BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Joseph A. Zaragoza, Chicago, IL, Respondent.	DECISION Complaint No. E8A2002109804 Dated: August 20, 2008

Respondent traded excessively in a customer's account; exercised discretion without having prior written authorization; failed to submit email correspondence to his firm for review and approval; and failed to provide his firm with written notice of his outside business activities. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Kevin G. Kulling, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Joseph A. Zaragoza ("Zaragoza") appeals a July 27, 2007 FINRA Hearing Panel decision under NASD Rule 9311.[1] The Hearing Panel found that Zaragoza: (1) excessively traded a customer's account; (2) exercised discretionary authority in that account without written authorization; (3) failed to submit email correspondence to his

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

firm for review and approval; and (4) failed to notify his firm in writing of his outside business activity. For excessively trading a customer's account, exercising discretionary authority without written authorization, and failing to submit email correspondence for review and approval, the Hearing Panel imposed a single bar against Zaragoza. The Hearing Panel declined to impose a sanction against Zaragoza for engaging in outside business activities given the bar that it imposed for the other violations.

After thoroughly reviewing the record in this matter, we affirm the Hearing Panel's findings of violations and imposition of sanctions.

I. Background

Zaragoza began working in the securities industry in October 1993 as a general securities representative. From October 1993 through November 1999 he was associated with several FINRA member firms before becoming associated with David A. Noyes & Co. ("Noyes & Co." or "the Firm") in November 1999 as a general securities representative. Zaragoza left Noyes & Co. voluntarily in July 2002 and associated with another member firm that same month as a general securities representative. He remained with that firm from July 2002 through July 2007, when the firm terminated him as a result of the issuance of the Hearing Panel's decision in this matter. Zaragoza presently is not associated with a member firm.

II. Facts

A. Zaragoza Engaged in Frequent Trading of Customer DV's Account

1. Customer DV Opened an Individual Retirement Account with Zaragoza

In January 2000, DV rolled over approximately $192,000 in 401(k) retirement funds to an individual retirement account ("IRA") that his relative, Zaragoza,[2] opened for him at Noyes & Co. DV was approximately 67 years old at the time and recently had retired from his job as a train operator at a steel company, where he worked for 35 years.

DV executed a new account form at Noyes & Co. that listed his investment objectives as "Growth" and "Growth and Income." The new account form also listed DV's annual income as "[l]ess than $50,000," which consisted of pension and social security payments, and his net worth as "$100,000 to under $500,000." The only previous investment experience that DV had was limited to contributing to the 401(k) and stock-purchase plans offered through his former employer.

---

[2] Zaragoza's father and DV were cousins.

2. Zaragoza Executed 290 Trades in DV's Account over 28 Months

On March 10, 2000, the day after DV deposited approximately $192,000 in retirement funds into his IRA account, Zaragoza began executing frequent purchases and sales of stocks in DV's account, primarily in the technology sector. During the 28-month period under review, March 2000 through June 2002, Zaragoza executed 290 trades in DV's account—most of which were marked as "solicited"—that generated gross commissions of $32,912. DV's account also turned over more than five times annually in that period.[3] Further, the cost-to-equity ratio, meaning the amount the account would need to appreciate to break even, was 17.9 percent annually.[4] The losses in the account amounted to approximately $134,000 at the time that DV closed the account in June 2002.[5]

Zaragoza engaged in "in and out" trading in DV's account, repeatedly buying and selling stocks and holding them for short periods.[6] For example, Zaragoza successively bought and sold the securities of Vitesse Semiconductor Corp. ("Vitesse") 10 times over a two-month period, from April 24 through June 31, 2000. In two instances, Zaragoza

---

3 In accounts that hold substantial securities positions, as DV's account did, a formula is used that measures turnover by dividing the total cost of purchases made during a certain period by the average monthly equity during that period. *Allen George Dartt*, 48 S.E.C. 693, 695 (1987) (citing Report of the Special Study of the Options Markets to the Securities and Exchange Commission, H.R. Com. Print IFC3, 96th Cong., 1st Sess., at 451 (1978) [Hereinafter Special Study of the Options Market]). The average monthly equity is determined by "totaling all cash additions, deducting all cash withdrawals, and dividing by the total number of the months in question," and including in that figure all securities available for investment at market value, calculated monthly. *See id*. (citing Special Study of the Options Market, at 451).

4 The cost-to-equity ratio is calculated by dividing the total amount of commissions, margin interest and other fees by the average equity. *See Dep't of Enforcement v. Brigandi*, Complaint No. C10040025, 2007 NASD Discip. LEXIS 3, at *10 n.13 (NASD NAC Jan. 17, 2007). The cost-to-equity ratio calculation represents the percentage of return on the customer's average net equity needed to pay broker-dealer commissions and other expenses, or "the amount an investment would have to appreciate to break even." *Rafael Pinchas,* 54 S.E.C. 331, 340 (1999).

5 DV withdrew approximately $41,000 from the account over the 28-month period, before closing the account in June 2002 with approximately $17,000 remaining.

6 "In and out" trading involves "the sale of all or part of a customer's portfolio, with the money reinvested in other securities, followed by the sale of the newly acquired securities." *Costello v. Oppenheimer & Co.,* 711 F.2d 1361, 1369 n.9 (7th Cir. 1983).

purchased and immediately sold Vitesse shares within a day or two of their purchase.[7] Zaragoza also held trading positions in other stocks for similarly short periods. For example: (1) on June 6, 2000, Zaragoza purchased 100 shares of "Varian" and subsequently sold those shares on June 7, 2000; (2) on July 12, 2000, Zaragoza purchased 200 shares of "Helix" and sold the shares on July 25, 2000; and (3) on May 4 and 10, 2001, Zaragoza purchased 1,300 and 2,000 shares of "Exabyte," respectively, and subsequently sold 2,800 shares of Exabyte six days later, on May 10, 2001.

