FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ALAIN FLORESTAN (CRD No. 2818942), Respondent.	Disciplinary Proceeding No. 2014039091903 Hearing Officer—LOM **DEFAULT DECISION** June 2, 2017

Respondent violated FINRA Rules 2111 and 2010 by recommending a trading strategy without considering the costs and without having a reasonable basis for believing the strategy suitable. For this misconduct, he is suspended from associating with any FINRA member in any capacity for nine months and fined $7,500.

Respondent violated FINRA Rules 1122 and 2010, and Article V, Section 2(c) of FINRA's By-Laws by willfully failing to timely update his Form U4 to disclose five judgments against him. For this misconduct, he is suspended from associating with any FINRA member in any capacity for six months and fined $10,000. Because the misconduct was willful, he is subject to a statutory disqualification.

Respondent violated FINRA Rules 8210 and 2010 by failing to timely respond to FINRA staff requests for information pursuant to FINRA Rule 8210. For this misconduct, he is barred from associating with any FINRA member firm in any capacity.

In light of the bar, the suspensions and fines are not imposed.

For the Complainant: Steven Graham, Esq., Penelope Brobst Blackwell, Esq., David B. Klafter, Esq., and John Luburic, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: No appearance.

DECISION

I. Introduction

On December 31, 2015, FINRA's Department of Enforcement ("Enforcement") filed a Complaint against Alain Florestan ("Florestan"). The Complaint also included charges against Florestan's firm, Caldwell International Securities Corp. ("CISC" or the "Firm"), and seven other individuals. Three of those individuals were principals of the Firm; four were registered representatives at a branch of the Firm different from the one where Florestan worked. The Complaint had nine causes of action that applied to various Respondents.

On May 25, 2016, Enforcement filed and served its motion to hold Florestan in default ("Default Motion"),[1] along with a memorandum of law ("Memorandum"),[2] a declaration ("Declaration")[3] and exhibits (referred to by the prefix "CX" and identifying number). These documents state facts to support the allegations in the Complaint and Enforcement's legal contentions. Florestan submitted no response. As the Declaration recited, and as demonstrated by the exhibits attached to the Declaration, even though the First and Second Notices of Complaint were validly served on Florestan by Enforcement,[4] he did not file an Answer to the Complaint. He also did not participate in the April 18, 2016 initial pre-hearing conference despite having been served with notice. On July 18, 2016, I held another pre-hearing conference. Even though he was served with notice, Florestan did not participate in that pre-hearing conference either.

On July 21, 2016, I issued an Order deeming Florestan in default ("Default Order"). I declared, however, that I would not issue a default decision until the resolution of the charges as to all Respondents. The Default Order was served on Florestan to give him notice and an opportunity to object if he chose to do so.[5] The Office of Hearing Officers has received no objection or response from him in the last ten months since the Default Order was issued and served.

In the meantime, the Firm and its three principals settled the supervisory charges against them. Three of the other registered representatives who were Respondents settled the charges against them, and the fourth registered representative Respondent presented his defense at a hearing. The charges against that last Respondent have been resolved by the issuance of a Hearing Panel Decision.

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[1] The document is titled "Department Of Enforcement's Motion For Entry Of Default Decision And Request For Sanctions."

[2] The document is titled "Department Of Enforcement's Memorandum Of Law In Support Of Motion For Entry Of Default Decision And Request For Sanctions."

[3] The document is titled "Declaration In Support Of Enforcement's Motion For Entry Of Default Decision."

[4] On May 19, 2017, Enforcement also filed and served a Supplemental Declaration In Support Of Enforcement's Motion For Entry Of Default Decision ("Supp. Declaration"), which provides additional information relevant to service of the Complaint and other papers on Florestan. The exhibits to this document are referred to after a citation to Supp. Declaration by the word "exhibit" and an individual identifying number.

[5] The document is titled "Order Defaulting Respondent Florestan And Removing Him From Service List."

Florestan has done nothing to cure his default or to indicate a willingness to participate in the proceeding. It is appropriate to resolve the charges against him without further delay. For the reasons discussed below, I find Respondent in default and **GRANT** Enforcement's Default Motion.

