

State of Missouri  
Office of Secretary of State

Case No. AP-10-45

IN THE MATTER OF:

TRACY WAYNE MITCHELL, CRD No. 5521674; and  
GUIDEPOST FINANCIAL LIMITED LIABILITY  
COMPANY;

Respondents.

Serve both: Tracy Wayne Mitchell and  
Guidepost Financial Limited Liability  
Company, at:  
1525 East Republic Road, Suite A-120  
Springfield, Missouri 65804

**ORDER TO CEASE AND DESIST AND ORDER TO SHOW CAUSE WHY CIVIL  
PENALTIES AND COSTS SHOULD NOT BE IMPOSED**

On December 29, 2010, the Enforcement Section of the Securities Division of the Office of Secretary of State (the "Enforcement Section"), through the Securities Division's Chief Enforcement Counsel, Nathan Soendker, submitted a Petition for Order to Cease and Desist and Order to Show Cause Why Civil Penalties and Costs Should Not Be Imposed and Petition for Order Revoking Respondent Tracy Wayne Mitchell's Investment Adviser Representative Registration. After reviewing the petition, the Commissioner issues the following findings of fact, conclusions of law and order:

**I. FINDINGS OF FACT**

1. Respondent Tracy Mitchell ("Mitchell") is a Missouri-registered investment adviser representative with Gradient Advisors, LLC ("Gradient Advisors"), and has a business address of 1525 East Republic Road, Suite A-120, Springfield, Missouri 65804. Mitchell is registered in Missouri through the Central Registration Depository with number 5521674.
2. Mitchell has been a Missouri-registered investment adviser representative with Gradient Advisors since February 17, 2010. For the period August 19, 2009, to February 17, 2010, Mitchell was a Missouri-registered investment adviser representative with Gradient Investments, LLC ("Gradient Investments"), an affiliate of Gradient Advisors. From September 15, 2008, through July 22, 2009, Mitchell was a Missouri-registered investment adviser representative for Envision Investment Advisors, LLC ("Envision"). From May 15, 2008, through November 5, 2008, Mitchell was a Missouri-registered investment adviser representative for Redhawk Wealth Advisors, Inc. ("Redhawk").
3. Respondent Guidepost Financial Limited Liability Company ("Guidepost"), is a Missouri limited liability company with its office at 1525 East Republic Road, Suite A-120, Springfield, Missouri 65804. Guidepost was organized in the state of Missouri on January 10, 2007, for the purpose of providing financial services to the general public. Documents filed with the Missouri Secretary of State list Mitchell as the organizer, manager, and registered agent of Guidepost. Guidepost has not notice-filed with Missouri as a federal covered investment adviser and is not registered in Missouri as an investment adviser or a broker-dealer.
4. Gradient Advisors is a federal covered investment adviser with its home office at 4570 Churchill Street, Suite 100, Shoreview, Minnesota 55126. Gradient Advisors' registration was approved by the U.S. Securities and Exchange Commission ("SEC") on February 10, 2010, and Gradient Advisors notice-filed in Missouri on February 16, 2010. Gradient Advisors is registered through the Investment Adviser Registration Depository ("IARD") with number 152665.
5. Gradient Investments is a federal covered investment advisor with its home office at 4570 Churchill Street, Suite 200, Shoreview, Minnesota 55126. Gradient Investments is registered through the IARD with number 141726. Gradient Investments' registration was approved by the SEC on December 1, 2009, and Gradient Investment notice-filed in Missouri on December 1, 2009. For the period October 22, 2007, through December 8, 2009, Gradient Investments was a Missouri-registered investment adviser.
6. As used herein, the term "Respondents" refers to Mitchell and Guidepost.
7. On June 23, 2009, a senior citizen residing in Ozark, Missouri ("MR1") contacted the Enforcement Section regarding a free-lunch seminar conducted by Mitchell.
8. MR1 stated that MR1 attended the June 2009 seminar and that Mitchell encouraged investors to sell their securities and/or annuities and take surrender penalties in order to purchase equity index annuities ("EIAs"). Mitchell also stated that the bonus feature of the EIA would pay for the surrender fees and investors would never lose money investing in an EIA. Although MR1

was provided with a sign-up sheet and encouraged to schedule a subsequent one-on-one meeting with Mitchell, MR1 did not attend a subsequent appointment with Mitchell.