3. Extent of Control Zaragoza Exerted over DV's Trading Account

Although it is undisputed that DV did not give Zaragoza written discretionary authority to trade his account, Zaragoza claimed that DV orally approved each of the 290 trades at issue prior to their execution. DV contradicted Zaragoza's testimony, stating that Zaragoza did not obtain his prior approval before executing each trade and that he typically became aware of the trades, after-the-fact, via emails from Zaragoza and from trade confirmations. The Hearing Panel found DV's testimony to be more credible than Zaragoza's and that DV's testimony was supported by email correspondence between Zaragoza and DV, which showed that Zaragoza often sent emails to DV after he had executed a transaction. Additionally, there is no evidence that Zaragoza obtained written approval from his Firm to exercise discretionary authority over DV's account despite a Firm prohibition against the exercise of such authority over a customer's account without prior written permission from the branch manager and a member of the Firm's executive committee.

DV testified that he told Zaragoza when he opened the account to "go ahead, do the trading when you think is the best to do it. Don't wait for me to approve . . . and when I see something I don't like it [sic], I tell [sic] your father right away." DV further testified that he was not aware during the period in which Zaragoza handled his account that Zaragoza was required to obtain his approval before executing each of the trades at issue. DV's only guidance to Zaragoza when he opened the account was his stated preference for investments in "large" companies. DV testified that it was his goal in opening the account to increase the value of his retirement funds over the next couple of years before he had to begin taking distributions from the account.

The record demonstrates that Zaragoza and DV usually communicated with each other regarding the activity in DV's account either through Zaragoza's father, Joseph Zaragoza, Sr. ("Zaragoza Sr."), who acted as a translator, or via email. Zaragoza testified that he and DV communicated through Zaragoza Sr. because Zaragoza could not speak Spanish, DV's native language. The Hearing Panel observed that, although DV could speak English, he did not appear to be entirely comfortable in his ability to do so. DV's

---

[7] Zaragoza purchased 100 shares of Vitesse on June 5, 2000. He sold those shares on June 7, 2000. Just eight days later, on June 15, 2000, Zaragoza again purchased 100 shares of Vitesse, and then sold those shares the next day.

testimony was consistent with Zaragoza's in that he communicated with Zaragoza primarily through Zaragoza Sr. or via email. DV stated that his relatives sometimes assisted him in writing the emails that he sent to Zaragoza concerning the activity in his account. Additionally, the record shows that Zaragoza used his personal, rather than his Noyes & Co., email account to communicate electronically with DV. Although Noyes & Co. had a policy requiring the branch manager to approve all correspondence, including email correspondence, "prior to being sent," Zaragoza did not submit the emails to the branch manager prior to sending them to DV. The record includes copies of at least 10 such emails that were not submitted to the Firm's branch manager for approval.[8]

DV identified 10 trades in his IRA account that Zaragoza made without receiving DV's prior authorization for each trade. The record includes trade confirmations and emails from Zaragoza advising DV of those trades. For example, a confirmation shows the sale of 200 shares of Cree Inc. on January 31, 2001. A separate confirmation shows a purchase of 100 shares of Texas Instruments Inc. that also was executed on January 31, 2001. One day later, on February 1, 2001, at 1:01 p.m., Zaragoza advised DV that "[a] stock that I am going to put you in is Texas Instruments." Later that same day, at 1:38 p.m., Zaragoza sent DV a separate email stating that he sold one half of the Cree Inc. stock at a profit.[9]

DV sent Zaragoza emails throughout the relevant period expressing his concern regarding Zaragoza's trading activity and the ever-increasing losses in his account. In an email dated December 23, 2000, DV advised Zaragoza that, "[w]hen we had around $146,000 I told your dad it would be better to buy CD's until [the] market got better. You said we have sold companies and by the end of the year we should be almost even." On June 19, 2001, DV sent Zaragoza another email advising him that he was "concerned" about his money," and stating that "[i]t seems to me you are doing too much 'turning,' Last month there were 23 transactions, are those too many?" On November 9, 2001, DV

---

8 The emails are set forth in Exhibits 10 and 11. For example, on October 11, 2000, Zaragoza sent DV an email advising DV that he "recently bought some Intel at 37 5/8." On October 19, 2000, Zaragoza sent DV an email stating that, "[t]oday I picked up 100 shares of triquent semiconductor (TQNT)." On February 1, 2001, Zaragoza sent DV an email stating that he "sold half the CREE [INC] to book you some profits . . . . A stock I am going to put you in is Texas Instruments." In an email to DV dated April 19, 2001, Zaragoza stated, "I have been active in your account recently in a good way."

9 The record also includes a similar pattern of trade confirmations and emails for the following other transactions at issue: (1) a purchase of 100 shares of Intel Corp. on October 11, 2000; (2) a purchase of 100 shares of Triquint Semiconductor Inc. on October 19, 2000; (3) a purchase of 100 shares of Cree Inc. on January 22, 2001; (4) a sale of 200 shares of Vitesse on January 23, 2001; (5) a purchase of 100 shares of Intel Corp.; (6) a purchase of 300 shares of AT&T Corp. on January 9, 2001; (7) a 1,000-share purchase of Lucent Technologies, Inc. on April 18, 2001; and (8) a 1,000-share sale of Lucent Technologies Inc. on April 19, 2001.

sent Zaragoza an email asking him "why [Zaragoza failed] to buy CDs" when DV previously requested such action. DV went on to state: "When there [was] $77,000 I told you I don't care to recooperate [sic], what I want is DO NOT LOST [sic] ANY MORE MONEY! . . . . Joey, you have wasted away my life savings and so far: NO EXPLANATION AT ALL."

