

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

America First Associates Corp.

and

Joseph Ricupero
New York, NY,

Respondents.

DECISION

Complaint No. E1020040926-01

Dated: August 15, 2008

Respondent Ricupero failed to update his Form U4. Respondents Ricupero and America First Associates Corp. executed settlement agreements that included improper confidentiality provisions. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Paul A. Hare, Esq., William A. St. Louis, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Pro Se

Decision

Pursuant to NASD Rule 9311, Joseph Ricupero and America First Associates Corp. (“America First” or “the Firm”) (together “the Respondents”) appeal an April 12, 2007 Hearing Panel decision. In this decision, the Hearing Panel found that Ricupero violated NASD Rule 2110 and IM-1000-1 by failing to amend his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) to disclose that he had been named in an investment-related civil litigation and that he had settled with the litigants. For these violations, Ricupero was fined \$5,000 and required to requalify before again acting as a general securities representative and a general securities principal.

The Hearing Panel also found that the Respondents violated Rule 2110 by executing settlement agreements that included improper confidentiality provisions. For these violations, the Respondents were jointly and severally fined \$2,500. After a thorough review of the record, we affirm the findings made and modify the sanctions imposed by the Hearing Panel.¹

I. Background

Ricupero first became registered with a FINRA member firm as a general securities representative in November 1989. On November 8, 1995, he founded and became registered with America First as a general securities principal and general securities representative. In March 2006, America First ceased operations and on November 29, 2006, FINRA expelled America First for failing to submit a required annual report. Ricupero is not currently associated with a FINRA member.

II. Procedural History

On February 21, 2006, FINRA’s Department of Enforcement (“Enforcement”) filed a three-cause complaint against the Respondents. The first cause of the complaint alleged that Ricupero violated Rule 2110 and IM-1000-1 by failing to amend his Form U4. Causes two and three of the complaint alleged that the Respondents violated Rule 2110 by executing settlement agreements that included improper confidentiality provisions.

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority (“FINRA”). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

On August 1, 2006, Enforcement filed a motion for partial summary disposition as to the Respondents' liability under causes two and three.² On November 11, 2006, the Hearing Panel granted Enforcement's motion. Consequently, on November 16, 2006, the Hearing Panel held a hearing to determine the appropriate sanctions. In addition, the Hearing Panel addressed whether Ricupero was liable under cause one, and if so, what sanctions should be imposed. In a decision dated April 12, 2006, the Hearing Panel found that Ricupero was liable for the misconduct alleged in cause one. For this violation, the Hearing Panel fined Ricupero \$5,000 and required him to requalify as a general securities representative and general securities principal. For the Respondents' liability under causes two and three, the Hearing Panel fined the Respondents \$2,500, jointly and severally. The Respondents' appeal followed.

III. Facts

In June 2003, SC, a client of America First, filed a complaint with FINRA.³ Upon receipt of SC's complaint, FINRA began an investigation and on June 23, 2003, sent an NASD Rule 8210 ("Rule 8210") request to Ricupero regarding the SC matter. Ricupero responded to the Rule 8210 request in July 2003, stating that he and SC had reached a settlement on July 9, 2003 ("July 2003 Settlement"), pursuant to which SC executed a general release of liability.⁴

On January 14, 2004, FINRA staff wrote Ricupero asking him to explain why there was no clause in the July 2003 Settlement allowing SC to discuss the matter with securities

² NASD Rule 9264 provides that in a disciplinary action, either the complainant or the respondent may move for summary disposition of any or all of the causes of action against the respondent. A hearing panel may grant a summary disposition motion if there is no genuine issue with regard to any material fact that the moving party relies on in filing its motion and the opposing party does not come forward with specific facts showing a genuine issue in dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

³ SC filed the complaint because America First's clearing firm corrected an error in SC's margin rate, which resulted in a \$14,698.92 negative adjustment to SC's account.

⁴ The July 2003 Settlement included the following confidentiality provision:

I also hereby agree not to divulge or cause my counsel or anyone in privity with me to divulge either directly or indirectly *to any third party* (a) the amount or terms of this settlement, (b) the facts or circumstances underlying this settlement, (c) all calculations prepared [by] me, my attorney, or others on my behalf relating to my account.

