

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Scott Mathis
New York, NY,

Respondent.

DECISION

Complaint No. C10040052

Dated: December 12, 2008

Respondent willfully failed to amend his Form U4 to disclose five tax liens; willfully failed to disclose tax liens on two initial Forms U4; and failed to amend his Form U4 to disclose a customer complaint and a customer-initiated civil action. Held, findings modified and sanctions affirmed.

Appearances

For the Complainant: Samuel Barkin, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Eric S. Hutner, Esq., and David Richan, Esq.

Decision

Pursuant to NASD Rule 9311, Scott Mathis (“Mathis”) appeals a December 19, 2007 Hearing Panel decision. The Hearing Panel found that Mathis failed to amend his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) to disclose five federal tax liens, and that such failure was willful beginning in January 1999. The Hearing Panel also found that Mathis falsely denied the tax liens on two initial Forms U4. The Hearing Panel imposed a \$10,000 fine and three-month suspension against Mathis for these violations. In addition, the Hearing Panel found that Mathis failed to amend his Form U4 to disclose a customer complaint and a customer civil action, and that such failures to amend were not willful. For those violations, the Hearing Panel imposed a \$2,500 fine and a 10-business day suspension

to run concurrent with the three-month suspension. We affirm but modify the Hearing Panel's findings as discussed below.

I. Background

Mathis has worked in the securities industry in a registered capacity since 1985. He was associated with various firms before becoming associated with The Boston Group LP ("The Boston Group") as a general securities representative in August 1995 and as a general securities principal in November 1995. Mathis was associated with The Boston Group until it ceased operating in July 1998. Mathis became associated with National Securities Corporation ("National Securities") as a general securities representative and general securities principal in July 1998 following a mass transfer of registrations from The Boston Group. Mathis was associated with National Securities until September 2000, when he ceased his association with the firm voluntarily.

In April 1999, Mathis formed a new broker-dealer called InvestPrivate.com. In November 2000, the firm changed its name to InvestPrivate, Inc. ("InvestPrivate" or the "Firm"). In January 2008, the name of the Firm changed to DPEC Capital, Inc. ("DPEC Capital"). Mathis has been associated with InvestPrivate and DPEC Capital since June 2000 as a general securities representative and general securities principal. Additionally, from June 2000 to April 2001, Mathis served as the chief executive officer and chairman of the board of directors of CelebrityStartUps.com, Inc. ("CelebrityStartUps"), a development-stage company that he founded. CelebrityStartUps filed a membership application with FINRA in August 2000, but voluntarily withdrew the application in April 2001.

II. Procedural History

On February 7, 2005, FINRA's Department of Enforcement ("Enforcement") filed a 14-cause second amended complaint against Mathis, InvestPrivate, and two other respondents.¹ In May 2007, several parties entered into a settlement in which some of the charges were dismissed and others were settled, leaving counts five, six, and seven against Mathis in dispute.

Cause five alleges that Mathis willfully failed to amend his Form U4 to disclose five federal tax liens entered against him between August 16, 1996, and September 9, 2002, totaling \$634,436. Cause six alleges that Mathis willfully failed to disclose tax liens on two Forms U4 that he signed and filed, or caused to be filed, on November 25, 1999, and August 21, 2000, to become registered with InvestPrivate and CelebrityStartUps, respectively. Cause seven alleges that Mathis willfully failed to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil complaint. Although the complaint alleges that this failure was "willful," the parties stipulated prior to the hearing that such failure was "not willful."

¹ The complaint in this matter was amended twice to address issues not pertinent to this matter.

The Hearing Panel held a two-day hearing on July 10 and 11, 2007, and issued a decision on December 19, 2007. Mathis's appeal followed.

III. Facts

A. Mathis Received Notice of Five Federal Tax Liens

It is undisputed that Mathis received five written notices of tax liens from the Internal Revenue Service ("IRS") between August 1996 and September 2002. It is also undisputed that Mathis did not disclose the liens on his Form U4 until July 2003, after Enforcement staff brought the matter to his attention during an investigation of InvestPrivate that led to the filing of the complaint against Mathis in this matter. The first notice of tax lien, dated August 9, 1996, informed Mathis that the IRS had entered "a lien in favor of the United States" against him in the amount of \$274,526.68 of unpaid taxes for the 1993 and 1994 tax years ("First Tax Lien").² Mathis was associated with The Boston Group at the time he received the notice.

On September 23, 1998, the IRS sent Mathis a second notice of tax lien advising him that there was "a lien in favor of the United States" against him in the amount of \$53,302.53 of unpaid taxes for the 1995 tax year ("Second Tax Lien"). Mathis was associated with National Securities at the time he received the notice.