9. Based on MR1's complaint the Enforcement Section opened an investigation.
10. From September 1995 through 2008, Mitchell worked as a loan officer for a mortgage company and as an insurance producer focusing primarily on selling insurance products to mortgage clients. On the advice of a field marketing organization ("FMO"), Mitchell began selling EIAs to mortgage clients and other investors.
11. Mitchell contracted with at least two (2) FMOs that made contractual arrangements for Mitchell with various insurance companies. In addition, these FMOs provided Mitchell with marketing and training support to sell EIAs. These marketing materials included, but were not limited to, seminar handouts, brochures, seminar invitations, and mailing lists for potential seminar attendees.
12. Mitchell utilized free-lunch and dinner seminars as his primary marketing tool for selling EIAs, and this practice allowed Mitchell "to get in front of enough of the right prospective clients . . ." The vast majority of Mitchell's clients were elderly.
13. Mitchell specifically targeted retirees and individuals fifty-five years and older in his seminar marketing material. Mitchell stated that his seminar presentation has not changed significantly since he began giving seminars in December 2006, and from that time through 2009, Mitchell conducted an average of eight (8) seminars per year.
14. During his seminars, Mitchell usually discussed the volatility of the markets, highlighting both the risks involved with investing in the markets and the various costs associated with mutual funds, stocks, bonds, and variable annuities. Mitchell would contrast the volatility and costs associated with investments in the market with features of fixed annuity and EIA investments that he claimed would provide safety and remove market risk.
15. During his seminars, Mitchell also described the EIA as containing the same safety features as a fixed annuity, and that the EIA could also link to a market index. Mitchell would indicate that the EIA had no downside market risk, and the only downside was the potential for no growth.
16. In or around 2008, after spending a number of years engaging in EIA sales through seminars and contrasting EIAs with securities, Mitchell sought to obtain a Series 65 license and affiliate with an investment advisory firm. According to Mitchell, a Series 65 license would serve as a marketing tool for his business and "lend credibility" to his EIA recommendations.
17. After being referred by an FMO, GamePlan Financial Marketing, LLC, of Woodstock, Georgia ("GamePlan"), Mitchell took the Series 65 exam and registered as an investment advisor representative ("IAR") with Envision in 2008. Since August 2009, Mitchell has been an IAR for either Gradient Investments or Gradient Advisors.
18. Mitchell currently employs a variety of mechanisms to continue marketing his Series 65 license and IAR credentials to the public.
19. Mitchell's "Professional Profile" provided through his membership in the National Ethics Bureau ("NEB") indicated that Mitchell had completed his Series 65 exam, which allowed Mitchell to "advise clients concerning their mutual funds, stocks, bonds & other securities," and "[teach] investors how to preserve their assets, increase their income and reduce income taxes." This material was contained in packets that were provided to attendees at Mitchell's seminars.
20. Mitchell's business card stated that Mitchell was an "Investment Advisor [sic] Representative" with Guidepost. Mitchell's business card did not disclose that he is, in fact, registered as an IAR with Gradient Advisors or that Guidepost is Mitchell's limited liability company under which Mitchell markets his insurance services.
21. Mitchell's seminar invitation also marketed his credentials by prominently displaying Mitchell's IAR designation. Approximately one-fourth (1/4) of the invitation is dedicated to introducing Mitchell as "Your Investment Advisor [sic] Representative." The introductory paragraph of the invitation states that Mitchell is a "financial educator and advisor" and that he has "developed a specialty in teaching retirees how they may preserve their principal and protect their income."
22. Mitchell's seminar invitations included, among other things, the following:
  - o Is your Annuity SAFE?
  - o What your banker doesn't want you to know about CD's
  - o 80% of tax returns are prepared incorrectly!
  - o Is there a difference between Advisors and brokers? *Know the Facts!*
23. In addition to Mitchell's Professional Profile, business card, and seminar invitation, Guidepost's website also touted Mitchell's credentials and experience. The website stated that Mitchell's goal was "to be the most comprehensive retirement planner and investment advisor [sic] based upon [his] experience, professional judgement [sic] and skills." The website also stated that, since 1995, Mitchell has been "providing [Mitchell's] clients with unbiased and independent financial advice."
24. Mitchell's stated goals included "superior financial planning," providing education "on the most current financial products and

opportunities,” conducting business with “integrity and diligence,” and offering guidance in the “fulfillment of your asset retention and estate conservation goals.” In addition, the website stated that Mitchell’s services for his clients include “preparing and implementing comprehensive personal retirement & financial plans, annual asset advisory & management review, and mortgage services.”

