at 32.) He received that e-mail the day after he met with the Woods. He told the investigators that he completed the answers based on his memory of his conversation the previous day. He also claimed that he was going to take the document back to the Woods for an additional signature, but did not do so because they later cancelled the transaction. (Ex. A42 at 33.) Later in the same interview, he changed his story and asserted that he went back to the Woods' home to bring them a brochure that same day and got more information to complete the form. (Ex. A42 at 37-39)

After Mr. Claiborne received the application and the check, he returned to his office where the documents were processed by his administrative assistant. Mr. Claiborne testified that she did so in error and contrary to his instructions. The ALJ found, and the Division agrees, that this explanation is also not credible. When he was initially interviewed by the Division, Mr. Claiborne gave conflicting explanations as to how the check and the application were submitted. Initially, he claimed the he did not know how or why his assistant submitted the documents, but

speculated that he may have given them to her for internal processing. He also suggested that she may have simply taken it off of his desk and submitted it on her own initiative. (Ex. A42 at 44.) At the hearing, Mr. Claiborne put forth yet another explanation, now denying even giving the documents to his assistant. Rather, he insisted that she took the documents and the check off of his desk and submitted them without authority.

The ALJ concluded, and the Division agrees, that the evidence established, more likely than not, that Mr. Claiborne intentionally submitted the transaction, including the check, soon after he left his first meeting with the Woods. He altered the Needs Assessment, after Mr. Wood signed it, in an attempt to appease Bankers Life. Even then, the document reveals precious little of the information he would have needed to make a recommendation to the Woods to purchase an annuity. The only assets listed on the form were \$215,000 in CDs and unstated amounts in savings and in checking. The words “substantial” do not add any meaningful information regarding the value of the accounts. The scant information on the document reveals a modest monthly income and \$215,000 in CDs. Given such limited information, the ALJ found, and the Division agrees, that Mr. Claiborne was not in a position to make a determination as to whether it was suitable for the Woods to invest \$200,000 in a 10 year annuity.

As was the case with Ms. Holmes, Mr. Claiborne simply recommended that Mr. Wood convert savings from CDs to a Bankers Life annuity without a meaningful understanding of the Woods’ financial situation. He therefore did not have the information necessary to give him reasonable grounds to believe that the annuity was not unsuitable for Mr. Wood. The ALJ concluded, and the Division agrees, that the evidence therefore established that Mr. Claiborne failed to conduct a reasonable inquiry and did not have reasonable grounds to believe that the annuity he recommended to Mr. Wood was suitable for him. Therefore, the Division finds that Mr. Claiborne violated OAR 836-080-0090.

C. Holloway Transaction

On September 23, 2008, Mr. Claiborne recommended that Dean Holloway purchase an annuity in order to fund possible long term care needs. He suggested that Mr. Holloway purchase an annuity for a total of \$105,000, funded primarily from the surrender of a variable annuity. Because it was not possible to surrender the variable annuity immediately, Mr. Claiborne suggested that Mr. Holloway purchase the annuity for \$25,000, using funds in a Money Market account, and an additional \$80,000 from the surrender of the variable annuity. Mr. Claiborne later assisted Mr. Holloway in obtaining and completing the necessary forms to surrender that annuity and Mr. Holloway eventually invested the additional \$80,000 in the Bankers Life annuity.

OAR 836-080-0090 requires a producer to make a “reasonable inquiry” into a consumer’s financial affairs and insurance objectives prior to making a recommendation. The rule prohibits recommending the sale of a product only when the producer does not have reasonable grounds to believe that the transaction is “not unsuitable.” In this case, the evidence established that Mr. Claiborne failed to make such an inquiry into the Holloway’s financial status before making his recommendation to terminate the Prudential variable annuity and convert the money into a Bankers Life annuity.

The evidence shows that Mr. Claiborne recommended that the variable annuity be terminated without ever reviewing that policy. When interviewed under oath by Division investigators, Mr. Claiborne stated that Mr. Holloway did talk about a special feature of this annuity that would have protected his initial investment, but that Mr. Claiborne never reviewed the policy to understand that feature:

CUMMINS: Okay. And, again, I want to be very specific on this.

CLAIBORNE: Um hmm.

CUMMINS: You did not provide any guidance, any advice, any input into – any encouragement to close out the Prudential account and to submit \$80,000 to Banker’s Life?