On January 19, 1999, Mathis completed and signed National Securities' Annual Representative Certification ("Annual Certification"). When asked on the Annual Certification whether he had "filed for bankruptcy or had any liens or judgments entered against [him], which were not previously disclosed on Form U-4," Mathis responded "NO." Additionally, when asked "[i]f you are an independent contractor, have you paid all federal, state and local taxes due in full?" Mathis answered, "YES." At the time that Mathis completed the Annual Certification he was associated with National Securities as an independent contractor and had two federal tax liens pending against him.

On May 11, 1999, the IRS sent Mathis a third notice of tax lien informing him that there was "a lien in favor of the United States" against him in the amount of \$179,429.07 of unpaid taxes for the tax year 1997 ("Third Tax Lien"). Mathis was still associated with National Securities when he received this notice.

² The notice stated:

We have made a demand for payment of this liability, but it remains unpaid. Therefore, *there is a lien in favor of the United States* on all property and rights to property belonging to this tax-payer for the amount of these taxes, and additional penalties, interest, and costs that may accrue. (emphasis added.)

On November 25, 1999, Mathis filed an initial Form U4 related to his association with InvestPrivate. In answer to the Form U4 question about whether he had “any unsatisfied judgments or liens against [him],” Mathis responded “NO.” Prior to his completion of the Form U4, however, Mathis had received three separate notices from the IRS advising him that he had liens against him in favor of the United States in the amounts of \$274,526, \$53,302, and \$179,429, respectively. Additionally, despite having received notice of the federal tax liens, Mathis did not complete a Form U4 “Judgment/Lien Disclosure Reporting Page” (“DRP”) disclosing the lien type, the lien holder, and the lien amount for these liens.

On December 21, 1999, the IRS notified Mathis by letter that it had approved his request to pay his tax debt in monthly installments of \$10,000. The letter further informed Mathis that he was subject to a lien against his property until the debt, amounting to \$244,811, was fully paid, at which time the IRS would release the lien. The letter also stated that: “a Notice of Federal Tax Lien HAS ALREADY BEEN FILED.”

On August 21, 2000, Mathis filed a Form U4 seeking registration with CelebrityStartUps. Although Mathis had received three tax lien notices from the IRS, he nonetheless answered “NO” to the question on the Form U4 asking whether he had any unsatisfied judgments or liens against him. And again, he did not complete a Form U4 DRP disclosing the lien type, the lien holder, and the lien amount for each of the liens.

Tim Holderbaum (“Holderbaum”), an individual that Mathis hired to design a website for InvestPrivate, testified that he advised Mathis in December 2001 that he had attempted to establish an Internet store for an affiliate of InvestPrivate but was unsuccessful because a credit check using Mathis’s social security number showed that he was subject to a tax lien.³ Holderbaum testified that Mathis did not inquire about the tax lien when he advised Mathis about the problem with the credit check. Holderbaum also testified that, as a result of Mathis’s tax lien issue, he used his own social security number to establish the Internet store account.

On July 2, 2002, the IRS sent Mathis a fourth notice of tax lien advising him that there was “a lien in favor of the United States” against him in the amount of \$92,985.14 for the 1999 tax year (“Fourth Tax Lien”). Just two months later, on September 9, 2002, the IRS sent Mathis a fifth notice of tax lien informing him that there was “a lien in favor of the United States” against him in the amount of \$34,192.86 for the 2000 tax year (“Fifth Tax Lien”).

On August 6, 2002, the IRS sent Mathis a letter approving a further request from Mathis to pay his taxes in installments. The letter set forth a new installment plan that directed Mathis to pay \$7,000 per month until he had paid the full amount of taxes that he owed, which totaled \$272,442.21. The letter also included language identical to that in the December 21, 1999 IRS letter expressly informing Mathis that the government had a lien against his property that would not be released until he finished paying his tax debt.

³ Holderbaum testified that Mathis still employed him at the time of the hearing.

B. Mathis's Shifting Explanations for Failure to Disclose the Tax Liens

In the course of its investigation, Enforcement sent Mathis a letter on July 3, 2003, requesting an explanation of his failure to disclose the federal tax liens on his Form U4 and reminding Mathis of his obligation to amend his Form U4 to disclose the tax liens at issue. On July 14, 2003, Mathis disclosed the tax liens in an amended Form U4 filing. On July 23, 2003, Mathis responded to Enforcement's July 3, 2003 request for information stating that, "to the best of my recollection, I was not aware of the pendency of any federal tax liens at such times and further was not aware of any obligation to report such matters on Form U-4." Mathis further responded that "the only reasons of which I am aware for why the referenced federal tax liens were filed are that there was under-withholding of federal taxes on my income and because tax returns were filed late." Mathis paid off the liens within about one month after disclosing them in his July 14, 2003 Form U4 filing.⁴ The IRS consequently released the liens in October 2003.

In his August 2003 on-the-record interview with FINRA staff, Mathis did not dispute that he had received the five notices of tax liens at issue. Mathis argued in the proceedings below, however, that it was his understanding that there was a distinction between a "notice" of tax lien and being subject to a tax lien.

