FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MATTHEW DAVID RUBIN (CRD No. 4869755), Respondent.	Disciplinary Proceeding No. 2012033832501 Hearing Officer — MAD **EXTENDED HEARING PANEL DECISION** December 14, 2016

Respondent Matthew David Rubin violated FINRA Rule 2010 by initiating 12 unfunded automated clearinghouse requests for electronic fund transfers from his personal bank account to his brokerage account to create the false impression that his brokerage account and his securities trading activities were funded by significantly greater amounts. Respondent also willfully violated Section 7(f) of the Exchange Act of 1934 and Regulation X promulgated thereunder, and violated FINRA Rules 4210(f)(7) and 2010, by failing to meet margin calls in his brokerage account.

For the above misconduct, the Extended Hearing Panel bars Respondent from associating with any FINRA member firm in any capacity. Respondent is also ordered to pay the costs of this proceeding.

Appearances

For the Complainant: Michael J. Watling, Esq., Megan Davis, Esq., Lara C. Thyagarajan, Esq., and Andrew Beirne, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Paul W. Ryan, Esq., Silvia L. Serpe, Esq., Bettina Roberts, Esq., and Beth Kressel Itkin, Esq., Serpe Ryan LLP, New York, NY.

DECISION

I. Introduction

A customer who purchases securities may pay for the securities in full or purchase the securities on margin, borrowing part of the purchase price from his securities firm.

The margin is the portion of the purchase price that the customer must deposit in his brokerage account. Customers generally use margin to leverage their investments and increase their purchasing power.

Federal Regulations and FINRA rules govern how securities firms can extend credit for securities transactions. Firms can lend customers a portion of the total purchase price of a stock for new purchases. If the customer does not already have cash or other equity in his account to cover his share of the stock purchase price, the customer will receive a margin call from the firm. As a result of the margin call, the customer will be required to deposit the remaining amount of the stock purchase price into his account.

Respondent Matthew David Rubin, a registered representative with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill"), actively traded securities in his Merrill brokerage account without complying with applicable regulations, rules, and policies governing the use of margin. Rubin devised a method to circumvent his firm's systems and that enabled him to appear to satisfy, and avoid, margin calls without properly funding his securities transactions.

From March 2, 2012, through June 13, 2012 (the "Relevant Period"), Rubin effected nearly 2,000 securities transactions with a total principal value of nearly $88 million. To fund the transactions, he initiated 12 automated clearinghouse ("ACH")[1] requests for electronic funds transfers, in the amount of almost $18 million, from his personal bank account to his Merrill brokerage account even though he knew that he had insufficient funds available to cover the transfers. Rubin was able to use the ACH requests to make it appear as if he had deposited cash into his Merrill brokerage account because he learned that Merrill credited the amounts of the requests to his brokerage account for periods—often more than a week—before his lack of funds ultimately caused the transfers to fail. These extensions of credit artificially inflated the value of Rubin's Merrill brokerage account, enabling him to meet margin calls, avoid the issuance of margin calls, and satisfy his obligations to fund his securities transactions.

During the same period, Rubin mismarked certain short sales in his Merrill brokerage account as "Sales Not Long," which indicated to Merrill that he held those securities outside of his Merrill brokerage account and would deliver the securities to cover the sales. Because he mismarked the sales as "Sales Not Long," Merrill's systems did not include those transactions when calculating his margin limits, which would have occurred if he had correctly entered the transactions as short sales.

Rubin's misconduct went undetected during the Relevant Period because he misled and lied to his supervisors and other Merrill staff. In August 2012, Rubin

[1] The automated clearinghouse system is a nationwide network through which depository institutions send each other batches of electronic credit and debit transfers. https://www.federalreserve.gov/paymentsystems/fedach_about.htm.

voluntarily resigned from Merrill shortly after it began a formal investigation into his trading activity.

Upon reviewing the disclosures in Rubin's Uniform Termination Notice for Securities Industry Registration ("Form U5") filed by Merrill, indicating that Merrill was conducting an internal investigation into Rubin's trading activities, FINRA began an investigation. Following FINRA's investigation, the Department of Enforcement filed a two-count Complaint against Rubin, which it later amended.[2] The Amended Complaint alleges serious violations of FINRA's rules and securities regulations. The first cause of action alleges that Rubin violated FINRA Rule 2010 by initiating 12 unfunded ACH requests for electronic fund transfers from his personal bank account to his Merrill brokerage account, totaling approximately $18 million, to create the false impression that his brokerage account and his securities trading activities were funded by significantly greater amounts. The second cause of action alleges that Rubin willfully violated Section 7(f) of the Exchange Act of 1934 ("Exchange Act"), and Regulation X promulgated thereunder, and violated FINRA Rules 4210(f)(7) and 2010, by failing to meet margin calls in his brokerage account.

Rubin filed an Amended Answer and admitted liability for the two causes of action in the Amended Complaint.[3] At the hearing, Rubin explained that he engaged in this misconduct because he was under emotional distress.[4] The Extended Hearing Panel ("Panel") focused on the appropriate remedial sanction for Rubin. After careful consideration, the Panel determined that Rubin's misconduct warrants a bar from associating with any member firm in any capacity.

II. Findings of Fact

A. Respondent Matthew David Rubin

Rubin first became registered with FINRA in October 2004.[5] In April 2008, after working at another member firm, he registered as a general securities representative through his association with Merrill.[6] At Merrill, Rubin was a successful financial

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[2] Enforcement filed the original Complaint on December 14, 2015, and Rubin filed his Answer on January 11, 2016. On August 30, 2016, Enforcement filed an Amended Compliant, and Rubin filed his Amended Answer the same day.