CLAIBORNE: On the contrary. Mr. Holloway stated that he thought that he had some sort of clause in his annuity that would allow him to take the money out over time based on his original value plus five percent interest and I encouraged him to pursue that. To get his money – he thought he had a clause in his annuity, **which I never saw**, but he thought he had a clause in there stating that he could get his original investment, without losses, back plus five percent * * *.

CUMMINS: Did you ask to look at his annuity to see if that was, in fact, a clause? I mean you’re a 31 year top 10 percent agent. Surely you could have clarified that for him within a matter of seconds.

CLAIBORNE: He did not have a copy of it and **I didn’t ask him for it** because I was not recommending that he get rid of it.

(Ex. A33 at 41 – emphasis added.)

Had Mr. Claiborne reviewed the policy, he would have learned about all of the annuity’s special features, which include not just the Lifetime Five facet, but the guaranteed Minimum Death Benefit as well. Mr. Holloway was ten years older than his wife, so the Minimum Death Benefit was an important feature that might be used by his younger wife.

The Proposed Order appears to have given undue weight to the notion that Mr. Claiborne did review Mr. Holloway’s latest statement, which appeared to indicate that the principal value of the variable annuity was declining. However, because Mr. Claiborne had never read the policy, he did not understand that the principle value of the annuity was declining because Mr. Holloway had been making withdrawals for over three years, and had withdrawn over \$15,000.

The Proposed Order also noted that after the Holloways spoke to Prudential and learned that their IRAs had the Lifetime Five feature, Mr. Claiborne told the Holloways to leave those investments alone and appeared to blame the Prudential representatives for failing to inform the Holloways that their variable annuity also had the Lifetime Five feature. Thus, the Proposed

Order ALJ concluded that “There is no reason to believe that Mr. Claiborne was in a better position than the Holloways or the Prudential representatives to know of that feature.”

This conclusion is not supported by the evidence. Mr. Claiborne made a recommendation to Mr. Holloway on the variable annuity without ever reading the policy or understanding its features. As an insurance agent, he was obligated to make a reasonable inquiry into Mr. Holloway’s financial situation, not rely on Prudential to do his work for him. Such a reasonable inquiry certainly includes, at a minimum, reviewing the variable annuity policy itself before making any recommendation regarding what to do with this account.

The fact the Holloways did not have a copy of the policy does not absolve Mr. Claiborne of this responsibility. Mr. Claiborne knew that the Holloways had received investment advice from Bill Hermann, and could have contacted him to obtain a copy. If he was uncomfortable contacting Mr. Hermann, Mr. Claiborne could have requested a copy from Prudential, or asked the Holloways to request a copy, especially given his involvement in the Holloways’ telephone contact with Prudential.

Not only did the Proposed Order fail to take into consideration the loss of the guaranteed Minimum Death Benefit, Mr. Claiborne’s failure to review the variable annuity policy and his misunderstanding regarding the real reason for the variable annuity’s decreasing value, the Proposed Order also failed to consider Mr. Holloway’s loss of liquidity in purchasing the Bankers Life annuity which subjected him to a new surrender schedule to access his money. Mr. Holloway’s Suitability Questionnaire indicated that they had only \$3,000 in savings, \$95,000 in the variable annuity, \$71,000 in their IRAs and \$48, 371 in their money market. (Ex. A16 at 12.)

Because Mr. Holloway was not able to terminate his variable annuity over the phone during the September 23, 2008 meeting, Mr. Claiborne recommended that the Holloways take out over half of their money market’s value (\$25,000) and start the Bankers Life annuity until the variable account was terminated and that money could be added. As a result, the Holloways lost immediate access the majority of those funds without incurring a significant penalty (8%) thereby affecting their liquidity and ability to access funds in an emergency.

Under these circumstances, the facts show, by clear and convincing evidence that Mr. Claiborne failed to make a reasonable inquiry into the Holloway’s financial condition and demonstrates that Mr. Claiborne did not had reasonable grounds to believe that the transaction was not unsuitable. Therefore, the Division finds that Mr. Claiborne violated OAR 836-080-0090.

2. *False or Fraudulent Statements on or Relative to an Insurance Application – ORS 746.100*

ORS 746.100 provides:

No person shall make a false or fraudulent statement or representation on or relative to an application for insurance, or for the purpose of obtaining a fee, commission, money or benefit from an insurer or insurance producer.

