

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Nolan Wayne Moore
Beaumont, CA,

Respondent.

DECISION

Complaint No. 2008015105601

Dated: July 26, 2012

Respondent engaged in outside business activities without providing his firm with written notice; failed to appear for on-the-record testimony; and failed to respond timely to requests for information and documents. Held, findings affirmed, sanctions imposed as specified.

Appearances

For the Complainant: Jeffrey Bloom, Esq., Leo Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Jeffrey Kelvin, Esq.

Decision

Nolan Wayne Moore appeals a Hearing Officer's default decision issued on May 3, 2011. The Hearing Officer found that Moore violated FINRA's rules because he engaged in outside business activities without providing his firm with written notice of the activities; failed to appear for on-the-record testimony; and failed to respond timely to requests for information and documents. The Hearing Officer barred Moore for failing to appear for on-the-record testimony and, in light of the bar, declined to impose additional sanctions for the other causes of action. After an independent review of the record, we find that the Hearing Officer's entry of default against Moore was in accordance with FINRA's rules; the Hearing Officer's denial of Moore's motion to set aside the default decision was proper; and Moore violated FINRA's rules as alleged in the complaint. We therefore affirm the Hearing Officer's findings of liability. With regard to sanctions, we affirm the bar that the Hearing Officer assessed for Moore's failure to appear for on-the-record testimony and impose sanctions for the other causes of actions, where the Hearing Officer declined to do so.

I. Factual Background

A. Moore

Moore entered the securities industry in May 1999, when he registered with NYLife Securities LLC as an investment company and variable contracts products-limited representative. He remained associated with NYLife until February 2009, when the firm terminated him for the conduct at issue in this case. After NYLife terminated Moore, he registered with MML Investors Services, Inc. Moore left that firm in October 2009, and he has not since associated with another FINRA firm.

B. Outside Business Activities

Between March 2006 and February 2009, while registered with NYLife, Moore provided financial and administrative services to three NYLife customers and sold an equity-indexed annuity to a fourth NYLife customer. Moore received approximately \$48,000 in compensation for the activities; the activities were outside of the scope of Moore's employment with NYLife; and Moore did not provide NYLife with written notice of the activities.

1. Moore Provided Financial and Administrative Services to LB

LB was an NYLife customer and had been Moore's customer since 2001. From March 2006 to August 2008, Moore provided financial and administrative services to LB. In a written statement to NYLife and FINRA staff concerning his relationship with LB, Moore asserted that he and LB had a verbal agreement for Moore to organize LB's financial documents and records, review her bank account statements, manage her creditors, and assist her in the establishment of a new bank account. LB compensated Moore for the financial and administrative services with monthly automatic withdraws from her bank account. Moore received \$14,750 from LB during the relevant period.¹

2. Moore Provided Financial and Administrative Services to RF and RF

RF and RF, a married couple, became customers of NYLife and Moore in 2003. Between March 2006 and February 2009, the RFs paid Moore a monthly fee of \$250. The RFs stated in a customer complaint filed against Moore that the fee constituted Moore's compensation for various financial planning services, in addition to payment for helping them form a corporation to purchase and sell properties. Moore asserted in a statement to FINRA staff that he and the RFs had a verbal agreement for Moore to organize their personal records and to provide general assistance and information to help the RFs increase sales in their life insurance business. During the relevant period, the RFs paid Moore \$9,000.

¹ Moore directed the payments he received from LB to a corporation he formed to pay his personal office expenses.

3. Moore Sold an Equity-Indexed Annuity to MM

In November 2008, Moore sold NYLife customer, MM, an equity-indexed annuity issued by American Equity Investment Life Insurance Company.² MM purchased the equity-indexed annuity for \$228,000. Moore earned commissions totaling \$23,940 from the sale.

C. Failure to Appear for Testimony

FINRA's Department of Member Regulation initiated an investigation of Moore's activities involving MM, after MM submitted a customer complaint to FINRA in July 2009. MM's complaint asserted that Moore purchased the equity-indexed annuity without her authorization and converted \$90,000 from her checking account. As part of the investigation, Member Regulation sent Moore four requests to appear for on-the-record testimony. Moore never appeared to provide the testimony.

Member Regulation issued the first request on January 26, 2010. Member Regulation sent the request via certified and first-class mail to Moore's address of record as listed in the Central Registration Depository ("CRD"®), in addition to a residential address and a business address that Moore provided to Member Regulation staff during the course of the investigation. Although Member Regulation asked Moore to appear and provide testimony on February 23, he did not appear. Instead, on February 19, Moore contacted Member Regulation via email to inform the staff of his intended absence.