II. Findings Of Fact And Conclusions Of Law

A. Respondent's Background

Florestan began his career in the securities industry in September 1996. Over the next 15 years, Florestan worked at 17 FINRA member firms. He obtained Series 7 and 63 licenses. CISC filed a Form U4 for Florestan on April 27, 2012, and he thereby became associated with the Firm. On May 21, 2015, CISC terminated Florestan's association with the Firm and filed a Uniform Termination Notice for Securities Industry Registration (Form U5) with FINRA. He is no longer associated with any FINRA member firm.[6]

B. FINRA's Jurisdiction

FINRA retains jurisdiction over Florestan pursuant to Article V, Section 4(a) of FINRA's By-Laws. Enforcement filed its initial Complaint on December 31, 2015, within two years of the date that termination of Respondent's FINRA registration became effective, and the Complaint charges him with misconduct while he was a registered person.[7]

C. Origin Of Proceeding

Prior to 2011, CISC was a small regional broker-dealer with four offices and approximately 20 registered representatives. It traditionally focused on moderate or conservative stock trading for domestic investors.[8]

Starting in early 2011, however, the Firm began rapidly expanding the number of its offices of supervisory jurisdiction ("OSJs") and registered representatives. It more than doubled the number of its branches and the number of its associated persons, increasing the size of the Firm from 4 to 8 branches and from 20 to 40 registered representatives.[9]

The newly associated representatives had a different business model from the Firm. They primarily solicited investors located outside the United States by cold calling and recommended that the investors engage in speculative equity trading.[10]

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[6] Compl. ¶¶ 24-25; Declaration at 3, ¶¶ 6-7; and CX-1.

[7] Compl. ¶ 26; Declaration at 3, ¶¶ 6-8.

[8] Compl. ¶ 2; Declaration at 2-3, ¶ 5.

[9] Compl. ¶ 2; Declaration at 2-3, ¶ 5.

[10] Compl. ¶ 2; Declaration at 2-3, ¶ 5.

During a 2013 cycle examination, FINRA staff learned of the Firm's new line of business and began investigating it. The staff also investigated the new line of business in a 2014 cycle examination. The evidence uncovered in those cycle examinations led to the commencement of this disciplinary proceeding.[11]

D. Florestan Defaulted By Failing To Answer The Complaint

Enforcement served Florestan with the Complaint, First Notice of Complaint, and Second Notice of Complaint in accordance with FINRA Rules 9131, 9134, and 9215. Rule 9131(b) requires Enforcement to serve a complaint pursuant to Rule 9134. Rules 9134(a)(2) and 9134(b)(1) provide that service of a complaint on an individual respondent may be accomplished by first-class certified mail addressed to the person's residential address, as reflected in the Central Registration Depository ("CRD Address"). Rule 9134(b)(1) further provides that if Enforcement has actual knowledge that the CRD Address is out of date, it shall serve the respondent with duplicate copies at the person's last known residential address. Rule 9134(b)(3) provides that service by mail is complete upon mailing. Rule 9215(f) specifies that if a respondent does not file an answer or make any other request related to the complaint then Enforcement should send a second notice.

Florestan's CRD address is in Queens Village, New York. Prior to the filing of the Complaint, however, Florestan informed Enforcement that although he received mail at the CRD Address it is his mother's house. Florestan's actual residence is in Brooklyn, New York ("Brooklyn Address"), and he provided that to Enforcement.[12]

Enforcement served the Complaint on Florestan twice. On February 10, 2016, as required by the Rules, Enforcement sent the Complaint and Notice of Complaint to his CRD Address by first-class certified mail. It also sent copies of the Complaint and Notice of Complaint by first-class regular mail to his CRD Address and by first-class certified mail and first-class mail to his Brooklyn Address. After the deadline for filing an Answer had passed, on March 11, 2016, Enforcement again served the Complaint, this time with a Second Notice of Complaint. It sent the documents to Florestan's CRD Address and to his Brooklyn Address both by first-class certified mail and by first-class mail.[13]

By serving Florestan twice by first-class certified mail addressed to his CRD Address and sending duplicates to his Brooklyn Address, Enforcement did what it was required to do. Florestan received valid constructive notice of this proceeding.[14]

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[11] Declaration at 2-3, ¶ 5.