In response to DV's concerns about the continuing trading losses in his account, Zaragoza sent DV a series of emails about his ability to recoup the losses in DV's account. On December 22, 2000, Zaragoza sent DV an email that acknowledged DV's request to move the funds from his trading account into "CDs," but that also warned DV that he would "run the risk" of not recouping his losses "[i]f the market starts going higher" if he did so. On January 5, 2001, Zaragoza sent DV an email stating that "it will take a little more time for us to recoup, but we will get there." In an email dated January 23, 2001, Zaragoza informed DV that he had sold some Vitesse stock at "a profit" and that "this one worked out." On April 19, 2001, Zaragoza sent DV an email stating that he had placed DV "in the best possible positions to recouperate [sic] the account. It is finally starting to work." In an email dated June 20, 2001, Zaragoza acknowledged DV's continuing concern about the losses in his account, stating that "I am trying to. . . minimize our downside. [W]hen I buy something, I am putting a stop on the downside, so as to not fall into that trap of buying something and then having the market go way down." On September 10, 2001, Zaragoza advised DV via email that he had transferred $25,000 from DV's account to an annuity guaranteed "to earn 7.2 %. The rest of the money we will keep in hopes this market will recover."

B. Zaragoza's Sale of Two Annuities to Customer HH

Zaragoza testified that he sold two Jackson National Life annuities to Noyes & Co. customer HH in January and February 2002, for which he received commissions totaling $4,400 from Jackson National Life. There is no evidence that Zaragoza provided any written disclosure to Noyes & Co. about this outside business activity. Moreover, the Hearing Panel found that Zaragoza's supervisor credibly testified at the hearing that he had no knowledge of Zaragoza's licensing relationship with Jackson National Life.

III. Procedural Background

On September 8, 2006, FINRA's Department of Enforcement ("Enforcement") filed a four-cause complaint against Zaragoza following its examination of Zaragoza's handling of transactions in DV's account. The complaint alleged that Zaragoza: (1) failed to give Noyes & Co. prompt written notice of his outside business activity involving the sale of fixed annuities to at least one public customer, in violation of NASD Rules 3030 and 2110; (2) effected approximately 10 discretionary transactions in DV's account, from March 2000 through July 2002, without having obtained prior written authorization from DV and without having obtained written acceptance of the accounts as discretionary by Noyes & Co., in violation of NASD Rule 2510 and Rule 2110; (3) excessively traded DV's account from March 2000 to July 2002, in violation of NASD Rule 2310 and Rule 2110; and (4) failed to submit at least 10 pieces of email correspondence to Noyes & Co. for review and approval before sending the correspondence to DV, in violation of Rule 2110.

A FINRA Hearing Panel held an evidentiary hearing in this matter on February 27-28, 2007. In a decision dated July 27, 2007, the Hearing Panel found Zaragoza liable with respect to each allegation and barred Zaragoza in all capacities from association with any member firm. Zaragoza subsequently filed a timely appeal.

IV. Discussion

We affirm the Hearing Panel's findings that Zaragoza excessively traded in DV's account and exercised discretion in that account without written authorization. We also affirm the Hearing Panel's findings that Zaragoza failed to submit emails from his personal email account to Noyes & Co. for review and approval and that he failed to provide the Firm with written disclosure of his outside business activity involving his sales of two Jackson Life annuities to customer HH.

A. Excessive Trading

Rule 2310 requires that a registered representative have reasonable grounds, based upon a customer's investment objectives, financial situation, and needs, for believing that a recommended transaction is suitable for a customer. Recommendations that result in excessive trading activity in a customer's account can result in a violation of this suitability rule. *See Jack H. Stein*, Exchange Act Rel. No. 47335, 2003 SEC LEXIS 338, at *7 (Feb. 10, 2003); *Paul C. Kettler*, 51 S.E.C. 30, 32 (1992) ("Excessive trading represents an unsuitable frequency of trading" and violates FINRA suitability standards).

Excessive trading occurs in a customer's account when a registered representative has control over trading in the account and the frequency of trading activity in the account is inconsistent with the customer's objectives and financial situation. *See Daniel Richard Howard*, 55 S.E.C. 1096, 1100 (2002); *Harry Gliksman*, 54 S.E.C. 471, 475 (1999). A preponderance of the record evidence shows that Zaragoza controlled the trading in DV's account, and that the level of trading in the account was excessive.

1. Zaragoza Controlled the Trading in DV's Account

Control over an account may be established where a customer, although not granting his broker formal written discretionary authority, so relies on the broker that the broker is "in a position to control the volume and frequency of transactions in the account." *John M. Reynolds*, 50 S.E.C. 805, 807 (1991). In this case, although DV did not give Zaragoza formal written authority to exercise discretion in his account, he granted Zaragoza oral authority to exercise discretion. DV testified that he told Zaragoza to "do the trading when you think is the best to do it. Don't wait for me to approve."

We also consider the investment experience of the customer, the relationship between the customer and the broker, and the reliance placed by the customer on the broker to determine whether a registered representative has exercised control over a customer's account. *See Zaretsky v. E. F. Hutton & Co.*, 509 F. Supp. 68, 74 (S.D.N.Y. 1981). The record demonstrates that DV lacked investment experience, having previously invested only in his employer's 401(k) and stock participation plans. And DV was unaware during the relevant period that Zaragoza was required to obtain DV's authorization prior to placing each of the 290 trades at issue in this matter. Moreover, DV testified that he "trusted" his relative, Zaragoza, to manage the account. DV testified that he entrusted Zaragoza with the responsibility of "choos[ing]" the trades, and that Zaragoza "knows more than I do" about investment matters. The evidence demonstrates that DV turned over total control of the trading in his account to Zaragoza.[10] *See Reynolds*, 50 S.E.C. at 475.