Mathis offered a number of other explanations at the hearing for his failure to disclose the tax liens on his Form U4. He stated that "a lack of concentration" caused him to answer "YES" on the Annual Certification to the question of whether he had paid all of his federal, state, and local taxes, and that he did not extensively review the notices of tax liens because he immediately forwarded them to his accountant who was handling negotiations with the IRS on a payment plan to address his federal tax debt. Mathis further testified that in preparation for the hearing in this matter, he remembered that in 1996, while associated with The Boston Group, he sought the advice of a co-worker and former FINRA district director, Kye Hellmers ("Hellmers"), about whether the First Tax Lien needed to be disclosed on his Form U4.⁵ According to Mathis, Hellmers advised him that the First Tax Lien was not required to be disclosed because it was not a securities-related matter. Hellmers testified at the hearing and corroborated Mathis's testimony regarding the advice he had given Mathis about the Form U4 tax lien disclosure issue. Hellmers also testified, however, that he had no experience during his tenure at FINRA dealing with issues concerning the disclosure of unsatisfied judgments or liens on the Form U4.

⁴ Mathis testified that, after he disclosed the liens on his Form U4, "[t]here was so much uproar regarding [the tax liens], I just decided to pay [them] off."

⁵ Hellmers was the executive vice chairman and Mathis was vice chairman at the Boston Group. Before joining The Boston Group, Hellmers served as the district director of FINRA's Los Angeles regional office for 10 years. Previously, Hellmers worked in the FINRA district office in New York City for approximately 10 1/2 years.

C. Customer Complaint and Civil Action

Mathis and Enforcement stipulated that Mathis failed to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil action.

On December 6, 2002, Mathis received a letter of complaint from two elderly customers of InvestPrivate. The letter alleged that Mathis and another InvestPrivate representative recommended unsuitable investments, misrepresented the nature of the investments, and failed to disclose certain conflicts of interest. The letter asked for restitution of more than \$1 million. Mathis stipulated that his Form U4 was not amended to report this customer complaint until February 20, 2003, after FINRA advised him that it had not been disclosed timely.

On April 6, 2002, customer FS served InvestPrivate with a civil complaint that named Mathis, InvestPrivate, InvestPrivate Holdings Corp., the Firm's compliance director, and an InvestPrivate registered representative (FS's broker) as defendants. FS's complaint alleged that these defendants committed various sales practice violations, including fraud and supervisory violations, and requested more than \$2 million in damages. Mathis stipulated that he did not amend his Form U4 to report the FS-initiated civil action until July 7, 2003, after FINRA brought the matter to his attention.

IV. Discussion

A registered representative's Form U4 must be kept current at all times by supplementary amendments filed with FINRA within 30 days of learning of facts or circumstances giving rise to the amendment. Article V, Section 2(c) of the FINRA By-Laws. A Form U4 that is inaccurate or incomplete so as to be misleading may be deemed to be conduct inconsistent with just and equitable principles of trade in violation of NASD Rule 2110.⁶ See IM-1000-1; *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995), *petition for rev. denied*, 105 F.3d 664 (9th Cir. 1996). Because the Form U4 is used by FINRA and other self-regulatory organizations, state regulators, and broker-dealers to determine and monitor the fitness of securities professionals, "the candor and forthrightness of applicants is critical to the effectiveness of the screening process." *Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005), *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006).

For the reasons set forth below, we affirm the Hearing Panel's finding that Mathis failed to amend his Form U4 to disclose five tax liens. We modify, however, the Hearing Panel's finding that Mathis's failure to amend his Form U4 was willful only from January 1999 and find, instead, that such failure was willful beginning in August 1996, and that he willfully failed to disclose the liens on two initial Forms U4, as alleged in the complaint. We affirm the Hearing Panel's finding that Mathis failed to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil action.

⁶ NASD Rule 0115 makes all FINRA rules, including NASD Rule 2110, applicable both to FINRA members and to persons associated with FINRA members.

A. Mathis Failed to Disclose Five Tax Liens on His Form U4

The Form U4 requires registered representatives to disclose any “unsatisfied judgments or liens.” The Form U4 also instructs registered representatives to complete a Form U4 DRP when they are subject to an unsatisfied judgment or lien disclosing the: (1) judgment/lien amount; (2) judgment/lien holder; and (3) judgment/lien type.

It is undisputed that Mathis failed to amend his Form U4 to disclose the five tax liens that the IRS entered against him from August 1996 through September 2002. Although Mathis was required to amend his Form U4 within 30 days after learning of each of the tax liens, he did not do so until July 2003, and only after FINRA staff brought the issue to his attention. *See* Article V, Section 2(c) of FINRA’s By-Laws. Mathis therefore failed to amend his Form U4 timely to disclose the five tax liens, in violation of NASD Rule 2110 and IM-1000-1.