In response to Moore's email, Member Regulation issued a second request for on-the-record testimony on February 22, 2010. Member Regulation sent the request via certified and first-class mail to Moore's CRD address and residential address. The staff also sent Moore a copy of the request via email. Member Regulation's request offered Moore three alternate dates in March to appear to provide testimony and asked Moore to select one of the dates. Moore did not respond to the request.³

On March 1, 2010, Member Regulation issued a third request for on-the-record testimony. The staff sent the request to Moore via email and certified and first-class mail at his CRD address and residential address. The request highlighted Moore's failure to respond to Member Regulation's request of February 22, and set March 23 as the date for Moore's on-the-record testimony. On March 22, the day before Moore was scheduled to testify, he contacted Member Regulation via email to inform the staff that he would not appear to provide testimony. Moore's email also noted that he would contact Member Regulation to reschedule his appearance. Moore did not appear on March 23, and he did not contact FINRA staff to reschedule the date for his on-the-record testimony.

² In April 2002, Moore obtained permission from NYLife to sell non-NYLife insurance products. In February 2006, however, NYLife banned its registered persons from selling any equity-indexed annuity.

³ The Postal Service returned the certified mailings as unclaimed, but did not return the first-class mailings.

When Moore failed to contact FINRA staff, Member Regulation issued the fourth, and final, request for Moore to appear for on-the-record testimony. Member Regulation issued the request on April 1, 2010. As with the three prior requests, Member Regulation sent the request to Moore via certified and first-class mail at his CRD address and residential address. Member Regulation also sent Moore a copy of the request via email to the address Moore had used to contact FINRA staff on March 22. The request summarized the staff's efforts to schedule the on-the-record testimony, dating back to January 26, and set April 19 as the date to obtain Moore's testimony. The request admonished Moore that a failure to appear for on-the-record testimony, "in and of itself, may be grounds for a disciplinary action, including a fine, suspension and/or bar from association with a member firm." Moore failed to appear for the on-the-record testimony on April 19.⁴

D. Failure to Respond Timely to Requests for Information and Documents

In early 2010, FINRA's Department of Enforcement initiated an investigation of Moore's outside business activities involving the RFs. As part of the investigation, Enforcement issued requests for information and documents on January 7, and February 4, 2010. Enforcement sent the requests via certified mail to Moore's CRD address and residential address. Although the two requests demanded Moore's response on January 28, and February 26, respectively, he did not respond.⁵

On April 27, 2010, Enforcement sent Moore a letter, notifying him that he would be suspended in all capacities on May 21, pursuant to FINRA Rule 9552, unless he responded to the requests for information and documents that Enforcement had issued in January and February.⁶ Enforcement sent the letter via Federal Express and first-class mail to Moore's CRD address and residential address. Moore did not respond to Enforcement's letter or the requests for information and documents.⁷

⁴ The Postal Service returned both certified mailings and the first-class mailing sent to Moore's CRD address. The other first-class mailing, which Enforcement sent to Moore's residential address, was not returned.

⁵ The Postal Service returned both mailings from February 4 and the mailing to Moore's residential address from January 7. Enforcement tracked the mailing from January 7, which had been sent to Moore's CRD address, and confirmed that the Postal Service left notice of the mailing at the correct address.

⁶ The FINRA Rule 9550 Series provides a procedural mechanism for FINRA to initiate expedited proceedings on an expedited basis. *See FINRA Regulatory Notice 10-13*, 2010 FINRA LEXIS 15, at *1 (Feb. 2010).

⁷ Federal Express tracking shows that the letter sent to Moore's CRD address was refused and returned, and the letter sent to his residential address was delivered. The first-class mailings to Moore's CRD address and residential address were not returned.

On May 21, 2010, Enforcement sent Moore another letter, informing him of his suspension. The letter explained that Moore could seek termination of the suspension on grounds of full compliance with Enforcement's requests. The letter, however, admonished Moore that his failure to request termination of the suspension within three months would result in the imposition of an automatic bar on July 30.

On July 15, 2010, Moore responded by letter to Enforcement staff and requested termination of the suspension on grounds of full compliance with the requests for information and documents.⁸ Moore's request for termination of the suspension included responses to the requests that Enforcement had issued in January and February. FINRA accordingly terminated the suspension.

II. Procedural Background

A. Complaint

On December 1, 2010, Enforcement filed a three-cause complaint against Moore. The complaint alleged that Moore: (1) engaged in outside business activities without providing his firm with written notice, in violation of NASD Rules 3030 and 2110, and FINRA Rule 2010; (2) failed to provide on-the-record testimony, in violation of FINRA Rules 8210 and 2010; and (3) failed to respond timely to FINRA's requests for information and documents, in violation of FINRA Rules 8210 and 2010.