The Hearing Panel found that DV's testimony that he did not give Zaragoza prior authorization for each of the trades in question was more credible than Zaragoza's claim that he did receive such authorization. The "[c]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference." *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004). We find that the substantial evidence necessary to overturn the Hearing Panel's credibility determination is absent. The Hearing Panel found that the emails that Zaragoza sent to DV advising him, after-the-fact, of trades that he effected in DV's account were consistent with DV's "credible" testimony and "established that [Zaragoza] informed DV of trading activities in the account after they occurred rather than beforehand, as [Zaragoza] claimed."[11] We agree with the Hearing Panel's conclusions.

---

10 DV testified that he did not complain to anyone at Noyes & Co. about Zaragoza's trading in his account because he "put [his] trust in [Zaragoza]."

11 The Hearing Panel found that Zaragoza Sr.'s testimony undercut Zaragoza's claim that he received DV's prior approval before effecting each trade:

> [E]ven giving credit to the testimony of [Zaragoza's] father that he initially spoke with DV approximately once or twice a week, and after approximately six or seven weeks his communications with DV trailed off to once or twice a month, [Zaragoza Sr.'s] communications with DV were not frequent enough to support [Zaragoza's] claim that he received authority in advance of [his] almost daily trading in the account.

The Hearing Panel therefore implicitly determined that Zaragoza Sr.'s assertion that Zaragoza obtained prior approval from DV before effecting each trade at issue was not credible. *See Dist. Bus. Conduct Comm. v. Jones*, Complaint No. C02970023, 1998 NASD Discip. LEXIS 60, at *8 (NASD NAC Aug. 7, 1998). We find insufficient evidence in the record to overturn the Hearing Panel's credibility determination with respect to Zaragoza Sr.'s testimony.

[Footnote continued on next page]

2. Zaragoza Excessively Traded DV's Account

There is no single test for determining that an account has been traded excessively,[12] nor is there any "magical per annum percentage" to assess the level of trading in an account.[13] Nevertheless, in addition to considering an investor's investment goals and financial situation, the turnover rate and the frequency of trades in an account "provide an objective and reasonable basis for a finding of excessive trading." *See Stein*, 2003 SEC LEXIS 338, at *16. A pattern of "in and out" trading is another "hallmark" of excessive trading. *See Howard*, 55 S.E.C. at 1100-01.

Although there is no clear line of demarcation, courts and the Commission have suggested that an annual turnover rate of six reflects excessive trading.[14] The Commission, however, also has found turnover rates of less than six to indicate excessive trading.[15] Here, Zaragoza turned over DV's account more than five times annually.[16] In

[cont'd]

[12] *See Costello v. Oppenheimer & Co*., 711 F.2d 1361, 1369 (7th Cir. 1983).

[13] *Gerald E. Donnelly*, 52 S.E.C. 600, 603 (1996).

[14] *Peter C. Bucchieri*, 52 S.E.C. 800, 805 (1996) (*citing Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir. 1980)).

[15] *Donnelly*, 52 S.E.C. at 602 n.11 (noting that respondent had acknowledged that "an annualized turnover rate of between two and four percent is 'presumptive of churning'"); *Michael H. Hume*, 52 S.E.C. 243, 245 n.5 (1995) (noting that turnover rates of 3.5 and 4.4 were found to be excessive in past cases); *Reynolds*, 50 S.E.C. at 808 n.12 (finding excessive trading, in part, based on the fact that the account was turned over more than four times on an annualized basis).

[16] Enforcement calculated an annualized turnover rate for DV's account of 5.2 for the 28-month period at issue. Zaragoza argued, however, that the turnover figure should be recalculated to account for the $25,000 purchase of an annuity in September 2001, because Enforcement's calculation of the turnover rate accounted for the $25,000 annuity purchase as a withdrawal rather than an investment. Although we agree with Zaragoza that the annuity purchase should have been accounted for as an investment rather than a withdrawal, we note that doing so does not materially effect the turnover rate.

When the turnover rate for the 28-month period is recalculated to include the $25,000 as an investment, rather than as a withdrawal, it is 5.29 annually (dividing purchases of $980,956 by average monthly equity of $79,440, and multiplying by .428 to obtain annualized rate). We also calculated the turnover rates for the periods preceding

[Footnote continued on next page]

addition, Zaragoza sometimes held positions in particular stocks for short periods, demonstrating a pattern of "in and out" trading, which is another hallmark of excessive trading.[17] In fact, "[i]n and out trading is 'a practice extremely difficult for a broker to justify' and can, by itself, provide a basis for finding excessive trading."[18] Zaragoza initiated 290 transactions, sometimes up to 25 trades in a single month, and generated $32,912 in gross commissions from the trades within the 28-month period at issue. Moreover, the commission costs made it necessary for DV's account to appreciate at least 17.9 percent annually just to break even. We also note that Zaragoza admitted that he should have "managed the account a little bit better," and that he made "bad recommendations" with respect to DV's account.

We conclude from the foregoing facts that the frequency of trading in DV's account was wholly inconsistent with DV's investment objectives and financial situation. DV testified that his investment objective was to increase the value of his IRA account over a couple of years before he would be required to begin taking distributions from the account. DV listed "Growth" and "Growth and Income" as investment objectives. DV was advanced in age (approximately 67 years old), unsophisticated concerning financial

[cont'd]

and following the purchase of the annuity to obtain an accurate picture of the turnover rate for those periods. *See Stein*, 2003 SEC LEXIS 338, at *18, n.31 ("In determining whether a broker has engaged in excessive trading, we are not limited to looking only at the full period that the broker managed the customer's account; rather, it is appropriate for us also to review the trading done over a reasonably abbreviated portion of the entire period"). For the 18-month period prior to the investment in the annuity, the turnover rate is 5.25 annually (dividing purchases of $851,704 by average monthly equity of $108,051, and multiplying by .666 to obtain annualized rate). For the 10-month period subsequent to the investment of the $25,000 in the annuity, the turnover rate is 5.54 annually (dividing purchases of $129,252 by average monthly equity of $27,938, and multiplying by 1.1 to obtain annualized rate). We consider the differences among these turnover rates to be immaterial. In addition, we note that the Enforcement examiner who testified at the hearing calculated a turnover rate of 5.47, when annualized, which differs slightly from our calculation of 5.54 annually for the 10-month period. There is no evidence in the record, however, showing the Enforcement examiner's calculations of the turnover rate for that period. Thus, for the 10-month period at issue, we rely on our calculation of the annual turnover rate (5.54) rather than the turnover rate calculated by the Enforcement examiner.