The Division asserts that Mr. Claiborne made false statement on Mr. Holloway's annuity application when he answered "no" to questions that asked if Mr. Holloway was intending to replace or surrender an existing annuity and by writing on the application "No replacing being done with this transaction." Furthermore, the Division contends that Mr. Claiborne made a false representation by failing to answer a question that asked if Mr. Holloway "anticipated" putting additional funds into the annuity during the first year. The ALJ concluded that the evidence supported both assertions of misconduct, and the Division agrees with this conclusion.

On September 23, 2008, Mr. Claiborne met with Mr. Holloway and completed the application for a Bankers Life annuity. At that time, Mr. Holloway gave Mr. Claiborne a check for \$25,000. On that same day, Mr. Holloway called Prudential to ask about forms needed to cancel his existing variable annuity. Based on Mr. Claiborne's recommendation, Mr. Holloway intended to use the proceeds from the variable annuity to fund the Bankers Life annuity. Both Mr. Holloway and his wife testified that Mr. Claiborne was present when they called Prudential. Mr. Claiborne denied being present, and asserted that Mr. Holloway made the decision to surrender his Prudential annuity without Mr. Claiborne's knowledge or advice.

The evidence shows that Mr. Claiborne *was* present during the September 23, 2008 telephone conversation with Prudential. It is Mr. Claiborne's own words to Prudential during the later, September 30th call that refutes his position.

The evidence shows that two calls were made to Prudential on September 23, 2008 – the first took place at 4:26 pm, and the second took place at 5:04 pm. (Ex. A28 at 1; Ex. A29 at 1.) During both conversations, Mr. Holloway specifically discussed his intent to withdraw all funds from his variable annuity account. (*Id.*) Because he could not accomplish that over the telephone, Mr. Holloway asked that the correct forms be sent to him. (Ex. A29 at 3.) Mr. Holloway also asked for an accounting of the present value of the account, which he was told was \$88,593.33. (*Id.*)

When it appeared that Prudential had sent the incorrect forms, Mr. Claiborne was present and participated in the follow-up call made to Prudential on September 30, 2008. During that phone call, Mr. Claiborne admitted that he was present at the Holloway home when the forms were requested over a week ago:

CLAIBORNE: Well, what's frustrating is, is he called and **I was here, uh, a little over a week** and asked for the form to convert this to a 10-year payout and this is what was received by him in the mail. So, uh, what are we suppose to do?

* * *

CLAIBORNE: Well, what he asked for, uh, **last week** was a total liquidation and he wanted to do it immediately before the market went down and they said, no, we've got to send you some forms.

(Ex. A30 at 3, 7; emphasis added.)

During the same conversation, Mr. Claiborne further undercut his argument that he was not present during the September 23rd phone call when he complained to Prudential about how much money Mr. Holloway lost because of its failure to send the correct forms:

GAHAGAN (Prudential): Okay. And I – I certainly apologize. Let me see if we can get that [the correct form] to him overnight. Can I place you on hold just a few more moments?

CLAIBORNE: Uh, yeah, and I'm going to put him [Mr. Holloway] on the phone. The apology isn't going to do us much good as the fact he's already lost another \$5000 in a week but let me put him on the phone. * * *.

(*Id.* at 7-8.)

To bolster his position that he was not present during the September 23rd phone calls to Prudential, Mr. Claiborne provided a copy of his work schedule for that day. (Ex. A39.) Relying on his schedule, Mr. Claiborne asserted that his meeting with the Holloways took place early in the afternoon (scheduled to begin at 1:15 pm) and that he was with other clients when the Prudential calls took place at 4:26 pm and 5:04 pm. Later Division evidence completely discredited Mr. Claiborne's testimony. As part of its regular course of business, Prudential records all telephone calls between its employees and policy holders. (Ex. A32 at 1.) Prudential is located in Connecticut, which, in September 2008, was operating under Eastern Daylight Time. Exhibits A27 and A28 are transcripts of the phone calls that took place between Mr. Holloway and Prudential personnel. As such, the times set out on the transcripts reflect what time it was in Connecticut, Eastern Daylight Time, which is three hours *later* than when the calls actually were placed in Oregon. Therefore, these calls actually took place in Oregon at 1:26 pm and 2:04 pm, which is exactly when Mr. Claiborne's own schedule showed he was meeting with the Holloways. (Test. of Cummins; Ex. A45.)