(emphasis added).

regulators. The January 14, 2004 letter included a copy of NASD Notice to Members 95-87, which sets forth acceptable and unacceptable examples of confidentiality provisions.⁵

On January 20, 2004, Ricupero responded by sending FINRA a copy of a letter also dated January 20, 2004, that Ricupero sent to SC. The January 20, 2004 letter stated that Ricupero and SC's agreement should not be construed to prohibit or restrict SC from responding to any inquiry from "NASD, or any other self-regulatory organization." In March 2004, FINRA staff confirmed that SC had received the letter and acknowledged that the July 2003 Settlement did not prevent FINRA from investigating SC's complaint.⁶

In a letter dated February 5, 2004, to FINRA staff, Ricupero stated that the July 2003 Settlement was the only such agreement that the Firm had executed. Only two months after the July 2003 Settlement, however, Ricupero had entered into another settlement (the "September 2003 Settlement"). The September 2003 Settlement involved HS, Randano Financing Corp., and Paril Holding (collectively "the Investors") and followed a lawsuit the Investors filed in the U.S. District Court of New York ("Federal Court Action").⁷ The Federal Court Action arose from Ricupero's attempt to raise capital for America First through a 1998 private placement offering ("1998 Offering").

In their complaint, the Investors alleged that Ricupero had committed common-law fraud and violated the federal securities laws. Specifically, the Investors alleged that America First violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder by making material misrepresentations through Ricupero in connection with the 1998 Offering. The complaint also alleged that Ricupero was individually liable under Exchange Act

⁵ *NASD Notice to Members 95-87* (Oct. 1995) provides in part:

Whenever a settlement agreement references confidentiality, the confidentiality clause should be written to expressly authorize the customer or other person to respond, without restriction or condition, to any inquiry about the settlement or its underlying facts and circumstances by any securities regulator, including the NASD.

⁶ SC spoke with FINRA staff regarding the underlying facts of the July 2003 Settlement in spite of the confidentiality provision. Ultimately, FINRA staff determined that SC's complaint did not warrant opening a full investigation.

⁷ HS was an officer of an investment services company with whom Ricupero met in the fall of 1998 to discuss the sale of America First shares to HS. Randano Financing Corp. and Paril Holding were two Panamanian companies that were clients of HS. Ricupero gave HS private placement memoranda, and HS distributed the memoranda to these clients. In conjunction with the offering, HS gave Ricupero \$50,000 in exchange for America First shares. Randano Financing Corporation and Paril Holding each gave \$200,000 to Ricupero for the Firm's shares.

Section 20(a) for America First's misrepresentations. The September 2003 Settlement, negotiated by Ricupero's attorneys, included a broad confidentiality provision that made no allowance for the Investors to respond to a FINRA inquiry regarding the settlement of the case, although it did make such an allowance for inquiries from "governmental authorities."⁸

On March 25, 2004, FINRA staff requested information from America First regarding the Federal Court Action and the September 2003 Settlement. In letters dated April 30, 2004, and May 7, 2004, the Respondents' counsel provided FINRA staff with copies of the Investors' initial complaint and their amended complaint in the Federal Court Action.⁹ Ricupero's counsel also provided FINRA staff with the September 2003 Settlement.¹⁰

Shortly thereafter, FINRA staff attempted to contact the Investors to investigate the violations of the securities laws alleged in the Federal Court Action. The Investors' counsel, however, told FINRA staff that his clients would not cooperate with the FINRA investigation because of the September 2003 Settlement's confidentiality provision. Ultimately, FINRA staff did not file a complaint against the Respondents in connection with its investigation of the alleged securities law violations in the Investors' complaint.¹¹

Although Ricupero reviewed the Investors' complaint and knew in October 2002 that he was named in the Federal Court Action alleging securities law violations, he did not amend his

⁸ The confidentiality agreement read as follows:

[the plaintiffs] agree that the terms of this Agreement shall be kept strictly confidential, and that they (and their respective employees or agents) shall not disclose this Agreement's terms to any third party except (a) as required by law in response to service of legal process, after first providing 20 days written notice of the legal process to the other Party; or (b) for necessary disclosures to their attorneys, accountants, insurers, shareholders, or governmental authorities, on a confidential basis if permitted by law.

⁹ Ricupero was served with the initial complaint for the Federal Court Action on October 24, 2002. The Investors amended their complaint against Ricupero on January 23, 2003. The amended complaint alleged that Ricupero committed common-law fraud in connection with the 1998 Offering, but did not allege any violation of the securities laws. The amended complaint also dropped HS as one of the Investors.

¹⁰ Under this settlement, America First agreed to pay the Investors \$125,000.

¹¹ The Hearing Panel found that the Respondents did not enter into either settlement with the intent to impede FINRA's investigation of the facts underlying the settlements. The Hearing Panel also found that neither settlement impeded FINRA's investigation of these facts.