[17] *See Costello*, 711 F.2d at 1369 & n.9 (finding that a pattern of in-and-out trading, showing that positions have been held only for a short period of time, is also an indicator of excessive trading).

[18] *Pinchas*, 54 S.E.C. at 339 (1999) (*quoting Costello*, 711 F.2d at 1369 & n.9).

investment matters, and he received less than $50,000 in annual retirement income. In view of DV's investment objectives and financial situation, Zaragoza should have utilized a conservative investment approach in DV's account in an effort to preserve DV's principal, which constituted DV's "life savings." In contrast to that approach, Zaragoza employed an aggressive trading strategy that resulted in excessive trading activity in DV's account and contributed to a rapid decline in the value of DV's account. After the first 10 months of Zaragoza's trading activity, DV's account statement showed that the account had lost $102,543 in market value.

The excessive trading in DV's account was inconsistent with DV's investment objectives and financial situation and thus unsuitable. We therefore find that Zaragoza violated Rules 2310 and 2110.[19]

B. Zaragoza Exercised Discretion in DV's Account Without Prior Written Discretionary Authority

Rule 2510(b) prohibits a registered representative from exercising discretionary authority in a customer's account unless the customer has given prior written authorization and the representative's member firm has given written approval for such an account. Noyes & Co. also had a policy that prohibited the exercise of discretion over a customer account without prior written permission from the branch manager and a member of the Firm's executive committee. The Hearing Panel found that Zaragoza exercised discretion over trading in DV's account without obtaining the required written discretionary authority. We affirm the Hearing Panel's determination.

Although Zaragoza testified that he obtained DV's oral approval before executing each trade, the Hearing Panel found Zaragoza's testimony not credible when viewed against the testimony of DV and Zaragoza Sr. and Zaragoza's emails to DV. As discussed above, the evidence demonstrates that Zaragoza had full control over DV's account and that he effected 10 trades identified by DV without obtaining DV's prior written authorization. *See Paul F. Wickswat*, 50 S.E.C. 785, 787 (1991) (finding a violation when there was oral authorization, but no written authorization, to make discretionary trades). Finally, there is no evidence that the Firm received any written notice of Zaragoza's discretionary authority over DV's account, as required under Rule 2510(b) and the Firm's policy.[20]

---

[19] A violation of another FINRA rule constitutes a violation of Rule 2110. *See Charles C. Fawcett*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *11-12 (Nov. 8, 2007) (stating that violations of FINRA rules are inconsistent with just and equitable principles of trade and constitute a violation of Rule 2110.) NASD Rule 0115 makes all FINRA rules, including Rule 2110**,** applicable to both FINRA members and all persons associated with FINRA members.

[20] As a result of Zaragoza's failure to obtain the necessary written authorization, the Firm was unable to comply with the requirements of Rule 2510(c) "to approve promptly

[Footnote continued on next page]

We find that Zaragoza exercised discretion in DV's account with respect to 10 trades in DV's account without obtaining the requisite prior written authorization and approval, in violation of Rules 2510 and 2110.

C. Zaragoza Failed to Submit Email Correspondence for Review and Approval

Noyes & Co.'s "Electronic Communications Policy" required branch manager "approval" of all correspondence, including email correspondence, "prior to being sent." The Hearing Panel found that Zaragoza's supervisor credibly testified that he did not review and approve the emails that Zaragoza sent to DV on his personal email account. We find nothing in the record to disturb the Hearing Panel's credibility determination. *See John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21-22 (Jan. 22, 2003). Zaragoza asserted at the hearing that he could not recall whether he obtained approval with respect to his email correspondence with DV, and that he "may have" done so. The Hearing Panel found Zaragoza's hearing testimony to be inconsistent with his prior on-the-record testimony, in which he admitted that he had not received such approval. Thus, the Hearing Panel gave no weight to Zaragoza's hearing testimony on the subject. We agree with the Hearing Panel's finding.

Based on these facts, Zaragoza's failure to submit at least 10 pieces of email correspondence to his Firm for review and approval is activity inconsistent with high standards of commercial honor and just and equitable principles of trade, which is a violation of Rule 2110.[21]

D. Zaragoza Failed to Provide Written Disclosure of His Outside Business Activities

Rule 3030 prohibits a person associated with a member from accepting compensation as a result of any business activity "outside the scope of his relationship with his employer firm, unless he has provided *prompt written notice* to the member." (emphasis added.) There is no dispute that Zaragoza was required to submit such notice

---

[cont'd]

in writing each discretionary order entered and review all discretionary accounts at frequent intervals in order to detect and prevent transactions which are excessive in size or frequency in view of the financial resources and character of the account."

[21] FINRA's disciplinary authority under Rule 2110 is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade." *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (citation omitted).

to Noyes & Co. regarding the $4,400 in compensation he received from his sales of Jackson National Life annuities to customer HH in early 2002. There also is no evidence showing that Zaragoza submitted the required written notice to Noyes & Co.