Enforcement sent Moore a copy of the complaint and first notice of complaint via certified mail at his CRD address and residential address. The first notice of complaint informed Moore that his deadline to file an answer to the complaint was December 29. Moore did not respond to the first notice of complaint. On January 3, 2011, after the deadline for Moore to file an answer passed, Enforcement sent Moore a copy of the complaint with a second notice of complaint. Enforcement served Moore with the complaint and second notice of complaint via certified mail at his CRD address and residential address. The second notice of complaint required Moore to file an answer by January 20. Moore did not file an answer or otherwise respond to the second notice of complaint.⁹

B. Entry of the Default Decision

On March 2, 2011, after Moore failed to respond to the second notice of complaint, Enforcement filed a motion for default with the Hearing Officer. Enforcement's motion was supported by the declaration of counsel for Enforcement, in addition to four exhibits. These exhibits consisted of: (1) a copy of the Uniform Termination Notice for Securities Industry Registration ("Form U5") that NYLife filed upon firing Moore; (2) a CRD printout for Moore that provided his address of record; (3) copies of the returned certified mail envelopes for the complaint and first notice of complaint; and (4) copies of the returned certified mail envelopes

⁸ Moore sent the letter from his residential address.

⁹ The Postal Service returned all mailings of the complaint and first and second notices of complaint to FINRA.

for the complaint and second notice. Enforcement sent Moore a copy of the motion for default, counsel's declaration, and a list of the exhibits. Enforcement sent the motion for default and accompanying documents to Moore's CRD address and residential address via certified mail.

Moore filed no response to the motion for default, and the Hearing Officer issued a default decision on May 3, 2011. The Hearing Officer found that Moore defaulted by failing to answer the complaint, deemed the allegations of the complaint admitted by virtue of Moore's default, and concluded that Moore violated FINRA's rules as alleged in the complaint. Although the Hearing Officer found Moore liable under each of the three causes of action detailed in the complaint, the Hearing Officer assessed sanctions – a bar – only for Moore's failure to appear for on-the-record testimony.¹⁰

C. Motion to Set Aside the Default Decision

On May 25, 2011, Moore filed a notice of appeal with the Office of General Counsel to pursue an appeal before the NAC. On June 29, 2011, Moore filed a motion to set aside the default decision with the Office of Hearing Officers, in accordance with FINRA Rule 9269.¹¹ In his motion, Moore argued that Enforcement failed to effect valid service upon him, and that he did not respond to the complaint because he did not receive it.

Enforcement filed its opposition to Moore's motion on July 11, 2011. The Hearing Officer issued an order denying the motion on August 15, 2011. The Hearing Officer's order noted that Moore did not notify CRD of his change in address; that a significant amount of time elapsed before Moore filed the motion to set aside the default decision and the default decision become final in the interim; and that Moore failed to demonstrate good cause for failing to participate in the proceedings before the Hearing Officer.

After the Hearing Officer denied the motion, Moore reinitiated his appeal before the NAC, requesting the NAC's review of the Hearing Officer's entry of a default decision and denial of the motion to set aside his default.

III. Discussion

As we review the merits of this appeal, we begin with an analysis of the Hearing Officer's entry of default against Moore.¹² We then examine the Hearing Officer's denial of

¹⁰ The Hearing Officer noted that a \$75,000 fine and one-year suspension in all capacities were appropriate sanctions for Moore's outside business activities. The Hearing Officer offered no recommendation with regard to the assessment of sanctions for Moore's failure to respond timely to the requests for information and documents.

¹¹ Moore's filing of the motion to set aside the default decision stayed his appeal before the NAC.

¹² We discuss the rules in effect when the conduct occurred and base our review of this case on the written record developed in the proceedings below and the briefs the parties submitted during the appeal.

Moore's motion to set aside the default decision and consider whether Moore demonstrated good cause for his failure to participate in the proceedings below. And finally, we review the substance of the allegations set forth in Enforcement's complaint.

After a careful review of the record, we conclude that the Hearing Officer's entry of default against Moore was in accordance with FINRA's rules; the Hearing Officer's denial of Moore's motion to set aside the default decision was proper; Moore failed to demonstrate good cause for failing to participate in the proceedings before the Hearing Officer; and Moore violated FINRA's rules as alleged in the complaint.