Form U4 to disclose the action until January 2006.¹² As with the initial complaint, Ricupero was aware that he was named in the amended complaint but also failed to disclose it on his Form U4.¹³ Ricupero testified that his non-disclosure was based on his and his attorney's belief that the Investors were not customers of the Firm and that Ricupero would be exonerated.¹⁴

IV. Discussion

After reviewing the record, we affirm the Hearing Panel's finding that Ricupero violated Rule 2110¹⁵ and IM-1000-1 by failing to update his Form U4. In addition, we agree with the Hearing Panel that Ricupero and America First violated Rule 2110 by executing settlement agreements that included improper confidentiality provisions. As discussed below, however, we modify the sanctions imposed by the Hearing Panel for these violations.

¹² Question 14H(2) of the Form U4 required Ricupero to disclose whether he was "named in any pending *investment-related* civil action that could result in a 'yes' answer" to the question "[h]as any domestic or foreign court ever . . . found that you were involved in a violation of any investment-related statute(s) or regulation(s)?" (emphasis added). The Form U4 defines "investment-related" as pertaining to "securities, commodities, banking, insurance or real estate (including, but not limited to, acting as or being associated with a broker-dealer, issuer . . . or savings association)."

¹³ Question 14I(1) of the Form U4 required Ricupero to disclose whether he had "ever been named as a respondent/defendant in an investment-related, consumer-initiated arbitration or civil litigation which alleged that you were involved in one or more *sales practice violations* and which (a) is still pending, or (b) resulted in an arbitration award or civil judgment against you, regardless of amount, or (c) was settled for an amount of \$10,000 or more?" (emphasis added). The Form U4 defines "sales practice violations" as "any conduct directed at or involving a customer which would constitute a violation of . . . any provision of the Securities Exchange Act of 1934 . . ."

¹⁴ On October 18, 2004, Ricupero sent FINRA a letter seeking further clarification on whether he had to disclose the Federal Court Action in response to Question 14(H)(2). The October 2004 letter also asked FINRA whether the September 2003 Settlement precluded the Investors from cooperating with FINRA's investigation. In this letter, Ricupero told FINRA that he would amend his Form U4 if FINRA determined that he was required to disclose the Federal Court Action. The letter also mentioned that if asked by FINRA, he would notify the Investors that they should not construe the provisions in a manner that would prevent them from responding to FINRA's inquiries. FINRA did not respond to this letter.

¹⁵ Rule 2110 requires that FINRA members shall, in conducting their business, "observe high standards of commercial honor and just and equitable principles of trade."

A. Ricupero Violated Rule 2110 by Failing to Update His Form U4

Article V, Section 2(c) of the FINRA By-Laws provides that applications for registration with FINRA shall be kept current at all times. An individual applies for registration with FINRA for the first time by filing a Form U4 and, thereafter, he or she is obligated to update the Form U4 as changes occur.¹⁶ The questions on a Form U4 are a critical means of providing FINRA with the information needed to protect investors.¹⁷ Consequently, Rule 2110 and IM-1000-1 require associated persons to answer the questions on a Form U4 completely and accurately.¹⁸ In answering questions on his Form U4, Ricupero allowed years to go by without disclosing that he had been named in the Federal Court Action or that he had settled the action. We find that Ricupero's failure to disclose this information violated Rule 2110 and IM-1000-1.

1. *Ricupero Did Not Disclose the Federal Court Action in His Answer to Question 14H(2)*

Question 14H(2) of Form U4 explicitly asked Ricupero whether he had been "named in any pending investment-related civil action" that could result in a court finding that he violated any investment-related statute or regulation. It is undisputed that after receiving the initial complaint in October 2002 Ricupero did not timely update his Form U4 to disclose that he had been named in the Federal Court Action. It is also undisputed that the initial complaint in the Federal Court Action alleged that the Respondents had violated investment-related statutes. Specifically, the initial complaint alleged that Ricupero and America First's attempt to raise capital for the Firm through the 1998 Offering violated Rule 10b-5 and Exchange Act Section 20(a).

Ricupero argues that he did not have to disclose the Federal Court Action on his Form U4 because the court had not yet adjudicated the matter and he did not believe the court would find

¹⁶ Under Article V, Section 2(c) of the FINRA By-Laws, associated persons are required to amend their Form U4 not later than 30 days after learning of the facts or circumstances giving rise to the amendment.