Zaragoza contended in his brief on appeal that he "thought that all required written disclosures regarding Jackson were being submitted by [Jackson National Life], and that [his supervisor at Noyes & Co.] was fully apprised of the relationship." Zaragoza, however, may not shift responsibility for his non-compliance to a third party. *See, e.g.*, *Michael David Borth*, 51 S.E.C. 178, 181, 1992 SEC LEXIS 3248, at *7 (1992) (finding that a respondent may not "shift his responsibility to others"). Thus, it was Zaragoza's responsibility to provide to Noyes & Co. the requisite written notice of his outside business activities involving Jackson National Life, which he failed to do. Additionally, the Hearing Panel found that Zaragoza's supervisor credibly testified at the hearing that he had no knowledge of Zaragoza's business activities related to Jackson National Life. The record includes insufficient evidence to cause us to overturn the Hearing Panel's credibility determination. *See Montelbano*, 2003 SEC LEXIS 153, at *21-22.

We affirm the Hearing Panel's finding that Zaragoza failed to provide Noyes & Co. with written notice of his outside business activity involving his receipt of compensation for the sales of two Jackson National Life annuities to HH.[22] Zaragoza therefore violated Rules 3030 and 2110.

V. Sanctions

The Hearing Panel decided to aggregate for purposes of sanctions the excessive trading, exercise of discretion without written authorization, and failure to submit email correspondence for review and approval violations because they arose from the same course of conduct, as permitted by FINRA's Sanction Guidelines ("Guidelines").[23] We uphold the Hearing Panel's decision to aggregate these interrelated violations for purposes of assessing sanctions.

The Hearing Panel found that Zaragoza used "his undocumented discretion to carry out excessive trading in DV's account, and [that] he avoided detection by sending emails from his personal email account without supervisory review." The Hearing Panel concluded that Zaragoza's violations (excessive trading, exercise of discretion without

---

[22] The Hearing Panel's findings contain two insignificant variances from the complaint regarding the amount of Zaragoza's compensation and the months in which the annuity sales were made. We find that this caused no error in these proceedings.

[23] The Guidelines state that it may be appropriate to aggregate similar violations. *FINRA Sanction Guidelines* 4 (2007), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

written authorization, and failure to submit email correspondence for review and approval) constituted egregious misconduct that warranted a bar in all capacities. For the reasons set forth below, we affirm the Hearing Panel's decision to impose a bar in all capacities against Zaragoza for those violations.[24] The Hearing Panel also determined that Zaragoza's failure to disclose in writing his outside business activity would warrant sanctions on the low end of the recommended range provided in the Guidelines. Because Zaragoza was barred for the other violations, the Hearing Panel chose not to impose a sanction for that violation. We find that ordering Zaragoza to disgorge the $4,400 in commissions earned on his sales of annuities to HH would be an appropriate sanction. We decline, however, to order the disgorgement in light of the bar.

A. A Bar is Appropriate for Violations Related to Zaragoza's Handling of DV's Account

For excessive trading violations, the Guidelines suggest a suspension in any or all capacities for a period of 10 business days to one year.[25] Where there is evidence of egregious misconduct, the Guidelines recommend considering a longer suspension of up to two years or a bar. For exercising discretion without prior written authorization in violation of Rule 2510(b), the Guidelines suggest a fine of $2,500 to $10,000 and, in egregious cases, a suspension in any and all capacities for 10 to 30 business days.[26] Although there are no specific Guidelines for failing to submit electronic correspondence for review and approval, the Hearing Panel considered the Guidelines for recordkeeping violations to be appropriate, which recommend a review of the nature and materiality of the inaccurate or missing information, and consideration of a suspension for up to 30 business days and a fine of $1,000 to $10,000.[27] In egregious cases, the Guidelines

---

[24] The Guidelines instruct us to order restitution where appropriate to remediate misconduct. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5). Zaragoza testified that DV "was made whole" by his Firm. The record does not include any evidence, however, regarding the amount that the Firm purportedly paid to DV to settle the matter. Zaragoza provided an exhibit that was signed by DV showing that Zaragoza paid $4,500 to DV to settle the following arbitration matter, *[DV and MV] v. David A. Noyes & Company, Joseph Zaragoza and [DD]*, NASD Arb. No. 03-00629, and that DV released Zaragoza from all claims and liability related to that matter. Because we are not able to determine from the record whether or not DV was fully compensated for his losses, we are not able to calculate the amount of possible outstanding losses related to this matter. We note, moreover, that Enforcement did not request restitution in the proceedings below. For these reasons, we have determined that it is not appropriate to order restitution in this matter.

[25] *Guidelines*, at 82.

[26] *Id*. at 90.

[27] *Id*. at 30.

suggest a longer suspension of up to two years or a bar. Additionally, we have considered the specific principal considerations for each of these rule violations, as well as the Principal Considerations in Determining Sanctions and the General Principles applicable to all sanctions determinations.[28] For the following reasons, we find Zaragoza's violations to be egregious and warrant a bar.

We conclude that Zaragoza acted recklessly by exercising discretion in DV's account without DV's written authorization and by excessively trading DV's account.[29] DV was in a particularly vulnerable position due to: (1) his inexperience in financial matters and limited financial resources as an elderly retiree;[30] (2) the language barrier between Zaragoza and DV; and (3) the high degree of trust that DV placed in Zaragoza given the family relationship and Zaragoza's position as a registered representative. The extent of DV's trust in Zaragoza is evident in an email DV sent to him on or around December 2000, stating, "Joe what I want is not lost [sic] more money. I don't care if you buy anything or don't buy anything until you get better signs from the market . . . . But I trust you, remember you are the manager."