A. The Hearing Officer Properly Entered a Default Decision Against Moore

FINRA Rule 9269(a) authorizes the Hearing Officer to issue a default decision against a respondent when the respondent fails to file an answer to the complaint. The record in this case establishes that Moore did not file an answer to the complaint, and that the Hearing Officer properly entered a default decision against him. *See Dep't of Enforcement v. Merhi*, Complaint No. E072004044201, 2007 NASD Discp. LEXIS 9, at *13 (NASD NAC Feb. 16, 2007).

B. The Hearing Officer Properly Denied Moore's Motion to Set Aside the Default Decision

We similarly find that the Hearing Officer properly exercised discretion and denied Moore's motion to set aside the default decision. When a Hearing Officer issues a default decision, the respondent may file a motion, pursuant to FINRA Rule 9269(c), to set aside the default decision and request that the Hearing Officer reopen the case and hold a full evidentiary hearing on the merits.¹³ *See NASD Notice to Members 99-77*, 1999 NASD LEXIS 49, at *3-4 (Sept. 1999). To succeed on a motion to set aside a default, the respondent must demonstrate good cause for failing to participate in the proceedings before the Hearing Officer. *See* FINRA Rule 9269(c); *NASD Notice to Members 99-77*, 1999 NASD LEXIS 49, at *3.

FINRA has provided guidance to assist adjudicators in determining whether a respondent has established good cause. *See Paz Secs., Inc.*, Exchange Act Rel. No. 52693, 2005 SEC LEXIS 2802, at *16 n.15 (Oct. 28, 2005); *NASD Notice to Members 99-77*, 1999 NASD LEXIS 49, at *4. Adjudicators are advised to consider: (1) whether the respondent notified CRD of any change of address; (2) the period of time between the issuance of the default decision and the respondent's appeal or motion to set aside;¹⁴ and (3) the reason for the respondent's failure to participate in the proceedings before the Hearing Officer. *See NASD Notice to Members 99-77*, 1999 NASD LEXIS 49, at *4.

¹³ The Hearing Officer that entered the original default decision is tasked with deciding the motion to set aside a default. *See* FINRA Rule 9269(c).

¹⁴ The Hearing Officer stated that Moore filed the motion to set aside on June 29, 2011, nearly nine weeks after issuance of the default decision. While this is factually accurate, the record in this case also establishes that Moore timely filed his notice of appeal on May 25, 2011, 22 days after the Hearing Officer issued the default decision.

We find that Moore did not establish the requisite good cause for failing to participate in the proceedings before the Hearing Officer, and that the Hearing Officer's denial of Moore's motion to set aside the default decision was proper. *See generally Dep't of Enforcement v. Bond*, Complaint No. C10000210, 2002 NASD Discip. LEXIS 6, at *9-10 (NASD NAC Apr. 4, 2002) (applying factors and finding that respondent failed to demonstrate good cause to set aside default decision).

Moore asserts that he had good cause for not participating in the proceedings below because he moved without providing FINRA with a forwarding address, and consequently, did not receive the complaint or first or second notices of the complaint. Under the circumstances of this case, Moore's purported failure to receive the complaint does not establish good cause nor offer any basis to set aside the default decision issued against him. *See Merhi*, 2007 NASD Discip. LEXIS 9, at *2-3, 14 (finding that respondent who failed to answer complaint, after having constructive notice of complaint, did not demonstrate good cause).

We note, as an initial matter, that if Moore did not receive the complaint and other pleadings and documents in this case, as he claims, it is because he failed to update his address of record in CRD. Article V, Section 2 of FINRA's By-Laws requires all registered representatives to keep current all applications for registration. It was therefore incumbent upon Moore to keep FINRA apprised of his current address.¹⁵ *See Warren B. Minton*, 55 SEC 1170, 1177 (2002) (stating that registered person has continuing duty to notify FINRA of his or her current address and to receive and read mail sent to that address); *NASD Notice to Members 97-31*, 1997 NASD LEXIS 35, at *2 (May 1997) (explaining that registered representatives have continuing duty to maintain current address in FINRA's records). Moore's failure to receive the documents in this case was a direct consequence of his failure to update his address in CRD and does not remedy his failure to participate in the proceedings below. *See id.* at *3 (stating that disciplinary complaints are mailed to registered representative's last known address as reflected in CRD and are deemed to have been received there, regardless of whether the individual actually receives them).

We also find that Enforcement properly served Moore with all correspondence in this matter, by sending the correspondence via U.S. Postal Service mail to Moore's address of record as listed in CRD. *See* FINRA Rule 9134(a)(2), (b)(1) (allowing for service by mail at individual's address listed in CRD); *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1998) (finding complaint properly served upon respondent at CRD address was sufficient notice of the action despite respondent's claims of never actually receiving complaint).