[12] Compl. ¶ 293, n.11; Declaration at 4, ¶ 9 and CX-1; Supp. Declaration Exhibit 2.

[13] Declaration at 4-5, ¶¶ 9-15.

[14] *See, e.g.*, *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *20-21 & n.21 (NAC June 3, 2014), *aff'd*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015).

Pursuant to FINRA Rule 9215, and according to the Second Notice, Florestan's Answer was due by March 28, 2016. He failed to file one. Thus, Florestan defaulted. Pursuant to FINRA Rules 9215(f) and 9269(a)(2), the Default Motion is **GRANTED** and I deem the allegations in the Complaint admitted. [15]

E. Florestan Committed Violations

The charges against Florestan appear in the first, eighth, and ninth causes of action.

1. First Cause Of Action – Suitability

Enforcement charges in the first cause of action that Florestan lacked a reasonable basis for believing that the trading strategy he recommended to customers was suitable.

a. Law

FINRA Rule 2111 provides that an associated person "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer."[16] The supplementary material to the Rule counsels that the phrase "investment strategy" should be interpreted broadly.[17]

Reasonable-basis suitability requires that an associated person conduct "reasonable diligence" sufficient to provide him with "an understanding of the potential risks and rewards associated with the recommended security or strategy." The lack of such an understanding when recommending a security or strategy violates the suitability rule.[18]

FINRA Rule 2010 requires FINRA members and their associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business. The Rule requires members of the securities industry not merely to conform to legal and regulatory requirements, but to conduct themselves with integrity, fairness, and honesty.[19] It is well established that a violation of another FINRA Rule is also a violation of Rule 2010.[20]

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[15] Respondent is notified that he may move to set aside the default pursuant to FINRA Rule 9269(c) upon a showing of good cause.

[16] From July 9, 2012, through July 31, 2014, during the relevant period of time, three versions of Rule 2111 were in effect. *See* FINRA Rules at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=15663&element_id=9859&highlight=2111#r15663. For our purposes, they may be treated as one. Each version contained the operative language quoted above and the accompanying guidance is consistent.

[17] Rule 2111, Supplementary Materials, 03 Recommended Strategies.

[18] Rule 2111, Supplementary Materials, 01 General Principles.

[19] *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *22 n.20 (Feb. 13, 2015).

[20] *See Dep't of Enforcement v. Merrimac Corp. Sec., Inc.*, No. 2011027666902, slip op. at 6, n.7 (NAC May 26, 2017). *See also Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999); *CMG Inst. Trading, LLC*, No. 2006006890801,

b. Facts

The first cause of action alleges that, from July 2012 through July 2014, Florestan recommended an active trading investment strategy and charged high commissions of 4% or more on each transaction without understanding that the frequent trading and high commissions were generating excessive cost-to-equity ratios in customer accounts. Without understanding the costs of the trading strategy and how they related to performance in the accounts, he did not have a reasonable basis for believing the strategy suitable.[21]

Florestan worked at a branch of the Firm referred to in the Complaint as the AWM Group branch. He and the other registered representatives at that branch cold called international investors. Typically, they would only accept as customers those investors who agreed to select speculation as an investment objective. They did not explain to customers the risks and costs of speculation as an investment objective and, indeed, did not themselves understand the risks and costs of speculation.[22] The branch supervisor believed that "any time you buy stock it's speculative."[23]

The trading strategy that Florestan recommended involved investing in a single security at a time. Florestan would recommend the purchase, telling the customer that there was reason to expect the company to experience some catalyst or event within three to six months. Uniformly, after that catalyst or event occurred—or, more often, when Florestan decided that the catalyst would not occur—Florestan would recommend that the customer sell the first security and purchase a new security. The new security supposedly was also expected to experience some catalyst or event within three to six months. The cycle repeated itself month by month, with Florestan charging 4% or more on each transaction and generating high amounts of accumulating commissions.[24]

Illustrative of the strategy, Florestan would recommend that customer PVDK buy a single security and then recommend that the security be sold within a month in order to purchase another single security. The frequency of trading escalated rapidly once the customer opened the account. As a result of Florestan's active trading investment strategy, PVDK's account had an annualized turnover rate of 16.01. That strategy coupled with Florestan's high commissions resulted in an annualized cost-to-equity ratio of 63.90%. PVDK suffered a loss of $38,742.96. Although the Complaint charged that Florestan followed the same pattern generally, PVDK was the only Florestan customer identified in the Complaint.[25]

2010 FINRA Discip. LEXIS 7, at *3 n.2 (NAC May 3, 2010); *Dep't of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, at *11 and nn.12 & 13 (OHO Oct. 4, 2011).

