

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 58074 / July 1, 2008

Admin. Proc. File No. 3-12739

In the Matter of the Application of

DOUGLAS J. TOTH  
c/o Robert G. Stevens, Esq.  
947 State Road, Suite 202  
Princeton, New Jersey 08540

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY  
PROCEEDINGS

Violations of Rules of Fair Practice

Causing Misstatement on and Failure to Amend Form U4

Registered representative of member firm of registered securities association caused the firm to file a Form U4 on his behalf that failed to disclose a pending investment-related state civil action and to fail to amend the inaccurate Form U4 thereafter. Held, association's findings of violations and sanction imposed are sustained.

APPEARANCES:

Robert G. Stevens, for Douglas J. Toth.

Marc Menchel, Alan Lawhead, James S. Wrona, and Deborah F. McIlroy, for Financial Industry Regulatory Authority, Inc.

Appeal filed: August 28, 2007  
Last brief received: December 10, 2007

## I.

Douglas J. Toth ("Toth"), a former registered representative of NASD member firm Bedminster Financial Group, Ltd. ("Bedminster"), seeks review of NASD disciplinary action. <sup>1/</sup> NASD found that Toth, by failing to disclose to Bedminster a pending state civil action against him for securities fraud, willfully caused Bedminster to file on his behalf an inaccurate Uniform Application for Securities Industry Registration ("Form U4") and to fail to amend the Form U4, in violation of NASD Membership Rule IM-1000-1 and Conduct Rule 2110. <sup>2/</sup> NASD suspended Toth in all capacities for one year. We base our findings on an independent review of the record.

## II.

Toth's Association with Somerset and the New Jersey Civil Action

Toth has worked as a registered representative with various NASD member firms since 1993. Prior to joining Bedminster, Toth served as president and chief executive officer of and was registered with Somerset Financial Group, Inc. ("Somerset"), a former NASD member firm. Nicholas Thompson ("Thompson") acted as Somerset's secretary and managing director. <sup>3/</sup> By July 2002, Somerset was experiencing financial difficulties and ceased its broker-dealer operations. Shortly thereafter in October 2002, Somerset's NASD membership lapsed, Toth terminated his registration, and by December 2002, Somerset was effectively out of

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<sup>1/</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

<sup>2/</sup> Membership Rule IM-1000-1 prohibits the filing of incomplete or misleading information in connection with registration as a registered representative, and requires that such filing be corrected upon notice thereof. NASD Manual at 3111 (2001 ed.). NASD Rule 2110 requires members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade." NASD Manual at 4111 (2001 ed.).

<sup>3/</sup> We take official notice of basic information regarding Toth, Thompson, and Somerset contained in the Central Registration Depository ("CRD") available on FINRA's Web site. 17 C.F.R. § 201.323.

business. Having personally guaranteed several Somerset loans, Toth owed a substantial amount of debt to several former Somerset investors and to other creditors. <sup>4/</sup>

On July 3, 2003, the New Jersey Attorney General and the New Jersey Bureau of Securities filed a civil action against Toth, Thompson, Somerset, and others for securities fraud (the "New Jersey Action"). <sup>5/</sup> The complaint (the "New Jersey Complaint") alleged that Toth and others made materially false and misleading statements to investors and omitted material facts with respect to the degree of risk, intended aims, and suitability of an investment. The New Jersey Complaint sought permanent injunctions, restitution, disgorgement, and civil penalties against Toth and others. In July 2005, the New Jersey Action was dismissed without prejudice.

#### Toth Meets with Bedminster

Robert Van Pelt ("Van Pelt") owns seventy-four percent of Bedminster and is its president. James Solakian ("Solakian") is a passive, twenty-four-percent owner of Bedminster. Solakian invested \$150,000 in Somerset in November 2001, which Toth had personally guaranteed. During the spring of 2003, Solakian threatened to sue Toth to recover his Somerset investment. Toth offered to bring broker-dealer business to Bedminster to offset his debt to Solakian and to avoid litigation.

