FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL EARL MCCUNE (CRD No. 1640241), Respondent.	Disciplinary Proceeding No. 2011027993301 Hearing Officer - MC **HEARING PANEL DECISION** April 23, 2014

Respondent Michael Earl McCune willfully failed to file timely disclosures on his Form U4 to reflect a bankruptcy and liens filed against him, in violation of NASD Rule 2110 and IM-1000-1, and FINRA Rules 1122 and 2010. The Hearing Panel suspends him from associating in any capacity with any FINRA member firm for six months and imposes a fine of $5,000 and costs. Respondent's willful violations subject him to statutory disqualification.

Appearances

Lane Thurgood, Esq., and Robert Floyd, Esq., Rockville, Maryland, for the Department of Enforcement.

Michael Earl McCune, Respondent, pro se.

I. Background

Respondent Michael Earl McCune has a troubled financial history, marked by filings of bankruptcies and tax liens. As a registered representative in the securities industry since 1987,[1] Respondent was obligated by NASD and FINRA Rules[2] to disclose these events to his employer firm, and to ensure that they were reflected in timely amendments to his Uniform Application for

[1] Stipulations of Fact Between FINRA Department of Enforcement and Respondent Michael E. McCune ("Stip.") 1-9.

[2] NASD consolidated with the regulatory arm of the New York Stock Exchange in July 2007. A new Consolidated Rulebook was adopted on December 15, 2008. S*ee* FINRA Regulatory Notice 08-57 (Oct. 2008). The conduct rules

Securities Industry Registration or Transfer ("Form U4") filed with the Central Registration Depository ("CRD"). His failure to meet these obligations led to the Complaint and hearing in this case.

Respondent filed his first bankruptcy petition in 1989. He did not disclose it until 1996, when he amended his Form U4 as he began employment with a new firm. Six years later, in 2002, Respondent filed another bankruptcy petition; it was dismissed in 2005. The Complaint does not include Respondent's failure to make timely disclosures and the appropriate amendments to his Form U4 in connection with these bankruptcy petitions.

In 2005, Respondent filed his third bankruptcy petition. Subsequently, from 2009 to 2011, four tax liens – one state tax and three federal – were filed against him. However, Respondent did not disclose any of these events to his employer firm as he should have, and he neglected to amend his Form U4 until his employer learned of them in 2011.

The Complaint charges Respondent with willfully failing to disclose the 2005 bankruptcy and the four lien filings to his firm, and willfully failing to make timely amendments to his Form U4, in contravention of Article V, Section (2) of the NASD and FINRA By-Laws, violating NASD Rule 2110 and IM-1000-1, and FINRA Rules 1122 and 2010. Enforcement requests a finding that these violations were willful, and asks the Hearing Panel to impose a six month suspension in all capacities, and a fine of $5,000.

Respondent does not contest the facts alleged in the Complaint, but he urges the Hearing Panel to refrain from finding his conduct willful. He argues that a finding of willfulness is unduly harsh. A finding of willfulness subjects Respondent to statutory disqualification from the

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applied in this case are those existing at the time of the conduct at issue. Because the conduct at issue began before the consolidation, and continued after the consolidation, both former NASD Rules and current FINRA Rules are implicated. The relevant By-Laws have remained unchanged. FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

securities industry.[3] The Hearing Panel recognizes that statutory disqualification is a consequence that has been characterized by the United States Court of Appeals for the Second Circuit as "potentially a more severe sanction than a monetary penalty or temporary suspension."[4] FINRA's By-Laws provide that a person subject to statutory disqualification cannot be associated with any FINRA member firm until the firm obtains permission from FINRA.[5]

The Hearing Panel has given careful consideration to the evidence and the arguments of the parties and has given due weight to the concerns expressed by both parties. A careful review of the circumstances of this case, however, compels a finding that Respondent's violative conduct was willful.