25. According to the website, the primary focus of Guidepost was “to provide sound advice to those that are approaching [sic] or in retirement” and that, in part, Guidepost’s research and efforts are spent on “finding the tools and information that can help the retiree maintain or increase income . . . .”
26. Although Mitchell’s marketing materials espoused Mitchell’s status as an IAR, his seminars promoted insurance products over stocks, bonds, mutual funds, or other equity products.
27. While Mitchell’s marketing materials and website stated and Mitchell’s seminar presentations talked about the importance of having a financial plan in place and the subtle differences between a stockbroker (broker-dealer agent) and “Independent Investment Advisor,” the only products Mitchell promoted were fixed and indexed annuities, which are insurance products. Mitchell promoted these insurance products without thoroughly detailing the potential benefits or risks the annuities may have in comparison to the benefits and/or risks of other investment vehicles, such as CDs, stock, bonds, mutual funds, or variable annuities.
28. Although Guidepost and Mitchell hold themselves out as an investment adviser and an IAR and financial planning professional to the senior market, gathering assets to manage as an investment adviser representative was not Mitchell’s focus when he obtained his Series 65. Instead, Mitchell and Guidepost used Mitchell’s IAR as a marketing tool to attract new insurance clients, and Mitchell continued to concentrate on EIA sales as his primary source of income.
29. Currently, according to Mitchell, approximately seventy-five to eighty percent (75-80%) of his income is derived from EIA sales.
30. During an April 14, 2010, on-the-record interview with the Enforcement Section (“Mitchell’s OTR”), Mitchell acknowledged that he is not experienced in managing assets. In addition, Mitchell stated that he relied on and continues to rely on GamePlan and other FMOs to provide him with the marketing and training support necessary to expand his annuity business.
31. According to GamePlan’s website, GamePlan is one of the top producing “financial marketing organizations in the United States” and offers “custom-tailored marketing programs and exclusive incentives and promotions” for increased sales in EIAs, fixed annuities, and other insurance products.
32. In 2010 GamePlan offered incentives to GamePlan affiliated producers that included, among other things:
  - a. trips to the Caribbean shoreline in Puerto Rico, San Juan, and the Vieques Island;
  - b. a Producer Partnering Program that allowed GamePlan affiliated producers to increase paychecks;
  - c. a Referral Program that allowed GamePlan affiliated producers to earn additional money through referrals; and
  - d. marketing reimbursement.
33. The GamePlan website indicated extensive product and marketing training to help grow the GamePlan affiliated producer’s business. However, it did not indicate that any education would be given to affiliated producers that would address the suitability of EIA sales.
34. During Mitchell’s OTR, Mitchell acknowledged that he has a fiduciary duty to his clients as an IAR. Mitchell stated that he understood that this fiduciary duty meant he is required to put his clients’ needs before his own.
35. According to Mitchell, when Mitchell is presenting a seminar and dealing with members of the public, Mitchell tries to meet his fiduciary duties.
36. Mitchell was a member of the NEB, and Mitchell provided a copy of NEB’s “Ethics Check” to everyone who attended Mitchell’s seminars.
37. NEB is a fee-based membership organization that approves individual membership based on existing information NEB receives from third-party regulatory and judicial sources. According to NEB’s website, however, NEB provides “no guaranteed assurance or warranty of the character or competence of its members.”
38. In addition to his NEB membership, Mitchell stated he is a Chartered Federal Employee Benefits Consultant (“ChFEBC”), and the NEB and ChFEBC logos were indicated on his business card
39. Mitchell did not disclose on his marketing materials or in his seminars that the ChFEBC was not a designation accredited by either the National Commission for Certifying Agencies or the American National Standards Institute, that two of the three parts of the ChFEBC training course consisted entirely of marketing and sales techniques, or that the entire training could be finished in approximately one week.