Solakian arranged an initial meeting ("Initial Meeting") in May 2003 with Toth and Van Pelt. At the time of the Initial Meeting, Van Pelt was aware of Toth's financial difficulties, but he believed that Toth was a "rainmaker, essentially, somebody who could promote business." The three discussed Toth's business proposals in a general manner and the possibility of Toth joining Bedminster.

#### Additional Meetings Leading to Toth's Association with Bedminster

Sometime between May 2003 and August 13, 2003, Van Pelt, Toth, and Thompson met again to discuss Toth's business proposals and whether Toth and Thompson should become registered with Bedminster. The parties met at Thompson's office at vFinance Investments, Inc. ("vFinance"), in Flemington, New Jersey. <sup>6/</sup>

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<sup>4/</sup> Toth filed a petition for bankruptcy on February 4, 2005, in the United States Bankruptcy Court for the District of New Jersey. Due to the pendency of his bankruptcy petition, NASD declined to seek monetary sanctions from Toth.

<sup>5/</sup> Harvey v. Schloth, Civil Action ESX 03c225 (N.J. Super. Ct. Law Div. filed July 3, 2003).

<sup>6/</sup> After Somerset closed, Thompson became associated with vFinance, which also acquired all of Somerset's former clients.

However, the witnesses gave differing testimony before the NASD Hearing Panel as to the number and dates of their meetings as well as to the matters discussed in those meetings. Van Pelt testified about one additional meeting held around May 2003 (after the Initial Meeting but before the filing of the New Jersey Complaint). According to Van Pelt, at this meeting Toth disclosed that two arbitrations were pending against him. Toth explained that one arbitration was brought by "a group of wealthy people" and the other arbitration involved a "question of suitability."

Toth was not asked about and did not testify to attending a second meeting in May 2003. Toth testified that he and Thompson met with Van Pelt twice at the end of July or beginning of August 2003 (and thus after the filing of the New Jersey Complaint), which he described as "just before [his] hire date." According to Toth, at one of the two meetings, he and Thompson "sat across" from Van Pelt and reviewed with him a "folder" full of documents that contained "all the documents that relate[d] to the arbitration and every civil case." Toth could not recall whether the New Jersey Complaint was in the folder, stating, "It is possible that it was not, but we discussed it." Toth could not remember whether they discussed the merits of the New Jersey Action or "exactly what [Van Pelt] said" in response to Toth's disclosure of New Jersey Action. Toth, nonetheless, insisted that Van Pelt "knew about [the New Jersey Action]."

Thompson testified that he also attended the two meetings with Van Pelt and Toth in late July or early August. According to Thompson, at the second of these meetings, he made Van Pelt aware of "all the cases" against him, including the New Jersey Action, and "all the documents were there" for Van Pelt's review. Thompson recalled little or no reaction on Van Pelt's part to disclosure of the New Jersey Action. Thompson ultimately did not register with Bedminster. <sup>7/</sup>

Van Pelt testified to receiving an e-mail from Toth during the second week of August that notified him of an imminent "deal" for Bedminster, involving GMAC Guaranteed Northeastern Tax Credit Fund, LLC (the "GMAC Fund"). According to Van Pelt, he asked Toth what Van Pelt needed to do to effectuate the deal and Toth replied, "I need to get registered and you need to qualify with GMAC broker/dealer . . . ." Van Pelt stated that he also asked Toth, for purposes of registering him with NASD, whether there was "anything different" from Toth's last Form U4 filed with Somerset, "except for the arbitrations [they had] talked about in May [2003.]" Van Pelt testified that Toth replied, "[N]o, those are the only two items." At the hearing, Toth did not remember this conversation taking place.

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<sup>7/</sup> Thompson testified that he had vFinance timely disclose the New Jersey Action in an amended Form U4 in July 2003. Thompson's claim turned out to be false. vFinance did not amend Thompson's Form U4 until January 2004, and only after it was notified of the New Jersey Action by NASD.