[3] In his Amended Answer, Rubin disputed certain facts, but he admitted to violating the FINRA rules and the securities regulations charged in the Amended Complaint.

[4] The hearing was held in New York, New York, on September 20-21, 2016.

[5] Amended Complaint ("Am. Compl.") ¶ 3; Amended Answer ("Am. Ans.") ¶ 3.

[6] Am. Compl. ¶ 3; Am. Ans. ¶ 3; Complainant's Exhibit ("CX-") 2, at 3-4.

advisor.[7] He graduated from Merrill's three-year, competitive training program, and was named the "top trainee".[8] He also helped train new Merrill program attendees.[9]

Rubin resigned from Merrill on August 21, 2012.[10] He subsequently became registered as a general securities representative through his association with two other FINRA member firms; however, he has not been registered with FINRA since January 2, 2015.[11]

B. Rubin Actively Traded His Merrill Lynch Account by Initiating Almost $18 Million in Unfunded ACH Requests

During the Relevant Period, Rubin actively traded securities in his Merrill brokerage account, effecting approximately $44 million in total purchases and $44 million in total sales.[12] His goal was to profit from his trading, and he realized approximately $33,000 in trading gains from his securities transactions during the Relevant Period.[13]

The 12 ACH requests for electronic funds transfers, totaling $17.895 million, that Rubin initiated during the Relevant Period from his personal bank account to his Merrill brokerage account contributed to his ability to actively trade in his Merrill account.[14] At the time that he initiated the ACH requests, Rubin knew or should have known that he

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[7] Hearing Transcript ("Tr.") 45, 508. Rubin attributes his success to the support he received at Merrill as well as his own hard work. Tr. 508-09. He was successful in school. He graduated from the University of Virginia with honors, and was named the marketing student of the year. Tr. 41-42, 501-02.

[8] Tr. 508; Joint Exhibit ("JX-") 1, at 82. He also received other awards at Merrill. Tr. 508.

[9] Tr. 509.

[10] CX-2, at 14-15; Tr. 121-22. Rubin's Form U5, filed on August 28, 2012, terminated his association with Merrill and noted that Merrill was conducting an internal review to determine whether he had "violated Firm policy regarding personal brokerage accounts." Am. Compl. ¶ 3; Am. Ans. ¶ 3; CX-2, at 15.

[11] Am. Compl. ¶ 3; Am. Ans. ¶ 3. Rubin remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because: (1) the Complaint was filed within two years after the effective date of termination of his registration with a FINRA member, namely, January 2, 2015; and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member.

[12] Tr. 436-37. An analysis of Rubin's trading using just the dates that he initiated the ACH requests revealed that he effected approximately $21.5 million in total purchases and $23.6 million in total sales. CX-41, at 1; Tr. 441. An analysis of Rubin's trading using the time periods when each ACH request was pending (i.e., when the ACH requests reflected monies in Rubin's account that should not have been there) revealed that he effected approximately $37.3 million in total purchases and $37 million in total sales. CX-41, at 2-3; Tr. 441-42.

[13] CX-1C; Tr. 76-77.

[14] Am. Compl. ¶¶ 8-9; Am. Ans. ¶¶ 8-9.

lacked sufficient funds in his personal bank account to cover the transfers.[15] The 12 ACH Requests were as follows:[16]

Date ACH Request Initiated	ACH Request Amount	Date Merrill Credited the ACH Request	Date the ACH Request Failed
03/08/2012	$20,000	03/09/2012	03/20/2012
03/20/2012	$750,000	03/21/2012	03/29/2012
04/12/2012	$500,000	04/13/2012	04/23/2012
04/20/2012	$150,000	04/23/2012	05/02/2012
05/03/2012	$650,000	05/07/2012	05/16/2012
05/04/2012	$450,000	05/07/2012	05/16/2012
05/07/2012	$750,000	05/08/2012	05/16/2012
05/08/2012	$6,000,000	05/10/2012	05/18/2012
05/09/2012	$5,000,000	05/10/2012	05/18/2012
05/16/2012	$2,500,000	05/17/2012	05/25/2012
05/16/2012	$1,000,000	05/18/2012	05/30/2012
06/01/2012	$125,000	06/04/2012	06/13/2012

Regarding the first ACH request for $20,000, Rubin testified that he thought he might have had enough money in his account when coupled with a line of credit.[17] However, approximately ten days later, the ACH transfer failed due to Rubin's insufficient funds.[18] That request revealed a loophole in Merrill's system.[19] Although each of the ACH requests ultimately failed for lack of funding, Merrill temporarily credited the amounts of those requests to Rubin's brokerage account as if he had deposited legitimate funds.[20] After discovering the loophole, Rubin made 11 more ACH requests in much larger amounts, knowing that he did not have the funds in his account to enable the transfer to occur.[21] By taking advantage of the delay between the date Merrill credited each ACH request to his account and the date the request later failed for insufficient funding, Rubin was able to use the amounts of the ACH requests to appear to meet margin calls and to increase his margin equity, and therefore increase his buying power in the account.

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[15] Am. Compl. ¶ 10; Am. Ans. ¶ 10.

[16] CX-1B.

[17] Tr. 82.

[18] CX-1B.

[19] Tr. 525-26.

[20] Am. Compl. ¶ 11; Am. Ans. ¶ 11.

[21] *See, e.g.*, Tr. 87, 99; Am. Ans. ¶ 10.