Thus, the facts establish, by clear and convincing evidence, that Mr. Claiborne knew of Mr. Holloway's intent to surrender the variable annuity and to deposit the proceeds into the Bankers Life annuity at the time Mr. Claiborne completed the application for the Bankers Life annuity. The Division concludes that Mr. Claiborne's answers to the contrary were false and constituted a violation of ORS 746.100.

3. *Failure to Timely and Truthfully Respond to a Director's Inquiry – ORS 731.296*

ORS 731.296 provides:

The Director of the Department of Consumer and Business Services may address any proper inquiries to any insurer, licensee or its officers in relation to its activities or condition or any other matter connected with its transactions. Any such person so addressed shall promptly and truthfully reply to such inquiries using the form of communication requested by the

director. The reply shall be verified by an officer of such person, if the director so requires. A reply is subject to the provisions of ORS 731.260.

Thus, all licensees are required to respond to such inquiries truthfully and by the deadline provided. The evidence shows that Mr. Claiborne's response was neither truthful nor timely filed.

ORS 731.260 requires a licensee to "promptly reply to a request made by the Director. The Oregon Supreme Court had identified three classes of statutory terms of interpretative purposes. *See, e.g., Springfield Education Assn. v. Springfield School Dist. No 19*, 290 Or 217 (1980). Applying this standard, "promptly" is an inexact term. As such, the Court has held that although the interpretation of the word by the agency charged with its enforcement is not binding, it is "entitled to [the Court's] careful consideration. *Knapp v. City of North Bend*, 204 Or 34, 41 (1987); *see also Jeld-Wen, Inc. v. Environmental Quality Commission*, 162 Or App 100, 108, *rev. denied*, 329 Or 479 (1999) (court took into account and agreed with agency's interpretation of its statute).

In this case, the Division interpreted "promptly" to mean 21 days. As the entity charged with enforcing this provision, its interpretation of ORS 731.260 is entitled to careful consideration. Instead of giving the Division's interpretation the weight to which it was entitled, the Proposed Order relied on a dictionary definition of "prompt" and, after applying that definition, substituted his interpretation to conclude that Mr. Claiborne's submittal was timely. The Division concludes such an interpretation is not supported by the law and gives it no weight.

Applying the Division's definition, the evidence establishes that Mr. Claiborne's response was not timely filed. On December 17, 2008, the Division mailed a letter to Mr. Claiborne, along with a copy of the Holloways' complaint. The Division instructed Mr. Claiborne to submit a report that addressed each issue raised in the complaint. In bold type, the letter instructed Mr. Claiborne to submit the report within 21 days after he received the letter. Mr. Claiborne asserted that he received the letter on December 24, 2008. Assuming that Mr. Claiborne was truthful in reporting the receipt of the letter, he then had until January 14, 2009 (21 days after he received the Division's letter) to file a response.

However, the Division did not receive Mr. Claiborne's response until January 27, 2009; which is 34 days after December 24, 2008. Even if the Division used the date placed on the letter - January 16, 2009, the response is still untimely - i.e., 23 days after December 24, 2008. Mr. Claiborne offered no explanation as to why he did not respond to the letter sooner. Nor is there any evidence that he called or wrote the Division seeking an extension of time. This was not the first time Mr. Claiborne had received a request for information so he understood the need to comply with the deadline provided. The Division finds that Mr. Claiborne's untimely response to its request for information constitutes a violation of ORS 731.296.

Additionally, the record established that Mr. Claiborne's response, and his follow-up letter on April 13, 2009, were not truthful. The record established that Mr. Claiborne gave untruthful answers during his interview with Board investigators in August 2009. In both letters and in the interview, Mr. Claiborne denied recommending that Mr. Holloway surrender his

Prudential annuity and deposit the proceeds, or a portion of them, into the Bankers Life annuity. Those assertions were contradicted by the sworn testimony of both Mr. and Ms. Holloway and, as set out in detail above, the statements Mr. Claiborne made on September 30, 2009 to a Prudential representative on Mr. Holloway's behalf.

