

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2017052874401**

TO: Department of Enforcement
Financial Industry Regulatory Authority ("FINRA")

RE: David H. Fagenson, Respondent
General Securities Representative
CRD No. 1652012

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, I, David H. Fagenson, submit this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against me alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. I hereby accept and consent, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

Fagenson first registered in the securities industry in 1987. From September 2010 through October 2016, Fagenson was registered with FINRA as a General Securities Representative through FINRA member firm UBS Financial Services Inc. ("UBS" or the "Firm") (BD No. 8174). Fagenson is currently registered with FINRA through another member firm. Fagenson is subject to FINRA's jurisdiction pursuant to Article V, Section 4 of FINRA's By-Laws.

RELEVANT DISCIPLINARY HISTORY

In April 2011, Fagenson entered into a Stipulation and Consent Agreement with the State of Florida Office of Financial Regulation ("SFOFR") pursuant to which Fagenson's registration with the SFOFR was revoked without prejudice to reapply, based upon findings that Fagenson failed to disclose on his Uniform Application for Securities Industry Registration or Transfer (Form U4) that he had been charged with a third degree felony for violating § 893.13(1)2 of the Florida Statutes.

OVERVIEW

Between January 2012 and September 2016 (the “Relevant Period”), Fagenson engaged in quantitatively unsuitable trading in the accounts of three senior customers in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010.

FACTS AND VIOLATIVE CONDUCT

FINRA Rule 2111(a) provides in pertinent part that “[a] member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer’s investment profile.” As explained in the Supplementary Material found at Rule 2111.05(c):

Quantitative suitability requires a member or associated person who has actual or *de facto* control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer’s investment profile, as delineated in Rule 2111(a). No single test defines excessive activity, but factors such as the turnover rate, the cost-to-equity ratio, and the use of in-and-out trading in a customer’s account may provide a basis for a finding that a member or associated person has violated the quantitative suitability obligation.

Turnover rate represents the number of times that a portfolio of securities is exchanged for another portfolio of securities. The cost-to-equity ratio measures the amount an account has to appreciate just to cover commissions and other expenses. In other words, it is the break-even point where a customer may begin to see a return. A turnover rate of six or a cost-to-equity ratio above 20 percent generally indicates that excessive trading has occurred.

NASD Rule 2310(a), which was superseded by FINRA Rule 2111, provided that “[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.”¹ NASD IM-2310-2(b)(2) specifically prohibited registered representatives from engaging in excessive trading, *i.e.*, quantitatively unsuitable trading.

¹ NASD Rule 2310 was superseded by FINRA Rule 2111 on July 9, 2012.

During the Relevant Period, Fagenson engaged in quantitatively unsuitable trading in the accounts of customers EB, JM and LM.

Customer EB, who is a 95-year-old widow with a net worth of over \$5 million, had several accounts with Fagenson at UBS, including a brokerage account. EB's investment objective for the brokerage account was income and capital appreciation, and her risk profile was moderate. Fagenson recommended the trading in the account and EB followed such recommendations. EB did not propose any trades of her own. As a result, Fagenson exercised *de facto* control over EB's brokerage account. Fagenson's trading resulted in an annualized turnover rate of 16.07 and an annualized cost-to-equity ratio of 31.75%. During this period, EB's brokerage account lost approximately \$283,314, while generating more than \$260,000 in commissions and markups for Fagenson and the Firm.

Customers JM and LM, who are married, are in their 70s. During the Relevant Period, JM and LM had a net worth of over \$5 million. JM and LM had several joint accounts with Fagenson at UBS, including a brokerage account. JM and LM's investment objective for the brokerage account was income and capital appreciation, and their risk profile was moderate. Fagenson recommended the trading in the account and JM and LM followed such recommendations. JM and LM did not propose any trades of their own. As a result, Fagenson exercised *de facto* control over JM and LM's brokerage account. Fagenson's trading resulted in an annualized turnover rate of 25.84 and an annualized cost-to-equity ratio of 35.05%. During this period, JM and LM's brokerage account lost approximately \$239,000, while generating more than \$210,000 in commissions and markups for Fagenson and the Firm.

Fagenson's trading in the accounts of EB, JM and LM was excessive and unsuitable given the customers' investment profiles, including their ages and risk tolerances.

By virtue of the foregoing, Fagenson violated NASO Rule 2310 and FINRA Rules 2111 and 2010.

B. I also consent to the imposition of the following sanctions:

- An eight-month suspension in all capacities from association with any FINRA member firm.

On March 16, 2018, Respondent Fagenson filed a Chapter 7 bankruptcy petition pursuant to Title 11, United States Code. Accordingly, no monetary sanction is being assessed in this matter.

I understand that if I am barred or suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in

Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension (see FINRA Rules 8310 and 8311).

The sanctions imposed herein shall be effective on a date set by FINRA staff.

II.

WAIVER OF PROCEDURAL RIGHTS

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- B. To be notified of the Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, I specifically and voluntarily waive any right to claim bias or prejudgment of the Chief Legal Officer, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

I further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

I understand that:

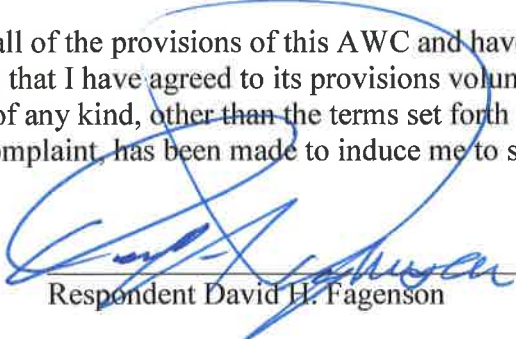
- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of

the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;

- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 4. I may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. I may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. I understand that I may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA or its staff.

I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

10/9/2018
Date (mm/dd/yyyy)


Respondent David H. Fagenson

Reviewed by:



James Salah Esq.
Counsel for Respondent
Salah Astarita & Cox, LLC
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(561) 989-9080

Accepted by FINRA:

November 21, 2018

Date

Signed on behalf of the
Director of ODA, by delegated authority



Samuel Barkin
Senior Regional Counsel
FINRA Department of
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