1. Rubin Used Unfunded ACH Requests to Appear to Meet Margin Calls

As stated above, federal regulation, specifically Regulation T of the Board of Governors of the Federal Reserve, governs the amount of credit that broker-dealers may extend to customers for the purchase of securities. During the Relevant Period, when Rubin was confronted with Regulation T calls requiring him to deposit additional cash or securities in his Merrill account, he did not deposit cash or securities. Rather, he used the unfunded ACH requests to artificially inflate the value of his Merrill account and create the impression that he had met the Regulation T calls.[22]

On March 19, 2012, and May 8, 2012, Rubin's Merrill account was subject to Regulation T calls when the total available funds and marginable securities in his account fell below the requirements set forth in Regulation T. On these two occasions, he used unfunded ACH requests in order to appear to meet more than $3.8 million in margin calls. Specifically, on March 19, 2012, Merrill issued a Regulation T call to Rubin for $734,761.[23] The next day, Rubin initiated an ACH request to transfer $750,000 from his personal bank account (which, at that time, had a balance of only approximately $686) to his Merrill account.[24] Although the ACH request ultimately failed for lack of funding by March 29, 2012, Merrill temporarily credited $750,000 to Rubin's brokerage account, thereby making it appear as if he had met the Regulation T call.[25] Rubin knew when he made the ACH request that he did not have sufficient funds in his personal bank account to cover the transfer.[26]

Similarly, on May 8, 2012, Rubin was subject to a Regulation T call for approximately $3,121,123.[27] In order to prevent Merrill from issuing a Regulation T call, Rubin initiated an ACH request to transfer $6 million from his personal bank account (which, at the time, had a balance of only $2,721).[28] He initiated a second ACH request in the amount of $5 million on May 9, 2012, when the balance in his personal bank account was only $2,421.[29] Although both ACH requests ultimately failed for lack of funding by May 18, 2012, the amounts of the two ACH requests were temporarily credited to Rubin's Merrill account.[30] That $11 million credit led Merrill to believe that no margin

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[22] Tr. 110-11.

[23] Am. Compl. ¶ 24a; Am. Ans. ¶ 24; CX-7, at 8.

[24] Am. Compl. ¶ 24a; Am. Ans. ¶ 24.

[25] Am. Compl. ¶ 24a; Am. Ans. ¶ 24.

[26] Am. Compl. ¶¶ 9-10; Am. Ans. ¶¶ 9-10; Tr. 87, 90, 99.

[27] Am. Compl. ¶ 24b; Am. Ans. ¶ 24.

[28] Am. Compl. ¶ 24b; Am. Ans. ¶ 24.

[29] Am. Compl. ¶ 24b; Am. Ans. ¶ 24.

[30] Am. Compl. ¶ 9; Am. Ans. ¶ 9.

call was necessary and it did not issue the $3,121,123 Regulation T call to Rubin.[31] Rubin knew when he made the ACH requests that he did not have the funds in his personal bank account to cover the transfers.[32]

2. Rubin Used Unfunded ACH Requests to Appear to Increase His Margin Equity

Rubin also used the unfunded ACH requests to artificially enhance his buying power, in the form of his margin equity,[33] which enabled him to effect securities transactions without triggering margin calls.[34] For example, on March 20, 2012, Rubin initiated an unfunded ACH request in the amount of $750,000, which Merrill credited to his account the next day.[35] As a result, Rubin's margin equity increased from $307,592 on March 20, 2012, to $932,278 by the end of the next day.[36] Similarly, on April 12, 2012, Rubin initiated an unfunded ACH request in the amount of $500,000, which Merrill credited to his account the next day, resulting in an increase in Rubin's margin equity from $276,595 to $760,148.[37] Rubin's margin equity peaked at $27,678,139 on May 10, 2012, when five unfunded ACH requests totaling $12,850,000 were credited to his Merrill account.[38]

C. Rubin Mismarked His Short Sale Trades as Sales Not Long

During the Relevant Period, Rubin sold securities in his account using short sales.[39] Short sales are security transactions where a customer sells a security that he has borrowed from his broker-dealer and then purchases the same security in the market to cover the sale.[40] When engaging in these transactions, Rubin used Merrill's order management system.[41] The order management system has a drop-down box with different

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[31] Am. Compl. ¶ 24b; Am. Ans. ¶ 24.

[32] Am. Compl. ¶ 10; Am. Ans. ¶ 10.

[33] Margin equity is the amount of cash or marginable securities in a customer's brokerage account that is available to be used as credit for the purchase of additional securities.

[34] Tr. 69-70, 94-95. At the hearing, Rubin drew a distinction between using the ACH requests to prevent margin calls and increasing his margin equity. Tr. 94-95, 108-09. However, he ultimately acknowledged that this was a distinction without a difference, noting that "[i]t had the added bonus that it helped in the future." Tr. 94.

[35] Am. Compl. ¶ 9; Am. Ans. ¶ 9.

[36] Am. Compl. ¶ 26; Am. Ans. ¶ 26.

[37] Am. Compl. ¶¶ 9, 26; Am. Ans. ¶¶ 9, 26.

[38] Am. Compl. ¶ 26; Am. Ans. ¶ 26.

[39] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[40] Am. Compl. ¶ 32; Am. Ans. ¶ 32; *see* https://www.sec.gov/answers/shortsale.htm.