40. For the period October 2, 2008, through July 16, 2009, Mitchell held six (6) free lunch seminars throughout the Branson/Springfield, Missouri, area.
41. During this approximate period, Mitchell held approximately thirty-two (32) subsequent meetings with seminar attendees for whom he made investment recommendations. Those prospective clients for whom Mitchell made investment recommendations were Missouri investors and were primarily over the age of sixty (60).
42. Of those thirty-two (32) subsequent recommendations to prospective clients, approximately thirty-one (31) recommendations were to liquidate securities or annuities to invest in an EIA.
43. Mitchell stated that when he holds a subsequent meeting with a seminar attendee, the first question he asks that prospective client is where his or her assets are held. If the prospective client indicates that they want to reduce risk, Mitchell tells this prospective client that he/she will either have to go to a bank for a CD, or the prospective client may want to look at a fixed annuity or an EIA that Mitchell sells because a fixed annuity or EIA “does not have market exposure . . . .”
44. In or around July 2009, a 62-year old resident of Battlefield, Missouri (“MR2”), met with Mitchell after attending one of Mitchell’s seminars. MR2 was preparing to retire from the U. S. Postal Service (“USPS”) and had questions about the thrift savings plan (“TSP”) MR2 had through the USPS.
45. MR2 was interested in placing the assets from MR2’s TSP in “something that would make money” every year and would not lose the principal investment. MR2 also indicated that the assets in the TSP would be used for income.
46. Mitchell recommended that MR2 purchase an RBC Choice 12 EIA (“RBC Annuity”). Based on Mitchell’s recommendation, MR2 purchased the RBC Annuity with assets from MR2’s TSP.
47. The RBC Annuity contained, among other things, the following provisions:
  - a. a 12-year surrender period, during which time MR2 could access only ten percent (10%) of the annuity value per year without incurring surrender charges; and
  - b. at the end of the surrender period, RBC had the option to move all of MR2’s assets to the fixed account, paying a minimum of one percent (1%).
48. MR2 invested sixty-one thousand, five hundred thirty dollars (\$61,530) in the RBC Annuity. These funds represented approximately one hundred percent (100%) of MR2’s liquid investment assets.
49. Mitchell placed one hundred percent (100%) of MR2’s annuity assets in the fixed account, which had a guaranteed interest rate the first year of two and eight-tenths percent (2.8%).
50. MR2 stated that, although MR2 knew Mitchell had placed MR2’s assets in an insurance product, MR2 was not aware that MR2 had purchased an EIA.
51. In addition, MR2 stated that Mitchell, among other things:
  - a. did not discuss investment products other than EIAs;
  - b. only provided information about the RBC Annuity;
  - c. did not explain the surrender charges or surrender period applicable to the RBC Annuity; and
  - d. never indicated to MR2 that there could be years with no appreciation of MR2’s annuity.
52. Although, according to Mitchell, MR2’s investment in the RBC Annuity was to provide future income and, although MR2’s investment in the RBC Annuity represented approximately one hundred percent (100%) of MR2’s liquid net worth, Mitchell did not explain to MR2, among other things, that:
  - a. for twelve (12) years, MR2 would only be able to withdraw ten percent (10%) of MR2’s annuity each year without incurring a surrender charge;
  - b. for years two (2) through eight (8) of the annuity contract, the fixed account only paid interest at a rate of one and eight-tenths percent (1.8%); and
  - c. for years nine (9) through twelve (12), the minimum guaranteed rate of interest on the fixed account was only one percent (1%).
53. In or around August 2009, a seventy (70) year old resident of Springfield, Missouri (“MR3”), and spouse met with Mitchell concerning questions about MR3’s annuity. MR3 and spouse had previously met Mitchell at a dinner seminar. According to Mitchell, MR3’s spouse had heard that some annuities offered lifetime income benefit riders that guaranteed a lifetime income stream.

54. At the time MR3 met with Mitchell, MR3 had an annuity in the approximate amount of one hundred eighty-nine thousand, eight hundred ninety-seven dollars (\$189,897) with OM Financial Life Insurance Company ("OM Financial"), and MR3 and spouse were interested in knowing whether they could receive a lifetime income stream from that annuity.
55. After calling and talking to representatives of OM Financial, Mitchell informed MR3 that it was not possible to add an income benefit rider to MR3's current annuity, and the only way MR3 would be able to have a policy with a lifetime income stream was to surrender the OM Financial annuity contract and purchase an RBC Enhanced Choice 12 EIA.
56. Mitchell completed an annuity application form for the RBC Enhanced Choice 12 EIA, and on August 6, 2009, MR3 signed the application.
57. MR3 intended to roll over MR3's OM Financial annuity totaling one hundred eighty-nine thousand, eight hundred ninety-seven dollars (\$189,897) to fund the RBC Enhanced Choice 12 EIA, which would represent approximately fifty percent (50%) of MR3 and spouse's net investment assets.
58. The surrender of MR3's OM Financial annuity would have resulted in a substantial surrender penalty totaling more than twenty-five thousand dollars (\$25,000).
59. In addition to the twenty-five thousand dollar (\$25,000) surrender charge, MR3's new RBC contract would have established a new twelve (12) year surrender period, with a first-year surrender penalty of approximately fourteen percent (14%).
60. Although Mitchell, as an IAR, had a fiduciary duty to MR3, Mitchell did not explain to MR3 that a lifetime income stream could also be obtained by either taking systematic monthly withdrawals or "annuitizing" MR3's current OM Financial annuity (i.e., by converting MR3's assets in that annuity into a lifetime series of monthly payments).
61. Had MR3 either annuitized or established a systematic monthly withdrawal from MR3's current annuity with OM Financial, MR3 could have avoided surrender penalties and a new surrender period applicable to the RBC Enhanced Choice 12 EIA recommended by Mitchell.
62. After consulting with third parties, MR3 cancelled the transaction.
63. In or around April 2009, an eighty-two (82) year old resident of Springfield, Missouri (MR4), met with Mitchell to discuss MR4's finances. MR4 had previously met Mitchell at a dinner seminar. According to Mitchell, MR4 was looking for safety for MR4's investments and additional income.
64. Although MR4 already owned several annuities and approximately eighty-five percent (85%) of MR4's investments were illiquid, Mitchell recommended that MR4 exchange a Hartford Life Insurance Company variable annuity ("Hartford VA") for an EIA from American Equity Investment Life Insurance Company ("American Equity").
65. Based on Mitchell's recommendation, MR4 purchased an American Equity Advantage Gold EIA ("American Equity EIA") from Mitchell.
66. The total amount invested in the annuity was forty-three thousand thirty-three dollars (\$43,033), and the assets used to purchase the annuity were derived from the 1035 exchange of the Hartford VA.
67. The exchange of MR4's Hartford VA incurred a surrender charge of approximately four thousand six hundred dollars (\$4,600).
68. The American Equity EIA had a twelve (12) year surrender period, during which time MR4 could only access ten percent (10%) of MR4's money annually without incurring surrender charges.
69. Although many variable annuities have a fixed income account that would remove any market risk from the annuity, Mitchell did not discuss with MR4 whether or not MR4's Hartford VA had a fixed account and whether MR4 had the option of keeping the Hartford VA and moving the assets from the variable accounts to the fixed account without incurring any surrender charge.
70. When asked during Mitchell's OTR if it was a concern to Mitchell that MR4 would be ninety-four (94) years old before MR4's annuity was fully liquid, Mitchell replied that "[i]t's a concern to me . . . if it's a concern for the client . . ."
71. In or around March 2009, a seventy-nine (79) year old resident of Willard, Missouri (MR5), met with Mitchell to discuss investments options for MR5. MR5 had previously attended one of Mitchell's luncheon seminars.
72. MR5 stated that MR5 had lost money in the stock market and wanted to transfer MR5's assets to a less volatile investment for approximately three (3) years, at which time MR5 believed rates on certificates of deposit ("CDs") would have increased.
73. After talking with MR5, Mitchell recommended that MR5 purchase an Aviva Income Select Plus EIA ("Aviva Annuity").
74. On March 5, 2009, MR5 purchased the Aviva Annuity for ten thousand dollars (\$10,000), and the assets invested in the Aviva Annuity were derived from the liquidation of MR5's mutual funds.

