FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RICHARD J. FUSARI (CRD No. 1018500), Respondent.	Disciplinary Proceeding No. 2013035517601 Hearing Officer–KBW **DEFAULT DECISION** March 8, 2016

Respondent willfully violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by failing to timely amend his Form U4 to disclose information relating to his financial condition. For these violations, Respondent is fined $5,000, suspended from associating in any capacity with any FINRA member firm for six months, and ordered to pay hearing costs.

For the Complainant: Matthew M. Ryan, Esq., and David F. Newman, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Richard J. Fusari, Pro Se

DECISION

I. Introduction

Respondent Richard J. Fusari was formerly associated with FINRA member firm Allied Beacon Partners, Inc. On December 18, 2014, FINRA's Department of Enforcement filed a Complaint against Respondent alleging that he violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by failing to timely amend his Uniform Application for Securities Industry Registration (Form U4) to disclose information relating to his financial condition.

On January 28, 2016, Enforcement filed a motion for entry of default decision ("Default Motion"), together with a memorandum supporting Enforcement's Default Motion ("Supporting

Memorandum"), counsel's declaration in support of Enforcement's Default Motion ("Decl."), and supporting exhibits.[1] Respondent did not respond to the Default Motion.

For the reasons set forth below, I find Respondent in default and grant Enforcement's Default Motion.

II. Findings of Fact and Conclusions of Law

A. Respondent's Background

Respondent first became registered with FINRA in 1987. From April 2011 to January 2014, Respondent was registered with FINRA through an association with Allied Beacon. On January 4, 2013, Allied Beacon filed a Uniform Termination Notice for Securities Industry Registration (Form U5) that stated Respondent was discharged for "Violations of Written Supervisory Procedures - Use of Unauthorized E-Mail Account." Respondent is not currently associated with a FINRA member firm.[2]

B. FINRA's Jurisdiction

FINRA retains jurisdiction over Respondent pursuant to Article V, Section 4(a) of FINRA's By-Laws. The Complaint was filed within the two-year period after the termination of Respondent's registration, and the Complaint charges him with misconduct that commenced while he was registered and associated with Allied Beacon.

C. Origin of the Investigation

This proceeding arose from an investigation FINRA initiated in response to the Form U5 that Allied Beacon filed disclosing Respondent's discharge.[3]

D. Respondent's Default

The hearing began on October 27, 2015. I continued the hearing after learning that Respondent had been taken to an emergency room during the lunch break. A week later, the Office of Hearing Officers ("OHO") received an email from an individual claiming to be Respondent's wife. The email indicated that because of concerns for Respondent's health, Respondent's wife would not permit him to continue participating in the proceeding.

At Enforcement's request, I issued an Order setting a Status Conference for December 17, 2015. The Order warned that failure to appear at the conference, in person or through counsel, may be deemed a default. OHO sent the Order: (1) by first-class mail to Respondent's

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[1] The exhibits supporting the declaration are labeled EX-1 through EX-7. Exhibits admitted at the Hearing begin with the prefix "CX-".

[2] EX-1, at 8; Complaint ("Compl.") ¶¶ 3-5.

[3] Decl. ¶¶ 4-5.

most current residential address as reflected in the Central Registration Depository ("CRD") address, which was his address at the time of the hearing and (2) electronically to the email account that Respondent used in this proceeding ("email address").[4] The U.S. Postal Service returned the mailing to OHO marked, "Return to Sender – Refused – Unable to Forward."

Respondent did not appear at the Status Conference. When Respondent did not join the Status Conference, an OHO Case Administrator sent an email to Respondent, at my request, reminding him of the conference, stating that all the parties were on the line awaiting his participation, and providing him with the call-in information. Also at my request, Enforcement telephoned Respondent and left a voicemail message with both the dial-in number and the passcode.[5] Respondent did not participate in the Status Conference and has not contacted OHO to explain his failure to do so.

Accordingly, I issued an Order to Show Cause Why Respondent Should Not Be Held In Default (the "Show-Cause Order"). The Show-Cause Order directed Respondent to appear at a telephone conference (the "Show-Cause Hearing") on January 19, 2016, to show cause why he should not be held in default for his failure to appear at the Status Conference. Like the Order setting the Status Conference, the Show-Cause Order warned that failure to appear at the Show-Cause Hearing, in person or through counsel, may be deemed a default. OHO sent the Show-Cause Order by first-class mail to Respondent's CRD address and electronically to Respondent's email address. As with the mailing containing the Order setting the Status Conference, the U.S. Postal Service returned the mailing to OHO marked, "Return to Sender – Refused – Unable to Forward."