Bedminster Files a Form U4 Registering Toth

On August 13, 2003, Van Pelt electronically filed a Form U4 registering Toth as a Bedminster general securities representative, general securities principal, and options principal with NASD and with the Virginia and New Jersey state regulators. 8/ Toth's Form U4 omitted the New Jersey Action. Van Pelt testified that he answered "no" in response to Question 14H(2) of Form U4, which asked: "Are you [i.e., Toth] named in any pending *investment-related* civil action that could result in a yes answer to any part of [Question] 14H(1)?" 9/ Other than one investment-related arbitration, Toth's Form U4 reported no other investment-related arbitration or civil litigation involving Toth.

Van Pelt testified that he gathered the information to file Toth's Form U4 based on Toth's past CRD filings and his conversations with Toth. Van Pelt testified that he was unaware of the New Jersey Action and therefore did not report it on Toth's Form U4. Van Pelt electronically affixed Toth's signature to the Form U4 under the heading, "Signature of *Applicant*," which represented that Toth "attest[ed] to the completeness and accuracy of the record" therein. 10/ Toth testified that he did not review or sign a manual copy of the Form before it was filed, although he knew Van Pelt intended to register him around that time.

On August 14, 2003, the day after Toth's Form U4 was filed, Van Pelt, on behalf of Bedminster, executed a soliciting dealer agreement with, among others, the GMAC Fund, making Bedminster an authorized dealer in GMAC Fund's securities. Van Pelt considered

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8/ Form U4, as well as an amendment thereto, is filed electronically with CRD by a member firm on behalf of an individual. The member firm must provide a paper copy of the Form U4 to the individual for manual signature. As part of the member firm's recordkeeping requirements, the signed copy is kept on file by the member firm and must be made available upon regulatory request. See Membership Rule 1140, NASD Manual at 3411 (2001 ed.).

9/ Italics in original. Question 14H(1) of Form U4, in pertinent part, asks: "Has any domestic or foreign court ever: (a) *enjoined* you in connection with any *investment-related* activity? (b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)?" NASD Manual at 485 (2003 ed.).

10/ Van Pelt also entered his own electronic signature under the heading "Signature of *Appropriate Signatory*," representing that Toth had "an opportunity to review the information contained [t]herein" and that he had "approved" it. Italics in original. According to the "Signature Section" of Toth's Form U4, a signature "includes a manual signature or an electronically transmitted equivalent" and is "effected by typing a name in the designated signature field," which constitutes a "legally binding signature." The language preceding the applicant's signature on the Form U4 also permits the "applicant's agent" to type the applicant's name on the form's signature line.

GMAC Fund a significant transaction for Bedminster. The GMAC Fund transaction made Bedminster a net profit of \$12,500, a portion of which Solakian received as part owner of the firm. Toth earned a net commission of \$6,000 on the transaction.

#### Efforts to Obtain Toth's Signature to the Form U4

Van Pelt testified that, after filing Toth's Form U4, he asked Toth "several times" to sign a copy of the Form U4. In a fax transmission dated August 13, 2003, the fax cover sheet stated that Toth's registration with Bedminster was effective and requested that Toth "review the attached Form U4 for accuracy" and "[s]ign and return the signature page for [Bedminster's] records." <sup>11/</sup> At the hearing, Toth testified that he never received this fax transmission. When asked if he recognized the fax number listed on the fax cover sheet, Toth testified initially that it "was an old fax number" for Somerset that was no longer in use. He later re-stated that he did not "recognize the number" and that the facsimile "never made it to [him]." NASD established that the fax number belonged to Thompson's vFinance office in Flemington.

On September 17, 2003, the New Jersey Bureau of Securities sent an information request to Bedminster regarding Toth's Form U4. Van Pelt testified that the September 17 letter requested "a complete explanation of any and all complaints against [Toth] in the state" of New Jersey. Van Pelt testified that he asked Toth in September 2003 to respond to the September 17 letter.