75. Although MR5 believed that the product MR5 purchased had a three (3) year duration, the Aviva Annuity actually had a ten (10) year surrender period, with a surrender penalty the first year of approximately sixteen percent (16%). According to MR5, Mitchell did not tell MR5 that the annuity was subject to surrender penalties for ten (10) years.
76. Mitchell created a document titled "Internal Suitability Fact Find for Annuity Recommendation" that indicated the reason for MR5's purchase of the annuity was "growth." However, Mitchell placed one hundred percent (100%) of MR5's assets invested in the annuity in the fixed account that, for a period of three (3) years, paid an interest rate similar to that of a CD.
77. MR5 planned to move the assets back to MR5's bank to a CD at the end of the three (3) year period if CD rates improved, and MR5 stated to the Enforcement Section that he would never invest in a 10-year annuity that paid interest of approximately one percent (1%) per year.
78. Although MR5 had desired a short-term investment until bank CD rates improved, Mitchell, in fact, recommended and sold MR5 an annuity that had a ten (10) year surrender period, that would incur substantial surrender penalties if surrendered during that ten (10) year period, and that had a minimum renewal rate after the first three (3) years of only one and three-fourths percent (1.75%).
79. In or around May 2009, a sixty-three (63) year old resident of Springfield, Missouri ("MR6"), met with Mitchell to discuss the possible disposition of assets MR6 had in a 401(k) plan. MR6 had previously attended one of Mitchell's seminars. MR6 stated that Mitchell recommended "safety" for MR6's assets so that MR6 would not lose any principal invested.
80. After this May 2009 meeting, MR6 purchased an American Equity Retirement Gold EIA ("American Equity EIA II") from Mitchell with approximately one hundred seventy-two thousand dollars (\$172,000) derived from MR6's 401(k).
81. In addition, MR6 also purchased an RBC Enhanced Choice 12 EIA ("RBC EIA II") from Mitchell with approximately one hundred eighty-eight thousand dollars (\$188,000) derived from MR6's non-qualified money-market assets. Both purchases were made on the sole recommendation of Mitchell.
82. The American Equity EIA II contract had a ten (10) year surrender period with a fourteen (14) year vesting schedule for the bonus that was attached to the contract. The RBC EIA II contract had a twelve (12) year surrender period with a first year surrender penalty of fourteen percent (14%).
83. According to records provided to the Enforcement Section by Mitchell, eighty percent (80%) of MR6's investment assets were concentrated in these two EIAs.
84. When asked why Mitchell recommended MR6 purchase two (2) different annuities, Mitchell stated that the primary reason was that "[d]ifferent allocation options in the indexes are available with RBC than American Equity."
85. Although Mitchell emphasized the importance of index allocation for MR6's annuities, one hundred percent (100%) of MR6's funds invested in the two (2) EIAs were allocated to the fixed accounts and, as of the date of the Petition, those assets still remained in the fixed accounts.
86. According to MR6, sometime in April 2010 Mitchell called MR6 for an account review, and as a result of that review, Mitchell did not recommend any change to MR6's allocation.
87. When asked by investigators with the Enforcement Section if MR6 understood EIAs, MR6 stated that MR6 only knew the basics and took Mitchell's word on what the product could do for MR6.
88. Although CDs, bonds, or other investment vehicles could have provided diversification to MR6's portfolio without sacrificing liquidity, when asked if other investment vehicles had been recommended, MR6 stated that Mitchell did not recommend or discuss any products other than the EIAs MR6 purchased.
89. Mitchell has been registered and has held himself out as an IAR in the State of Missouri since May 15, 2008. However, the Enforcement Section was unable to find any evidence that Mitchell recommended products or investment options such as fixed or variable annuities, CDs, or mutual funds to his clients; instead, Mitchell only recommends EIAs to his clients.
90. Although Mitchell held himself as an IAR and recommended to his clients that they purchase EIAs from him, he failed to provide written disclosures to his clients about the material conflicts of interest that could reasonably be expected to impair Mitchell's rendering of unbiased and objective investment advice, including, but not limited to:
  - a. that Mitchell would materially benefit from the sale of the insurance products he recommended through the payment of commissions;
  - b. the amount of the commission that he would receive on any particular insurance product that he sold to his clients; and
  - c. that Mitchell was acting in the capacity of an insurance agent when selling EIAs.
91. One of the primary features of an EIA that differentiates it from other investment vehicles is the manner in which returns can be enhanced based on gains in linked indices, while maintaining a guaranteed minimum return.