[41] Tr. 59-60.

selections so that Rubin could choose either short sale or "Sale Not Long" depending on the type of transaction.[42] Sales Not Long are short sales where the customer owns the securities sold short outside of the firm.[43] Rubin mismarked certain of his short sales as Sales Not Long.[44]

Merrill treats Sales Not Long differently from short sales in terms of market risk. Short sales are margin transactions booked on the margin side of an account because the customer must purchase the security to cover the sale and, thus, must have in place sufficient collateral in his brokerage account to hedge against the risk of having to buy a covering position at a higher price than the short sale. Sales Not Long are cash transactions where the customer already owns the security elsewhere and therefore does not incur the margin risk associated with taking a short position.[45]

Applying Merrill's distinction, Rubin's Sales Not Long were short positions on the underlying security, which generated cash proceeds that were credited to his Merrill account.[46] However, Rubin did not own all of the securities that were subject to his Sales Not Long.[47] Around the same time that he effected the Sales Not Long, he also effected corresponding margin purchases of those same securities.[48] Those corresponding margin purchases were long positions, which resulted in debit balances.[49] As a result of Rubin's misidentification of his short positions as Sales Not Long, Merrill's systems did not automatically match his long positions on those same securities as it would have if Rubin had identified correctly his sales as short sales.[50] Additionally, because Rubin incorrectly marked his short sales as Sales Not Long, Merrill did not apply the margin limitations that it would have applied if he had properly marked the transactions as short sales. By mismarking the short sales, Rubin avoided the need to fund his Merrill account with additional cash or securities.

Rubin's misidentification of his short positions, coupled with his unfunded ACH requests, enabled him to obtain credit from Merrill to purchase or carry securities when Merrill credited the amounts of his ACH requests to his Merrill brokerage account.[51]

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[42] Tr. 60.

[43] Am. Compl. ¶ 32; Am. Ans. ¶ 32; Tr. 59.

[44] Tr. 55, 60.

[45] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[46] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[47] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[48] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[49] Am. Compl. ¶ 32; Am. Ans. ¶ 32.

[50] Am. Compl. ¶ 33; Am. Ans. ¶ 33.

[51] Am. Compl. ¶¶ 35, 40; Am. Ans. ¶¶ 35, 40.

Rubin's unfunded ACH requests created the appearance that he was depositing funds in his Merrill account.[52] Although the ACH requests failed for lack of funding, they eliminated the margin calls and caused Merrill to pair Rubin's short positions (his Sales Not Long) with his corresponding long positions on the same securities, thus closing the paired short positions.[53]

Rubin claims that in 2012 he did not know how, if at all, a Sale Not Long impacted his account, and he did not draw a distinction between a short sale and a Sale Not Long.[54] However, the Panel did not find his testimony on this point to be credible. Rubin was the top trainee at Merrill after going through a competitive selection process. He was responsible for training other new trainees. It is highly unlikely that someone as ambitious and inquisitive as Rubin would continually select the Sale Not Long category from the drop-down box on Merrill's order management system if he did not know what that categorization meant. Plus, Rubin received notifications from Merrill regarding his commitments in connection with his Sales Not Long, requiring him to deliver shares pursuant to his Sale Not Long transactions.[55] Lastly, at the hearing, Rubin confirmed the statements in his Amended Answer, where he acknowledged that he misclassified short sales as Sales Not Long to increase his margin equity.[56]

D. Rubin Lied to Merrill Employees When Questioned About His Transactions

Rubin's supervisors questioned him about the transactions in his Merrill account and some of the ACH requests. When responding, Rubin lied repeatedly.

On May 7, 2012, a Merrill supervisory and compliance manager, KN, e-mailed Rubin regarding an equity deficit of $7,374.[57] Rubin replied that he had transferred funds the previous week that should be reflected in Merrill's system.[58] His reference to transferring funds related to his four prior ACH requests that failed for lack of funding.[59] Other than the four prior ACH requests, Rubin had made no other transfers into his Merrill account.[60] He never provided any clarification to the Merrill supervisors or other

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[52] Am. Compl. ¶ 35; Am. Ans. ¶ 35.

[53] Am. Compl. ¶¶ 40, 41; Am. Ans. ¶¶ 40, 41.

[54] Tr. 59, 63, 69, 114.

[55] CX-6, at 5-7, 17; Tr. 112.

[56] Tr. 55.

[57] CX-14; Tr. 96-97.

[58] CX-14, at 2.

[59] Tr. 97-98.

[60] Tr. 98-99.

staff that the transfers would fail because he did not have the funds in his personal bank account.[61]

On May 14, 2012, a Merrill manager, GJ, received an alert about Rubin's requests on May 8 and 9 to transfer $6 million and $5 million respectively into his Merrill account.[62] When GJ questioned Rubin, Rubin lied to GJ, stating that he had sufficient money available in his personal bank account to cover the transfers, claiming that the money had come from a prior job and from his family.[63] Rubin also lied to GJ when he explained further that he kept the money outside of his Merrill account in order to get a better interest rate.[64] At the time, the balance in Rubin's personal bank account was in the $30 to $2,000 range.[65]

On May 18, 2012, Branch Manager PS e-mailed Rubin about two ACH requests made on May 16 requesting transfers in the amounts of $2.5 million and $1 million that had triggered another alert.[66] PS asked Rubin, "Is this legitimate?"[67] Rubin immediately provided a false response to PS stating, "It was an error, I called them, it added a zero."[68] He did not provide a truthful explanation to PS.[69]

On May 30, 2012, another Merrill manager, MS, received an e-mail advising him that 13 ACH transfers had been credited to Rubin's Merrill account and then returned a few days later for lack of funding.[70] When MS asked Rubin about the failed transfers, Rubin falsely stated that they were the result of "keystroke/encoding errors."[71]

On August 2, 2012, after reviewing Rubin's failed ACH transfers, GJ and another Merrill manager, BK, met with Rubin about the ACH requests.[72] BK had prepared a list of all the rejected ACH requests.[73] She handed the document to Rubin and asked for an

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[61] Tr. 99.