Nevertheless, in his letters and sworn statements to the Division, Mr. Claiborne emphatically asserted that Mr. Holloway made the decision to surrender the Prudential annuity on his own. He further asserted that Mr. Holloway made the decision in spite of Mr. Claiborne's advice that Mr. Holloway pursue the option of receiving a lifetime payout equivalent to a five percent rate of return. Those representations are simply untrue given the sworn testimony from the Holloways and Mr. Claiborne's own statements to the Prudential representative. Rather, a preponderance of the evidence established that Mr. Claiborne recommended that Mr. Holloway surrender the Prudential annuity in favor of the Bankers Life annuity. The Division finds that the evidence therefore established that Mr. Claiborne failed to respond truthfully to the Division's inquiry in violation of ORS 731.296.

4. Sanction

The Division proposed revocation of Mr. Claiborne's non-resident individual insurance producer license. ORS 744.074(1) provides, in relevant part:

The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

* * * * *

(b) Violating any insurance laws, or violating any rule, subpoena or order of the director or of the insurance commissioner of another state or Mexico or Canada.

Mr. Claiborne asserted that the proposed revocation was unduly harsh. In particular, Mr. Claiborne noted that if his license was revoked, he would likely forfeit any interest he has in a Bankers Life retirement program.

The impact of revocation of a professional license can undoubtedly be profound. This is particularly true in cases, such as the present one, where the individual has practiced the profession for a number of years and has established a financially successful practice. Nevertheless, the Division is not required to impose a lesser sanction in order to prevent broader economic consequences to the individual. The evidence has demonstrated that Mr. Claiborne committed multiple violations of insurance laws in connection with the sale of annuities. Most significantly, despite his knowledge of the requirement that he attempt to ascertain whether the sale of an annuity was not unsuitable, Mr. Claiborne, on at least three occasions, recommended the sale of annuities to elderly individuals without a meaningful assessment of their economic circumstances. With regard to Ms. Holmes, Mr. Claiborne recommended the sale of an annuity

that resulted in an immediate loss of more than \$2,000 and the potential for future lost interest payments. With regard to the Woods, Mr. Claiborne recommended the sale of an annuity despite having almost no information regarding the Woods's savings and investments. When Bankers Life questioned the suitability of the investment, Mr. Claiborne altered a form which Mr. Wood had previously signed as being accurate. When confronted about changes to the document, Mr. Claiborne gave conflicting and increasingly self-serving answers.

With regard to the Holloway transaction, Mr. Claiborne recommended the sale of an annuity that he knew would be funded primarily through the surrender of a variable annuity and actively assisted Mr. Holloway in discussions with Prudential to secure the necessary forms needed to complete the transaction. Mr. Claiborne made this recommendation despite the fact he had never read the policy nor understood its unique and advantageous features for Mr. Holloway. Despite his knowledge, Mr. Claiborne falsely indicated on Mr. Holloway's application that he was not replacing an existing annuity, and did not plan on doing so. Mr. Claiborne offered no reasonable explanation for his conduct, but falsely asserted that he was not aware of Mr. Holloway's decision to surrender the Prudential annuity.

The evidence also established that Mr. Claiborne made false statements, as well as an untimely response to the Division, including statements under oath, in an attempt to shield himself from liability for his conduct. His statements to investigators were often self-serving, contradictory, and contrary to all other available evidence. Given those false statements, the Division can have no assurance that Mr. Claiborne will fully cooperate with any future investigations that might arise. Mr. Claiborne has thus demonstrated a willingness to deceive other insurance companies, the Division, and most importantly, the consumers, to serve his own interests. Because the Division cannot rely on Mr. Claiborne to tell the truth, its ability to effectively regulate his conduct to protect consumers in the future will be severely restricted.

Given the evidence in this matter, the ALJ concluded that the appropriate sanction is revocation. ORS 744.074(1) allows the Division to revoke Mr. Claiborne's license. The Division takes seriously its responsibility to protect the public from unscrupulous licensees. Mr. Claiborne's license has already been suspended once for similar misconduct. (Ex. A1.) Given his prior discipline and level of misconduct at issue here, the Division finds that the only appropriate sanction is the revocation² of Mr. Claiborne's license.

