FINANCIAL INDUSTRY REGULATORY AUTHORITY[1]
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SCOTT MATHIS (CRD No. 1362203), Respondent.	Disciplinary Proceeding No. C10040052 **Hearing Panel Decision** Hearing Officer – SNB December 19, 2007

For willfully failing to amend his Form U4 to reflect the filing of federal tax liens, and willfully failing to disclose the tax liens on two initial Form U4s, Respondent is suspended from associating with any member firm in any capacity for three months and fined $10,000. For failing to amend his Form U4 to disclose two customer complaints, Respondent is suspended for ten business days and fined $2,500.

Appearances

Samuel L. Barkin, Esq., and Hugh C. Patton, Esq., New York, NY, appeared on behalf of the Department of Enforcement.

Eric S. Hutner, Esq., and David S. Richan, Esq., New York, NY, appeared on behalf of Scott Mathis.

DECISION

I. Procedural History

On May 12, 2004, the Department of Enforcement ("Enforcement") filed a fourteen count complaint against Respondent Scott Mathis and several other

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD.

respondents.[2] In May of 2007, the parties entered into a settlement pursuant to which Enforcement dismissed some of the charges and settled others, leaving counts five, six and seven in dispute. The remaining charges allege that Respondent willfully failed to amend his Form U4 to reflect the filing of federal tax liens, willfully failed to disclose the tax liens on two initial Form U4s, and failed to disclose two customer complaints.

Respondent filed an answer denying these charges and requesting a hearing, which was held on July 10 and 11, 2007, before a hearing panel composed of a Hearing Officer and two former members of the District 10 Committee.[3]

II. Facts

A. Respondent

Respondent has been continuously registered with FINRA since May 23, 1985. Stip. 1. From that time until 1995, he was registered with various member firms. In August 1995 he registered with The Boston Group, where he worked until July 1998, when he became registered with National Securities Corporation ("National"). In April 1999 he jointed InvestPrivate, Inc., ("InvestPrivate") where he has been registered as a

[2] When the Complaint was filed, FINRA issued a press release entitled "NASD Charges InvestPrivate, Inc. and its Chairman [Scott Mathis] with Fraudulently Raising Millions." Several years later, FINRA withdrew all allegations of fraudulent misconduct without explanation. At the Hearing, Respondent noted that FINRA's press release, alleging that Respondent engaged in a massive fraud, remained on FINRA's website without any clarification or subsequent history showing that the fraud allegations were withdrawn. Respondent asked the Panel to rectify this. 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.

[3] References to the testimony of the hearing are designated as "Tr_", with the appropriate page number. References to the exhibits provided by Enforcement are designated as "CX-___." References to Respondent's exhibits are designated as "RX-___." References to Corrected Stipulations are designated as "Stip. __" with the appropriate page number and references. First Supplemental Stipulations are designated as "Supp. Stip. __" with the appropriate page number and references. CX-1-10, 18, 21-24, 26-31, 54-56, 59-63, and 65, and RX-1, 2, 5, 7, and 8 were admitted into the record.

General Securities Representative and General Securities Principal since July 8, 2000 to the present. Stip. 10; CX-1.

B. Respondent's Tax Liens

Respondent does not dispute that between August 1996 and September 2002, the Internal Revenue Service ("IRS") entered five tax liens against him. The tax liens arose from his inability to pay his then-current personal income tax obligations as they became due for the tax years 1993 and 1994 (one lien covering both years), 1995, 1997, 1999, and 2000. Specifically:

- On August 9, 1996, the IRS entered a $274,526.68 tax lien against Respondent in connection with his unpaid taxes for 1993 and 1994 (the "August 1996 Tax Lien");
- On September 23, 1998, the IRS entered a $53,302.53 tax lien against Respondent in connection with his unpaid taxes for 1995 (the "September 1998 Tax Lien");
- On May 11, 1999, the IRS entered a $179,429.07 tax lien against Respondent in connection with his unpaid taxes for 1997 (the "May 1999 Tax Lien") ;
- On July 2, 2002, the IRS entered a $92,985.14 tax lien against Respondent in connection with his unpaid taxes for 1999 (the "July 2002 Tax Lien");
- On September 9, 2002, the IRS entered a $34,192.86 tax lien against Respondent in connection with his unpaid taxes for 2000 (the "September 2002 Tax Lien").