[62] CX-23, at 19-20.

[63] CX-23, at 21, 32; Tr. 102.

[64] CX-23, at 21, 32; Tr. 102.

[65] Tr. 103.

[66] CX-18; Tr. 105.

[67] CX-18.

[68] CX-18; Tr. 107.

[69] Tr. 107.

[70] CX-23, at 22.

[71] CX-23, at 1, 3.

[72] CX-23, at 27; Tr. 118-19.

[73] Tr. 119, 377.

explanation.[74] Rubin neither admitted to his misconduct nor provided an explanation of what he was actually doing.[75] Instead, he lied again, stating "that he made errors entering the wire amounts" and claimed "that if an [ACH] didn't go through," the "system kept trying to send the money."[76] At the conclusion of the meeting, GJ and BK asked Rubin to provide copies of his bank statements showing the value of the account that would have allowed for these transactions to occur.[77] Rubin never provided his bank statements; instead, he provided bank statements for his mother's account held at a different bank.[78] The balances in his mother's bank statements would not have enabled the ACH requests to have been processed.[79]

At the hearing, Rubin explained that he lied to his supervisors and continued to engage in the activity because he was depressed after his step-father became very sick and then passed away.[80] To cope, he engaged in addictive-type trading.[81]

E. Rubin Was Not Forthright with FINRA

During FINRA's investigation, Rubin was not forthright with FINRA staff. On September 17, 2012, FINRA sent Rubin a Rule 8210 request letter, seeking a full explanation of the disclosure in Rubin's Form U5 relating to the internal review of Rubin's Merrill brokerage account.[82] Although Rubin received the September 17 Rule 8210 request letter approximately six weeks after the Merrill managers had confronted him about his trading and provided him a list of the unfunded ACH requests, he responded to FINRA stating that there were only three days in May and June 2012 where his personal trading exceeded Merrill's margin requirements.[83] In reality, there were 12 unfunded ACH requests that occurred in March, April, May, and June 2012.[84]

As part of its investigation, FINRA took Rubin's on-the-record testimony in September 2013. When testifying, he claimed not to understand what certain common industry terms meant. Although he maintained a margin account at Merrill and had

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[74] Tr. 119, 377-78.

[75] Tr. 119-20.

[76] CX-23, at 27.

[77] Tr. 379.

[78] Tr. 379-80.

[79] Tr. 380.

[80] Tr. 513, 541-42.

[81] Tr. 513-14, 518.

[82] CX-35, at 1.

[83] CX-36, at 2.

[84] CX-1B.

received numerous notices from Merrill regarding Regulation T calls, he initially testified that he did not know what a Regulation T call was.[85] After being questioned on the topic further, he testified that "it is a type of margin call, to the best of my recollection."[86] He also claimed not to know what the term "day trader" meant even though, when responding to a FINRA Rule 8210 request letter nine months earlier, he stated that he "engaged in day trading in [his] Merrill Account."[87]

During his on-the-record testimony, Rubin also denied that any of his ACH requests could have "satisfied" any of the margin notices that he received because he lacked sufficient funds in his bank account to cover the requests and, thus, no funds ultimately were transferred.[88] He maintained that he initiated the unfunded ACH requests in order "to ward off" these "superfluous margin notices."[89] However, during the hearing, when questioned about whether the effect of the ACH requests on his account was to get rid of margin notices or fund trades, Rubin acknowledged that the ACH requests supported his trading and testified, "I make no distinction ... because either way it let me get away with my conduct."[90] Rubin further explained that, although he did not want to admit that the ACH requests funded his trading because no funds actually moved, "in my mind it didn't make a difference because it let me trade."[91]

III. Conclusions of Law

A. Rubin Violated FINRA Rule 2010 by Using Fake Unfunded ACH Requests to Artificially Inflate the Value of His Trading Account

The first cause of action alleges that Rubin violated FINRA Rule 2010 by using the unfunded ACH requests to artificially inflate the value of his Merrill account. FINRA Rule 2010 requires registered representatives to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.

Rubin admits that, on 12 separate occasions over the course of approximately three months, he initiated ACH requests to transfer funds from his personal bank account to his Merrill account when he knew or should have known that he had insufficient funds available to cover the requests.[92] He also admits that he initiated the transfers in order to

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[85] CX-6, at 3, 7, 21, 23; CX-7, at 24, 26; CX-38, at 2; JX-1, at 121.

[86] JX-1, at 121.

[87] CX-38, at 2; JX-1, at 208-09.

[88] JX-1, at 147-48.

[89] JX-1, at 34-36, 140, 149, 151-52, 190-91, 195-97, 219, 223.

[90] Tr. 617, 619.

[91] Tr. 618.

[92] *See* Am. Compl. ¶¶ 8-10; Am. Ans. ¶¶ 8-10.

artificially inflate the value of his Merrill account and mislead Merrill into believing that he was meeting margin calls and funding his securities transactions.[93]

The Panel concludes, and Rubin acknowledges, that his unethical conduct violated FINRA Rule 2010.[94]

B. Rubin Willfully Violated Section 7(f) of the Exchange Act and Regulation X, and Violated FINRA Rules 4210(f)(7) and 2010, by Failing to Meet Margin Calls

The second cause of action alleges that Rubin willfully violated Section 7(f) of the Exchange Act and Regulation X promulgated thereunder, and that he violated FINRA Rules 4210(f)(7) and 2010, by failing to meet margin calls in his Merrill account.