On October 3, 2003, Van Pelt and Toth met at Thompson's vFinance office in Flemington. Toth voiced concerns about continuing his association with Bedminster because Solakian had recently filed "multiple lawsuits against [him]." Van Pelt testified that he handed Toth a set of documents at this meeting for Toth to review and sign, which included a copy of the Form U4, and that Toth indicated he wanted to review the documents over the weekend. Toth testified that he did not recall the details of the October 3 meeting, but he was certain he did not receive any documents from Van Pelt at the time.

#### Bedminster Files a Form U5 Terminating Toth's Association

On October 6, 2003, Toth telephoned Van Pelt to tender his resignation, citing Solakian's lawsuits against him as the reason. Van Pelt testified that during this call he told Toth that Toth still needed to sign the documents Van Pelt gave him on October 3. Van Pelt further testified

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<sup>11/</sup> Form U4 instructions provide that "*Firms* are responsible for obtaining the individual/*applicant's* consent to the undertakings and attestations" in the Form U4. NASD Manual at 476 (2003 ed.) (italics in original).

that he advised Toth that, if Toth signed the documents, Van Pelt would report to CRD that Toth's termination of employment with Bedminster was "voluntary." <sup>12/</sup>

On October 7, 2003, Van Pelt sent Toth a letter by overnight courier, confirming their October 3 meeting and their October 6 phone conversation. In the letter, Van Pelt instructed Toth to sign and return various documents or "the reason for termination [on his Form U5] will be 'for cause' with a suitable explanation." <sup>13/</sup> Van Pelt also again urged Toth to provide "a suitable explanation" to the New Jersey Bureau of Securities.

According to Toth, the only time he received any documents from Van Pelt was by overnight courier, although his testimony is unclear as to when this occurred. Toth "believe[d] that [he] signed those [documents] and returned them to [Van Pelt]," but he did not remember the date on which this took place. Toth denied that he received a copy of the Form U4.

On October 24, 2003, Van Pelt filed a Form U5 terminating Toth's registration with Bedminster. <sup>14/</sup> On October 27, 2003, Toth sent Van Pelt two e-mails. The first e-mail, titled "State of NJ," described "three pending Arbitrations" against Toth and requested that Van Pelt forward the information to the New Jersey Bureau of Securities. Toth's e-mail did not contain any reference to the New Jersey Action. The second e-mail notified Van Pelt that Toth was resigning, effective August 31, 2003. Van Pelt stated that he did not know why Toth designated his resignation date as of August 31 because Van Pelt first received the e-mail on October 27, 2003. Van Pelt never received a signed Form U4 or any other executed documents from Toth. Van Pelt testified that he did not become aware of the New Jersey Action until NASD contacted him six months after the filing and that he did not get a copy of the New Jersey Complaint until November 2004.

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<sup>12/</sup> A Uniform Termination Notice for Securities Industry Registration ("Form U5") requires disclosure of the nature of the termination (e.g., "discharged, other, permitted to resign, deceased, voluntary"), and where the termination is not voluntary or because of death, the circumstances giving rise to it. Rev. Form U5 (06-2003), NASD Manual at 501 (2003 ed.).

<sup>13/</sup> The October 7 letter listed the documents as "the NASD fingerprint card, 1099 employment agreement, of firm compliance manual, and Rule 3040 documents for selling away from [Bedminster]."

<sup>14/</sup> Van Pelt marked "other" as the reason for the termination and stated the reason as: "failure to provide NASD fingerprint card[,] failure to respond to written request from NJ Bureau of Securities for additional information[,] failure to sign 1099 firm agreement[,] failure to sign Rule 3040 Document[, and] failure to accept firm compliance manual."

### NASD Questions Toth about his Form U4

On July 26, 2004, as part of a routine examination of Bedminster, NASD staff sent Toth a written request for information about Toth's association with Bedminster. Among other questions, the July 26 letter asked Toth for a description of "all information [Toth] provided the firm about matters requiring disclosure on [his] Form U4" including "a specific discussion" of what he informed Bedminster about the New Jersey Action. On August 9, 2004, Toth responded to NASD's letter, stating that he did not "recall all that was discussed [with Bedminster], but we had many meetings about Somerset and the problems arising from my association with that firm. In addition, all arbitrations and civil cases were discussed and disclosed."