Stip. 15; CX-4; CX-5; CX-7; CX-23; CX-24.

These liens were released by the IRS in October 2003. Stip. 16. During the seven years when the liens were pending, Respondent's Form U4 incorrectly reflected a "No" answer to a question which asked, "Do you have any unsatisfied judgments or liens against you." In addition, in November 1999 and August 2000, Respondent completed two new Form U4s that incorrectly answered "No" to this question. Stip. 22.

Specifically, on August 14, 1995, Respondent signed and filed a Form U4 in connection with his application for FINRA registration through The Boston Group. On July 24, 1998, there was a mass transfer of registrations from The Boston Group to National, which allowed representatives to be systematically terminated with a predecessor firm and registered with a successor firm without requiring submission of Form U4 and U5 filings. During his employment with The Boston Group and National, Respondent did not amend his Form U4 to disclose the existence of the August 1996 tax lien, the September 1998 tax lien, or the May 1999 tax lien. Stip 17-19.

On November 25, 1999, Respondent signed and filed a Form U4 in connection with his application for FINRA registration through InvestPrivate. On August 21, 2000, Respondent signed and filed a Form U4 in connection with his application for FINRA registration through CelebrityStartUps.com Inc. ("CelebrityStartUps"). On both Form U4s, Respondent falsely answered "No" to Question 23(M), which asked, "Do you have any unsatisfied judgments or liens against you?" Moreover, during his employment with InvestPrivate and CelebrityStartUps, Respondent did not amend his Form U4 to disclose the existence of the July 2002 tax lien, or the September 2002 tax lien. Stip 20-22.

Respondent ultimately amended his Form U4 disclosures on July 14, 2003, when FINRA Staff brought the issue to his attention. Stip. 24. Shortly thereafter, in October 2003, Respondent paid his overdue taxes, and all liens were released. Id.

C. The Customer Complaints

It is undisputed that Respondent failed to timely amend his Form U4 to reflect two customer complaints – a civil action and a written complaint. Enforcement does not allege that this conduct was willful. Stip. 29.

Specifically, on December 6, 2002, Respondent received a written complaint letter from customers OB and MB alleging fraud and suitability violations, and requesting damages of over $1 million (the "OB Complaint"). Stip. 25; CX-55. At that time, Respondent's firm relied upon an outside consultant to handle Form U4 amendments. However, in this case, the consultant did not make the required filing. CX-26; Tr. 119-125. Respondent amended his Form U4 to reflect the OB Complaint on February 20, 2003, after FINRA Staff brought it to his attention. Stip. 26.

In addition, on April 6, 2003, Respondent received a civil complaint filed by customer FS alleging sales practice violations, and requesting damages of over $2 million (the "FS Complaint"). Stip. 27; CX-56. Again, InvestPrivate's consultant failed to timely amend Respondent's Form U4. CX 26; Tr. 470. However, Respondent filed an amendment on July 7, 2003, after FINRA Staff brought it to his attention. Stip. 28. Despite this filing, Respondent argued at hearing that he was not required to disclose the FS Complaint.

III. Violations

A. Failure to Disclose Tax Liens on Form U4s

Rule 2110 and IM-1000-1 require associated persons to answer the questions of the Form U4 accurately and fully. It is well established that the accuracy of an applicant's Form U4 "is critical to the effectiveness" of a self-regulatory organization's ability "to monitor and determine the fitness of securities professionals." See e.g., Dep't of Enforcement v. Toth, No. E9A2004001901, 2007 NASD Discip. LEXIS 25, at *23 (NAC July 27, 2007) (appeal docketed, No. 3-12739 (SEC Aug. 27, 2007)) (quoting Rosario R. Ruggiero, 52 SEC 725, 728 (1996)); Thomas R. Alton, 52 SEC 380, 382 (1995), aff'd 105 F.3d 664 (9th Cir. 1996).