Section 7(f) of the Exchange Act prohibits persons from obtaining, receiving, or enjoying the beneficial use of an extension of credit for the purpose of purchasing or carrying securities unless the credit extension complies with Section 7 of the Exchange Act and the rules and regulations promulgated thereunder.[95] Regulation X, promulgated pursuant to Section 7 of the Exchange Act, prohibits borrowers from willfully causing broker-dealers to extend credit in contravention of the parameters set forth in Regulation T of the Exchange Act.[96]

Regulation T imposes restrictions on the ability of a broker-dealer to extend credit for the purposes of purchasing, carrying, or trading in securities. With regard to margin accounts, Regulation T requires a borrower to make a deposit of 50 percent of the security at issue in order to execute a purchase on margin.[97] A "margin deficiency" occurs when "the amount by which the required margin exceeds the equity in the margin account."[98] A "margin call" is "a demand by a creditor to a customer for the deposit of additional cash or securities to eliminate or reduce a margin deficiency."[99]

FINRA Rule 4210(f)(7) provides that when a "margin call", as defined by Regulation T, is required in a customer's account, "no member shall permit a customer to make a practice of . . . meeting the margin required by liquidation of the same or other commitments in the account."

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[93] *See* Am. Compl. ¶¶ 11-12; Am. Ans. ¶¶ 11-12.

[94] *See* Am. Compl. ¶ 13; Am. Ans. ¶ 13.

[95] 15 U.S.C. § 78g(f).

[96] 12 C.F.R. § 224; *see also John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at *27-28 (July 25, 2008).

[97] 12 C.F.R. §§ 220.4, 220.12; *John D. Audifferen*, 2008 SEC LEXIS 1740, at *28.

[98] 12 C.F.R. § 220.2.

[99] 12 C.F.R. § 220.2.

By using unfunded ACH requests in order to appear to meet margin calls and to pay for his securities transactions, Rubin willfully caused Merrill to extend credit to him in contravention of Regulation T. The Panel finds, and Rubin acknowledges, that he willfully violated Section 7(f) and Regulation X.[100] Additionally, because the ACH requests were unfunded, Rubin did not meet or prevent margin calls with the deposit of additional cash or securities in his Merrill account.[101] Instead, he met those margin calls with the proceeds of the sales of commitments that resulted in the margin calls or other commitments in his Merrill account. Accordingly, as Rubin also acknowledges, he also violated FINRA Rules 4210(f)(7) and 2010.[102]

The Panel also finds that Rubin further violated FINRA Rules 4210(f)(7) and 2010 by using the unfunded ACH requests in connection with closing out his Sales Not Long positions. His unfunded ACH requests created the appearance that he had funded transactions in his Merrill account, including his corresponding margin purchases of the same securities that he sold in Sales Not Long. With this appearance of funding, Rubin caused Merrill to pair those corresponding margin purchases with his short positions, which closed out his short positions and created free credit balances that he was able to use. The failure of the ACH requests meant that Rubin did not fund those securities purchases except by the sale of the same securities or with the proceeds of the sales of other securities in his Merrill account, in violation of FINRA Rules 4210(f)(7) and 2010.

IV. Sanctions

The Panel found Rubin liable for the two causes of action in the Amended Complaint. Because both causes of action stem from the same underlying activity—initiating ACH requests to create the false appearance that Rubin's Merrill account and his securities trading activities were funded by greater amounts than they actually were—the Panel determined to batch the causes of action.[103]

After careful consideration, the Panel concluded that the appropriate remedial sanction for Rubin is a bar from associating with any FINRA member in any capacity. In

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[100] *See* Am. Compl. ¶ 42; Am. Ans. ¶ 42.

[101] *See* Am. Compl. ¶ 41; Am. Ans. ¶ 41.

[102] *See* Am. Compl. ¶ 42; Am. Ans. ¶ 42.

[103] FINRA Sanction Guidelines at 4 (General Principle No. 4) (2016), http://www.finra.org/industry/sanction-guidelines; *see Dep't of Enforcement v. Fox & Co. Invs., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NAC Feb. 24, 2005) ("Where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve [FINRA's] remedial goals.") (citation omitted), *aff'd*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005); *see, e.g., Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 65, at *66-67 & n.42 (NAC June 22, 2001) (aggregating or "batching" sanctions for violations of Section 17(b) of the Securities Act of 1933 based on material omissions with sanctions for violations under NASD Conduct Rules 2110 and 2210 based on the same omissions).

reaching this sanction determination, the Panel considered FINRA's Sanction Guidelines ("Guidelines"), the Principal Considerations set forth in the Guidelines, and the specific mitigating factors presented by Rubin. The Panel believes that the sanction imposed here will also have a deterrent effect.[104] The Panel factored in deterrence because, as the Securities and Exchange Commission has noted, "to be truly remedial, the sanctions must deter the applicants before us and others who may be tempted to engage in similar violations."[105]

A. The Sanction Guidelines

The Guidelines do not provide specific recommendations to adjudicators for a violation of FINRA Rule 2010. However, under the facts and circumstances of this case, the most analogous guideline is that for falsification of records, which recommends a fine of $5,000 to $146,000 and a suspension of up to two years where mitigation exists, or a bar in egregious cases.[106] In determining the appropriate sanction, the Guidelines further instruct adjudicators to consider (1) the nature of the falsified document, and (2) whether the respondent had a good faith, but mistaken, belief of express or implied authority. Here, the documents at issue were unfunded ACH requests that Rubin initiated in amounts totaling nearly $18 million. Merrill credited the unfunded ACH requests to Rubin's account, which increased his margin equity and his ability to engage in securities transactions for many days and at times for more than a week.