On August 16, 2004, NASD staff notified Toth in a second written request that his letter response was not complete and lacked his signature. NASD staff asked what specific information Toth had provided to "the firm and its principals regarding [the New Jersey Action]." Additionally, NASD requested that Toth confirm "whether [he] provided [Bedminster] a copy of the suit and when this was done," and if he had not provided a copy of the New Jersey Complaint, "explain how [he] provided sufficient details on the suit so that the matter could be reviewed and accurately reflected on [his] Form U4 applications."

On August 31, 2004, NASD staff received a second letter from Toth, also dated August 9, 2004. The second letter was signed by Toth but, in response to NASD's request for additional information, Toth supplied an almost identical answer to the one in his first letter, inserting only that ". . . documents relating to the cases were give[n] to [] Van Pelt. I do not remember the dates they were given to Mr. Van Pelt but it was prior to my hire." Toth testified that the first time he saw the Form U4 that Bedminster filed on his behalf was in October 2004 when he met with NASD for his on-the-record testimony in this proceeding and that it was at this point he realized the Form U4 was inaccurate.

### NASD Proceedings

On August 9, 2006, NASD's Hearing Panel found that Toth willfully caused a Form U4 to be filed containing a misrepresentation of material fact. The Hearing Panel found Van Pelt's testimony with respect to whether Toth disclosed the New Jersey Action credible and did not credit Toth's testimony. The Hearing Panel suspended Toth in all capacities for one year. On July 27, 2007, NASD's National Adjudicatory Council ("NAC") affirmed the Hearing Panel's finding that Toth willfully caused the filing of a Form U4 that contained a misrepresentation of material fact and found that he failed to correct the inaccurate Form U4.

### III.

Membership Rule IM-1000-1 prohibits the filing, in connection with membership or registration as a registered representative, of information so incomplete or inaccurate as to be



misleading, and requires that such a filing be corrected upon notice thereof. 15/ Form U4 is used by NASD and other self-regulatory organizations to determine the fitness of applicants for registration as securities professionals. 16/ Consequently, the candor and forthrightness of applicants is critical to the effectiveness of the screening process. Misrepresentations on Form U4, in addition to violating Membership Rule IM-1000-1, violate the standard of just and equitable principles of trade to which every person associated with an NASD member is held. 17/

It is undisputed that on August 13, 2003, Bedminster filed an inaccurate Form U4 on Toth's behalf that failed to disclose the New Jersey Action. The record in this matter establishes that Toth willfully caused Bedminster to file the inaccurate Form U4 because he failed to supply Van Pelt with information regarding the New Jersey Action. 18/ Toth also failed to review and correct the inaccurate information in the Form U4 that was submitted on his behalf.

The Hearing Panel determined that Van Pelt "consistently and credibly" testified that Toth never disclosed the existence of the New Jersey Action. We have previously stated that "credibility determinations of an initial fact finder are entitled to considerable weight" because they are based on hearing the witnesses' testimony and observing their demeanor. 19/

Toth challenges the Hearing Panel's determination to credit Van Pelt's testimony over Toth's and Thompson's assertions that they disclosed the New Jersey Action to Van Pelt before he filed the Form U4. However, Toth's and Thompson's testimony concerning their purported disclosure of the New Jersey Action lacked specificity and support. Neither Toth nor Thompson

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15/ NASD Manual at 3111 (2001 ed.).

16/ See, e.g., Daniel Richard Howard, 55 S.E.C. 1096, 1101 (2002), aff'd, 77 Fed. Appx. 2 (1st Cir. 2003) (unpublished); Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); Thomas R. Alton, 52 S.E.C. 380, 382 (1995), aff'd, 105 F.3d 664 (9th Cir. 1996) (Table).

17/ Alton, 52 S.E.C. at 382 & n.5 (citing cases).