¹⁷ FINRA uses the Form U4 to screen and monitor applicants seeking to participate in the securities industry. See *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995) (stating that FINRA uses the Form U4 "to determine the fitness of applicants for registration as securities professionals").

¹⁸ NASD IM-1000-1 provides that the filing of registration information that is "incomplete or inaccurate so as to be misleading . . . or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade" in violation of Rule 2110. See also *Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) (stating that "[e]very person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate"), *aff'd sub nom. Kauffman v. SEC*, 40 F.3d 1240 (3rd Cir. 1994) (table).

him liable. We reject such a restrictive view of the Form U4's disclosure requirements.¹⁹ It is a fact that once the Investors filed the initial complaint, it was *possible* that the court could find that Ricupero violated one or more of the investment-related statutes or regulations cited in the initial complaint. Ricupero's personal belief that the court would not find a violation does not change this fact or excuse him from his responsibility to disclose the initial complaint on his Form U4.

In addition, Ricupero contends that he is not liable for failing to amend his Form U4 or executing the improper confidentiality provisions because FINRA did not respond to his counsel's October 18, 2004 letter to FINRA. The letter asked FINRA for a "determination" as to: (1) whether the Federal Court Action was "consumer-initiated" litigation that required Ricupero to amend his Form U4; and (2) whether the September 2003 Settlement's exclusion of "governmental authorities" from its confidentiality requirements allowed the Investors to disclose the settlement's underlying facts to FINRA investigators. It is well-settled, however, that FINRA members and associated persons are solely responsible for their knowledge of and compliance with FINRA's rules. *See, e.g., Kirk A. Knapp*, 50 S.E.C. 858, 862 n.15 (1992) (stating that respondent "cannot shift his responsibility for compliance with regulatory requirements to . . . NASD") (internal citations omitted). Ricupero cannot shift this responsibility to FINRA even if he sought FINRA's advice and did not receive a response. *Cf. Apex Fin. Corp.*, 47 S.E.C. 265, 267 (1980) (finding that applicants were not justified in relying on NASD's silence to sell unregistered securities where applicants asserted that they did not receive a response from FINRA when they asked for FINRA's advice about the sale of these securities).²⁰ We therefore find that Ricupero violated Rule 2110 and IM-1000-1 by failing to disclose the Federal Court Action on his Form U4.

2. *Ricupero Did Not Disclose the Federal Court Action or the September 2003 Settlement in His Answer to Question 14I(1)*

Ricupero had another opportunity to disclose the Federal Court Action on his Form U4, but failed to do so. Question 14I(1) of Form U4 asked Ricupero whether he had been named in any investment-related civil litigation that alleged he was involved in sales practice violations and was initiated by a consumer. In addition, Question 14I(1) asked Ricupero whether he had settled such litigation for an amount of \$10,000 or more. In his response to this question,

¹⁹ Indeed, the Commission has rejected a similar argument seeking such a restrictive interpretation of Form U4's disclosure requirements. *See Jon R. Butzen*, 52 S.E.C. 512, 513 (1995) (rejecting respondent's assertion that it was unnecessary for him to disclose a pending NASD complaint on his Form U4 because the complaint had not yet been adjudicated).

²⁰ We also affirm the Hearing Panel's finding that Ricupero cannot establish reliance on counsel's advice as an affirmative defense for his failure to make the disclosures in violation of Rule 2110 and IM-1000-1. This defense is not available where, as here, intent is not an element of the violations. *See Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 558 n.17 (1995), *aff'd* 102 F.3d 579 (D.C. Cir. 1996).

however, Ricupero did not disclose either the Federal Court Action or the September 2003 Settlement.

As discussed above, the Federal Court Action was investment-related, and it is undisputed that Ricupero was aware of the initial complaint's allegations of potential securities law violations. It is also undisputed that Ricupero settled the Federal Court Action for \$125,000, an amount well above the Form U4's \$10,000 threshold for disclosure of such settlements.

In addition, the initial complaint and the amended complaint each contained common-law fraud allegations in connection with the 1998 Offering. Such allegations, by definition, constitute sales practice violations included in the Form U4's disclosure requirements because they cover conduct that violates "any state statute prohibiting fraudulent conduct in connection with the offer, sale or purchase of a security . . ." ²¹ Under these facts, we find that Ricupero was required to disclose the Federal Court Action and September 2003 Settlement on his Form U4. The plain language of the Form U4 calls for disclosure of these items, and Ricupero's failure to do so violated Rule 2110 and IM-1000-1.