Finally, we note that FINRA sent the complaint and first and second notices of complaint not only to Moore's CRD address, but also to an address that Moore identified as his residence in correspondence with FINRA staff in August 2009. This residential address also is the same address from which Moore directed correspondence to FINRA staff in July 2010, requesting termination of the suspension for his failure to respond to FINRA's requests for information and documents.

¹⁵ Moore still has not updated his address in CRD.

Based on the foregoing, we conclude that Enforcement properly served Moore with the complaint and first and second notices of complaint, Moore had constructive notice of the complaint, and Moore has not demonstrated good cause for his failure to participate in the proceedings before the Hearing Officer.¹⁶ *See Dep't of Enforcement v. Verdiner*, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 n.1, 6 (NASD NAC Dec. 9, 2003) (finding respondent received constructive notice when complaint was mailed to CRD address). We therefore affirm the Hearing Officer's entry of a default decision against Moore and denial of Moore's motion to set aside the default decision.

C. Moore Violated FINRA's Rules as Alleged in the Complaint

Having found that Moore defaulted by failing to answer Enforcement's complaint, the Hearing Officer deemed the allegations against Moore admitted and incorporated the allegations of the complaint into the default decision as findings of fact. *See* FINRA Rule 9269(a)(2). After a review of the evidence, we affirm the Hearing Officer's findings that Moore engaged in outside business activities without providing his firm with written notice; failed to appear for on-the-record testimony; and failed to respond timely to requests for information and documents.¹⁷

¹⁶ Moore requested oral argument in this matter, but our finding that Moore failed to demonstrate good cause explains why we have considered this appeal based on the record and briefs, without oral argument. Pursuant to FINRA Rule 9344(a), the NAC will consider an appeal of a default decision based on the written record without the opportunity for oral argument, unless the respondent demonstrates good cause for his failure to participate in the proceedings below. *See Dep't of Enforcement v. Salaverria*, Complaint No. C07040077, 2005 NASD Discip. LEXIS 10, at *10 (NASD NAC Dec. 12, 2005).

¹⁷ Moore argues that the issuance of a default decision, and Enforcement's failure to provide him with copies of the documents in their investigative files, denied him due process and resulted in an unfair disciplinary proceeding. We disagree and find that the issuance of a default decision under the circumstances presented in this case was proper and in accordance with FINRA's rules. Moore had many opportunities to participate in the proceedings before the Hearing Officer, but failed to avail himself of FINRA's disciplinary process. Moreover, with regard to Enforcement's investigative files, the NAC subcommittee empanelled to consider this appeal ordered Enforcement to provide Moore with a copy of the index to their investigative files, not copies of the documents themselves. *See* FINRA Rule 9251(a) (stating that Enforcement shall make documents available for inspection and copying). Enforcement complied with the subcommittee's order and provided Moore with an index to the investigative files in October 2011. Finally, we find that the Hearing Officer provided for procedures in this case, as is required under Section 15A of the Securities Exchange Act of 1934. To the extent that constitutional due process would require more, such requirements do not apply to FINRA's disciplinary proceedings. *See Richard A. Neaton*, Exchange Act Rel. No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011).

1. Moore Engaged in Outside Business Activities Without Providing NYLife with Written Notice of the Activities

NASD Rule 3030 governs outside business activities and prohibits an associated person from engaging in outside business activities, unless the associated person has provided prompt written notice of the activities to the firm.¹⁸ The record in this case establishes that, from March 2006 to February 2009, Moore engaged in outside business activities, and he did so without providing NYLife with the required written notice.

Moore admits in statements to NYLife and FINRA staff that he provided financial and administrative services to LB, RF, and RF, sold an equity-indexed annuity to MM, and received compensation for the services and sale. On appeal, however, Moore asserts that he provided NYLife with written notice of the activities. The documentary evidence in the record belies this point and supports the conclusion that Moore did not disclose his outside business activities in writing to NYLife.

First, we note that NYLife fired Moore for failing to disclose the outside business activities involving LB. We also highlight the fact that NYLife's responses to FINRA's requests for information and documents concerning Moore's outside business activities state that Moore did not provide any notice, written or otherwise, of the financial and administrative services rendered to LB or the sale of the equity-indexed annuity to MM. Finally, we consider the outside business activities disclosures, which Moore submitted to NYLife during the relevant period, and note that the forms did not disclose any of the outside business activities at issue in this case.