Respondent failed to appear at the Show-Cause Hearing. When Respondent did not join the Show-Cause Hearing, an OHO Case Administrator sent an email to Respondent alerting him that the hearing was ongoing, providing him the necessary contact information, and instructing him to contact the Case Administrator as soon as possible if he could not join the hearing.[6] Respondent has not contacted OHO.

FINRA Rule 9269 provides that a Hearing Officer may issue a default decision against a Party who "fails to appear at a pre-hearing conference . . . of which the Party has due notice."[7] In addition, FINRA Rule 9241 provides, "The Hearing Officer may issue a default decision, pursuant to Rule 9269, against a Party that fails to appear, in person or through counsel or a representative, at a pre-hearing conference of which the Party has due notice."[8]

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[4] Hearing Transcript ("Tr.") at 44-45.

[5] EX-6, at 3.

[6] Transcript of Show-Cause Hearing at 4.

[7] FINRA Rule 9269(a).

[8] FINRA Rule 9241(f).

Respondent had due notice of both the Status Conference and the Show-Cause Hearing. He failed to appear, in person or through counsel, at both. Accordingly, I find Respondent in default pursuant to FINRA Rule 9241(f) and 9269(a)(1) and deem the allegations in the Complaint against Respondent admitted pursuant to FINRA Rule 9269(a)(2).

E. Respondent's Failure to Disclose Events Relating to His Financial Condition

This proceeding is based on Respondent's failure to disclose on his Form U4 two events that relate to his financial condition. One event occurred in 2010 and the other in 2011. Respondent never disclosed either event.

1. Events Relating to Respondent's Financial Condition

On July 2, 2010, ING USA Annuity and Life Insurance Company obtained a default final judgment against Respondent for $7,877.01 (the "ING Default Judgment"), which remains unsatisfied.[9] The Certificate of Service attached to the ING Default Judgment certifies that a true and correct copy of the default judgment was mailed that day to Respondent at his CRD address.[10] It may be presumed that a document mailed in the regular course of business was received by the addressee.[11] Although Respondent testified at the hearing that he did not recall learning of the ING Default Judgment, he offered no evidence that he did not receive the service copy and acknowledged that he lived at his CRD address in July 2010.[12] Accordingly, I find that Respondent received the service copy of the ING Default Judgment in July 2010.

On or about May 2, 2011, the Internal Revenue Service filed a lien (the "IRS lien") against Respondent and his wife for $27,834.48, which remains unsatisfied.[13] According to an IRS document, a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 was mailed to Respondent and his wife on May 3, 2011 via certified mail.[14] It therefore may be presumed that Respondent received notice of the IRS lien.[15] In addition, Respondent and his wife requested an IRS hearing pursuant to Internal Revenue Code § 6320 and the signatures

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[9] Compl. ¶ 12; CX-2, at 1.

[10] CX-2, at 2.

[11] *Robert M. Fuller*, 56 S.E.C. 976, 990-91 (2003), *aff'd*, 95 F. App'x. 361 (D.C. Cir. 2004).

[12] EX-2, at 76, 83.

[13] Compl. ¶ 14; CX-4; CX-15, at 2.

[14] CX-15, at 2.

[15] *Dep't. of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *27-28 (NAC Mar. 9, 2015) (IRS documents, which reflect that notices of tax liens were mailed to taxpayers, create a presumption that the notices were received.).

on the request were dated July 7, 2011.[16] Accordingly, I find that Respondent received notice of the IRS lien in 2011.