Moreover, Article V, Section 2(c) of the FINRA By-Laws requires that associated persons keep their Form U4s "current at all times," and that amendments to Form U4s be filed "not later than 30 days after learning of the facts or circumstances giving rise to the amendment." Failing to file prompt amendments to a Form U4 is a violation of Rule 2110. See Toth, 2007 NASD Discip. LEXIS 25. See also, FINRA's Membership, Registration and Qualification Requirements, IM-1000-1 (providing that an incomplete or inaccurate filing of information with FINRA by a registered representative "may be deemed to be conduct inconsistent with just and equitable principles of trade").

Form U4s require the disclosure of unsatisfied tax liens. CX-8 p. 3. There is no dispute that, over a seven year span, Respondent failed to amend his Form U4 to disclose five tax liens, and failed to disclose these liens on two initial Form U4s. Accordingly, the Panel finds that Respondent violated Rule 2110 and IM-1000-1.

B. Failure to Disclose Customer Complaints

As noted above, Rule 2110 and IM-1000-1 require associated persons to answer the questions of the Form U4 accurately and fully, and to keep the Form U4 current by filing required amendments within 30 days.

Respondent was therefore required to timely amend his Form U4, to disclose any "investment related, consumer initiated, written complaint" that "alleged that [he was] involved in one or more sales practice violations and contained a claim for compensatory damages of $5,000 or more." Id. He was also required to disclose whether he was the subject of any pending "investment-related, consumer initiated…civil litigation" alleging that he was "involved in one or more sales practice violations." Id.

Respondent does not dispute that he was required to amend his Form U4 to disclose the OB Complaint. However, at the hearing, Respondent argued that he was not required to amend his Form U4 to disclose the FS Complaint because, although he was named as a defendant, he was not the customer's broker, and did not commit the actions alleged in the Complaint. Tr. 115-117, 379-384. Moreover, Respondent asserted that because the complaint only alleged that "defendants" committed the violations, without specifying Respondent, Respondent had no obligation to disclose the complaint. Id.; CX-56. InvestPrivate's Compliance Officer testified that he concurred in Respondent's interpretation. Tr. 452-453.

The Panel was not persuaded by this argument. Where, as here, Respondent is a named defendant in a complaint filed by a customer, alleging generally that defendants (who, as defined, included Respondent) engaged in investment related sales practice

violations, Respondent is required to disclose this on his Form U4, even if the complaint is unclear or without merit.

Respondent was required to timely amend his Form U4 to disclose the OB and FS customer complaints, and Respondent failed to comply with this requirement. Accordingly, the Panel finds that Respondent violated Rule 2110 and IM-1000-1.

IV. Applicability of a Statutory Disqualification

Enforcement alleges that Respondent's failure to disclose his tax liens was willful. A finding of willfulness has serious consequences. Section 15(b)(4)(A) of the Securities Exchange Act of 1934 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 that application is statutorily disqualified from participating in the securities industry. Article III, Section 4(f) of FINRA's By-Laws gives effect to this by providing that a person is subject to a "disqualification" if such person "has willfully made or caused to be made in any application … to become associated with a member … 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 such application … any material fact which is required to be stated therein."

A. Willfulness

To support a finding of willfulness, the Hearing Panel need not find that Respondent intended to violate a specific rule or law; rather, the Hearing Panel need only find that Respondent "intended to commit the act that constitutes the violation." Dep't of

Enforcement v. Knight, No. C10020060, 2004 NASD Discip. LEXIS 5 at *9-10 (NAC April 27, 2004).