On appeal, Ricupero argues that he did not have to disclose either the Federal Court Action or the September 2003 Settlement because they were not "consumer-initiated" items that must be disclosed under Question 14I(1). Ricupero claims that the Investors were not "customers" of America First and therefore not "consumers" within the meaning of Question 14I(1). ²² From this assumption, Ricupero concludes that because the Investors were not consumers, the items that he did not disclose on his Form U4 were not "consumer-initiated" and that he did not violate Rule 2110 and IM-1000-1 by failing to disclose them. As discussed below, Ricupero's conclusion, that the Investors were not customers of America First has no merit.

Cases interpreting the term "customer" in the securities context have viewed the term broadly to encompass individuals or entities that have some brokerage or investment relationship with the broker-dealer. See *Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir. 2001) (discussing how courts have taken a broad view of the term "customer" in cases where "there existed some brokerage or investment relationship between the parties"); see also *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001) (stating that "the NASD Code defines 'customer' broadly . . .").

Here, Ricupero was a registered representative of America First who sold the Firm's shares to the Investors as part of the 1998 Offering. We find that this alone was enough to create

²¹ Ricupero does not dispute that the common-law fraud allegations would be covered under this definition.

²² FINRA has offered guidance regarding Question 14I's definition of a "consumer." This guidance states that a consumer includes "a current, former or prospective *customer*." Form U4 and U5 Interpretive Questions, *available at* <http://www.finra.org/RegulatorySystems/CRD/FilingGuidance/p005243> (emphasis added).

the investment relationship necessary to make the Investors “customers”—and therefore “consumers”—under the broad disclosure requirements of Form U4.²³

Ricupero argues that the Investors could not have been customers of America First because they did not have a customer account with the Firm and therefore could not have received “investment services” from the Firm. Ricupero’s position is at odds with established case law. Courts that have squarely addressed this issue have determined that an investor may be deemed to be a firm’s customer even if the investor does not have a customer account with the firm. *See Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995) (holding that investors who had been defrauded by a representative of a FINRA member were “customers” of the member even though the investors had never opened formal accounts with the member); *see also WMA Sec. Inc. v. Ruppert*, 80 F. Supp. 2d 786, 789 (S.D. Ohio 1999) (finding that the fact that investors never opened accounts with a broker-dealer was irrelevant because by conducting business with the broker-dealer’s registered representative, the investors became the broker-dealer’s customers).

Relying on the *Innovex* decision, Ricupero also argues that the Investors were not customers of America First because they were sophisticated foreign companies that did not seek “investment advice” from America First.²⁴ Ricupero misapplies the *Innovex* court’s holding. The *Innovex* court held that an entity that only received banking advice from a broker-dealer in connection with a merger without receiving investment or brokerage-related services was not a “customer” of the broker dealer. *See Innovex*, 264 F.3d at 772. In the *Innovex* case, the entity’s business relationship with the broker-dealer was a business relationship that did not entail an investment relationship. Specifically, the service provided by the broker-dealer in the *Innovex* case was limited to banking advice and did *not* involve the sale of securities through one of the firm’s employees.

²³ We note, as did the Hearing Panel, that America First acted as both the issuer and seller of stock to the Investors. America First’s actions in this regard provide even more support for our conclusion that the Firm had the investment relationship with the Investors needed to create a customer relationship. Indeed, since the Hearing Panel decision was issued in April 2006, courts have concluded that a customer relationship can be created when a broker-dealer’s representative sells securities to an investor as part of a private placement offering even when the broker-dealer *is not* acting as an issuer of the stock. *See O.N. Equity Sales Co. v. Pals*, 509 F. Supp. 2d 761, 769 (N.D. Iowa 2007) (finding that an investor who contributed \$1.1 million as part of a private placement offering was a customer of a broker-dealer where one of the broker-dealer’s representatives was a trustee of the offering and the broker-dealer claimed it was unaware of its representative’s involvement in the offering); *O.N. Equity Sales Co. v. Prins*, 519 F. Supp. 2d 1006, 1010-11 (D. Minn. 2007) (same). We therefore reject Ricupero’s argument that the Investors were not “customers” of America First because the securities purchased by the Investors were in connection with a private placement offering.

²⁴ Ricupero also argues that the Investors knew that the 1998 Offering was risky and that their participation in the 1998 Offering was an arms length transaction to further support his claim that the Investors did not seek “investment advice” from America First.