18/ One may be found to have caused a violation if he or she was responsible for an act or omission that he or she knew or should have known would contribute to the violation. See Rita J. McConville, Exchange Act Rel. No 51950 (June 30, 2005), 85 SEC Docket 3127, 3145-46 & n.45 (citing Robert M. Fuller, 56 S.E.C. 976, 984 (2003), petition denied, 95 Fed. Appx. 361 (D.C. Cir. 2004) (unpublished)), petition denied, 465 F.3d 780 (7th Cir. 2006), reh'g denied, 2007 U.S. App. LEXIS 926 (7th Cir. 2007), cert. denied, 128 S. Ct. 48 (2007).

19/ Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 & n.21, petition denied, 209 Fed. Appx. 6 (2d Cir. 2006) (unpublished); Laurie Jones Canady, 54 S.E.C. 65, 78 n.23 (1999) (citing Anthony Tricarico, 51 S.E.C. 457, 460 (1993)), petition denied, 230 F.3d 362 (D.C. Cir. 2000).

could recall details regarding their discussion of the New Jersey Action and whether they specifically reviewed the New Jersey Complaint with Van Pelt. Moreover, Thompson was impeached by his failure to disclose the New Jersey Action to vFinance.

Toth also claimed to remember little from his October 3, 2003, meeting with Van Pelt, at which, Van Pelt testified, he again supplied Toth with a Form U4 for his signature. Toth's two e-mails dated October 27 represent the only documents that Toth ever sent to Van Pelt concerning his employment, and while he described three arbitrations in one of the e-mails, neither e-mail mentioned the New Jersey Action.

Toth claims that Van Pelt's testimony exhibited "memory and other problems." Toth cites to Van Pelt's testimony that Toth disclosed only two arbitrations, one involving "wealthy people." According to Toth, the proceeding involving "wealthy people" was in fact a civil suit in New Jersey federal court. 20/ Toth also notes that Van Pelt stated that he met with Toth at an office near an airport. Toth claims Van Pelt makes a mistaken reference to Somerset offices that had closed in the summer of 2002, a year prior to the meetings in question.

Toth's attempts to discredit Van Pelt based on these alleged inconsistencies provide no reason to reject the Hearing Panel's credibility determination. The NAC rejected Toth's assertions, stating that both Van Pelt's imprecise use of legal jargon (which, the NAC noted, was shared with Toth) and Van Pelt's reference to meetings taking place "near an airfield," when they did not, were not sufficient to overturn the Hearing Panel's finding that Van Pelt was credible. 21/ We have considered the totality of the record and find no reason to overturn the Hearing Panel's credibility determinations.

Documentary evidence also supports Van Pelt's testimony concerning his efforts to obtain Toth's signature on the Form U4. For example, on the same day that Van Pelt electronically filed the Form U4, he attempted to fax a copy to Toth for his review and signature. Although Toth claims that he never received this facsimile because it was sent to the vFinance office in Flemington, the facsimile supports Van Pelt's testimony about his efforts to have Toth review and sign the Form U4. Again, on October 7, 2003, Van Pelt sent Toth a letter, via overnight

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20/ Although it appears that this civil suit involving Somerset investors was not disclosed on Toth's Form U4, we cannot determine from the record before us whether, as Toth argues, this was the type of case that needed to be disclosed in response to Form U4's disclosure questions. No other lawsuit, besides the New Jersey Action, is contained in the record.

21/ Cf. Tricarico, 51 S.E.C. at 461 (upholding NYSE credibility determination despite alleged inconsistencies in witness's testimony).

delivery, that specifically referenced their October 3 discussion in which Van Pelt supplied Toth with a Form U4 for his signature. 22/

Toth argues that "it makes no practical sense for him to fail to disclose the New Jersey [Action]" to Van Pelt when Toth knew that the State of New Jersey would be reviewing the Form U4, but this argument is inconsistent with other behavior of Toth. Toth did not disclose the New Jersey Action in his October 27, 2003, e-mail response to the inquiry from the New Jersey Bureau of Securities.