[21] Declaration at 6-8, ¶¶ 19-26.

[22] Compl. ¶¶ 57-64.

[23] Compl. ¶ 64.

[24] Compl. ¶¶ 67-70; Declaration at 6-8, ¶¶ 19-20.

[25] Compl. ¶¶ 68, 72, and Schedule A; Declaration at 6-8, ¶¶ 19-26.

No one at the AWG Group branch, including Florestan, conducted any due diligence on this active trading investment strategy they were recommending to customers, either generally or for any specific customer.[26] Neither Florestan nor his colleagues at the branch where he worked could explain turnover rates or cost-to-equity ratios. Florestan did not perform any analysis to determine how costs were affecting his customers' accounts. Because Florestan did not understand turn over rates or cost-to-equity ratios and he did not analyze the costs of the trading strategy he was recommending, he had no understanding of the risks, volatility, or likely performance of his recommendations.[27] In fact, customers of the AWM Group branch realized losses and paid staggering costs given the amounts invested in their accounts.[28]

c. Conclusions

Given his complete lack of due diligence and absence of understanding of the costs of the trading strategy he recommended, Florestan lacked a reasonable basis for believing the active trading strategy to be suitable. He violated FINRA Rules 2111 and 2010.

2. Eighth Cause Of Action – Willful Failure To Disclose Judgments

a. Law

In the eighth cause of action, Florestan is charged with willfully failing to timely disclose five civil judgments on his Uniform Application for Securities Industry Registration or Transfer (Form U4).

i. Form U4

FINRA's By-Laws and Rules impose a continuing obligation on every registered person to update information on his or her registration application, the Form U4. Article V, Section 2(c) of the By-Laws requires that information in a person's registration application "shall be kept current at all times by supplementary amendments … filed … not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122 further provides that no associated person shall fail to correct inaccurate or misleading information in his or her registration filing upon receiving notice of the correct information.

The Securities and Exchange Commission ("SEC") has said that the importance of the Form U4 "cannot be overstated."[29] The Form U4 is used by FINRA and other regulators, as well as broker-dealer firms, to determine and monitor the fitness of securities professionals. Forms

[26] Compl. ¶ 74.

[27] Declaration at 7, ¶¶ 23-26.

[28] Compl. ¶¶ 72-73.

[29] *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012).

U4, which are publicly available, also provide investors important information in deciding whom they trust to handle their investments and to advise them.[30]

The failure to timely file an amendment to a Form U4 also violates FINRA Rule 2010. As noted above, a violation of any other FINRA Rule also constitutes a violation of FINRA Rule 2010.[31]

ii. Statutory Disqualification

A person is subject to a statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934 if, among other things, the person has "willfully" made a false or misleading statement with respect to any material fact in his application to be associated with a FINRA member firm, or the person has omitted from the application a material fact that is required to be stated.[32] Thus, both willfulness and materiality bear on statutory disqualification.

Misconduct is willful in the context of the securities laws if the person "intentionally commit[ed] the act" that constitutes the violation, regardless of whether he understood that he was violating a particular rule.[33] Willful acts are voluntary, in contrast to acts that are inadvertent or coerced. All that is necessary is that the person intentionally commits the act that constitutes the violation.[34]

In the context of Form U4 disclosures, the SEC has defined materiality in the following way: "[A] fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available."[35] The National Adjudicatory Council has held that "essentially all of the information that is reportable on the Form U4 may be considered material."[36] Unsatisfied liens and judgments in particular are significant because they raise concerns about whether a respondent can responsibly manage his own financial affairs, and ultimately they cast doubt on a

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[30] *Id. See also North Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *30 (May 8, 2015) .