2. Respondent's Failure to Disclose Events

In April 2011, when Respondent became associated with Allied Beacon, he completed a Form U4 to reflect his new association. Respondent did not disclose his ING Default Judgment on that Form U4.[17]

In October 2012, Respondent completed an Allied Beacon Annual Compliance Questionnaire and Certification, in which he falsely represented that there were no unreported judgments or liens against him.[18]

Respondent has not amended his Form U4 to reflect either the ING Default Judgment or the IRS lien.[19]

F. Violations of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010

Registered representatives like Respondent must complete and file with FINRA a Form U4 to become registered through a FINRA member firm. Article V, Section 2(c) of FINRA's By-Laws requires a registered representative to keep his or her Form U4 current at all times by filing a supplementary amendment within 30 days after learning of facts or circumstances giving rise to the amendment. FINRA Rule 1122, in turn, prohibits associated persons from filing registration information that "is incomplete or inaccurate so as to be misleading…or fail[ing] to correct such filing after notice thereof."

At all relevant times, Question 14M of Form U4 asked, "Do you have any unsatisfied judgments or liens against you?" If an affirmative answer was given to Question 14M, the registered person was required to provide details about the lien or unsatisfied judgment.[20]

During the investigation, Respondent argued that he was not obligated to report the IRS lien on his Form U4 because the tax obligation underlying the IRS lien arose from his wife's taxable withdrawal of funds from her IRA and therefore the lien did not pertain to him. However, the Notice of Federal Tax lien specifies that the lien is against the property and rights to property of both Respondent and his wife. Specifically, the Notice of Federal Tax Lien identifies both Respondent and Respondent's wife as the "taxpayer" and states that "there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount

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[16] CX-15, at 2.

[17] Compl. ¶ 13; CX-17; Tr. 43-44.

[18] Compl. ¶ 15; CX-16, at 2.

[19] Compl. ¶ 15.

[20] Compl. ¶ 10; CX-17, at 14.

of these taxes, and additional penalties, interest, and costs that may accrue."[21] A registered representative must report an unsatisfied judgment against him even if the judgment is also against another person.[22] Thus, Respondent should have disclosed the IRS lien in response to Question 14M.

In response to Question 14M, Respondent was obligated to amend his Form U4 to reflect the ING Default Judgment and the IRS lien. By failing to do so, Respondent violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.[23]

G. Respondent is Subject to Statutory Disqualification

Under Article III, Section 3(b) of FINRA's By-Laws, a "statutorily disqualified" person cannot become or remain associated with a FINRA member firm unless FINRA has approved the association.[24] A person is subject to statutory disqualification under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 if the person:

> *willfully* made or caused to be made in any application . . . to become associated with a member of . . . a self-regulatory organization . . . any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any *material* fact, or has omitted to state . . . any *material* fact which is required to be stated therein.[25]

Thus, a registered person is subject to statutory disqualification for failing to timely update his or her Form U4 if the failure was willful and the omitted information was material.[26]

1. Respondent's Failures Were Willful

"A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'"[27] A finding of willfulness does not require

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[21] CX-4.

[22] *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *22 (NAC Dec. 12, 2012) (holding that in response to Question 14M a registered representative should have reported a judgment for which he was jointly and severally liable).

[23] *Dep't of Enforcement v. The Dratel Grp., Inc.*, No. 2009016317701, 2015 FINRA Discip. LEXIS 10, at *11-12 (NAC May 6, 2015); *Dep't of Enforcement v. North Woodward Fin. Corp.*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *18-19 (NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *appeal docketed*, No. 15-3729 (6th Cir. July 7, 2015).

[24] FINRA By-Laws, Article III, Section 3.

[25] 15 U.S.C. § 78c(a)(39)(F) (emphasis added).

[26] *The Dratel Grp., Inc.*, 2015 FINRA Discip. LEXIS 10, at *18 (holding that individual respondent was statutorily disqualified because the NAC found that the individual respondent willfully failed to disclose material information on his Form U4).

[27] *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)) (quotation omitted).

intent to violate the law, but merely intent to do the act that constitutes a violation of the law.[28] Respondent had notice of the ING Default Judgment and the IRS lien, yet failed to amend his Form U4 to report them. Thus, Respondent's failures were willful.