Additionally, we find that Zaragoza's failures to comply with the written disclosure provisions of Rule 2510 and the Firm's prohibition against exercising authority over a customer account without prior written permission significantly contributed to his ability to excessively trade DV's account in an unfettered manner for a period of 28 months. Specifically, Zaragoza's actions prevented Noyes & Co. from subjecting DV's account to the extra supervisory scrutiny intended by the rule. We also find aggravating that Zaragoza abused DV's oral discretionary authority by trading excessively in DV's account[31] and that Zaragoza continues not to take responsibility for having exercised discretion in DV's account.

---

28 *Id*. at 2-7.

29 The Guidelines recommend that we consider whether the respondent's misconduct was intentional, reckless, or negligent. *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 13).

30 We assess the level of sophistication of the affected customer for purposes of determining appropriate sanctions. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 19).

31 The Guidelines for exercise of discretion without a customer's written authority list as a principal consideration whether the customer expressly or impliedly granted discretionary authority. *Id*. at 90. The Hearing Panel concluded that DV did not expressly grant authority to Zaragoza. We disagree with that conclusion given DV's testimony that he orally advised Zaragoza to trade the account without checking with him first before placing trades. Nevertheless, such oral authority does not serve to mitigate the violation under the facts of this case. The record demonstrates that Zaragoza abused such authority. Furthermore, we note that DV effectively attempted to rescind the oral

[Footnote continued on next page]

Zaragoza's use of his personal, rather than his business, email account to communicate with DV compounded the problem by enabling Zaragoza to evade detection by his Firm regarding his unauthorized and absolute discretionary authority over DV's account.[32] If Zaragoza's supervisor had been in a position to review the emails that Zaragoza sent to DV, the supervisor would have had an opportunity to address Zaragoza's misconduct promptly.

Furthermore, Zaragoza's excessive trading in DV's account was wholly inconsistent with DV's investment objectives and financial situation, and thus was reckless. Instead of taking measures to protect DV's principal, which consisted of DV's "life savings," Zaragoza engaged in an aggressive "in and out" pattern of trading.[33] Zaragoza's trading resulted in: (a) the turnover of DV's account more than five times annually; (b) a cost-to-equity ratio of 17.9 percent; [34] (c) the execution of 290 trades over a 28-month period, and total purchases of $955,956, in an account that had a beginning equity of $192,000;[35] (d) gross commissions charged to the account in the amount of $32,912, which added to the further diminution of DV's account equity; [36] and (e) trading losses of $134,000.[37]

[cont'd]

authority that he previously granted to Zaragoza by advising him in December 2000 to transfer the funds from his IRA account into certificates of deposit.

32 We conclude that Zaragoza's actions were an attempt to conceal his misconduct from Noyes & Co., a consideration under the Guidelines. *Id*. at 6 (Principal Considerations in Determining Sanctions, No. 10). Additional evidence of Zaragoza's attempts to conceal his misconduct from the Firm is a handwritten note from Zaragoza to DV advising DV to send any emails to Zaragoza's personal email account.

33 The Guidelines suggest that we consider whether the respondent engaged in a "pattern of misconduct." *Id*. at 6 (Principal Considerations in Determining Sanctions, No. 8).

34 We note that the Hearing Panel's decision referenced two different cost-to-equity ratios relevant to the trading in DV's account for the 28-month period: 17.9 percent and 17.5 percent. We find that the evidence supports the finding that the cost-to-equity ratio was 17.9 percent.

35 *See id*. at 6-7 (Principal Considerations in Determining Sanctions, Nos. 9, 18).

36 The Hearing Panel found that Zaragoza executed frequent trades in DV's account in a desperate attempt to recoup losses attributable, in part, to the downturn in the market occurring at the time, rather than for his personal gain. There is no support in the record, however, for that part of the Hearing Panel's finding that Zaragoza's excessive trading

[Footnote continued on next page]

We also are extremely troubled by Zaragoza's disregard of DV's request to transfer all of the funds from his IRA account to certificates of deposit. Although Zaragoza acknowledged in an email to DV in December 2000 that Zaragoza Sr. had advised him of DV's transfer request, Zaragoza argued forcefully against such a move, warning DV that he would not recoup his losses "if the market starts going higher" and his funds were "locked in . . .CDs." Instead of complying with DV's wishes, Zaragoza sent emails to DV designed to convince him that Zaragoza was capable of continuing to handle the account, despite the mounting losses in the account.[38] For instance, Zaragoza advised DV that certain individual stocks held in the trading account were "finally working out," that he had made a "quick profit" for DV on the sale of "shares of Lucent," and that "it will take a little more time for us to recoup, but we will get there." Zaragoza abused his position of trust, not only by exerting total control over, and excessively trading, DV's account, but also by attempting to assuage DV's repeated concerns about

---

[cont'd]

was solely attributable to his efforts to recoup losses in DV's account. And we give no weight to Zaragoza's self-serving statement at the hearing that he "discounted" some of the commissions because "[DV] was family."

[37] Although Zaragoza admitted that he made "bad recommendations" and was responsible for the frequent trading in DV's account, he also attempted to minimize his role in the decline of the value of DV's account by testifying that "we're all aware of what happened with the dotcoms, the overall market, and it was tough on everybody including myself." While we recognize that the market was experiencing a downturn during the period in which Zaragoza traded DV's account (March 2000 through June 2002), that fact does not in any way mitigate Zaragoza's misconduct, which involved a frequency of trading in DV's account that was unsuitable given DV's investment objectives and financial situation. *Cf.*, *Laurie Jones Canady*, 54 S.E.C. 65, 80 (1999) (rejecting attempt by Canady to blame customers' losses on the "savings and loan crisis and tax law changes . . .," and finding that the success or failure of Canady's trading strategy is "irrelevant" to the fact that he made unsuitable recommendations). We find that Zaragoza's acceptance of responsibility for engaging in the frequent trading of DV's account is outweighed by the numerous aggravating circumstances identified in our discussion of sanctions.