[31] *E.g.*, *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16 (NAC Mar. 9, 2015).

[32] *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *14 (Mar. 15, 2016).

[33] *Mathis v. SEC*, 671 F.3d 210, 215 (2d Cir. 2012).

[34] *McCune*, 2016 SEC LEXIS 1026, at *15, *19-20 & nn.22-23. *See also Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2015 FINRA Discip. LEXIS 42, at *41 (OHO July 10, 2015), *aff'd*, slip op. at 13 (NAC Mar. 15, 2017), *appeal docketed*, No.3-17930 (SEC Apr. 14, 2017); *Dep't of Enforcement v. Riemer*, No. 2013038986001, 2016 FINRA Discip. LEXIS 56, at *15-17 & nn.38-41 (OHO Nov. 4, 2016), *appeal docketed* (NAC Nov. 21, 2016).

[35] *McCune*, 2016 SEC LEXIS 1026, at *21-22; *Mathis*, 671 F.3d at 219.

[36] *Dep't of Enforcement v. Toth*, No. E9A2004001901, 2007 NASD Discip. LEXIS 25, at *34 (NAC July, 2007).

person's ability to provide trustworthy financial advice and services to investors who rely on that person to act on their behalf as a securities industry professional.[37]

b. Facts

While he was associated with other FINRA member firms (not CISC), Florestan had five judgments entered against him from multiple creditors: (i) April 1, 2002 judgment for $3,226.73; (ii) April 13, 2001 judgment for $2,965; (iii) December 1, 2000 judgment for $2,595; (iv) April 8, 1998 judgment for $2,309; and (v) March 12, 1996 judgment for $4,045.70. Regardless of whether he knew about any of the outstanding judgments at the time they were entered, he knew about them on August 13, 2013. On that date, FINRA staff notified Florestan of the five judgments. However, Florestan still did not disclose any of the judgments for approximately eight months. Even then, he did not disclose them all at once. Rather, Florestan disclosed the judgments by amending his Form U4 on April 16, 2014, September 30, 2014, and February 27, 2015. It appears that he disclosed each lien only after making a long-delayed effort to resolve it, so that he had an explanation once the lien was disclosed. For example, in some instances, when he disclosed a lien he also disclosed that he had agreed to a payment plan.[38]

c. Conclusions

By failing to disclose the judgments within 30 days of being informed of them by FINRA staff, Florestan violated Article V, Section 2(c) of the By-Laws, and FINRA Rules 1122 and 2010. His failure to disclose was willful. FINRA staff informed him of the judgments in August 2013, and yet he failed to disclose them for more than half a year. It was only upon later learning that FINRA staff intended to bring a disciplinary proceeding that he made the disclosures. The information that he failed to disclose also was material within the context of Form U4 disclosures. Accordingly, Florestan's misconduct subjects him to a statutory disqualification.

3. Ninth Cause Of Action

In the ninth cause of action, Enforcement alleges that Florestan failed to respond in a timely manner to two letters from FINRA staff requesting information pursuant to Rule 8210 and follow-up communications seeking that information.

a. Law

FINRA Rule 8210(a)(1) authorizes FINRA staff to require a an associated person to provide information for purposes of an investigation, complaint, examination, or proceeding. The information may be presented orally, in writing, or electronically. Rule 8210(c) provides that no person may fail to provide information requested pursuant to Rule 8210. Rule 8210(d) provides that a Rule 8210 request for information shall be deemed received by a currently or formerly registered person if it is mailed or otherwise transmitted to the person's last known CRD

[37] *Tucker*, 2012 SEC LEXIS 3496, at *32-33.

[38] Compl. ¶¶ 274-78; Declaration at 8, ¶¶ 27-28 and CX-1, at 28-29, 47-49.

Address. If the staff has actual knowledge that the CRD Address is outdated or inaccurate, however, then a copy should be mailed or otherwise transmitted both to the person's last known CRD Address and to any other more current address for that person that is known to the staff.