Enforcement asserts that the tax liens were clear on their face, so Respondent knew or should have known that it was wrong to answer "No" to the question "do you have any unsatisfied judgments or liens against you." In support, Enforcement points to the text of each "Notice of Federal Tax Lien" that Respondent admittedly received, which states:

> …we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. 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 taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue. (emphasis added by Enforcement)

CX-4; CX-5; CX-7; CX-21; CX-23.

Respondent offers several arguments in response. First, he asserts that he did not understand that the documents he received were tax liens. Specifically, Respondent testified that when he received the five IRS documents entitled "Notice of Federal Tax Lien," he did not read them; he forwarded them to his accountant. Tr. 142-144, 150, 360. Respondent further testified that he believed the documents were simply "notices" and he would only be subject to a lien if access to his assets was limited, or if there was a freeze or attachment. Id. This argument, on its own, was not persuasive to the Panel. The willfulness issue does not turn on Respondent's subjective intent. The IRS documents, based upon their title alone, should have alerted Respondent to the fact that they were tax liens. Moreover, because the notices involved a significant amount of money – the first lien was for approximately $275,000 – they were highly important documents that a reasonable person would have read. This is particularly so because the notices were not

complex, and were only one page in length. CX-4; CX-5; CX-7; CX-23; CX-24. Nor was the Panel persuaded by Respondent's argument that the Form U4 phrase "unsatisfied judgments or liens" was so ambiguous that it did not call for disclosure of Respondent's tax liens.

At the hearing, Respondent offered a new argument. He claimed that when he received the first Notice of Tax Lien in 1996, he showed it to Kye Hellmers ("Hellmers"), who informed Respondent that he was not required to disclose it on his Form U4. Tr. 226-236, 357-360. Hellmers was Vice Chairman of The Boston Group at that time. Tr. 207-209. More importantly, Hellmers had 20 years experience working for FINRA, the last ten of which were in the capacity of District Director. Id. Hellmers appeared at the hearing and corroborated Respondent's account. Tr. 232-233. Hellmers recalled that he reviewed the Notice of Lien, and based upon his years of experience, told Respondent that he did not think any action, such as reporting the matter on his Form U4, was required. Hellmers' advice was based upon his understanding at the time that Form U4 disclosure standards required disclosure only if the lien was securities-related. Tr. 228-230. Hellmers testified that he forwarded the Notice of Lien to The Boston Group's Compliance Department, and heard nothing back, and so he assumed that the Compliance Department agreed with his opinion that nothing needed to be disclosed. Tr. 231-232, 243-244, 359.

Enforcement did not challenge the credibility of Hellmers' testimony, and the Panel found Hellmers to be credible.[4] Moreover, while the advice Hellmers gave

[4] Enforcement challenges Respondent's claim of reliance upon Hellmers' advice, because he did not remember the advice until shortly before the hearing. However, Respondent explained that his recollection was refreshed when, several weeks before the hearing, he was informed of Hellmer's recollection of the course of events. Tr. 386-387. Enforcement also argues that Respondent should not have relied on

Respondent was wrong - Form U4's lien disclosure requirement is not limited to securities-related liens, but by its terms applies to all liens - the Panel found that Respondent's consultation with and reliance on Hellmers, a senior officer who had recent, lengthy service as a FINRA District Director, was reasonable.[5] Dep't of Enforcement v. Kalmaer, No. C9B020016, 2002 NASD Discip LEXIS 38 (OHO Sept. 17, 2002) (declining to find willfulness when respondent consulted a "seasoned securities professional" regarding his U4 disclosure obligations). Accordingly, the Panel found that Respondent's failure to amend his Form U4 in 1996 and 1998 was not willful.

Respondent testified, however, that he subsequently forgot about this advice. It is unclear when this happened; however, in any event, there came a point when it should have become apparent that it was no longer reasonable to rely upon it. First, in January 1999, Respondent's false statements National's Annual Representative Certification ("Certification") indicated to the Panel that Respondent was aware that there might be an issue regarding the requirement to disclose tax liens. In particular, Respondent falsely stated in the Certification that he had paid all federal and state taxes due in full.[6] This representation, which Respondent clearly knew was false, indicated to the Panel that

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Hellmers' advice without receiving further confirmation from the Compliance Department. However, because Hellmers made the inquiry on Respondent's behalf, Compliance would have responded to Hellmers, not Respondent.

