

NEW APPLICATION
ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS 2005 MAY 24 P 3 42

Arizona Corporation Commission

DOCKETED

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDEL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

MAY 24 2005

DOCKETED BY

In the matter of:

DAVID JOHN PALEN, CRD#2321162
11557 North 120th St.
Scottsdale, AZ 85259-3239

Respondent

DOCKET NO. S-03587A-05-0000
NOTICE OF OPPORTUNITY FOR HEARING
REGARDING PROPOSED ORDER TO
CEASE AND DESIST, ORDER FOR
RESTITUTION, FOR ADMINISTRATIVE
PENALTIES, OF REVOCATION, AND FOR
OTHER AFFIRMATIVE ACTION

**NOTICE: RESPONDENT HAS 10 DAYS TO REQUEST A HEARING
RESPONDENT HAS 30 DAYS TO FILE AN ANSWER**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that respondent DAVID JOHN PALEN ("PALEN") has engaged in or is about to engage in acts and practices that constitute violations of A.R.S. § 44-1801, *et seq.*, the Arizona Securities Act ("Securities Act") and the Arizona Investment Management Act, A.R.S. § 44-3101 *et seq.* ("IM Act").

I.
JURISDICTION

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution, the Securities Act and the IM Act.

II.
RESPONDENT

2. PALEN was at all pertinent times a registered securities salesman in Arizona, CRD# 2321162, operating as a Financial Advisor ("Advisor") under American Express Financial Advisors, Inc. ("AEFA"). PALEN's last known address is 11557 North 120TH Street, Scottsdale, Arizona

1 85259-3239. At all times pertinent to this action, PALEN was operating within Arizona in association
2 with AEFA, from February 1993 until on or about January 5, 2005. From in or around 2002, PALEN
3 operated out of his home, which was a registered office of AEFA. PALEN is currently not affiliated
4 with any securities dealer, and his registration is suspended.

5 III.

6 FACTS

7 3. AEFA offers a Financial Advisory Service that allows its financial advisors to sell
8 and provide financial planning services. This service is intended to help clients address specific
9 financial planning needs and objectives, analyze their current financial situations, present strategies
10 and make recommendations, including the advisability of investing in, purchasing, or selling
11 securities, to help clients attain their goals. From in or around 1997 through 2004, PALEN earned
12 much of his compensation through AEFA by selling Financial Advisory Services to AEFA clients.

13 4. To establish a financial advisory account, the client must sign the AEFA service
14 agreement ("Service Agreement"). The Service Agreement form indicates the types of services the
15 client is purchasing (i.e. comprehensive financial planning or individual or multiple topic-specific
16 services).

17 5. All AEFA advisors may sell an Annual service to clients, which allow clients to
18 select the advice services that will be provided during the 12-month service period. Advisors who
19 meet certain qualification criteria may also sell Good Until Changed or Cancelled ("GTCC")
20 services. With the GTCC service, the 12-month service period is automatically renewed on each
21 anniversary of the original signed Service Agreement, as long as provision is made for the payment
22 of the service fees or unless the client or Advisor opt to terminate the agreement at an earlier date.
23 PALEN sold both types of agreements.

24 6. The service fees for advisory serves are determined by the Advisor, and must be
25 approved by the client before the client signs the Service Agreement. Payment options include
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1 check or money order, American Express card, or redemption from an existing AEFA client
2 investment account.

3 7. The signed Service Agreement and the form of payment are submitted to the AEFA
4 corporate office for processing.

5 8. If the service fees are to be paid by redemption, the client can sign a redemption
6 form or have the Advisor execute a telephone transaction. In order for an Advisor to execute
7 telephone transactions on behalf of a client, the client must sign a form known as the Advisor and
8 Paraplanner-Assisted Telephone and Online Transaction Authorization form ("AATT"), which the
9 Advisor maintains in the client's file. The service fees are automatically deducted from a client's
10 AEFA account when the Advisor submits the Service Agreement and redemption form to AEFA
11 corporate office, or when the Advisor delivers telephone instructions for the redemption.

12 9. AEFA pays 85% of the service fees to the Advisor.

13 10. From 1998 through 2004, AEFA assigned approximately 64 clients to PALEN.
14 Approximately 23 of those clients paid the financial advisory service fees through redemptions or
15 surrenders in their accounts. PALEN executed the redemptions and surrenders by telephone
16 instructions to AEFA's corporate office.

17 11. In December 2004, one of PALEN's clients complained to AEFA that he had not
18 authorized the redemption or surrender from his account to pay for service fees.

19 12. AEFA initiated an investigation, and requested the complaining client to sign an
20 "Affidavit of Forgery," attesting that the signature on his Service Agreement was not his and that
21 he did not authorize anyone to sign it on his behalf. AEFA agreed to refund the service fee to the
22 client, and the transaction charge of \$25.