It has been long recognized that the duty of FINRA members and their associated persons to provide documents and information sought pursuant to Rule 8210 is "unequivocal."[39] When someone becomes an associated person, he assumes an obligation to be bound by FINRA's rules, including Rule 8210.[40] The reason that full and prompt responses to Rule 8210 requests are important is that FINRA lacks subpoena power. A failure to provide information fully and promptly undermines FINRA's ability to carry out its regulatory mandate.[41]

b. Facts

During the course of its investigation of CISC and the AWM Group branch, FINRA staff sent Florestan letters dated June 25, 2015, and July 6, 2015, pursuant to FINRA Rule 8210. In accordance with Rule 8210(d), the letters were sent to Florestan's CRD Address. At that time, Enforcement did not have another address for Florestan. The Rule 8210 request letters were sent both by first-class regular mail and by first-class certified mail. The Rule 8210 request letters requested information regarding Florestan's communications with his customers about the trading in their accounts.[42]

The Rule 8210 letters sent by first-class regular mail were not returned to the staff. The second time the staff sent the Rule 8210 request letters, the staff received back a green card showing that the letter sent by first-class certified mail was received. The green card was signed by "A. Florestan."[43]

On July 23, 2015, after Florestan failed to respond or provide the information requested pursuant to Rule 8210, FINRA staff sent to his CRD Address a Notice of Suspension letter issued pursuant to Rule 9552. Florestan still did not provide the requested information. On

[39] *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000).

[40] *Id*.

[41] *See, e.g.*, *Behnam Halali*, Exchange Act Release No. 79722, 2017 SEC LEXIS 31, at *3 n.2 (Jan. 3, 2017) (because FINRA lacks subpoena power, Rule 8210 is vitally important) (citing *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2958, at *23-24 (Nov. 8, 2007); *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD [FINRA's predecessor] lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Morton Bruce Erenstein*, 316 Fed. Appx. 865, 871, 2008 U.S. App. LEXIS 19746, at *13 (11th Cir. Sept. 16, 2008) ("[I]t is critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations, especially because the NASD lacks subpoena power.").

[42] Compl. ¶¶ 285-89.

[43] Compl. ¶¶ 285-90.

August 17, 2015, the staff sent him another Suspension letter pursuant to Rule 9552, to Florestan's CRD Address.[44]

Florestan emailed the staff on September 23, 2015. He claimed he had not responded to the letters sent to his CRD Address because he had not been living at that address for three years. He also claimed to have been out of the country around the time the Rule 8210 letters were sent. He provided what he claimed to be his new home address, the Brooklyn Address.[45]

FINRA staff sent Florestan a letter dated September 28, 2015, via email and certified mail both to his CRD Address and to the Brooklyn Address. In that letter the staff notified Florestan that his response still failed to provide some of the information that had been requested. He failed to provide telephone records for the period from January 1, 2014, through December 19, 2014. On October 23, 2015, the business day prior to the October 26 deadline for him to respond, Florestan provided the staff with some of the telephone records requested and a statement that he had not yet been able to obtain the remaining records. The staff extended his deadline to respond to October 28, 2015. On that date, Florestan provided the staff a handwritten note from an employee of his cell phone carrier stating that they were unable to provide him with any additional telephone records. The staff lifted Florestan's suspension based upon this information.[46]

Although the staff concluded that Florestan ultimately responded to the Rule 8210 requests, the staff asserts that he failed to do so timely. He failed to respond for over three months, and he did so only on the cusp of being permanently barred. He impeded and delayed the staff's examination by his failure to respond in a timely manner. The information sought was material to the investigation and necessary for FINRA to complete its regulatory mandate to fully investigate potential rule violations.[47]

c. Conclusions

Florestan violated FINRA Rules 8210 and 2010 by failing to respond timely to two Rule 8210 letters and subsequent follow-up requests.

III. Sanctions

A. Suitability Violation

FINRA's Sanction Guidelines ("Guidelines")[48] provide for a range of fines for suitability violations. That range spans from $2,500 to $110,000. The Guidelines further provide that an

[44] Compl. ¶¶ 291-92; Declaration at 8-9, ¶¶ 29-30.

[45] Compl. ¶¶ 293; Supp. Declaration Exhibit 2.

[46] Compl. ¶¶ 294-95.