92. Although Mitchell recommended and sold EIAs to his clients, the Enforcement Section has uncovered no evidence that Mitchell recommended or placed his clients' assets in the indexed accounts of the annuities sold. Instead, assets were placed in fixed accounts, which simply provide a fixed interest return (currently around one (1%) percent), without allowing for the upside potential of the indices.
93. Instead of recommending other less costly and less restrictive products that provide similar returns to the fixed accounts of the annuities sold, such as CDs, traditional fixed annuities, or recommending that clients place their money in the fixed accounts of existing annuities, Mitchell recommended and sold annuity products in which he would obtain a substantial commission and subject the client to surrender penalties, additional surrender periods, and/or higher costs.
94. The Enforcement Section uncovered no evidence that Mitchell recommended any investment vehicle other than the fixed accounts inside EIAs for investment of his clients' assets.
95. The Enforcement Section uncovered no evidence that Mitchell had prepared any analysis of the financial situation and needs of his clients, or prepared and provided his clients with comparisons of options which may have met those needs, prior to recommending and selling his clients EIAs.
96. Mitchell failed to provide information to his clients necessary for them to make an informed decision about whether or not to invest in an EIA. All of the six (6) Missouri residents interviewed by the Enforcement Section indicated that they did not understand critical aspects of the products they purchased through Mitchell, including but not limited to, caps, participation rates, or the different indexing methods. All six (6) Missouri residents stated that they relied on Mitchell to recommend the product most suitable for them.

## **II. STATUTORY PROVISIONS**

97. Section 409.6-601(a), RSMo. (Cum. Supp. 2009), provides that the Missouri Securities Act of 2003 "shall be administered by the commissioner of securities . . . ."
98. Section 409.1-102(15), RSMo. (Cum. Supp. 2009), defines "Investment adviser" as "a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation."
99. Section 409.1-102(26), RSMo. (Cum. Supp. 2009), defines "Sale" to include: "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value." That same section defines "offer to sell" as "every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value."
100. Section 409.1-102(28), RSMo. (Cum. Supp. 2009), defines "security" as "a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest of participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing"
101. Section 409.4-403(a), RSMo. (Cum. Supp. 2009), states:
 

It is unlawful for a person to transact business in this state as an investment adviser unless the person is registered under this act as an investment adviser or is exempt from registration as an investment adviser under subsection (b).
102. Section 409.4-412(c), RSMo. (Cum. Supp. 2009), states:
 

If the commissioner finds that the order is in the public interest and subsection (d)(1) to (6), (8), (9), (10), or (12) and (13) authorizes the action, an order under this act may censure, impose a bar, or impose a civil penalty in an amount not to exceed a maximum of five thousand dollars for a single violation or fifty thousand dollars for several violations on a registrant and if the registrant is a broker-dealer or investment adviser, any partner, officer, or director, any person having similar functions of any person directly or indirectly controlling the broker-dealer or investment adviser.
103. Section 409.4-412(d), RSMo. (Cum. Supp. 2009), states:
 

A person may be disciplined under subsections (a) to (c) if the person:  
 . . .

- (13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years;

....