Mathis cannot escape liability by stating that he did not extensively review the notices of tax liens before forwarding them to his accountant to handle because the obligation to keep the Form U4 current falls squarely on the registered representative. *See Frank R. Rubba*, 53 S.E.C. 670, 674 (1998) (holding that the responsibility for updating the Form U4 rests with the registered representative). Thus, it was Mathis’s responsibility to update his Form U4 with requisite information about the liens. The Form U4 plainly requires disclosure of any unsatisfied judgments or liens and further requires the filing of a DRP that discloses the lien amount, lien holder, and lien type.⁷

In addition, Mathis was subject to the First, Second, and Third Tax Liens when he marked “NO” to the question on the initial Forms U4 that he filed when he became associated with InvestPrivate and CelebrityStartUps that asked whether he was subject to any tax liens. Mathis’s failures to disclose those liens on the two initial Forms U4 also violate NASD Rule 2110 and IM-1000-1.

B. Mathis Is Subject to a Statutory Disqualification for Willfully Failing to Disclose Material Information on His Form U4

We next consider whether Mathis is subject to a statutory disqualification. Section 3(a)(39)(F) of the Securities Exchange Act of 1934 (“Exchange Act”) states that a person who files an application for association with a member of a self-regulatory organization and who “willfully” fails to disclose “any material fact . . . which is required to be stated” in such

⁷ The Hearing Panel was not persuaded by Mathis’s assertion that the requirement on the Form U4 to disclose any “unsatisfied judgments or liens” was ambiguous and confusing. We agree with the Hearing Panel’s conclusion and find that there is no plausible basis for such a claim. It is axiomatic that the Form U4’s requirement to disclose “liens” includes tax liens. We find that a reasonable person would not conclude that tax liens were somehow exempted from the requirement.

application is “statutorily disqualified” from participating in the securities industry. *See also* Article III, Sec. 4 of the FINRA By-Laws. Based on the analysis below, we find by a preponderance of evidence that Mathis acted “willfully” in failing to disclose “material” information on his Form U4. Mathis is therefore statutorily disqualified from participating in the securities industry.

1. Willfulness

In determining whether Mathis acted willfully, we need not find that he intended to violate NASD rules to uphold a finding of willfulness. *See Dep’t of Enforcement v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *10 (NASD NAC Apr. 27, 2004) (*citing Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965)). Instead, we need only find that he intended to commit the act that constitutes the violation, electing not to report tax liens on his Form U4. *See id.*; *Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000). Thus, we find that Mathis willfully failed to disclose the tax liens at issue on his Form U4.

Mathis’s shifting explanations are insufficient to overcome this willfulness finding. Mathis asserted during the investigation and at the hearing that, although he had received notices of tax liens from the IRS, he was unaware that he was subject to any liens because he thought there was a distinction between a “notice” of a tax lien and being subject to a tax lien. Like the Hearing Panel, we are not persuaded by Mathis’s argument. Indeed, the record unequivocally demonstrates that the IRS notified Mathis that he was subject to five separate tax liens. It is also undisputed that Mathis received every one of the five notices of tax lien that the IRS sent to him. Each one-page notice advised Mathis of the following facts: (1) that the IRS had “made a demand” for payment of the tax liability set forth in the notice; (2) that the taxes “remain[ed] unpaid;” and (3) that the United States had a “lien on all property and rights to property belonging to [Mathis] for the amount of these taxes.” The notices therefore clearly and unambiguously informed Mathis that the IRS had entered liens against him in the amounts of his unpaid federal taxes. In addition, the two installment agreement letters that Mathis received from the IRS specifically informed him that tax liens would remain against him and would not be released until he paid his tax debt in full. These IRS documents subjected Mathis to federal tax liens and no reasonable person could conclude otherwise. Moreover, Mathis’s claimed unawareness of the tax liens is further undermined by the fact that he had been alerted by Holderbaum in December 2001 that his attempts to establish an Internet account in Mathis’s name were unsuccessful because the credit check revealed that Mathis had an existing tax lien.

Mathis also argues that he did not disclose the tax liens because of advice he received from Hellmers that he did not have to disclose the First Tax Lien. The Hearing Panel concluded that Mathis reasonably relied on such advice. In finding that Mathis did not act willfully with respect to events prior to January 1999, the Hearing Panel found the testimony of Hellmers to be credible and concluded that Mathis’s reliance on the advice was reasonable given Hellmer’s position at The Boston Group and his lengthy service as a FINRA district director. Based on that reasoning, the Hearing Panel found that Mathis’s failure to amend his Form U4 to disclose the First Tax Lien in 1996 was not willful. The Hearing Panel also found, however, that Mathis became aware that “there might be an issue regarding the requirement to disclose tax liens” when he falsely represented on the Annual Certification in January 1999 that he was current in his

taxes and “made a conscious effort to conceal his tax liabilities from his employer.” The Hearing Panel stated that Mathis’s awareness of a tax lien was “underscored” in December 2001 when Holderbaum told Mathis about the tax lien issue related to his credit report and Mathis “took no action.” Accordingly, the Hearing Panel found that Mathis’s failure to amend his Form U4 to disclose the tax liens beginning in January 1999 was willful.