5. **Mr. Claiborne's Exceptions**

On July 22, 2011, Mr. Claiborne filed exceptions to the Proposed Order. The Division has considered his exceptions and determined that all such exceptions are without merit because of the following reasons, among others:

Mr. Claiborne's first exception is that the Proposed Order ignored the terms of the Division's Stipulation and Final Order with Bankers Life. As discussed in detail above, this exception is without merit. The agreement set out in the Stipulation and Final Order between the Division and Bankers Life applied to Bankers Life only, not its agents. Thus, the Stipulation and

² As Mr. Claiborne chose not to renew his license, it expired on May 31, 2011. However, ORS 744.011(1) makes clear that the expiration of a license does NOT deprive the Division of jurisdiction over Mr. Claiborne, thereby allowing for the revocation of his now expired license.

Final Order did not preclude the Division from pursuing this enforcement action.

Mr. Claiborne's second exception is that the sanction imposed should be mitigated by the length of time spent processing this matter. This exception too, is without merit. Given the number of potential violations at issue, it took the Division time to gather all the information necessary to determine the facts. As such, no such "mitigation" is appropriate.

In Mr. Claiborne's third exception, he asserts that the ALJ violated the standards set out in *Reguero v. Teacher Standards and Practices*, 312 OR 402 (1991) by not considering the evidence in light of its reliability. Mr. Claiborne's argument is not well taken.

Mr. Claiborne acknowledged, as he must, that Mrs. Holmes died before the hearing was held so was unavailable to testify (unlike the situation in *Reguero*). In place of her direct testimony, the ALJ relied on the next best thing – a letter she had written (and signed) to the Division in response to the information provided to the Division by Bankers Life and Mr. Claiborne. *See* Ex. A6. The letter was written in 2006, within a year after Mr. Claiborne had sold her a Bankers Life annuity so was close in time to the actual event. The fact that her daughter may have assisted Mrs. Holmes in writing the letter in no way detracts from its credibility or reliability. There is no "triple" hearsay – just the response by a woman to the misrepresentations made by Mr. Claiborne in defending his unsuitable recommendation to her.

To supplement the letter, the ALJ also allowed testimony by both the Division investigator who interviewed Mrs. Holmes, and her daughter, who assisted her mother in filing the complaint against Mr. Claiborne. Unlike Mr. Claiborne, neither had a reason to fabricate the information provided to them by Mrs. Holmes.

ORS 183.450(4)(c) provides that "substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." A review of Mr. Claiborne's testimony shows a pattern of false, self-serving, contradictory and contrary statements. Therefore, the record, when viewed as a whole, clearly would permit a reasonable person to conclude that Mr. Claiborne recommended an annuity to Mrs. Holmes without reasonable grounds to believe it was not unsuitable. Therefore, Mr. Claiborne's third exception is without merit.

Mr. Claiborne's fourth exception is that the ALJ erred in concluding he violated ORS 746.100 when Mr. Claiborne falsely represented on Mr. Holloway's application that there was no intent to replace or surrender an existing annuity. The ALJ reached this conclusion without determining whether Mr. Claiborne was actually present during the September 23, 2008 phone call between the Holloways and Prudential.

While the Division agrees with the ALJ that the evidence supports this conclusion regardless of whether Mr. Claiborne was present, the Division finds that the evidence supports a finding that Mr. Claiborne *was* present during the September 23, 2008. Therefore, it is clear that Mr. Claiborne knew that Mr. Holloway would be terminating his Prudential variable annuity account to fund the purchase of the Bankers Life annuity. As such this exception is baseless.

Finally, Mr. Claiborne asserted that his personal and professional circumstances should be considered in determining the penalty imposed against him. This is not so much an exception, but a plea for leniency. However, a licensee's health status, the impact on his economic situation and other similar factors are not relevant in determining the appropriate sanction. Instead, the focus must remain, as it did here, on the multiple violations of the law committed by Mr. Claiborne, as well as his prior record of discipline. As such, revocation is the appropriate sanction.

ORDER

Pursuant to ORS 744.074(1), Claiborne's Oregon expired nonresident individual insurance producer license shall be revoked.

Notice of Right to File Exceptions to the Amended Proposed Order

Mr. Claiborne has the right to file written exceptions to the Amended Proposed Order and present written argument concerning those exceptions pursuant to ORS 183.460. Mr. Claiborne may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within **30 (thirty) days** from the date this Amended Proposed Order was mailed to Mr. Claiborne. If no exceptions are filed, the Division will issue a Final Order after the 30th day from the issuance of the Amended Proposed Order.

Dated September 28, 2011

/s/ Teresa D. Miller

Teresa D. Miller
Administrator
Insurance Division
Department of Consumer and Business Services

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