[5] Respondent also testified that he relied upon the earlier advice of a Compliance Director when he was employed with Gruntal & Co. However, the Panel did not give this any weight, because it did not relate to the tax liens at issue in the Complaint, it purportedly occurred quite a long time ago in 1993, and the Compliance Director did not appear at the hearing to testify.

[6] The Panel did not find credible Respondent's explanation that his false answer to the "taxes due" question was the result of "a lack of concentration." This was not a matter of answering all questions in the negative or positive – Respondent answered some questions "yes" and some questions "no." Respondent's "yes" answer to indicate that he had paid all federal, state, and local taxes, suggested to the Panel that he intended to hide the fact that he owed substantial back taxes. It also enabled him to be consistent in his answer that he was not subject to "any liens or judgments … which were not previously disclosed on Form U4." Id.

Respondent made a conscious effort to conceal his tax liabilities from his employer. Consistent with this misrepresentation, Respondent also misrepresented in the Certification that there were no liens or judgments entered against him which were not previously disclosed on his Form U4. CX-6 p. 2, questions 14 and 22.

Moreover, in December 2001, Respondent was specifically informed that he was subject to tax liens, following a credit check. In particular, InvestPrivate employee Tim Holderbaum told Respondent that a credit check using Respondent's social security number (performed in the course of opening an on-line internet store) revealed that Respondent had tax liens. Supp. Stip. 7; Tr. 132, 289. Holderbaum conveyed this information to Respondent by email, and also discussed it with him.[7] CX-18; Tr. 291-295.

Respondent asserted that his willingness to use his social security number demonstrated that he was unaware of the tax liens. However, this begs the question of Respondent's conduct when he was specifically informed of the liens. Instead of taking a closer look at the issue and amending the Form U4 to reflect the liens, Respondent was unconcerned, made no further inquiry, and took no action. Tr. 291-293, 301, 309-310. At this point, even assuming Respondent was confused about the liens, had Respondent simply reviewed the wording of the lien documents, he would have seen that his Form U4 disclosure was incorrect.

Based upon these circumstances, the Panel finds that, in January 1999, when Respondent falsely represented on the Certification that he was current in his taxes, he

[7] Holderbaum testified that he did not feel it was his place to ask questions about Respondent's tax liens, and he simply used his own social security number in order to address the situation. Stip. 8; Tr. 295, 309-310.

exhibited his awareness of an issue with respect to the tax liens, and answered falsely to conceal this and cut off further inquiry. This awareness was underscored in December 2001, when Holderbaum told Respondent about the tax liens.

Accordingly, the Panel finds that Respondent willfully failed to amend his Form U4 to disclose tax liens from January 1999 to 2003, and falsely denied these tax liens in two initial Form U4s filed during this period.

B. Materiality

Respondent argues that the tax liens were not material because there was no evidence that customers or employers expressed concern, and state regulators took no action. However, as FINRA recently reaffirmed in Toth, "Because of the importance that the securities industry places on full and accurate disclosure of information required by the Form U4, essentially all of the information that is reportable on the Form U4 may be considered to be material." 2007 NASD Discip. LEXIS 25, at *34. Moreover, an employer, in deciding whether to hire Respondent, would most likely want to know that Respondent was experiencing such financial difficulty that he could not pay his federal income taxes as they came due. In this case, National's Certification required Respondent to answer substantially the same questions, indicating the information was clearly material to that firm. CX-6. Had Respondent responded accurately, this might have factored into the firm's hiring of Respondent, or the firm might have elected to impose enhanced supervision on Respondent. See Dep't of Enforcement v. Perez, No. C10950077, 1996 NASD Discip. LEXIS 51 at *6-7 (NBCC Nov. 12, 1996).