Although we find no reason to disturb the Hearing Panel’s credibility finding with respect to the testimony of Hellmers,⁸ we disagree with the Hearing Panel’s conclusion that Mathis reasonably relied on his advice. Hellmers testified that he told Mathis that his advice not to disclose the tax lien was only his “opinion” and that, therefore, he would forward the disclosure question to The Boston Company’s compliance office and would follow their decision.⁹ Moreover, there is no indication in the Form U4 that only liens that are securities-related are required to be disclosed. Given these facts, Mathis’s reliance on the advice he received from Hellmers was unreasonable. *See, e.g., Knight*, 2004 NASD Discip. LEXIS 5, at *11-12 (finding that respondent’s reliance on statement by individual who advised him to answer “no” to question on Form U4 regarding felony charges was unreasonable given that the person had no compliance responsibility and was not the branch manager).

Neither Hellmers nor Mathis received a response from The Boston Group compliance department concerning the tax lien disclosure question. The Hearing Panel reasoned that, because Hellmers had made the inquiry on Mathis’s behalf, the compliance department would have responded to Hellmers, not Mathis. But this reasoning does not address the gravamen of the allegation, which is that it was Mathis’s responsibility to make the requisite disclosures on his Form U4; hence, Mathis had a duty to seek information from the proper authorities about his Form U4 disclosure obligation.¹⁰ Consequently, Mathis was responsible for following up with The Boston Group’s compliance department. Similarly, Mathis should have consulted the proper

⁸ *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *15 n.21 (Jan. 6, 2006) (finding that the “credibility determinations of an initial fact finder are entitled to considerable weight”), *aff’d*, 2006 U.S. App. LEXIS 30982 (Dec. 12, 2006).

⁹ Hellmers stated that, after reviewing the First Tax Lien, he “offered to [Mathis] his opinion . . . that it was not a reportable event.” Hellmers testified that he thought that because the First Tax Lien “did not arise as a consequence of actions by Mr. Mathis within the securities industry . . . it didn’t rise to the level of a reportable event.” Hellmers admittedly had no experience during his tenure at FINRA with the disclosure requirements on the Form U4 relating to tax liens.

¹⁰ *See, e.g., James Allen Schneider*, 52 S.E.C. 840, 843 (1996) (finding that the respondent misrepresented information on a Form U4 and that he should have checked with proper authority if unsure how to accurately respond to a question), *aff’d*, 118 F.3d 1577 (3d Cir. 1997); *Dep’t of Enforcement v. Zdzieblowski*, Complaint No. C8A030062, 2005 NASD Discip. LEXIS 3, at *16 (NASD NAC May 3, 2005) (stating that respondent had “an obligation to inquire about the charge against him if he was unsure how to answer accurately a question on the Form U4”).

authorities at the other firms with which he was associated during the relevant period if he had questions about disclosing the tax liens on his Form U4.

We therefore modify the Hearing Panel's finding that Mathis's failure to amend his Form U4 prior to January 1999 was not willful. We find instead that, by a preponderance of the evidence, Mathis willfully failed to amend his Form U4 from the time he received notice of the First Tax Lien in August 1996. In addition, we find that Mathis acted willfully when he failed to disclose pending tax liens on two initial Forms U4.

2. Materiality

We turn next to the question of whether the tax liens were material for purposes of disclosure on Mathis's Form U4. We find that they were. As we have stated previously, "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material." *Knight*, 2004 NASD Discip. LEXIS 5, at *13. In the context of Exchange Act Rule 10b-5, a fact is material if a reasonable investor would view the disclosure of the omitted information as "significantly altering the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (citation omitted). Modifying this materiality standard to the circumstances here, we find that a reasonable employer or regulator would have viewed the tax liens against Mathis as extremely relevant. *See, e.g., Dep't of Enforcement v. Toth*, Complaint No. E9A2004001901, 2007 NASD Discip. 25, at *34-35 (NASD NAC July 27, 2007), *aff'd*, *Douglas J. Toth*, Exchange Act Rel. No. 58074, 2008 SEC LEXIS 1520 (July 1, 2008), *appeal filed Toth v. SEC*, No. 08-3289 (3d Cir. filed Jul. 31, 2008).