We therefore conclude that Moore engaged in outside business activities without the required written notice, and in so doing, violated NASD Rules 3030 and 2110, and FINRA Rule 2010.¹⁹ *See Micah C. Douglas*, 52 S.E.C. 1055, 1059 (1996) (finding that respondent's failure to notify his member firm of outside business activities constituted a violation of FINRA's rules).

¹⁸ NASD Rule 3030 provides:

No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member.

¹⁹ Moore's violation of NASD Rule 3030 constitutes conduct inconsistent with just and equitable principles of trade and violates NASD Rule 2110 and FINRA Rule 2010. *See generally Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *19 n.28 (July 1, 2008). NASD Rule 2110 states, "[A] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Associated persons are subject to the duties and obligations of NASD Rule 2110 pursuant to NASD Rule 0115. NASD Rule 2110 was transferred without change to FINRA's consolidated rulebook and codified as FINRA Rule 2010, which became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *32-33 (Oct. 2008). FINRA Rule 0140 subjects associated persons to the obligations of FINRA Rule 2010. Moore's outside

2. Moore Failed to Appear for Testimony

FINRA Rule 8210 requires that associated persons provide information orally or in writing with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding. The record in this case establishes that Member Regulation properly served Moore with four requests to appear to provide testimony concerning his sale of an equity-indexed annuity to MM, and Moore received the requests.²⁰ Moore, however, did not appear to provide the testimony. Moore's failure to appear for on-the-record testimony violates FINRA Rules 8210 and 2010.²¹ See *Reichman*, 2011 FINRA Discip. LEXIS 18, at *28-29.

3. Moore Failed to Respond Timely to FINRA's Requests for Information and Documents

Moore also failed to respond timely to FINRA's requests for information and documents, and in so doing, violated FINRA Rules 8210 and 2010. See *Brian L. Gibbons*, 52 S.E.C. 791, 794 (1996) (failure to provide information fully and promptly undermines FINRA's ability to carry out its regulatory mandate), *aff'd*, 112 F.3d 516 (9th Cir. 1997).

On January 7, and February 4, 2010, Enforcement served Moore with requests for information and documents concerning the financial and administrative services that he provided to the RFs. The requests required Moore's response on January 28, and February 26, respectively. Moore, however, delayed his response to FINRA. Moore did not respond to the requests for information and documents until July 2010, six months after a response was originally due and three months after Enforcement initiated expedited proceedings against Moore, suspended him, and informed him that he may be barred if he continued to ignore the requests.

On appeal, Moore acknowledges that he did not respond timely to the requests for information and documents, but argues that his response was untimely because he moved, did not apprise FINRA of a new address, and consequently, did not receive the requests. Even if true, Moore's assertions are insufficient to absolve him of his compliance obligations under

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business activities occurred between March 2006 and February 2009. The outside business activities that took place between March 2006 and December 14, 2008, violated NASD Rules 3030 and 2110. The activities that took place from December 15, 2008, to February 2009, violated NASD Rule 3030 and FINRA Rule 2010.

²⁰ Member Regulation sent the four requests on January 26, February 22, March 1, and April 1, 2010. The record reflects Moore's actual receipt of the January 26, and March 1, requests. In response to each of those requests, Moore contacted Member Regulation via email to inform the staff that he did not intend to appear to provide testimony on the scheduled date.

²¹ Moore's failure to appear pursuant to FINRA Rule 8210 violates FINRA Rule 2010. See *Dep't of Enforcement v. Reichman*, Complaint No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *28-29 (FINRA NAC July 21, 2011).

FINRA Rule 8210.²² The record in this case demonstrates that Enforcement properly sent the requests for information and documents pursuant to the service provisions of FINRA Rule 8210(d), and Moore had constructive notice of the requests.²³ *See, e.g., Dep't of Enforcement v. Hoeper*, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37, at *5 (NASD NAC Nov. 2, 2001) (service of request for information and documents is sufficient when made pursuant to FINRA Rule 8210(d)); *Dep't of Enforcement v. Steinhart*, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *7-8 (NASD NAC Aug. 11, 2003) (actual notice of request for information and documents is not required).

Because Enforcement properly served Moore with the requests for information and documents, Moore received adequate notice of the requests, and Moore failed to respond timely to the requests, we conclude that Moore violated FINRA Rules 8210 and 2010.²⁴ *See CMG Institutional Trading*, 2009 SEC LEXIS 215, at *29-30.

IV. Sanctions

The Hearing Officer barred Moore for failing to appear for on-the-record testimony. In light of the bar, the Hearing Officer declined to impose additional sanctions for Moore's outside business activities and failure to respond timely to FINRA's request for information and documents. After a careful review of the evidence in the record, we affirm the bar that the Hearing Officer assessed for Moore's failure to appear for on-the-record testimony and impose sanctions for the other causes of actions, where the Hearing Officer declined to do so.