Moreover, Toth's vague responses to the 2004 NASD inquiries into the details of what he told Bedminster about the New Jersey Action further support NASD's conclusion that Toth never disclosed the existence of the New Jersey Action. Despite NASD's detailed request for information on the filing of his Form U4, Toth provided incomplete answers. When NASD staff found his first response inadequate, it wrote him again. However, Toth's second reply added only that: "documents relating to the cases were give[n] to [] Van Pelt. I do not remember the dates they were given to Mr. Van Pelt but it was prior to my hire." These vague and evasive responses, similar to Toth's testimony in this proceeding, further undermine his credibility.

Toth emphasizes repeatedly that he never saw the Form U4 before he met with NASD in October 2004 and has never signed it. Yet, Toth admits to knowing that Van Pelt intended to register him around the time of the GMAC Fund transaction and that a Form U4 would be filed by Bedminster on his behalf. As we have stated previously, primary responsibility for maintaining the accuracy of a Form U4 lies with the registered representative. 23/

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22/ Toth asserts further that the errors in the Form U4 can be attributed to Van Pelt's motive "to get Toth registered as soon as possible" in order "to take advantage of Toth's rainmaking reputation" and that "[a]ccuracy took a second seat and gave way to opportunity. . . ." However, the record—consisting of both documentary and testimonial evidence—reflects Van Pelt's efforts to have Toth review and sign the Form U4 after its filing.

23/ Guang Lu, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 84 SEC Docket 2639, 2649 (rejecting applicant's defense that the president of his firm advised him not to disclose on the Form U4 that he was discharged from a previous job), aff'd, 179 Fed. Appx. 702 (D.C. Cir. 2006) (unpublished); Howard, 55 S.E.C. at 1102-03 (rejecting defense that firm's registration clerk independently forged a false answer on applicant's Form U4).

We find that Toth's failure to disclose the New Jersey Action violated Membership Rule IM-1000-1 and Conduct Rule 2110 by wilfully causing an inaccurate answer on his Form U4. 24/ Toth's failure to have his Form U4 amended thereafter further violated these rules.

#### IV.

Pursuant to Section 19(e)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), we sustain NASD's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 25/ NASD determined to suspend Toth in all capacities for one year. 26/ We sustain the sanction imposed by NASD because, as explained below, we believe that it is neither excessive nor oppressive in light of Toth's violative conduct and that it will adequately serve the public interest and the protection of investors.

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24/ Toth's conduct was willful. A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." Id. (quoting Gearheart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

25/ 15 U.S.C. § 78s(e)(2). Toth does not claim, nor does the record show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

26/ NASD also found that Toth, as a result of his violations, is statutorily disqualified. A person is deemed to be subject to a "statutory disqualification," under Securities Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39), if, among other things, "such person . . . has 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 light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein."

Under Article III, Section 3(b) of NASD's By-Laws, a "statutorily disqualified" person cannot become or remain associated with an NASD member unless the disqualified person's member firm applies for relief from the statutory disqualification under Article III, Section 3(d) of the By-Laws.

NASD declined to impose any monetary sanction because Toth had sought bankruptcy protection at the time.

We initially observe that NASD's determination to suspend Toth for one year in all capacities is consistent with NASD Sanction Guidelines. <sup>27/</sup> The Sanction Guidelines recommend that, for violations of NASD Conduct Rule 2110 involving filing false, misleading, or inaccurate Forms U4, or amendments, NASD should consider suspending an individual in any or all capacities for five to thirty business days and fining the individual \$2,500 to \$50,000. In egregious cases, the Guideline suggests a longer suspension for up to two years or a bar, and a fine ranging from \$5,000 to \$100,000. <sup>28/</sup> The Guideline further provides three "Principal Considerations," in addition to those listed in the Sanction Guidelines' Introductory Section, to apply when determining the appropriate sanction: (1) the nature and significance of the information at issue; (2) whether the failure to disclose information resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and (3) whether respondent member firm's misconduct resulted in harm to a registered person, another member firm, or any other person or entity. <sup>29/</sup>