Mathis was subject to five separate tax liens from August 9, 1996, to approximately October 2003, when the IRS officially released the liens after Mathis paid the outstanding tax debt. The liens during that period totaled \$634,434. We conclude that a reasonable employer, investor, or regulator would want to know that Mathis failed to pay his federal taxes over an extended number of years and that the taxes owed were sizeable. National Securities' Annual Certification required Mathis to disclose information on unpaid taxes and liens not disclosed on his Form U4, thus indicating the importance that National Securities placed on such information. We find that the nondisclosure of tax liens on Mathis's Form U4 altered the total mix of information available. Therefore, the tax liens constituted material information that should have been disclosed on Mathis's Form U4.¹¹

¹¹ Mathis argues that the tax liens were not material because no customer or regulator took any adverse action once he disclosed the tax liens on his Form U4. This argument is not persuasive. We find that the tax liens constituted material information by any objective standard.

C. Mathis Failed to Amend Timely His Form U4 to Disclose a Customer Complaint and a Customer-Initiated Civil Action

The parties stipulated that Mathis's failures to amend timely his Form U4 to disclose a customer complaint by two elderly customers and a civil action by customer FS were not willful. As the Commission has stated, "[s]tipulated facts serve important policy interests in the adjudicatory process, including playing a key role in promoting timely and efficient litigation; we will honor stipulations in the absence of compelling circumstances." *Abbondante*, 2006 SEC LEXIS 23, at *10. Because there are no compelling circumstances, we choose to honor the stipulation that Mathis's failures to amend timely his Form U4 to disclose the customer complaints were not willful.

1. The Customer Complaint

The Form U4 requires amendments to be filed to keep current the requisite Form U4 information, including the disclosure of any investment-related, consumer-initiated written complaint alleging that the registered representative was involved in sales practice violations and setting forth a claim for compensatory damages of \$5,000 or more.

Mathis does not dispute that he was obligated to amend timely his Form U4 to disclose a written complaint from two elderly customers that he received on or about December 6, 2002. Thus he should have amended his Form U4 to disclose the complaint by January 5, 2003, to comply with Article V, Section 2(c) of FINRA's By-Laws (requiring registered representatives to submit a Form U4 amendment within 30 days of their receipt of information required to be reported on the Form U4). Mathis did not make the amendment, however, until February 20, 2003 (76 days after his receipt of the customers' complaint and 34 days after his receipt of an information request from FINRA staff concerning his failure to amend his Form U4).

Mathis's failure to amend timely his Form U4 to disclose the customer complaint constitutes a violation of NASD Rule 2110 and IM-1000-1.

2. The Civil Action

The Form U4 requires the disclosure of any pending investment-related, consumer-initiated civil litigation in which the registered representative was "*named*" as a defendant and "*involved in one or more sales practice violations*." (emphasis added.) FS initiated civil litigation against Mathis, and other named defendants, on April 6, 2003. The civil complaint alleged that Mathis and others were involved in various sales practice violations.

At the hearing, Mathis argued that he was not obligated to disclose the FS complaint.¹² In support, Mathis asserted that the complaint alleged only generally that “defendants” committed the alleged violations without specifying him by name and that the complaint did not allege that he was “involved” in any “sales practice violations.” These arguments are inconsistent with Mathis’s being a named defendant in the civil action at issue and with the stipulation that Mathis entered into a couple of weeks prior to the hearing stating that he was served with a complaint by customer FS on or about April 6, 2003, that he was named as a defendant in that complaint, that he failed to amend timely his Form U4 to disclose the FS complaint, and that his failure to disclose the matter was not willful. We find no compelling circumstances to set aside these stipulations. *See Abbondante*, 2006 SEC LEXIS 23, at *10.

FS’s civil complaint plainly alleged that Mathis was “involved” in “sales practice violations” as those terms are defined in the guidance set forth in the “Form U4 and U5 Interpretive Questions” that FINRA issued “to clarify reporting obligations”:

The term “involved” includes both doing an act and failing reasonably to supervise another in doing an act. The term “sales practice violations” includes any conduct directed at or involving a customer that would constitute a violation of an SRO rule for which a person could be disciplined; any provision of the Securities and Exchange Act of 1934; or any state statute prohibiting fraudulent conduct in connection with the offer, sale or purchase of a security or in connection with the rendering of investment advice. . . .

FINRA, Form U4 and U5 Interpretive Questions (2003), <http://www.finra.org/RegulatorySystems/CRD/FilingGuidance/p005243> [hereinafter *Interpretive Guidance*].

Applying the principles in the *Interpretive Guidance*, there is no doubt that Mathis was required to disclose FS’s civil complaint. The complaint explicitly named him as a defendant

¹² Although InvestPrivate’s compliance director gave inconsistent statements regarding Mathis’s obligation to disclose the FS civil action on his Form U4, the Hearing Panel did not address the issue or make any credibility findings with respect to his statements. Based on the compliance director’s contrary statements and lack of corroborating evidence, we give his testimony no weight on the Form U4 disclosure issue. During the investigation phase of this case, the compliance director represented that he could not explain why Mathis’s Form U4 was not updated in a timely manner to disclose the FS complaint because the complaint was sent to the Firm’s outside consulting firm “with instructions to update” the Central Registration Depository (“CRD”®) records “as necessary.” He took the opposite position at the hearing, however, stating that when he reviewed FS’s complaint he determined that it did not need to be disclosed on Mathis’s Form U4. He further testified that he eventually disclosed the complaint on Mathis’s Form U4 at FINRA’s “urging,” stating that he “didn’t want to seem like I wasn’t cooperating with them.” In any event, as we have stated, it was Mathis’s responsibility to update his Form U4 to disclose the FS complaint.