104. Section 409.4-412(k), RSMo. (Cum. Supp. 2009), states:

If a proceeding is instituted to revoke or suspend a registration of any agent, broker-dealer, investment adviser, or investment adviser representative pursuant to subsection (b), the commissioner shall refer the matter to the administrative hearing commission. The administrative hearing commission shall conduct hearings and make such findings of fact and conclusions of law in such cases. The commissioner shall have the burden of proving a ground for suspension or revocation pursuant to this act. The administrative hearing commission shall submit its findings of fact and conclusions of law to the commissioner for final disposition.

105. Section 409.5-502(a), RSMo. (Cum. Supp. 2009), states, in part, that:

It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

...

- (2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

....

106. Section 409.6-604, RSMo. (Cum. Supp. 2009), states:

(a) If the commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the commissioner may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this act . . . .

(b) An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the commissioner shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the commissioner will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within fifteen days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the commissioner within thirty days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(c) If a hearing is requested or ordered pursuant to subsection (b), a hearing before the commissioner must be provided . . . . The final order may make final, vacate, or modify the order issued under subsection (a).

(d) In a final order under subsection (c), the commissioner may:

(1) Impose a civil penalty up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation;

(2) Order a person subject to the order to pay restitution for any loss, including the amount of any actual damages that may have been caused by the conduct and interest at the rate of eight percent per year from the date of the violation causing the loss or disgorge any profits arising from the violation;

(3) In addition to any civil penalty otherwise provided by law, impose an additional civil penalty not to exceed five thousand dollars for each such violation if the commissioner finds that a person subject to the order has violated any provision of this act and that such violation was committed against an elderly or disabled person. For purposes of this section, the following terms mean:

(A) "Disabled person," a person with a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment, or being regarded as having such an impairment;

(B) "Elderly person," "a person sixty years of age or older."

(e) In a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation of this act or a rule adopted or order issued under this act. These funds may be paid into the investor education and protection fund.

### III. CONCLUSIONS OF LAW

#### *Multiple Instances of Engaging in Dishonest and Unethical Practices*

107. Paragraphs 1 through 106 are incorporated by reference as though fully set forth herein.

108. Respondent Mitchell engaged in dishonest and unethical practices in the securities, investment, and insurance business when

he, among other things:

- a. failed to conduct a reasonable inquiry into his clients' overall portfolio, investment objectives, financial situation and needs, and investment experience;
- b. recommended products to clients without reasonable grounds for believing that the products were suitable;
- c. misrepresented to his clients and prospective clients the nature of the advisory services being offered or fees to be charged for such services;
- d. omitted to state material facts necessary to make the statements made regarding services or fees, in light of the circumstances under which they are made, not misleading;
- e. failed to provide a written disclosure to the clients about any material conflicts of interest that could reasonably be expected to impair the rendering of unbiased and objective advice before Mitchell rendered such advice to his clients; or
- f. failed to provide disclosures to his clients detailing the compensation Mitchell would receive through the sale of products he recommended.

109. Respondent Mitchell's dishonest and unethical practices constitute grounds for discipline pursuant to Section 409.4-412(d) (13), RSMo. (Cum. Supp. 2009), and thus are violations subject to the commissioner's authority to censure or impose a civil penalty on Respondent Mitchell under Section 409.4-412(c), RSMo. (Cum. Supp. 2009).

**Multiple Violations of Prohibited Conduct in Providing Investment Advice**

110. Paragraphs 1 through 106 are incorporated by reference as though fully set forth herein.

111. Respondent Mitchell, as a person that advised others for compensation, engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon another person by, among other things:

- a. holding himself out as an IAR with Respondent Guidepost;
- b. holding himself out as a IAR but failing to provide financial recommendations that were in the best interests of his clients;
- c. using his IAR registration to lend credibility to his annuity recommendations and sales;
- d. recommending and selling unsuitable products through which he made substantial commissions after leading his clients to believe that he was acting in their best interests;
- e. failing to provide written disclosure of material conflicts of interest; or
- f. failing to provide written disclosure of the commissions Mitchell made on the sale of the insurance products.

112. Respondent Mitchell violated Section 409.5-502(a)(2), RSMo. (Cum. Supp. 2009), when he engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon another person.

113. Respondent Mitchell's actions in engaging in a fraud or deceit constitute an illegal act, practice, or course of business and thus such actions are subject to the commissioner's authority under Section 409.6-604(a), RSMo. (Cum. Supp. 2009).

**Multiple Violations of Transacting Business as an Unregistered Investment Adviser**

114. Paragraphs 1 through 106 are incorporated by reference as though fully set forth herein.

115. At all times relevant, records maintained by the Missouri Commissioner of Securities contained no registration or granted exemption for Respondent Guidepost to transact business as an investment adviser in the State of Missouri.