A. Failure to Appear for Testimony

The record in this case establishes that FINRA issued four requests for Moore to appear to provide on-the-record testimony concerning his sale of an equity-indexed annuity to MM. The record also demonstrates that Moore received actual notice of FINRA's requests, but he never appeared to testify. In such instances, where the individual did not respond in any manner to FINRA's requests, FINRA's Sanctions Guidelines state that "a bar should be standard."²⁵

²² Enforcement sent each of the requests for information and documents to Moore's residential address, in addition to his address of record in CRD. When Moore responded to the requests in July 2010, he noted that the residential address was his current address and informed the staff that they could contact him there if they had additional questions.

²³ FINRA Rule 8210(d) states that, "[A] notice under this [r]ule *shall be deemed received* by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in [CRD]." (Emphasis added.)

²⁴ A failure to respond timely to FINRA's requests for information and documents constitutes a violation of FINRA Rule 2010. *See CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *29-30 n.36 (Jan. 30, 2009).

²⁵ *See FINRA Sanction Guidelines* 33 (2011) (Failure to Respond to Requests Made Pursuant to FINRA Rule 8210), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

Where mitigation exists, however, the Guidelines recommend a suspension in any or all capacities for up to two years and a fine of \$25,000 to \$50,000.²⁶ In assessing sanctions for violations of FINRA Rule 8210, the Guidelines advise adjudicators to consider the importance of the information requested as viewed from FINRA's perspective.²⁷

Our analysis of the evidence in this case leads us to conclude that the record contains no evidence of mitigation that warrants sanctions less than a bar. *See generally Paz Secs., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008) (“To ensure the continued strength of the self-regulatory system, members and their associated persons who fail to respond in any manner to [FINRA] Rule 8210 requests should be barred (or expelled) unless there are mitigating factors sufficient to rebut the presumption that such violators present too great a risk to the markets and investors to be permitted to remain in the securities industry.”).

We find that the information at issue in this case was important. Member Regulation's investigation of the sale of the equity-indexed annuity to MM not only sought information related to Moore's outside business activities and his sale of an unapproved product to an NYLife customer, but also concerned MM's allegations that Moore purchased the equity-indexed annuity without her authorization and converted \$90,000 from her checking account. Moore's failure to appear for on-the-record testimony in this instance frustrated FINRA's investigation of MM's allegations and impeded FINRA's ability to determine whether Moore engaged in additional violative conduct. *See Dep't of Enforcement v. Valentino*, Complaint No. FPI010004, 2003 NASD Discip. LEXIS 15, at *14 (NASD NAC May 21, 2003) (explaining that respondent's disregard FINRA staff's repeated attempts to arrange on-the-record testimony directly undermined FINRA's regulatory responsibilities and its efforts to investigate possible fraudulent activity), *aff'd*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004).

We also consider the fact that Moore had actual notice of FINRA's requests to appear, but he intentionally refused to comply with the requests.²⁸ Member Regulation gave Moore several opportunities to provide testimony, even permitting him to select among several dates to appear. Despite Member Regulation's efforts, Moore never appeared to testify.

As we review the evidence in the record, particularly the fact that Moore's repeated refusals to provide testimony thwarted Member Regulation's efforts to perform its regulatory responsibilities and investigate serious allegations of wrongdoing by Moore, we conclude that there is no evidence of mitigation and the standard sanction should apply. We accordingly bar Moore for failing to appear for on-the-record testimony.

²⁶ *Id.*

²⁷ *Id.* These factors are considered in addition to the Principal Considerations in Determining Sanctions that adjudicators rely on in every disciplinary case. *Id.* at 6-7.

²⁸ *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 13) (considering whether misconduct is intentional).

B. Outside Business Activities

For violations of NASD Rule 3030, the Guidelines recommend a fine of \$2,500 to \$50,000.²⁹ The Guidelines also recommend a suspension of up to 30 business days when the outside business activities do not include aggravating conduct.³⁰ Where there is aggravating conduct, the Guidelines suggest a suspension of up to one year, and in egregious cases, a longer suspension, or a bar.³¹

When formulating sanctions in cases involving undisclosed outside business activities, the Guidelines advise adjudicators to consider: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury; (3) the duration of the outside activity, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service; and (5) whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm.³² As discussed below, this case presents aggravating facts as to each of these factors.