The Guidelines applicable to violations of the margin rules, including FINRA Rule 4210, state that adjudicators should impose a fine of $1,000 to $73,000 and, in non-egregious cases, consider suspending the responsible individual in any or all capacities for up to 30 business days. In egregious cases, the Guidelines recommend a lengthier suspension of up to two years or a bar. The only Principal Consideration specific to a violation of the margin rules is the extent and nature of the respondent's failure to comply.[107] As discussed above, Rubin used the unfunded ACH requests in order to appear to meet more than $3.8 million in margin calls.

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[104] *See Edward John McCarthy*, 406 F.3d 179, 189 (2d Cir. 2005) (emphasizing the importance of providing a deterrence rationale for our decisions, in the context of a two-year suspension). *Cf. Schield Management Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, *35 (Jan. 31, 2006) (noting in our review of an administrative law judge's decision that we consider the extent to which the sanction will have a deterrent effect); *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 n.12 (1995) (stating in our review of an administrative law judge's decision that the selection of an appropriate sanction involves consideration of several elements, including deterrence); *Steadman v. SEC*, 603 F.2d 1126, 1142 (5th Cir. 1979) (In ruling on an appeal of our review of an administrative law judge's decision, the Fifth Circuit stated that "the Commission also may consider the likely deterrent effect its sanctions will have on others in the industry."), *aff'd on other grounds*, 450 U.S. 91 (1981).

[105] *Investment Planning*, 51 S.E.C. 592, 599 (1993).

[106] Guidelines at 37.

[107] *Id.* at 30.

B. The Principal Considerations

The Panel considered the Principal Considerations for the specific guidelines at issue as well as the Principal Considerations in the Guidelines that apply to all violations.[108]

1. Aggravating Factors

Several aggravating factors are applicable here and support the imposition of a bar. First, Rubin's misconduct was intentional.[109] He admitted that he made the decision to initiate the unfunded ACH requests again and again to avoid margin calls. He also acknowledged that in doing so the unfunded ACH requests supported his trading.

Second, Rubin concealed his misconduct from Merrill.[110] When questioned about his trading activity and the ACH requests, he lied to Merrill managers and staff on several occasions. Because Rubin was respected by his Merrill colleagues, his managers believed him when he falsely told them that he had sufficient funds available to cover his ACH requests, and they believed him when he falsely told them that he had entered the amounts of the ACH requests in error.

Third, Rubin was not initially forthcoming about the true extent of his misconduct when responding to FINRA's inquiries during its investigation.[111] Approximately six weeks after being confronted with all the ACH requests by Merrill managers, Rubin received the first Rule 8210 request letter from FINRA. Rubin minimized his misconduct, describing his wrongful activity as having occurred on only three days.

Fourth, Rubin engaged in a pattern of misconduct during a three-month period.[112] After his first ACH request for $20,000, he discovered the loophole in Merrill's system. He then took advantage of that loophole 11 more times during the three-month period.

Fifth, Rubin's misconduct resulted in the potential for monetary gain.[113] He testified that he intended to profit from his trading, and his account value increased by approximately $33,000 from his securities transactions during the Relevant Period. By

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[108] *Id.* at 6-7.

[109] *Id.* at 7 (Principal Consideration No. 13).

[110] *Id.* at 6 (Principal Consideration No. 10).

[111] *Id.* at 7 (Principal Consideration No. 12).

[112] *Id.* at 6 (Principal Consideration Nos. 8, 9).

[113] *Id.* at 7 (Principal Consideration No. 17).

causing Merrill to improperly extend credit to him, he shifted the financial risk of his trading to Merrill.[114]

Sixth, Rubin did not accept responsibility for his misconduct prior to detection by Merrill.[115] Although Rubin had numerous opportunities to accept responsibility, he failed to do so. It was not until after his misconduct was detected that he expressed remorse and felt ashamed for breaching the trust of his Merrill supervisors.

2. Lack of Mitigating Factors

Rubin has not presented any mitigation that warrants imposing any sanction less than a bar. First, Rubin emphasizes that his misconduct did not harm any customers.[116] He only initiated the unfunded ACH requests in his personal account, not any customer accounts. The lack of customer harm, however, is not mitigating.[117]

Second, Rubin argues that, because he stopped initiating unfunded ACH requests in June 2012, two months before Merrill discovered the full extent of his wrongdoing, he employed corrective measures.[118] The Panel does not find that the fact that Rubin stopped initiating unfunded ACH requests, after doing so for three months, amounts to a corrective measure. Although Rubin executed his last ACH request in June 2012, he had already been questioned about his trading activity and transfers on four occasions in May 2012. Plus, in early to mid-June Merrill manager MS had specifically asked Rubin not to initiate any more ACH requests.[119]

Third, Rubin emphasizes that he is not a recidivist and has no prior disciplinary history. However, it has been FINRA's long-standing position that a respondent should not be rewarded for complying with FINRA's rules.[120]

Fourth, during the hearing Rubin explained that he experienced stressful circumstances in his personal life at the time of the violations; specifically, the death of his step-father. In general, factors such as stress and emotional distress do not mitigate

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[114] *See John D. Audifferen*, 2008 SEC LEXIS 1740, at *49 (upholding imposition of bar on respondent who, among other things, violated Regulation X, and noting the need to prevent respondent from benefiting financially from improper credit extensions at the expense of his customers or his firm in the future and from placing "his own financial interests ahead of those of his customers and his firm").