and used the term “defendants” throughout the document to refer collectively to Mathis and the others listed as defendants in the caption of the complaint. In addition, the complaint alleged that Mathis, as a named defendant, was “involved” in specific “sales practice violations” such as churning and making unsuitable investments, in a supervisory capacity, and in making misrepresentations, in an individual capacity. As such, the complaint triggered a Form U4 reporting obligation for Mathis.¹³ Moreover, Mathis stipulated prior to hearing that he failed to amend timely his Form U4 to disclose the civil action and that such failure was not willful. As noted, we honor Mathis’s stipulation.

The record shows that Mathis received notice of FS’s civil action on about April 6, 2003. He therefore should have reported the action on his Form U4 by May 6, 2003, to comply with the requirement that amendments to the Form U4 be submitted to FINRA within 30 days of the registered representative’s receipt of information required to be reported on the Form U4. *See* Article V, Section 2(c) of FINRA’s By-Laws. The record shows that Mathis did not amend his Form U4, however, until July 7, 2003 (93 days after his receipt of the civil complaint). Mathis therefore failed to amend timely his Form U4 to disclose the civil complaint filed against him by customer FS, in violation of NASD Rule 2110 and IM-1000-1.

V. Sanctions

The Hearing Panel imposed sanctions of a \$10,000 fine and a three-month suspension against Mathis for willfully failing to disclose tax liens on his Form U4. The Hearing Panel also imposed a \$2,500 fine and a 10-business-day suspension against Mathis for his failure to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil action on his Form U4. We affirm the Hearing Panel’s sanctions.

Following the issuance of the complaint in this matter, FINRA issued a press release entitled “NASD Charges InvestPrivate, Inc. and its Chairman [Scott Mathis] with Fraudulently Raising Millions.” FINRA eventually withdrew all allegations of fraudulent misconduct. At the hearing and on appeal, Mathis argued that he has suffered harm from the fact that the FINRA press release remained on FINRA’s website without any indication that the fraud charges had been withdrawn. In response to Mathis’s request that the situation be rectified, the Hearing Panel stated in its decision:

While the Panel does not have the authority to direct FINRA staff to remove the press release or append it with clarifying information, the Panel encourages FINRA to consider taking action so that people reading the press release on FINRA’s website do not have the mistaken impression that FINRA continues to allege that Respondent engaged in fraudulent conduct.

¹³ Mathis’s assertion that FS’s allegations are without merit has no effect on his obligation to disclose the complaint on his Form U4. *See Dist. Bus. Conduct Comm. v. Respondent 1*, Complaint No. C8A960052, 1998 NASD Discip. LEXIS 63, at *17 (NASD NAC Oct. 13, 1998).

After issuance of the Hearing Panel’s decision, the press release on FINRA’s website was modified to include the following notice: “NASD withdrew the fraud charges against InvestPrivate, Inc., Mathis, [DG] and [RR].” Moreover, the press release now provides a hyperlink to permit readers to view the related settlement document for InvestPrivate, Mathis, DG, and RR, and the Hearing Panel decision for Mathis.

Mathis contends that the Hearing Panel should have imposed no sanctions against him. In support, he argues that he has been “harm[ed]” and “punish[ed]” as a result of the press release that remained on FINRA’s website without the subsequent history. We reject Mathis’s argument. The statements in the press release were accurate. We conclude that publication of the information in the press release is not a mitigating factor for purposes of sanctions.

A. Willful Failures to Disclose Initially and to Amend Timely Forms U4

We have considered FINRA’s Sanction Guidelines (“Guidelines”) in determining the appropriate sanctions.¹⁴ The Guidelines for filing a false or inaccurate Form U4 recommend a fine in the range of \$2,500 to \$50,000 and a suspension in any or all capacities for five to 30 business days.¹⁵ In egregious cases, such as those involving “repeated failures to file, untimely filings or false, inaccurate, or misleading filings,” the Guidelines recommend consideration of a longer suspension (of up to two years) or a bar.¹⁶ We conclude that Mathis’s misconduct was egregious based on the aggravating factors discussed below.

The Guidelines for filing a false or inaccurate Form U4 instruct us to consider: 1) whether the information at issue was significant and the nature of that information; 2) whether the respondent’s failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and 3) whether the respondent’s misconduct resulted in harm to a registered person, another member firm, or any other person or entity.¹⁷ Only the first consideration is applicable here. We find that member firms, customers, and state regulators would consider the nature of the undisclosed information—five tax liens totaling \$634,436—to be significant. In fact, the record demonstrates that National Securities considered information about tax liens and unpaid taxes to be essential information as evidenced by its Annual Certification requiring registered representatives to state whether they had any liens that were not disclosed on their Forms U4 and any unpaid taxes.