23 13. During an interview by AEFA, PALEN denied signing the complaining client's
24 name on the Service Agreement. However, PALEN identified two other Service Agreements
25 where he signed clients' names, resulting in transferring funds from their variable universal life
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1 ("VUL") policies and applying the proceeds to financial advisory Services Agreements to pay the
2 service fees.

3 14. Subsequently, PALEN has identified two or three additional Service Agreements
4 where he signed clients' names without their knowledge, resulting in redemptions or surrenders
5 from their AEFA accounts for service fees in connection with AEFA's Financial Advisory Service.

6 15. AEFA placed PALEN on suspension on or about December 17, 2004, pending
7 further investigation, and removed all of PALEN's client files from his office. On or about January
8 5, 2005, PALEN resigned his position with AEFA.

9 16. AEFA pursued further investigation and offered to refund service fees to
10 approximately 23 of PALEN's clients. AEFA requested each of those clients to sign an Affidavit
11 of Forgery, certifying that the signature on their Service Agreement was not their signature, and
12 that they did not authorize anyone to sign the Agreement for them.

13 17. When a Financial Advisory Service is sold to a client, the Advisor has 12-months to
14 deliver a written advice product to the client. The Advisor is responsible for delivering the plan to
15 the client and then electronically closing the delivery assurance for the financial plan after the
16 service is provided. If a plan is not closed electronically by the end of the 12-month service period,
17 the Advisor's compensation is reversed the following day, followed in 60 days by a full refund of
18 the service fees sent directly to the client.

19 18. AEFA's investigation revealed that some of PALEN's clients who paid service fees
20 for Financial Advisory Services did not receive financial plans and did not receive reimbursements.

21 19. Between January and April 2005, AEFA has paid at least \$230,000 in refunds to
22 former clients of PALEN's, reimbursing them for service fees they paid for financial advisory
23 services. Approximately 17 of those clients signed Affidavits of Forgery relating to the Service
24 Agreements.

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IV.

VIOLATION OF A.R.S. § 44-1991

(Fraud in Connection with the Offer or Sale of Securities)

20. In connection with the offer or sale of securities within or from Arizona, PALEN directly or indirectly: (i) employed a device, scheme or artifice to defraud; (ii) made untrue statements of material fact or omitted to state material facts which were necessary in order to make the statements made not misleading in light of the circumstances under which they were made; or (iii) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon offerees and investors. PALEN's conduct includes, but is not limited to, the following:

- a) Engaging in unauthorized sales of shares in clients' accounts; and
- b) Misrepresenting and/or failing to disclose the use of investment funds in client accounts to pay for financial advisory service fees.

21. This conduct violates A.R.S. § 44-1991.

V.

REMEDIES PURSUANT TO A.R.S. § 44-1962

(Denial, Revocation or Suspension of Registration of Salesman; Restitution, Penalties, or other Affirmative Action)

22. PALEN's conduct is grounds to revoke PALEN's registration as a securities salesman with the Commission pursuant to A.R.S. § 44-1962. Specifically, PALEN:

- a) Has violated A.R.S. § 44-1991 of the Securities Act within the meaning of A.R.S. § 44-1962(A)(2), by misrepresenting and failing to disclose material facts in connection with the sale of those securities.
- b) Engaged in dishonest or unethical practices within the meaning of A.R.S. § 44-1962(10) as defined by A.A.C. R14-4-130(A)(6), by executing a transaction on behalf of a customer without authority to do so; and

1 c) Engaged in dishonest or unethical practices within the meaning of A.R.S. §
2 44-1962(10) as defined by A.A.C. R14-4-130(A)(16), by making unauthorized use of securities or
3 funds of a customer or converting customer securities or funds for personal benefit.

4 23. PALEN's conduct is grounds to assess restitution, penalties and/or take appropriate
5 affirmative action pursuant to A.R.S. § 44-1962. Specifically, PALEN has:

6 a) Engaged in dishonest or unethical practices within the meaning of A.R.S. §
7 44-1962(10) as defined by A.A.C. R14-4-130(A)(6), by executing transactions on behalf of
8 customers without authority to do so; and

9 b) Engaged in dishonest or unethical practices within the meaning of A.R.S. §
10 44-1962(10) as defined by A.A.C. R14-4-130(A)(16), by making unauthorized use of securities or
11 funds of customers or converting customer securities or funds for personal benefit.

12 VI.

13 VIOLATION OF A.R.S. § 44-3241
14 (Fraud in the Provision of Investment Advisory Services)

15 1. PALEN engaged in a transaction or transactions within or from Arizona involving the
16 provision of investment advisory services in which PALEN, directly or indirectly: (i) employed a
17 device, scheme or artifice to defraud; (ii) made untrue statements of material fact or omitted to state
18 material facts which were necessary in order to make the statements made not misleading in light of
19 the circumstances under which they were made; and (iv) engaged in transactions, practices or courses
20 of business which operated or would operate as a fraud or deceit. PALEN's conduct includes, but is
21 not limited to, the following:

- 22 a) Engaging in unauthorized transactions in clients' accounts;
23 b) Signing clients' names on Service Agreements without authority;
24 c) Misrepresenting and/or failing to disclose the use of investment funds in
25 client accounts for the payment of financial advisory service fees;
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- d) Misrepresenting and/or failing to disclose the source for payment of financial advisory service fees; and
- e) Failing to provide financial advisory services for which service fees were charged to clients.