2. The Omitted Information Was Material

In the present context, "[i]nformation is material if it would have 'significantly altered the total mix of information made available.'"[29] "[B]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, [it is presumed] that essentially all the information that is reportable on the Form U4 is material."[30] The information that Respondent omitted was material because the ING Default Judgment and the IRS lien "raise concerns about whether [Respondent] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional."[31]

III. Sanctions

As the Securities and Exchange Commission has explained, Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public."[32] "Form U4 is used by all self-regulatory organizations (including FINRA), state regulators, and broker-dealers to determine and monitor the fitness of securities professionals who seek initial or continued registration with a member firm."[33]

In determining the appropriate sanction, I considered FINRA's Sanction Guidelines ("Guidelines") for failing to file forms or amendments. For failing to file forms and amendments, the Guidelines recommend a fine of $2,500 to $73,000 and consideration of suspension in any or all capacities for five to 30 business days.[34] For egregious cases (such as those involving

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[28] *Scott Mathis v. SEC*, 671 F.3d 210, 216-19 (2d Cir. 2012).

[29] *North Woodward Fin. Corp.*, 2014 FINRA Discip. LEXIS 32, at *17 n.13 (quoting *Mathis v. SEC*, 671 F.3d 210, 220 (2d Cir. 2012)).

[30] *Dep't of Enforcement v. McCune*, No. 2011027993301, 2015 FINRA Discip. LEXIS 22 at *12 (NAC July 27, 2015) (citations omitted), *appeal docketed*, SEC Admin. Proc. No. 3-16768 (Aug. 25, 2015).

[31] *Tucker*, 2012 SEC LEXIS 3496, at *32.

[32] *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *24 n.44 (Apr. 18, 2013) (quoting *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012)), *petition for review denied*, 575 F. App'x 1 (D.C. Cir. 2014) (citations omitted).

[33] *Id.* at *23 (quoting *Tucker*, 2012 SEC LEXIS 3496, at *26) (citations omitted).

[34] FINRA Sanction Guidelines at 69 (2015), http://www.finra.org/industry/sanction-guidelines.

repeated failures to file), the Guidelines call for consideration of a longer suspension in any and all capacities, for up to two years, or a bar.[35]

The Guidelines provide three Principal Considerations in Determining Sanctions that are specific to failing to file an amendment. One of these considerations applies to Respondent's conduct and is considered aggravating: the nature and significance of the information at issue.[36] As set forth above, the undisclosed information was significant. Respondent's failure to disclose the required information significantly altered the mix of information available to regulators assessing whether to scrutinize Respondent's conduct, member firms assessing whether to hire Respondent, and investors assessing whether to trust Respondent's competence and integrity.

In addition, I considered other aggravating factors. Respondent's false response to Allied Beacon's 2012 Annual Compliance Questionnaire and Certification misled Allied Beacon.[37] Respondent's failures to amend his Form U4 constituted a pattern of misconduct that extended over a substantial period of time.[38] Respondent's failures were intentional.[39]

After considering all these factors, I conclude that Respondent's misconduct was egregious and a $5,000 fine and a suspension of six months are reasonable and appropriate sanctions that will serve the remedial purposes of the Guidelines.

IV. Order

For willfully violating Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010, Respondent Richard J. Fusari is fined $5,000, suspended from associating in any capacity with any FINRA member firm for six months, and is subject to statutory disqualification.[40]

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[35] Guidelines at 70.

[36] Guidelines at 69. The other two principal considerations specific to failing to file an amendment do not apply to Respondent: whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and whether a firm's misconduct resulted in harm to a registered person, another member firm, or any person or entity. Because these considerations do not apply, I did not consider them either aggravating or mitigating.

[37] *See* Guidelines at 6 (Principal Consideration in Determining Sanctions, No. 10) (directing adjudicators to consider whether the respondent misled the member firm with which he was associated).

[38] *See* Guidelines at 6 (Principal Consideration in Determining Sanctions, No. 8) (directing adjudicators to consider whether the respondent engaged in numerous acts and/or a pattern of misconduct); Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 9) (directing adjudicators to consider whether the respondent engaged in misconduct over an extended period of time).

[39] *See* Guidelines at 7 (Principal Consideration in Determining Sanctions, No. 13) (directing adjudicators to consider whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence).

[40] I considered all of the arguments of the parties and rejected the arguments to the extent that they were inconsistent with the views expressed herein.

Respondent is also ordered to pay the costs of the hearing in the amount of $1,373.33, consisting of an administrative fee of $750 and the cost of the transcript. If this decision becomes FINRA's final disciplinary action, Respondent's suspension shall become effective on April 18, 2016. The fine shall be due and payable if and when Respondent re-enters the securities industry.

Kenneth Winer
Hearing Officer

Copies to:

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