In contrast, the Investors' business relationship with America First was an investment relationship because it involved the sale of securities through Ricupero, who was the Firm's representative and was trying to raise capital on the Firm's behalf. *See Lehman Bros., Inc. v. Certified Reporting Co.*, 939 F. Supp. 1333, 1335 (N.D. Ill. 1996) (finding that investors who purchased a company's shares from firms other than Lehman were considered "customers" of Lehman where the company had hired Lehman to market and sell its stock). As numerous courts interpreting the definition of "customer" in the securities context have held, America First's investment relationship with the Investors through their direct dealings with the Firm's representative was sufficient to create a "customer" relationship for the purposes of FINRA rules.²⁵ We therefore find that it was not necessary for the Investors to have sought or received investment advice from America First in order to be considered the Firm's "customer" and therefore a "consumer" within the framework of Form U4's disclosure requirements.

B. Ricupero and America First Violated Rule 2110 by Executing Settlement Agreements with Improper Confidentiality Provisions

The Commission has stated that "[a]n integral aspect of the statutory scheme for regulating broker-dealers and protecting investors is the responsibility of self-regulatory organizations . . . to investigate allegations that members and their associated persons have engaged in misconduct and to impose sanctions when appropriate." *William Edward Daniel*, 50 S.E.C. 332, 335 (1990). Restrictive confidentiality provisions that do not allow parties to respond to FINRA inquiries impair FINRA's ability to conduct proper investigations. Consequently, the confidentiality provisions of settlement agreements must "expressly authorize the customer or other person to respond, without restriction or condition, to any inquiry about the settlement or its underlying facts and circumstances by any securities regulator, including the NASD." *NASD Notice to Members 95-87* (Oct. 1995). A failure to include such express language violates Rule 2110. *Id.*; *see also Stratton Oakmont, Inc.*, 52 S.E.C. 1170, 1173-74 (1997) (finding violation of the predecessor to Rule 2110 where respondent settled customer claims with agreements that prevented the customers from cooperating with NASD's investigation of their claims).

Here, the language of the July 2003 Settlement was overly restrictive. On its face, it did not allow SC to disclose the underlying facts of the settlement to "any third party" and therefore did not expressly authorize SC to respond to FINRA's inquiries. Similarly, the September 2003

²⁵ *See Oppenheimer & Co.*, 56 F.3d at 357 (finding that investors who gave \$3 million to the firm's representative for investment were customers of the firm); *see also Hancock Life Ins. Co.*, 254 F.3d at 59 (finding that investors who were sold fraudulent promissory notes by firm's representative were customers of the firm). Ricupero attempts to distinguish this line of cases by arguing that they involve broker-dealers who were attempting to defraud their customers and that there is no evidence that the Respondents intended to defraud the Investors in this case. Ricupero ignores the fact that Investors alleged fraud in the initial complaint that he did not disclose on his Form U4. Moreover, Ricupero cites no authority to support his position, and we see no reason to create such an artificial restriction on Form U4's broad disclosure requirements.

Settlement contained language that was too restrictive. The September 2003 Settlement expressly authorized the Investors to speak with “governmental authorities” but did not authorize them to respond to FINRA inquiries. Ricupero argued that the language referencing governmental authorities included FINRA, but it is well-established that FINRA is not a governmental authority.²⁶ We therefore find that the Respondents violated Rule 2110 by executing two settlement agreements that did not expressly permit the parties to respond to FINRA’s inquiries.²⁷

V. Sanctions

The Hearing Panel fined Ricupero \$5,000 and required him to requalify as a general securities principal and general securities representative for his violation of Rule 2110 and IM-1000-1. In addition, the Hearing Panel fined the Respondents \$2,500, jointly and severally, for their violation of Rule 2110. We have considered the FINRA Sanction Guidelines (“Guidelines”) in determining the appropriate sanction for the Respondents’ violations as well as the potentially mitigating factors raised by the Respondents on appeal. On balance, we find that the sanctions imposed by the Hearing Panel for the Respondents’ violations were appropriately remedial, and we affirm these sanctions with the exception of the requirement that Ricupero requalify as a general securities representative and principal.

A. The Hearing Panel Imposed a Fine for Ricupero’s Failure to Update His Form U4 that Was Appropriately Remedial

During the relevant period, the Guidelines for filing an inaccurate Form U4 provided for fines ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for five to 30 business days.²⁸ In egregious cases, the Guidelines recommended consideration of a longer suspension (of up to two years) or a bar.²⁹ The Guidelines for submission of an inaccurate Form U4 also provided that in determining the appropriate sanction, adjudicators consider: (1) whether the information at issue was significant; (2) the nature of that information; and (3) whether the

²⁶ *Desiderio v. Nat’l Assoc. of Sec. Dealers*, 191 F.3d 198, 206 (2nd Cir. 1999) (dismissing due process claim because NASD is not a government actor).