[47] Compl. ¶¶ 296-97; Declaration at 8-9, ¶ 29.

[48] FINRA Sanction Guidelines (2017), http://www.finra.org/industry/sanction-guidelines.

individual respondent may be suspended for a period of ten business days to two years. Where aggravating factors predominate, the Guidelines counsel that adjudicators should strongly consider imposing a bar. In determining sanctions for a suitability violation, adjudicators take into account the Principal Considerations applicable to all types of violations.[49]

Additionally, the Guidelines provide that where appropriate, adjudicators should order restitution. Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss. It may be ordered when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct. A restitution order must include a description of the adjudicator's method of calculation.[50]

I find that Florestan's misconduct was serious, that there are aggravating factors, and that there are no mitigating factors. Florestan engaged in numerous acts and a pattern of misconduct[51] over an extended period of time lasting two years.[52] He recommended that a single customer, PVDK, engage in 76 securities transactions during that period. His misconduct resulted in injury to his customer, who incurred high costs and suffered losses.[53] In contrast, the misconduct redounded to Florestan's monetary benefit because he reaped more in commissions.[54] Florestan's failure to offer any defense is not the same thing as accepting responsibility for his misconduct.[55] The record contains no indication that he acknowledged the misconduct or attempted to take any corrective measures prior to intervention by the regulator.[56]

Enforcement recommended that Florestan be barred and ordered to pay his customer PVDK $38,742.96 in restitution. According to Enforcement, PVDK suffered $38,742.96 in losses and paid nearly $23,000 in commissions. Enforcement described how it calculated restitution in the following way: "Restitution was calculated in PVDK's account by subtracting the cost of buying each security during the period of July 2012 through July 2014 from the proceeds generated by the sales of those same securities during the same time period."[57]

I find the description of the calculation insufficiently precise and complete. Enforcement has not provided the exact amount of the commissions, although it has provided a slightly different number ($23,144.60) for total costs associated with realized trades.[58] Nor has Enforcement provided the individual calculations so that they could be verified. Furthermore, the

[49] Guidelines at 95.

[50] Guidelines at 4, General Principle 5.

[51] Guidelines at 7, Principal Consideration 8.

[52] Guidelines at 7, Principal Consideration 9.

[53] Guidelines at 7, Principal Consideration 11.

[54] Guidelines at 8, Principal Consideration 16.

[55] Guidelines at 7, Principal Consideration 2.

[56] Guidelines at 7, Principal Consideration 3.

[57] Memorandum at 21.

[58] Compl. Schedule A.

customer should have paid some of the costs of trading, but it is unclear what the reasonable costs should have been. Finally, the factual assertions about how the calculation was done appear in the legal memorandum in support of Enforcement's Default Motion and not in the evidentiary record formed by the Complaint, Declaration, and Supplemental Declaration. Thus, I lack sufficient evidence to calculate the loss proximately caused by Florestan's misconduct and describe the method of calculating the restitution amount.[59]

For the suitability violation, I conclude that it is appropriately remedial to suspend Florestan from associating with any FINRA member in any capacity for nine months and fine him $7,500.

B. Willful Failure To Timely Disclose Judgments

For late filing of Form U4 amendments to disclose information such as pending judgments, the Guidelines recommend that an individual be fined $2,500 to $37,000. Where aggravating factors are present, adjudicators should consider suspending an individual in any or all capacities for ten business days to six months. Where aggravating factors predominate, a longer suspension of up to two years may be imposed. If the individual intended to conceal information or mislead, a bar may be appropriate.[60]

There are a number of Principal Considerations that are specifically identified as relevant to the sanction for late filing of amendments to the Form U4. One is the duration of the delinquency.[61] In this case, the oldest judgment (1996) had been outstanding for more than fifteen years when FINRA staff informed Florestan of it in August 2013. The newest judgment (2002) had been pending for more than ten years. These are extremely long delinquency periods. Moreover, when the staff informed him in August 2013 of the five outstanding judgments against him, Florestan delayed for more than half a year before amending his Form U4 to disclose some, but not all, of the judgments. The first disclosure came in April 2014.

Another Principal Consideration in determining sanctions for this type of violation is whether the failure to timely disclose delayed a regulatory investigation.[62] As discussed above, Florestan's misconduct impeded and delayed the staff's examination.