II. Findings of Fact and Conclusions of Law

A. Respondent's Background

Respondent attended the University of Kansas where he earned a bachelor's degree in economics in 1982 and a Juris Doctor degree in 1986.[6] As a student, he worked as a trust officer at a bank in Pittsburg, Kansas, and then worked for the Internal Revenue Service, reviewing tax returns, for six months.[7]

Respondent began his career in the securities industry in 1987.[8] He was for a time a branch office manager, with responsibilities that included reviewing the Form U4 filings of

[3] *See Mathis v. SEC*, 671 F.3d 210, 211 (2d Cir. 2012).

[4] *Id.* at 215-16.

[5] FINRA By-Laws, Art. III, Sections 3(b) & (d).

[6] Respondent does not practice law and is not a member of any state bar. Hearing Transcript ("Tr.") 25, 76.

[7] *Id*. at 26.

[8] Stip 1.

registered representatives working in his branch.[9] From December 1996 until May 2011, Respondent was registered through FINRA member firm Royal Alliance Associates, Inc.[10]

B. Respondent's First Bankruptcy Disclosure

In 1989, the IRS sought to collect unpaid federal income taxes from Respondent.[11] In February 1989, Respondent filed a petition for bankruptcy pursuant to Chapter 13 of the U.S. Bankruptcy Code. The bankruptcy was converted to a Chapter 7 bankruptcy, and Respondent's debts were discharged in October 1990. For over five years, however, Respondent did not amend his Form U4. He finally disclosed the bankruptcy, and amended his Form U4, on December 27, 1996, when he joined Royal Alliance.[12]

Respondent's answer to Question 22L on his December 27, 1996 Form U4 suggests that he initially intended *not* to make the disclosure, but then changed his mind. Question 22L asked, "Have you … filed a bankruptcy petition or been declared bankrupt?" Respondent placed an "X" in the box to answer "NO," but scratched it out and marked the box giving "YES" as his response.[13]

Respondent's disclosure required him to explain the bankruptcy on the Disclosure Reporting Pages ("DRPs"), the final section of the Form U4. There, Respondent explained that an outside business failure, taxes, and debts acquired while he was in school caused him to file for bankruptcy to "buy time," and that since then his financial situation improved. On the DRPs, Respondent gave the excuse that he had "omitted by mistake" to disclose the bankruptcy and

[9] Tr. 25.

[10] Stip. 6-7. Respondent is currently employed as a registered representative at another FINRA member firm. Because the Complaint alleges misconduct occurring while he was registered through a FINRA member firm, and he is currently registered, he is subject to FINRA's jurisdiction.

[11] *Id*. at 14.

[12] *Id*. at 12-15.

[13] Complainant's Exhibit ("CX- ") 18, at 3.

include it earlier on his Form U4.[14] Respondent fully admits that he failed to amend his Form U4 to make a timely disclosure.[15]

C. Respondent's Awareness of His Disclosure Obligations

Royal Alliance required Respondent and all registered representatives to complete an annual compliance questionnaire containing specific reminders of their obligation to update their Form U4 and to include information about lien and bankruptcy filings.[16] Respondent completed the questionnaires.[17] In addition, the firm's Sales Practice Manual provided that representatives were to review their Form U4s "on at least an annual basis" to ensure that they were accurate.[18]

D. Respondent's Subsequent Failures to Disclose Bankruptcies and Liens

Respondent continued to experience financial problems after joining Royal Alliance. On October 11, 2002, he filed his second petition for bankruptcy in federal court. This petition for bankruptcy was dismissed by the court in 2005.[19] However, in May 2005, Respondent filed a third petition for bankruptcy in federal court.[20] It was converted to a Chapter 7 bankruptcy in December 2005, and Respondent's debts were discharged in May 2006.[21]

Unfortunately, the 2006 discharge in bankruptcy did not herald the end of Respondent's financial distress. Respondent was unable to pay his federal income taxes for several years. Consequently, on March 10, 2009, the IRS filed a tax lien against Respondent for $157,685.