²⁷ Ricupero argues that because of the Respondents’ January 20, 2004 letter allowing SC to speak with FINRA staff, the overly broad confidentiality provisions did not impair FINRA’s investigation and in turn, did not violate Rule 2110. We disagree. The plain language of FINRA’s guidance governing confidentiality provisions does not require proof that poorly drafted confidentiality provisions actually impede a FINRA investigation in order to establish a Rule 2110 violation. *See NASD Notice to Members 95-87* (stating that the “use” of improper confidentiality clauses would likely result in disciplinary action, especially in view of past warnings to NASD members in this area).

²⁸ *FINRA Sanction Guidelines 73* (2006), [hereinafter *Guidelines*].

²⁹ *Id.* at 74.

respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm.³⁰

Here, the information that Ricupero did not disclose on his Form U4 was significant. Ricupero failed to disclose a lawsuit alleging securities law violations and fraud. In addition, Ricupero did not disclose his settlement of the lawsuit for approximately \$125,000. The combination of these actions could have prevented FINRA from effectively pursuing one of the key aspects of its mission—protecting investors from possible fraudulent activity in the market. Moreover, Ricupero has a variety of disciplinary events that raise doubts about his ability to comply with his regulatory obligations in the future.³¹ Several other considerations, however, suggest that the sanctions imposed should reflect the lower end of the Guidelines' recommendations.

First, there is no evidence that Ricupero's inaccurate filing resulted in a statutorily disqualified person being associated with the Firm. Second, there is no evidence that Ricupero's misconduct was intentional rather than negligent, or that he intentionally tried to conceal information from FINRA through his failures to update his Form U4. Third, Ricupero's failure to disclose arose from a single lawsuit. Finally, there is evidence in the record that Ricupero relied on counsel in his failure to disclose the required information.³² Considering all of these

³⁰ *Id.* at 73.

³¹ On October 27, 1999, the Respondents executed a Letter of Acceptance, Waiver and Consent ("AWC") and were fined \$7,050, jointly and severally, and the Firm was separately fined \$2,500 for the Firm's failure to: (i) properly report transactions in NASDAQ and the OTC Bulletin Board; (ii) properly report transactions to ACT; and (iii) comply with the free-riding and withholding interpretation. On April 17, 2000, the Respondents executed an AWC and were fined \$12,500 for (i) failing to comply with FINRA continuing education requirements, (ii) failing to provide notice of the departure of three principals of the Firm, and (iii) conducting a securities business without the Firm maintaining its minimum net capital requirement. In addition, on November 17, 2003, the Respondents executed an AWC and were fined \$2,500 for permitting an unregistered individual to act in a registered capacity.

³² It is the respondent's burden to show that his or her reliance on competent counsel should be considered a mitigating factor in determining sanctions. *See Michael F. Flannigan*, Exchange Act Rel. No. 47142, 2003 SEC LEXIS 40, at *23 (Jan. 8, 2003) (stating that the respondent must show that he "made a complete disclosure to independent counsel, sought advice as to the legality of his conduct, and relied on that advice in good faith" to establish his reliance on counsel as a mitigating factor). Here, the record contains unchallenged testimony from Ricupero that: (1) he retained an attorney specializing in compliance issues whom he consulted "any time he had an NASD issue that need[ed] to be clarified," (2) he discussed the Form U4 disclosure requirements with his compliance attorney, (3) his compliance attorney advised Ricupero that he did not have to disclose the complaints or settlements at issue on his Form U4, and (4) Ricupero relied on this advice.

factors, we find that a \$5,000 fine is an appropriate sanction for Ricupero's failure to update his Form U4.³³

B. The Hearing Panel's Sanctions for the Respondents' Execution of Improper Settlement Agreements Were Appropriate

During the relevant period, the Guidelines for executing improper confidentiality provisions recommended a fine ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for one month to two years.³⁴ In egregious cases, the Guidelines recommended consideration of a bar.³⁵ The applicable principal considerations for determining sanctions included: (1) the nature of the restriction contained in the confidentiality clause; (2) whether the respondent voluntarily released the customer from the terms of the confidentiality agreement without regulatory intervention; and (3) whether the respondent released the customer from the terms of the confidentiality agreement after the regulator advised the respondent to do so.³⁶

Here, we find it aggravating that the restrictions in the July 2003 Settlement were particularly broad—precluding the discussion of the settlement with “any third party.” Although the September 2003 Settlement was less restrictive, it still did not expressly provide that the Investors could respond to a regulatory inquiry from FINRA regarding the underlying facts of the settlement. These overly restrictive provisions were executed by the Respondents despite the fact that FINRA had published examples of proper confidentiality provisions for the benefit of its members.