[38] DV's November 2000 account statement showed that the account had lost $98,020.57 in market value (representing over half of the beginning equity in the account) over the nine months since Zaragoza began trading in the account and that the account experienced substantial losses in market value in seven out of nine of those months. The monthly losses in the account ranged from $10,282.26 to $31,558.94 during the period from March through November 2000.

the trading activity while at the same time continuing to use an admittedly failed aggressive trading strategy in DV's account.[39]

Zaragoza argues in favor of mitigation that his commissions on DV's trades were not very sizeable. He further claims that the Firm received 65 percent of gross trading commissions, and that he and his partner split the remaining 35 percent in commissions. There is no evidence in the record about the specific amount of net commissions that Zaragoza earned on the trades that he effected in DV's account. The issue for purposes of sanctions, however, is not whether Zaragoza received commissions, or the amount of those commissions, but whether he had a "potential" for monetary gain. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No.17). Here, there is no question that Zaragoza's misconduct resulted in his potential for monetary gain in the form of trading commissions. Indeed, there is no question that Zaragoza actually received commissions.

Zaragoza also argues that his lack of a "prior disciplinary record" should be considered as support for the imposition of a sanction less than a bar. Zaragoza is incorrect. The courts and the Commission have consistently rejected arguments that a lack of a disciplinary record is a mitigating factor for purposes of sanctions in a FINRA disciplinary proceeding. *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (holding that "lack of a disciplinary history is not a mitigating factor"); *Daniel D. Manoff*, 55 S.E.C. 1155, 1165-66 & n.15 (2002) (stating that lack of disciplinary record does not mitigate sanction of a bar) (citing *Henry E. Vail*, 52 S.E.C. 339, 342 (1995)).

As further support for his claim that a sanction of less than a bar is appropriate in this matter, Zaragoza contends that his actions are not egregious. As demonstrated, however, there is ample support for our finding that Zaragoza's misconduct was egregious. In addition, Zaragoza's assertion that his sanction is "excessive" when compared to the sanctions imposed upon others who similarly violated FINRA rules is irrelevant. *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."). Moreover, we note that in the case that Zaragoza cited, *Dep't of Enforcement v. Stein*, Complaint No. C07000003, 2001 NASD Discip. LEXIS 38, at *18 (NASD NAC Dec. 3, 2001), the respondent was sanctioned only for excessive trading violations, and that there were no violations related to the exercise of discretion without written authority or failure to submit email correspondence for review and approval as in this case. For these reasons, the *Stein* matter provides no support whatsoever for Zaragoza's argument that his sanctions should be reduced.

---

[39] Zaragoza thus attempted to lull DV into inactivity by persuading him not to transfer his funds out of the trading account. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10).

As detailed above, Zaragoza's misconduct was egregious and warrants a bar.[40] We find that a bar is sufficiently remedial and will serve the important purpose of protecting future public investors. Additionally, the bar underscores for the securities industry the implications to both registered representatives and their customers of failing to obtain the necessary written authorization and approval to exercise discretionary authority over, and of excessively trading in, a customer's account.

B. Disgorgement of $4,400 in Commissions Is an Appropriate Sanction for Zaragoza's Outside Business Violation

The Guidelines for failing to provide written disclosure of outside business activities in violation of Rule 3030 suggest a fine in the range of $5,000 to $50,000 and a suspension of 10 business days to three months in cases involving $100,000.[41] The Hearing Panel determined that, although the violation would warrant sanctions on the low end of the Guidelines, it would impose no sanction in light of the bar for Zaragoza's other violations. In making its decision, the Hearing Panel considered that Zaragoza's misconduct was limited, involving the sale of two annuities to one Firm customer,[42] and that the customer was not harmed.[43]

We conclude that requiring Zaragoza to disgorge $4,400 in commissions, paid as a fine to FINRA, would be an appropriate sanction for his sales of two Jackson National Life annuities to HH.[44] Like the Hearing Panel, however, we have decided not to impose a sanction for this violation because of the bar imposed for the other violations.

---

40 The bar is outside of the recommendations for egregious cases under the Guidelines for the exercise of discretion without written authority. For the reasons discussed above, including the fact that this violation was considered on an aggregated basis with other violations, we find that a sanction above that suggested by the Guidelines is required.

41 *Guidelines*, at 14.

42 The violation-specific principal considerations ask us to consider whether the outside activity involved customers of the firm and, if so, the number of customers. *Id*.

43 The violation-specific principal considerations state that we should consider whether the outside activity resulted in any customer harm. *Id*.

44 We note that this sanction is consistent with the applicable Guidelines for failing to comply with outside business activities rule requirements and the general recommendation in the Guidelines to order the disgorgement of a respondent's financial benefit from his misconduct. *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

VI. Conclusion

We affirm the Hearing Panel's findings that Zaragoza: (1) traded excessively in DV's account, in violation of Rules 2310 and 2110; (2) exercised discretion in DV's account without written authority, in violation of Rules 2510 and 2110; (3) failed to submit email correspondence for review and approval, in violation of Rule 2110; and (4) failed to provide written disclosure of outside business activities, in violation of Rules 3030 and 2110. We bar Zaragoza from association with any member firm in any capacity for excessive trading, exercising discretion without written authority, and failing to submit email correspondence to his Firm for review and approval. We find that disgorgement of $4,400 in commissions earned on the annuities that Zaragoza sold to HH (paid as a fine to FINRA) would be an appropriate sanction for the outside business activity violation, but we decline to impose it given that Zaragoza is barred for the other violations.[45] In addition, Zaragoza is ordered to pay costs in the amount of $4,748.96, which consists of $3,327.52 in costs from the proceedings below, $1,000 in appeal costs, and $421.44 in appeal transcript costs. The bar imposed in this decision is effective immediately upon issuance of the decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[45] We also have considered and reject without discussion all other arguments advanced by the parties.