2. This conduct violates A.R.S. § 44-3241.

VII.

REQUESTED RELIEF

The Division requests that the Commission grant the following relief:

1. Order PALEN to permanently cease and desist from violating the Securities Act and the IM Act, pursuant to A.R.S. §§ 44-2032, 44-3292, and 44-1962;
2. Order PALEN to take affirmative action to correct the conditions resulting from their acts, practices or transactions, including a requirement to make restitution pursuant to A.R.S. § 44-2032 44-3292, and 44-1962;
3. Order PALEN to pay the state of Arizona administrative penalties of up to five thousand dollars (\$5,000) for each violation of the Securities Act, pursuant to A.R.S. § 44-2036;
4. Order PALEN to pay the state of Arizona administrative penalties of up to one thousand dollars (\$1,000) for each violation of the IM Act, pursuant to A.R.S. § 44-3296;
5. Order PALEN to pay the state of Arizona administrative penalties, pursuant to A.R.S. § 44-1962;
6. Order the revocation of PALEN's registration securities salesman pursuant to A.R.S. § 44-1962; and
7. Order any other relief that the Commission deems appropriate.

VIII.

HEARING OPPORTUNITY

RESPONDENTS PALEN may request a hearing pursuant to A.R.S. § 44-1972 and A.A.C. R14-4-306. If any respondent requests a hearing, respondent must also answer this Notice. A

1 request for hearing must be in writing and received by the Commission within 10 business days after
2 service of this Notice of Opportunity for Hearing. Each respondent must deliver or mail the request
3 to Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona
4 85007. A Docket Control cover sheet must accompany the request. A cover sheet form and
5 instructions may be obtained from Docket Control by calling (602) 542-3477 or on the
6 Commission's Internet web site at www.cc.state.az.us/utility/forms/index.htm.

7 If a request for a hearing is timely made, the Commission shall schedule the hearing to begin
8 20 to 60 days from the receipt of the request unless otherwise provided by law, stipulated by the
9 parties, or ordered by the Commission. If a request for a hearing is not timely made the Commission
10 may, without a hearing, enter an order granting the relief requested by the Division in this Notice of
11 Opportunity for Hearing.

12 Persons with a disability may request a reasonable accommodation such as a sign language
13 interpreter, as well as request this document in an alternative format, by contacting Linda Hogan,
14 Executive Assistant to the Executive Secretary, voice phone number 602/542-3931, e-mail
15 lhogan@cc.state.az.us. Requests should be made as early as possible to allow time to arrange the
16 accommodation.

17 IX.

18 ANSWER REQUIREMENT

19 Pursuant to A.A.C. R14-4-305, if PALEN requests a hearing, PALEN must deliver or mail
20 an Answer to this Notice of Opportunity for Hearing to Docket Control, Arizona Corporation
21 Commission, 1200 W. Washington, Phoenix, Arizona 85007, within 30 calendar days after the
22 date of service of this Notice. A Docket Control cover sheet must accompany the Answer. A
23 cover sheet form and instructions may be obtained from Docket Control by calling (602) 542-3477
24 or on the Commission's Internet web site at www.cc.state.az.us/utility/forms/index.htm.

25 Additionally, PALEN must serve the Answer upon the Division. Pursuant to A.A.C. R14-
26 4-303, service upon the Division may be made by mailing or by hand-delivering a copy of the

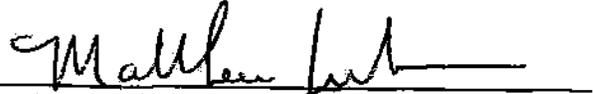
1 Answer to the Division at 1300 West Washington, 3rd Floor, Phoenix, Arizona, 85007, addressed
2 to Pamela T. Johnson.

3 The Answer shall contain an admission or denial of each allegation in this Notice and the
4 original signature of PALEN or his attorney. A statement of a lack of sufficient knowledge or
5 information shall be considered a denial of an allegation. An allegation not denied shall be
6 considered admitted.

7 When PALEN intends in good faith to deny only a part or a qualification of an allegation,
8 PALEN shall specify that part or qualification of the allegation and shall admit the remainder.
9 PALEN waives any affirmative defense not raised in the answer.

10 The officer presiding over the hearing may grant relief from the requirement to file an
11 Answer for good cause shown.

12 Dated this 27 day of May, 2005.

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15 Matthew J. Neubert
16 Director of Securities

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