[115] Guidelines at 6 (Principal Consideration No. 2).

[116] *Id.* (Principal Consideration No. 11).

[117] *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *38 (NAC Mar. 9, 2015).

[118] Guidelines at 6 (Principal Consideration No. 3).

[119] JX-1, at 230-31.

[120] *Harari*, 2015 FINRA Discip. LEXIS 2, at *37 (citing *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006)).

violations of FINRA rules.[121] When such factors have been given some mitigating effect, the respondent had presented evidence that such problems interfered with his ability to comply with FINRA rules.[122] In this case, the evidence does not support a finding that Rubin's emotional condition is a mitigating factor. Rubin has not pointed to any evidence in the record of any factors that prevented him from complying with FINRA rules. Indeed, the record supports that he understood his obligations under FINRA rules and tried to conceal his misconduct. While he undoubtedly was undergoing an extremely stressful period, the stress does not justify his continued use of unfunded ACH requests totaling nearly $18 million. Rubin's "conduct did not involve a momentary, stress-caused lapse in, or interference with, his judgment. Instead, it involved several separate decisions that were ... premeditated, intentional and ongoing."[123] His misconduct stopped only when it became apparent that he was going to be found out.

C. Conclusion

In determining the appropriate sanctions, the Panel considered the seriousness of Rubin's misconduct and its potential for reoccurrence.[124] He has demonstrated a willingness to utilize unethical means to enhance his trading ability, and then lie to his firm when questioned about his activity. His dishonest behavior indicates a troubling disregard for fundamental ethical principles, reflects negatively on his ability to comply with regulatory requirements, and suggests his continued participation in the securities industry poses an unwarranted risk to the investing public. Rubin's demonstrated inability to abide by his ethical obligations may manifest itself on other occasions in a customer-

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[121] *Harari*, 2015 FINRA Discip. LEXIS 2, at *38-39; *see Joel Eugene Shaw*, 51 S.E.C. 1224, 1226 (1994) (rejecting as mitigating the argument that an associated person who converted customer funds was "under extreme emotional stress as a result of severe financial problems and his parents' and children's ill health"); *Dep't of Enforcement v. William D. Mattes, Sr.*, No. 2006005936701, 2007 FINRA Discip. LEXIS 9, at *12 (OHO Nov. 6, 2007) (stating that "even severe emotional problems have not been held to be sufficient to overcome the presumption that a bar is the appropriate remedy"); *Dist. Bus. Conduct Comm. v. Tammy S. Kwikkel-Elliott*, No. C04960004, 1998 NASD Discip. LEXIS 4, at *14 (NASD NBCC Jan. 16, 1998) (finding that "[mis]conduct cannot be excused by the fact that [respondent] may have been under personal and work-related stress").

[122] *Harari*, 2015 FINRA Discip. LEXIS 2, at *40;*see Paul David Pack*, 51 S.E.C. 1279, 1283 (1994) (allowing mitigation where the respondent introduced uncontroverted medical evidence that respondent's misconduct was the result of his medical condition, including clinical depression and a chronic sleep disorder); *Bus. Conduct Comm. v. Nelson*, No. C9A920030, 1996 NASD Discip. LEXIS 17, at *9, 15 (NASD NBCC Mar. 8, 1996) (finding mitigation of respondent's failure to respond to FINRA's information requests where respondent was hospitalized or bedridden with chronic fatigue syndrome).

[123] *Dep't of Enforcement v. Saad*, No. 2006006705601r, 2015 FINRA Discip. LEXIS 49, at *32 (NAC Mar. 16, 2015), *appeal docketed*, No. 15-1430 (D.C. Cir. Nov. 20, 2015).

[124] *See McCarthy*, 406 F.3d at 190.

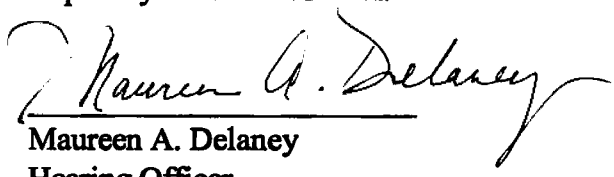
related transaction.[125] Accordingly, the Panel determined that the appropriate sanction for Rubin is a bar.

V. Order

Respondent Matthew David Rubin violated FINRA Rule 2010 by initiating 12 unfunded ACH requests for electronic fund transfers from his personal bank account to his brokerage account, totaling approximately $18 million, to create the false impression that his brokerage account and his securities trading activities were funded by significantly greater amounts. Rubin also willfully violated Section 7(f) of the Exchange Act and Regulation X promulgated thereunder, and violated FINRA Rules 4210(f)(7) and 2010, by failing to meet margin calls in his brokerage account.[126]

For the above misconduct, the Panel bars Rubin from associating with any FINRA member in any capacity. In addition, Rubin is ordered to pay the costs of this proceeding in the amount of $5724.02, which includes an administrative fee of $750 and hearing transcript costs of $4974.02.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this Decision becomes the final disciplinary action of FINRA.



Maureen A. Delaney
Hearing Officer
For the Extended Hearing Panel

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[125] *Saad*, 2015 FINRA Discip. LEXIS 49, at *46 (citing *Bernard D. Gorniak*, 52 S.E.C. 371, 372 (1995) (noting that this industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants")).

[126] The Panel considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.