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[14] *Id*. at 5.

[15] Stip. 13.

[16] *Id*. at 27-28.

[17] Tr. 37-38.

[18] CX-12, at 4.

[19] *Id.* at 35-36; Stip. 16-18.

[20] Stip. 19.

[21] *Id*. at 21.

Respondent received IRS notices of the lien.[22] He understood that he needed to report the lien within 30 days of receiving notice of the filing.[23]

This was not the only tax lien filed against Respondent during this time frame. He learned that on March 31, 2009, the state of Kansas filed a tax lien for $1,872.[24] In addition, on May 3, 2010, the IRS notified Respondent of the filing of another federal income tax lien, this one in the amount of $258,000.[25] Respondent received notice and knew that on March 4, 2011, the IRS filed yet another lien, this one for $2,559.[26]

Respondent concedes that he understood his responsibility to update his Form U4, and to inform his firm promptly of every bankruptcy or lien filing.[27] Despite receiving notice of these reportable events, Respondent failed both to inform his firm and to make timely amendments to his Form U4.

In March 2011, in connection with its annual audit, Royal Alliance's independent auditor informed Respondent's supervisor that Respondent may have had a "possible U-4 disclosure problem."[28] Royal Alliance conducted a credit check, which revealed the liens and bankruptcies that Respondent had not disclosed to the firm or placed onto his Form U4. Respondent made the disclosures on April 7, 2011. This was six years after he filed the petition in bankruptcy in 2005; two years after the IRS filed the $157,685 federal tax lien; two years after Kansas filed the state

[22] Tr. 38-39; Stip. 23.

[23] Tr. 39.

[24] *Id*. at 40-41; Stip. 24.

[25] Tr. 45-46.

[26] *Id*. at 48; Stip. 26.

[27] Tr. 47-48, 50; CX-4-11. The earlier questionnaires, from 2003 through 2006, specifically asked about bankruptcies. CX-8-11. The later questionnaires were more specific, posing questions requiring him to acknowledge that he must report liens and judgments, as well as bankruptcies. CX-4, at 6, CX-5, at 11, CX-6, at 2. All required Respondent to acknowledge his responsibility to keep his Form U4 current.

[28] CX-25.

tax lien for $1,872; eleven months after the IRS filed the $258,000 federal tax lien; and a month after the IRS filed the last federal tax lien for $2,559.

E. Discussion

The Applicable Rules

A person registering with FINRA must comply with Article V, Section 2 of FINRA's By-Laws by filing a Form U4 to provide the information FINRA requires. Article IV, Section 1(c) and Article V, Section 2(c) require a registered person to ensure that his Form U4 is updated by filing amendments within 30 days of learning of the occurrence of a reportable event. These requirements are identical to the NASD By-Laws that were in effect when Respondent first entered the securities industry in 1987 as a registered representative.

NASD IM-1000-01 stated that filing incomplete or inaccurate information "which could in any way tend to mislead," or failing to correct a filing after notice that it could mislead, may be "conduct inconsistent with just and equitable principles of trade." FINRA Rule 1122, which replaced NASD IM-1000-1 in August 2009,[29] retains the sense of its predecessor by its mandatory prohibition of the filing of "information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."

FINRA Rule 2010 and its predecessor, NASD Rule 2110, require FINRA members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.[30] Failing to disclose required information and providing false answers to questions on Form U4 violate NASD IM-1000-1, FINRA Rule

[29] FINRA Regulatory Notice 09-33, 2009 FINRA LEXIS 105, at *6-7 (June 2009).

[30] FINRA Rule 2010 supplanted NASD Rule 2110 on December 15, 2008. The two rules are identical.