We note that LB, the RFs, and MM, the recipients of Moore's services, were customers of Moore's employer, NYLife, when he engaged in the outside business activities, and we find that Moore's outside business activities could have created the impression that NYLife had approved the activities. Indeed, among other services, Moore provided LB and the RFs with financial services and sold MM an investment product.

Moore's outside business activities also caused injury to the customers, as evidenced by the fact that each customer filed complaints against Moore. LB and MM stated that they were unaware that Moore had access to their personal bank accounts and that Moore had removed funds from their accounts without authorization. The RFs complained that they paid Moore, but never received the services. The outside business activities at issue in this case are particularly troubling because they represent the types of arrangement that are ripe for customer abuse and injury.

NASD Rule 3030 ensures that firms "receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law." *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Rel. No. 26063, 1988 SEC LEXIS 1841, at *3

²⁹ *Id.* at 13 (NASD Rule 3030 is codified as FINRA Rule 3270 in FINRA's consolidated rulebook).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

(Sept. 6, 1988). Moore's misconduct prevented NYLife from prohibiting Moore's activities altogether. *Cf. Douglas*, 52 S.E.C. at 1060 (finding that applicant's failure to inform his employer firm of his outside business activities "deprived potential customers of the oversight and supervision provided by [applicant's] employer firm").

As we consider the activities that are at issue here, we are particularly troubled by Moore's sale of the equity-indexed annuity to MM. Moore sold the equity-indexed annuity to MM in direct contravention of NYLife's complete ban on all equity-indexed annuity sales, and did so while gaining substantial commissions for himself. We find these facts to be highly aggravating.

The lengthy period of time over which the conduct occurred, three years, the amount that Moore earned from engaging in the undisclosed activities, \$48,000, and the fact that Moore failed to disclose the activities on NYLife's outside business activities disclosures lead us to conclude that Moore's conduct is egregious. In light of the importance of protecting the investing public from further harm, we conclude that only a bar suffices to deter Moore and other associated persons from engaging in the type of misconduct presented here. *See McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *Steadman v. SEC*, 603 F.2d 1126, 1142 (5th Cir. 1979) ("The Commission . . . may consider the likely deterrent effect its sanctions will have on others in the industry"). We accordingly bar Moore for engaging in undisclosed outside business activities.

C. Failure to Respond Timely to FINRA's Requests for Information and Documents

For a failure to respond timely to FINRA's requests for information and documents, the Guidelines recommend suspending the individual in any and all capacities for up to two years and assessing a fine of \$2,500 to \$25,000.³³ When formulating sanctions, the Guidelines instruct adjudicators to consider: (1) the importance of the information requested as viewed from FINRA's perspective; (2) the number of requests made and the degree of regulatory pressure required to obtain a response; and (3) the length of time to respond.³⁴

We find that the requests at issue in this case were important and sought information and documents related to the purported agreement for financial and administrative services between Moore and the RFs. Not only did the requests seek information about Moore's undisclosed outside business activities involving the RFs, but also whether Moore had taken the RFs' money without rendering the services, as the RFs claimed. We also consider the fact that Moore responded to the requests for information and documents six months after Enforcement issued the initial request, and that he did so only after Enforcement initiated expedited proceedings.

Finally, we find it problematic that Moore's response to FINRA's requests for information and documents identified his residential address as his address of record, but Moore

³³ *Id.* at 33.

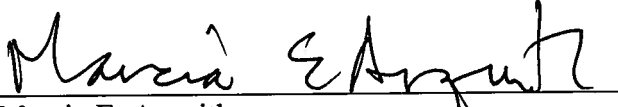
³⁴ *Id.*

continues to neglect his obligation to update his records in CRD to reflect this change.³⁵ After a careful assessment of the evidence in the record, we conclude that Moore's conduct calls for an 18-month suspension and \$15,000 fine.

V. Conclusion

Moore engaged in outside business activities without providing his firm with written notice of the activities, in violation of NASD Rules 3030 and 2110 and FINRA Rule 2010; failed to appear for on-the-record testimony, in violation of FINRA Rules 8210 and 2010; and failed to respond timely to FINRA's requests for information and documents, in violation of FINRA Rules 8210 and 2010. We bar Moore for failing to appear for on-the-record testimony, bar him for engaging in undisclosed outside business activities, and fine him \$15,000 and suspend him all capacities for 18 months for failing to respond timely to the requests for information and documents. We have considered, and reject without discussion, all other arguments of the parties.

On behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

³⁵ The residential address that Moore identified as his "current residence" in correspondence with FINRA staff in August 2009, and directed correspondence to FINRA staff in July 2010, is also one of the two addresses that FINRA staff directed the January 7, and February 4, 2010, requests for information and documents at issue in this case.