Indeed, although Ricupero was the Firm's chief compliance officer, he admitted that he never read FINRA's notices to its members regarding such provisions. The Respondents also did not make an attempt to voluntarily release SC or the Investors from the overbroad provisions until FINRA alerted them that these provisions did not comply with FINRA's rules.

We find it mitigating, however, that when informed by FINRA staff of the problems with the July 2003 Settlement, the Respondents promptly attempted to release SC from the settlement's non-disclosure provisions with regard to FINRA in its January 20, 2004 letter

³³ We note that for this violation, the Hearing Panel ruled that Ricupero must also requalify by examination as a principal and as a representative, but did not articulate its rationale for this specific sanction. *Cf. Dep't of Enforcement v. Cuzzo*, Complaint No. C9B050011, 2007 NASD Discip. LEXIS 12, at *30 (NASD NAC Feb. 27, 2007) (ordering respondent to requalify after finding that he would benefit from focusing on the securities rules and regulations). We find that a \$5,000 fine is appropriately remedial and do not impose a requalification requirement.

³⁴ *Guidelines*, at 34.

³⁵ *Id.*

³⁶ *Id.*

authorizing SC to cooperate with FINRA.³⁷ In addition, Enforcement staff acknowledged that the July 2003 Settlement did not preclude it from speaking to SC or impede its investigation of SC's complaint. Similarly, there is evidence in the record that the Respondents were prepared to release the Investors from the September 2003 Settlement's improper confidentiality provisions if they had been aware that the Investors had been contacted by FINRA and were refusing to cooperate with FINRA's investigation.

Finally, although there is some evidence that Ricupero relied on counsel in good faith to draft the confidentiality provisions,³⁸ there is no evidence that he specifically discussed the confidentiality provisions with counsel or that counsel advised Ricupero that the confidentiality provisions complied with FINRA's rules. As the Hearing Panel acknowledged, in his haste to resolve the dispute quickly, Ricupero did not consider the particular language of the confidentiality provisions. There is also no evidence that Ricupero considered whether the provisions complied with the instructions governing such provisions in *Notice to Members 95-87*. In fact, Ricupero admitted that he never even read *Notice to Members 95-87*. Under these facts, Ricupero did not meet his burden of establishing his reasonable reliance on counsel to draft the confidentiality provisions as a mitigating factor.

After considering each of these factors, we affirm the Hearing Panel's decision to impose a sanction that occupies the lower end of the Guidelines' recommended range for this violation. We therefore affirm the joint and several fine of \$2,500 that the Hearing Panel imposed on the Respondents for executing impermissible settlement agreements.

³⁷ The Hearing Panel found that Ricupero credibly testified that the Respondents would have released the Investors from the terms of the September 2003 Settlement's confidentiality provisions upon FINRA's request. We do not disturb this finding. We note that the Hearing Panel's finding is supported by evidence that the Respondents attempted to carve out an exception for FINRA by allowing the Investors to discuss the September 2003 Settlement with "governmental authorities" but failed to appreciate that FINRA, as a private corporation, does not fall within this exception.

³⁸ Ricupero testified that his clearing firm drafted the July 2003 Settlement and that he accepted it as written. Ricupero further testified that he accepted the September 2003 Settlement agreement under the terms negotiated by his attorney and counsel for the Investors. The Hearing Panel found that Ricupero had a good faith belief that the confidentiality provisions in each of these settlements complied with FINRA rules.

VI. Conclusion

We find that Ricupero violated Rule 2110 and IM-1000-1 by failing to make required disclosures on his Form U4 regarding the Federal Court Action and September 2003 Settlement. In addition, we find that Respondents violated Rule 2110 by entering into settlement agreements with impermissible confidentiality provisions.³⁹ Accordingly, we fine Ricupero \$5,000 for violating Rule 2110 and IM-1000-1. We also jointly and severally fine the Respondents \$2,500 for violating Rule 2110.⁴⁰

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and
Corporate Secretary

³⁹ We have also considered and reject without discussion all other arguments advanced by the parties.

⁴⁰ Pursuant to NASD Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.