1122, and are actions that contravene the obligation to act consistently with just and equitable principles of trade, and therefore violate FINRA Rule 2010 and NASD Rule 2110.[31]

Furthermore, Section 3(a)(39) of the Securities Exchange Act of 1934 states that a person is subject to a "statutory disqualification" if the person "has willfully made … in any application … to become associated with a member of, a self-regulatory organization … any statement which was at the time … false or misleading with respect to any material fact, or has omitted to state in any such application … any material fact which is required to be stated therein."[32]

Importance of the Information Required by Form U4

As explained by the Securities and Exchange Commission, the Form U4 "is used by all self-regulatory organizations … state regulators, and broker-dealers to determine and monitor the fitness of securities professionals."[33] The information provided on the Form U4 is accessible, through BrokerCheck, to the public, to assist people in selecting a securities professional to provide financial services. Thus, one purpose of the Form U4 is to protect the public by helping investors research the backgrounds of securities professionals.[34]

When a registered representative has filed bankruptcies, or liens have been filed against the representative, the information should be available to potential or current customers. Knowledge of a representative's troubled financial history could be important to them, and instrumental in helping them to decide whether to entrust their financial assets to the representative.[35] And it is important for amendments to be timely. The 30-day deadline to amend

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[31] *Joseph S. Amundsen*, Exchange Act Rel. No. 69406, 2013 SEC LEXIS 1148, at *28 (Apr. 18, 2013).

[32] 15 U.S.C. § 78c(a)(39).

[33] *Amundsen*, 2013 SEC LEXIS 1148, at *23.

[34] "BrokerCheck is a free tool to help investors research the professional backgrounds of current and former FINRA-registered brokerage firms and brokers." FINRA website at *www.finra.org/investors/toolscalculators/brokercheck/*.

[35] *Scott Mathis*, Exchange Act Rel. No. 61120, 2009 SEC LEXIS 4376, at *29 (Dec. 7, 2009), *aff'd*, 671 F.3d 210 (2d Cir. 2012).

Form U4 upon receiving information of an occurrence that necessitates the amendment is designed to ensure that regulatory organizations, employers, and members of the public who rely on the information are able to access current information.[36]

The Materiality of the Information

If information not disclosed by a representative is significant to investors, the representative's employer firm, or regulators, then it is material.[37] Information relating to a registered representative's serious financial difficulties is important to all of these interested parties.[38]

The materiality of bankruptcies and tax liens is well-established. The existence of liens is material to employers because they may indicate the presence of financial pressure that could affect a representative's judgment. The information is material to investors because the liens may be evidence of a representative's poor management of finances, and affect investors' confidence in his financial advice, and willingness to entrust their money to him. It is material to regulators because liens filed by creditors may raise questions about a broker's financial well-being and his ability to manage finances.[39]

Respondent's 2005 bankruptcy petition states that between 1997 and 2004, Respondent had acquired $191,367 in federal and state tax debts, despite earning a significant income.[40] Respondent's four tax liens, filed against him from 2009 to 2011, totaled more than $400,000. The fact that Respondent's failures to make timely disclosure of these significant events occurred

[36] *Amundsen*, 2013 SEC LEXIS 1148, at *25.

[37] *Robert D. Tucker*, Exchange Act Rel. No. 68210, 2012 SEC LEXIS 3496, at *47 (Nov. 9, 2012).

[38] *Id*.

[39] *Id.* at *32-33; *Mathis*, 2009 SEC LEXIS 4376 at *29-30.

[40] CX-1. The petition states that Respondent had a gross monthly income of over $14,000, and expenses of approximately $12,000.

against the backdrop of two previous bankruptcies makes their materiality to investors, employers and regulators all the more obvious. This fact also bears on the willfulness of Respondent's misconduct.