116. Respondent Guidepost violated 409.4-403(a), RSMo. (Cum. Supp. 2009), when it held itself out as providing investment advice to others for compensation through material disseminated to the public by Respondent Mitchell.

117. Respondent Guidepost's actions in transacting business as an unregistered investment adviser constitute an illegal act, practice, or course of business and thus such actions are subject to the commissioner's authority under Section 409.6-604(a), RSMo. (Cum. Supp. 2009).

118. This order is in the public interest and consistent with the purposes intended by the Missouri Securities Act of 2003. See Section 409.6-605(b), RSMo. (Cum. Supp. 2009).

**IV. ORDER**

**NOW, THEREFORE**, it is hereby ordered that Respondents, their agents, employees and servants, and all other persons participating in or about to participate in the above-described violations with knowledge of this order be prohibited from:

- A. violating or materially aiding in any violation of Section 409.5-502(a)(2), RSMo. (Cum. Supp. 2009), by engaging in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.
- B. violating or materially aiding in any violation of Section 409.4-403(a), RSMo. (Cum. Supp. 2009), by transacting business in the State of Missouri as an investment adviser without being registered or exempt from registration.

**IT IS FURTHER ORDERED** that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2009), the Commissioner will determine whether to grant the Enforcement Section's petition for an imposition of a civil penalty of up to ten thousand dollars (\$10,000) against Respondent Mitchell for multiple violations Section 409.5-502(a)(2), RSMo. (Cum. Supp. 2009), in a final order, unless Respondent Mitchell requests a hearing and shows cause why the penalty should not be imposed.

**IT IS FURTHER ORDERED** that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2009), the Commissioner will determine whether to grant the Enforcement Section's petition for an imposition of a civil penalty of up to ten thousand dollars (\$10,000) against Respondent Guidepost for multiple violations of Section 409.4-403(a), RSMo. (Cum. Supp. 2009), in a final order, unless Respondent Guidepost requests a hearing and shows cause why the penalty should not be imposed.

**IT IS FURTHER ORDERED** that, pursuant to Sections 409.4-412(c), RSMo. (Cum. Supp. 2009), the Commissioner will determine whether to censure and/or impose a civil penalty of up to fifty thousand dollars (\$50,000) against Respondent Mitchell for violations contained in Section 409.4-412(d)(13), RSMo. (Cum. Supp. 2009), in a final order, unless Respondent Mitchell requests a hearing and shows cause why a censure and/or penalty should not be imposed.

**IT IS FURTHER ORDERED** that, as the Enforcement Section has petitioned for an award for the costs of the investigation against Respondents in this proceeding, the Commissioner will issue a final order, pursuant to Section 409.6-604(e), RSMo. (Cum. Supp. 2009), awarding an amount to be determined after review of evidence submitted by the Enforcement Section, unless Respondents request a hearing and show cause why such award should not be made.

**SO ORDERED:**

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 30<sup>TH</sup> DAY OF DECEMBER, 2010.

ROBIN CARNAHAN  
SECRETARY OF STATE

(Signed/Sealed)  
MATTHEW D. KITZI  
COMMISSIONER OF SECURITIES

State of Missouri  
Office of Secretary of State

Case No. AP-10-45

IN THE MATTER OF:

TRACY WAYNE MITCHELL, CRD No. 5521674; and  
GUIDEPOST FINANCIAL LIMITED LIABILITY  
COMPANY;

Respondents.

Serve both: Tracy Wayne Mitchell and  
Guidepost Financial Limited Liability  
Company, at:  
1525 East Republic Road, Suite A-120  
Springfield, Missouri 65804

**NOTICE**

**TO: Respondents and any unnamed representatives aggrieved by this Order:**

You may request a hearing in this matter within thirty (30) days of the receipt of this Order pursuant to Section 409.6-604(b), RSMo. (Cum. Supp. 2009), and 15 CSR 30-55.020.

Within fifteen (15) days after receipt of a request in a record from a person or persons subject to this order, the Commissioner will schedule this matter for a hearing.

A request for a hearing must be mailed or delivered, in writing, to:

**Matthew D. Kitzi, Commissioner of Securities**  
**Office of the Secretary of State, Missouri**  
**600 West Main Street, Room 229**  
**Jefferson City, Missouri, 65102.**

CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of December, 2010, a copy of the foregoing Order and Notice in the above styled case was **mailed by certified U.S. Mail, postage prepaid, to:**

Tracy Wayne Mitchell  
1525 East Republic Road, Suite A-120  
Springfield, Missouri 65804

Guidepost Financial Limited Liability Company  
1525 East Republic Road, Suite A-120  
Springfield, Missouri 65804

**And hand delivered to:**

Nathan Soendker  
Chief Enforcement Counsel  
Securities Division

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John Hale, Specialist