In conclusion, the Panel finds that Respondent willfully failed to amend his Form U4 after his January 1999 Certification, and willfully made false representations in his

November 1999 and August 2000 initial Form U4s. In addition, the Panel finds that Respondent's failure to amend his Form U4 in December 2001, after Holderbaum confirmed that Respondent was subject to a tax lien, underscores this willfulness.

V. Sanctions

A. Tax Liens

For filing late, false, misleading, and inaccurate Form U4s, the FINRA Sanction Guidelines ("Guidelines") recommend a fine ranging from $2,500 to $50,000, as well as the consideration of a 5 to 30 business day suspension in all capacities. Guidelines, at 73-74 (2007). In egregious cases, such as those involving repeated misconduct, the Guidelines suggest a longer suspension of up to two years, or a bar.

Enforcement requests a suspension of at least eight months and a $10,000 fine for the failure to disclose the tax liens, and a suspension of at least 30 days and a $5,000 fine for the failure to disclose the customer complaints. Respondent asserts that he has already paid dearly - due to FINRA's uncorrected press release alleging that Respondent engaged in a massive fraud, which has had a profound negative impact on Respondent's business and reputation. Tr. 332-335. Respondent argues that no further sanctions should be imposed but if necessary, sanctions should not exceed a one-day suspension and a $1,000 fine.

The Guidelines suggest three principal considerations: (1) the "[n]ature and significance of information at issue; (2) whether the omission resulted in a statutorily disqualified person becoming associated with a firm; and (3) whether the misconduct harmed a registered person, a firm, or anyone else."

With respect to Respondent's failure to disclose the tax liens, while the information was material, it was not so significant as to make the violation egregious. Moreover, Respondent's failure to disclose the tax liens did not cause injury to his firm, customers, or other parties. Nor did the liens disqualify him from associating with a FINRA member.

However, the Panel also considered a number of aggravating factors. First, Respondent's failure to disclose the tax liens spanned seven years, and was willful for four of those years. Moreover, Respondent did not acknowledge his misconduct prior to detection by FINRA Staff, and attempted to conceal the tax liens, particularly through his untrue answers to the Certification. Finally, even when confronted with the fact that he had tax liens in his interactions with Holderbaum, he failed to make required Form U4 disclosures.

After careful consideration of these factors, the Panel finds that the appropriate remedial sanction in this case is a suspension of three months and a fine of $10,000.

B. Customer Complaints

In contrast to the failure to disclose the tax liens discussed above, Respondent's failure to disclose the two customer complaints was not willful. Moreover, while the nature of the customer complaints was serious, they were filed approximately 40 days late, and were the result of negligence by the outside consultant hired by Respondent's firm to handle such filings, rather than as a result of any willful conduct by Respondent. Accordingly, the Panel finds that the appropriate remedial sanction in this case is a suspension of ten business days and a fine of $2,500. Because the violations are similar,

the suspensions shall run concurrently. Dep't of Enforcement v. Siegel, No. C05020055 2004 NASD Discip. LEXIS 34 (NAC May 11, 2007).

VI. Conclusion

Respondent violated Rule 2110 and IM-1000-1 by willfully failing to provide material information on his Form U4.[8] For his failure to disclose tax liens, Respondent is suspended from associating with any member firm in any capacity for three months and fined $10,000, payable upon re-entry into the industry. For his failure to disclose customer complaints, Respondent is suspended from associating with any member firm in any capacity for ten business days and fined $2,500, payable upon re-entry into the industry. The suspensions shall run concurrently, and shall begin at the opening of business on February 18, 2008, and end at the close of business on April 18, 2008. In addition, Respondent is ordered to pay costs of $4,430.58, which includes an administrative fee of $750 and the cost of the hearing transcript.

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

[8] The Hearing Panel considered and rejected without discussion all other arguments of the parties.

Copies to:

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