The Willfulness of Respondent's Failures to Disclose

A violation is willful if a person knows what he is doing when he acts in violation of the applicable rules and federal securities laws. In other words, if a person voluntarily does something that is prohibited, the violation is willful.[41] In the context of a Form U4 disclosure violation, it is enough if a person provides false information on a Form U4 "of his own volition," and that the false answer is "neither involuntary nor inadvertent."[42] It is not necessary to show that a person intended to violate a rule, or knew of the particular rule he violated, to establish that a violation is willful.[43]

The record in this case clearly establishes that Respondent failed to disclose to his firm and amend his Form U4 to reflect his first bankruptcy until seven years after the filing. He failed to disclose the second bankruptcy petition he filed six years later. He failed to disclose his third bankruptcy, filed in 2005, until Royal Alliance confronted him about it in 2011. It was not until then that he amended his Form U4 to disclose the four tax liens filed from 2009 to 2011. In March 2000 and October 2003, when Respondent filed amendments to his Form U4, he gave false answers to questions explicitly asking him if he had filed a bankruptcy petition. These questions were clear and unambiguous.[44]

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[41] *Mathis*, 2009 SEC LEXIS 4376, at *19.

[42] *Amundsen*, 2013 SEC LEXIS 1148, at *38.

[43] *Id.* at *37-38.

[44] One question asked: "Within the past 10 years: (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?" Another asked: "Do you have any unsatisfied judgments or liens against you?" In response to each question, Respondent marked the box indicating the answer was "NO." CX-20, CX-21.

In determining whether Respondent acted willfully, the Hearing Panel cannot disregard the fact that Respondent disclosed at the end of 1996, seven years late, the first bankruptcy he filed in February 1989. Having done so, and having offered the excuse that he had mistakenly omitted to disclose the bankruptcy promptly, his subsequent failures to amend his Form U4 cannot reasonably be deemed anything other than willful. This record leaves the Hearing Panel with no other alternative than to find that Respondent willfully, over a protracted period, violated NASD Rule 2110 and IM-1000-1, and FINRA Rules 1122 and 2010.

III. SANCTIONS

In fashioning appropriate sanctions for failing to file, or filing late, false, or misleading amendments to Form U4, FINRA's Sanction Guidelines direct adjudicators to consider the "nature and significance" of the information that a respondent has failed to disclose. The Guidelines recommend a fine of $2,500 to $25,000 for late filings, a fine of $2,500 to $50,000 for failures to file and for filing false or inaccurate information, and consideration of suspension in any or all capacities for five to 30 business days.[45]

In egregious cases, the Guidelines call for consideration of a longer suspension, for up to two years, or a bar.[46] The factors to consider in determining whether a case is egregious include repeated failures to file, and untimely or false, inaccurate, or misleading filings. Among the Principal Considerations in Determining Sanctions that are relevant to this case are Principal Consideration No. 2, concerning acceptance of responsibility; Principal Consideration No. 8, relating to the number of violative acts and whether they reflect a pattern of misconduct; Principal Consideration No. 9, concerning the length of time over which the misconduct occurred; and Principal Consideration No. 10, addressing evidence of concealment of the

[45] *FINRA Sanction Guidelines* 69 (2013).

[46] *Id*. at 70.

misconduct.[47] The presence of these factors in this case cause the Hearing Panel to conclude that Respondent's misconduct was egregious.

First, Respondent did not accept responsibility for and acknowledge his misconduct to his firm or to FINRA prior to detection and intervention by his firm. It was not until Royal Alliance confronted Respondent, after discovering in a credit check that Respondent had undisclosed bankruptcies and liens, that he admitted their existence. And his explanation fell far short of an acknowledgement of his misconduct. Rather, Respondent attempted to evade such acknowledgement: he sent an e-mail to Royal Alliance's management in which he claimed that "[s]omehow" he "had the understanding that the U-4 did not require bankruptcy disclosure," and, with regard to his failure to disclose the liens, that he "(obviously incorrectly) thought that this referred to liens for civil judgements (lawsuits) although the language does not specify any particular type of lien." Tellingly, he added that this was "probably not [a] very satisfactory explanation."[48]

In the Answer Respondent filed in response to the Complaint, he claimed that he disclosed his 2005 bankruptcy filing and the tax liens to Royal Alliance *before* the firm conducted its audit.[49] His manager, however, refuted this claim. In a letter to FINRA, Respondent's manager made it clear that Respondent did not disclose the bankruptcies before the audit, and pointed out that in "all of [his] contacts, discussions, or annual audit reviews with [Respondent], never did he ever advise me of these issues."[50]

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[47] *Id*. at 6.