¹⁴ *FINRA Sanction Guidelines* (2007), <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf> [hereinafter *Guidelines*].

¹⁵ *Id.* at 73.

¹⁶ *Id.* at 74.

¹⁷ *Id.* at 73.

It also is relevant to our determination of the appropriate sanctions that Mathis repeatedly and willfully failed to disclose the tax liens over approximately seven years.¹⁸ Mathis did not receive advice from the compliance departments of the member firms with which he was associated not to disclose his tax liens. Even without such advice, however, there could be no misunderstanding under the facts in the record that Mathis had a duty to disclose the tax liens on his Form U4. Each IRS notice of lien unmistakably advised Mathis that he was subject to a tax lien. And the Form U4 is similarly clear: It plainly instructs registered representatives to disclose whether they have any liens against them and, if so, to complete a DRP disclosing the lien type, the lien holder, and the lien amount. Complete and accurate Form U4 disclosures “are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision.” *Dist. Bus. Conduct Comm. v. Perez*, Complaint No. C10950077, 1996 NASD Discip. LEXIS 51, at *7 (NASD NBCC Nov. 12, 1996). Because FINRA cannot investigate the veracity of every detail of each document filed, it “must depend on its members to report to it accurately and clearly in a manner that is not misleading.” *Robert E. Kaufman*, 51 S.E.C. 838, 839 (1993). Registered representatives thus do not fulfill their Form U4 disclosure obligations by putting their heads in the sand in hopes that information required to be disclosed on the Form U4 can stay hidden from member firms and regulators.

The Guidelines also advise us to consider whether the respondent attempted to conceal his misconduct or to lull into inactivity, mislead or deceive the member firm with which he was associated. *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10). We thus have considered that Mathis took active steps to conceal the tax liens from National Securities by providing untruthful answers to the Annual Certification when he falsely stated that he had paid his taxes in full and that he had no tax liens against him despite having received notice of the First and Second Tax Liens.¹⁹

We find that the Hearing Panel’s imposition of a \$10,000 fine and three-month suspension from association with any member firm in any capacity is an appropriately remedial sanction for Mathis’s willful failure to amend his Form U4 to disclose the five tax liens at issue

¹⁸ The Principal Considerations in Determining Sanctions instruct us to consider whether the respondent engaged in numerous acts or a pattern of misconduct over an extended period of time. *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

¹⁹ The Hearing Panel did not find credible Mathis’s explanation that his false answer to the question of whether he had paid all of his taxes in full was the result of “a lack of concentration.” The record supports that credibility determination. As the Hearing Panel observed, answering the questions on the Annual Certification was not a matter of answering all questions in the negative or positive—Mathis answered some questions, “NO,” and some questions, “YES.” Indeed, by answering, “YES,” to the question of whether he had paid all of his federal, state, and local taxes, Mathis was able to conceal from National Securities that he owed back taxes, which also enabled him to be consistent in his other answer on the Annual Certification indicating that he was not subject to “any liens.”

and his willful failure to disclose the tax liens pending against him at the time he filed two initial Forms U4.

B. Non-Willful Failure to Amend Timely a Form U4 to Disclose Customer Complaint and Customer-Initiated Civil Action

With respect to the appropriate sanctions for Mathis's failure to amend timely his Form U4 to disclose the customer's complaint and civil action, we have considered that Mathis's misconduct was not willful based on stipulations agreed to by the parties. Additionally, we have taken into consideration that Mathis amended his Form U4 to disclose the customer complaint and civil action after FINRA brought the matter to his attention. Based on these considerations, we affirm the Hearing Panel's imposition of a \$2,500 fine and a 10-business day suspension from associating with any member firm in any capacity. We also affirm the Hearing Panel's determination that the 10-business day suspension run concurrently with the three-month suspension.

VI. Conclusion

We find that Mathis willfully failed to amend his Form U4 to disclose five tax liens beginning in 1996 and that he willfully failed to disclose tax liens pending against him on two initial Forms U4, in violation of NASD Rule 2110 and IM 1000-1. For those violations, we fine Mathis \$10,000 and suspend him in all capacities for three months. We also find that Mathis failed to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil action, in violation of Rule NASD 2110 and IM 1000-1. For this misconduct, Mathis is fined \$2,500 and suspended for 10 business days.²⁰ Suspensions shall run concurrently. In light of our findings that Mathis's failures to disclose the tax liens were willful, Mathis is statutorily disqualified. We also impose costs of \$5,907.67, consisting of \$4,430.58 in hearing costs from the proceedings below and \$1,477.09 in appeal costs.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

²⁰ 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.

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