For the willful failure to timely disclose five judgments against him, I conclude that it is appropriately remedial to suspend Florestan from associating with any FINRA member in any capacity for six months and fine him $10,000.

[59] Guidelines at 4, General Principle 5.

[60] Guidelines at 71.

[61] Guidelines at 71.

[62] Guidelines at 71.

C. Failure To Provide Information Pursuant To Rule 8210 In A Timely Manner

For failing to respond to a request made pursuant to FINRA Rule 8210 in a timely manner, the Guidelines recommend a fine of $2,500 to $37,000 and a suspension in any or all capacities for up to two years. The Guidelines specifically provide that the lack of harm to customer or the lack of benefit to the violator does not mitigate a Rule 8210 violation.[63] The Guidelines provide that, if a respondent does not respond to a Rule 8210 request until after FINRA files a complaint, then adjudicators should "presume[e] that the failure constitutes a complete failure to respond."[64] A bar is the "standard" sanction for failing to respond.[65]

The Guidelines address three Principal Considerations that are specifically relevant to a failure to respond to a Rule 8210 request in a timely manner.

First, there is the importance of the requested information as viewed from FINRA's perspective. As noted above, the information sought in this case was material to the investigation and necessary for FINRA to fulfill its regulatory mandate.

Second, adjudicators should consider the number of requests made and the degree of regulatory pressure required to obtain a response. In this case, FINRA staff made two requests by letter and then followed up several times. It instituted a non-summary disciplinary proceeding under Rule 9552 to exert pressure on Florestan to respond. Ultimately, after he had been suspended and when he was about to be barred for his failure to provide information, Florestan communicated with the staff and began a partial production of the requested information. Although at the end of October 2015 the staff lifted the suspension, a high degree of regulatory pressure was needed to obtain a response from Florestan. Because that pressure included the filing of a complaint, the circumstances may be presumed the equivalent of a complete failure to respond, making a bar the "standard" and most appropriate sanction.

Third, adjudicators should consider the length of time to respond. The first request was made in June 2015, the second in July. It was only in late September that Florestan contacted FINRA staff in regard to the Rule 8210 requests, and it was still later toward the end of October 2015 when the staff lifted the suspension, treating Florestan's response as completed. Four months elapsed between the initial request and the completion of his response. That is a significant amount of time when the staff was investigating many kinds of potential misconduct by numerous people in several different branch offices, as well as whether the Firm had failed to carry out its supervisory responsibilities. The staff had an immediate need for the information, which Florestan untimely response failed to satisfy.

There is another aggravating factor. To the extent that Florestan did not receive the first two letters requesting information pursuant to Rule 8210 or received them late because they went

[63] Guidelines at 33.

[64] Guidelines at 33.

[65] Guidelines at 33.

to his mother's house, it is his own fault. He failed to comply with his obligation to update his CRD Address for three years.

For the failure to timely provide information requested pursuant to Rule 8210, I find that a bar from associating with any FINRA member in any capacity is warranted. Florestan's misconduct and the surrounding circumstances demonstrate that he has a disregard for his regulatory obligations. A bar is necessary to protect the investing public from a person who displays such disregard for his regulatory obligations and to deter others from engaging in similar misconduct.[66]

IV. Order

Respondent violated FINRA Rules 2111 and 2010 by recommending a trading strategy without considering the costs and without having a reasonable basis for believing the strategy suitable, for which he would be suspended for nine months and fined $7,500. However, in light of the bar, these sanctions are not imposed.

Respondent violated FINRA Rules 1122 and 2010, and Article V, Section 2(c) of FINRA's By-Laws by willfully failing to timely update his Form U4 to disclose five judgments against him. For this misconduct, he would be suspended from associating with any FINRA member in any capacity for six months and fined $10,000. However, in light of the bar, these sanctions are not imposed.

Respondent is barred from associating with any FINRA member firm in any capacity for his failure to provide information in a timely manner pursuant to FINRA Rule 8210. The bar shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action.

Lucinda O. McConathy
Hearing Officer

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[66] Guidelines at 2, General Principle 1.