[48] CX-22. (April 7, 2011 e-mail from Respondent to Royal Alliance managers).

[49] Answer ¶¶ 2, 12.

[50] CX-25. (September 26, 2011, letter from Respondent's manager to FINRA).

In his Answer, Respondent claimed that he attempted to amend his Form U4 to disclose his 2005 bankruptcy and the liens but was unsuccessful because the firm had changed its filing procedure.[51] At the hearing, he stated that when Royal Alliance updated its procedures for representatives to make online amendments to the Form U4, he was unable to "figure [out] how to do it," and simply "forgot" to do anything about it thereafter. Respondent admits that these claims do not excuse his failure to make the amendments.[52]

When asked about the Royal Alliance compliance forms he completed annually, with explicit reminders of his obligation to update his Form U4, Respondent testified that "nobody wants to hear" it but "the truth" is that compliance questionnaires and sales practice manuals are "thick" documents that "nobody reads." He claimed that he, too, did not read them, but acknowledged "that's not an excuse."[53] As Respondent admitted at the hearing, in the past his "attitude was not what it should have been."[54]

The Hearing Panel notes that the filing of a bankruptcy petition is not an inconsequential event for anyone, particularly for one working in the securities industry, and that Respondent filed three bankruptcy petitions over the course of his career. We also must take into consideration the fact that Respondent possesses a law degree; previously worked, albeit briefly, for the IRS; and during his securities industry career worked in a managerial capacity for a time, during which he was responsible for reviewing the Form U4 filings of representatives he supervised. Furthermore, the annual compliance questionnaires he filled out, and the two Form U4s he filed with misleading answers to direct questions as to whether he had any bankruptcies,

[51] Answer ¶ 12.

[52] Tr. 58-59.

[53] *Id.* at 50-51.

[54] *Id.* at 58.

lead us to conclude that Respondent's misconduct constituted a pattern, extending over a period of years, and included his concealment of the truth from his firm and from FINRA.

Finally, we find that Respondent's misconduct prevented his firm, regulators, and customers from subjecting him to the "scrutiny that would otherwise have been given to someone with his history" of financial problems, and that by doing so "he put his own interests … above the legitimate interests of regulators, firms, and investors in having truthful information on which to base their dealings with him."[55]

For these reasons, the Hearing Panel finds that Enforcement's recommendations are reasonable and appropriately serve the remedial purposes of the Sanction Guidelines. We also take into consideration that our finding that Respondent's misconduct was willful has the additional consequence of subjecting him to statutory disqualification. We find this to be appropriate, because, as it has been noted in other contexts, "license requalification is an appropriate remedial response" to a failure to fulfill the obligation to maintain a fully and accurately updated Form U4.[56]

IV. ORDER

For violating NASD Rule 2110 and IM-1000-1, as well as FINRA Rules 1122 and 2010, we suspend Respondent Michael Earl McCune in all capacities for six months and impose a fine of $5,000.[57]

Respondent is also ordered to pay the costs of the hearing in the amount of $1,522.94, consisting of an administrative fee of $750 and the cost of the transcript.

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[55] *Amundsen*, 2013 SEC LEXIS 1148, at *27.

[56] *Tucker*, 2012 SEC LEXIS 3496, at *67.

[57] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

If this decision becomes FINRA's final disciplinary action, Respondent's suspension shall become effective on the opening of business on June 16, 2014, and shall end at the close of business on December 15, 2014. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

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