We conclude, as did NASD, that Toth's failure to disclose the New Jersey Action constitutes egregious conduct. As we have stated, Form U4 is a critical tool for self-regulatory organizations to determine the fitness of applicants for registration as securities professionals. Toth's failure to disclose the New Jersey Action seriously undermined the effectiveness of that screening process. The existence of a state securities fraud action pending against Toth at the time of the Form U4 filing is without question significant information to the investing public, state regulators, and firms, such as Bedminster, considering hiring Toth. The fact that the New Jersey Complaint was subsequently dismissed two years after the events at issue does not diminish the importance of its timely disclosure. <sup>30/</sup> The NAC noted that the disclosure of such

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<sup>27/</sup> NASD promulgated the Sanction Guidelines in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines at 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. *Id.* The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators—which the Guidelines define as Hearing Panels and the NAC. *Id.* Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

<sup>28/</sup> NASD Sanction Guidelines at 73-74 (2006 ed.).

<sup>29/</sup> *Id.* at 77. NASD does not allege that Principal Considerations (2) or (3) are applicable here.

<sup>30/</sup> *Alton*, 52 S.E.C. at 383 n.8 (holding that applicant's failure to disclose perjury conviction on his Form U4 was not negated by the fact that a court vacated applicant's conviction three weeks later).

information at the time "may have had a serious consequence upon Toth's employment in the securities industry," and we agree.

Toth does not assert that any factors mitigate the severity of his violative conduct, nor do we find anything in the record to support a claim of mitigation. Moreover, we concur with NASD's finding of aggravating conduct in the willful nature of Toth's failure to disclose the charges in the New Jersey Action. Toth, a former registered principal of a member firm with over ten years of industry experience, knew Van Pelt would be making his Form U4 filing on or around August 13, 2003. Despite indications that there were inaccuracies in his registration (for example, the inquiry from the New Jersey Bureau of Securities), Toth remained idle. Toth consistently has blamed Van Pelt and Bedminster for the inaccurate answers on the Form U4, taking no responsibility for his role in the filing, even though he failed to review the Form U4 in any reasonable time. Moreover, Toth's vague and evasive answers to NASD questioning during its investigation contributed to the pattern of nondisclosure evident throughout and provides additional aggravating conduct. 31/

We agree with NASD that a one-year suspension is necessary to protect the interests of the investing public and is remedial. 32/ The fact that the State of New Jersey had filed an action alleging securities fraud by Toth was material to any determination of whether Toth would observe the high standards of conduct demanded of associated persons. Toth's failure to disclose this information deprived his firm from considering all material information in its determination of whether or under what circumstances to allow Toth to become registered with the firm. Thus, Toth deprived Bedminster of the ability to protect the investing public, either by refusing to allow

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31/ See Principal Consideration No. 12, NASD Sanction Guidelines at 7 (2006 ed.) (permitting consideration of applicant's level of cooperation with NASD during its investigation).

32/ We note that the NASD-imposed one-year suspension, without monetary sanction, is significantly less than the maximum associational bar and \$100,000 fine recommended by the Sanction Guidelines for similar misconduct.

Toth to associate or by putting in place adequate supervisory procedures. Suspending Toth for one year serves the public interest by impressing upon him and other applicants for registration the importance of disclosing such significant information and makes recurrence less likely. 33/

Accordingly, we find this sanction satisfies the standards of Exchange Act Section 19(e) in that it is neither excessive nor oppressive.

An appropriate order will issue. 34/

By the Commission (Chairman COX and Commissioners ATKINS and CASEY).

Florence E. Harmon  
Acting Secretary

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33/ Although "general deterrence is not, by itself, sufficient justification for expulsion or suspension, . . . it may be considered as part of the overall remedial inquiry." PAZ Sec., Inc., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

34/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 58074 / July 1, 2008

Admin. Proc. File No. 3-12739

In the Matter of the Application of

DOUGLAS J. TOTH  
c/o Robert G. Stevens, Esq.  
947 State Road, Suite 202  
Princeton, New Jersey 08540

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Douglas J. Toth, be, and it hereby is, sustained.

By the Commission.

Florence E. Harmon  
Acting Secretary