

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT

Complainant,

v.

VINCENT AU  
(CRD No. 2005219),

Respondent.

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Disciplinary Proceeding  
No. 2013036653301

Hearing Officer–MC

**HEARING PANEL DECISION**

December 12, 2016

**The Department of Enforcement did not prove by a preponderance of the evidence that Respondent willfully failed to amend his Uniform Application for Securities Industry Registration (“Form U4”) to disclose a federal tax lien, in violation of Article V, Section 2(c) of FINRA’s By-Laws, NASD Interpretive Material 1001-1, and FINRA Rules 1122 and 2010. Therefore, the Complaint is dismissed.**

For the Complainant: Josefina Martinez, Esq., David Friedman, Esq., and Margaret Tolan, Esq.,  
Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Jeff Kern, Esq., and Christopher Bosch, Esq., Sheppard Mullin Richter &  
Hampton, LLP, New York, NY.

**I. Introduction**

Respondent Vincent Au and his wife were unable to pay their tax bill when they filed their 2007 tax return. In November 2008, Au requested a 120-day extension of the payment deadline. The Internal Revenue Service granted the request with the proviso that if the Aus failed to pay in full by the new deadline in March 2009, it would file a tax lien.

In early 2009, Au consulted an accountant who advised him that by amending the Aus’ 2006 and 2007 returns, he could erase their tax liability. Au hired the accountant and informed the IRS of the steps he was taking. The IRS assigned a revenue agent to his case with whom Au remained in contact personally and through his accountant.

Au did not meet the IRS's extended deadline and in April 2009, the IRS filed a lien against the AUs for the amount owed. The IRS sent a single Notice of Federal Tax Lien ("Notice") to the AUs, but the Notice was returned to the IRS unclaimed.

In March 2010, Au filed an amendment to his Uniform Application for Securities Industry Registration ("Form U4") unrelated to the tax issue. In it, Au did not disclose the lien.

By April 2010, Au's accountant had resolved the 2007 tax problem. He submitted revised returns on their behalf that eliminated their tax liability and resulted in a tax credit. The IRS removed the lien and sent the AUs a refund.

The parties do not dispute these underlying facts. However, they urge the Hearing Panel to draw sharply opposing conclusions from them. The Department of Enforcement argues that Au intentionally refused to accept receipt of the Notice, and committed a willful violation of FINRA's By-Laws by not disclosing the lien on his Form U4. Enforcement argues that even if Au did not know the lien had been filed, he should have known, and he was required to amend his Form U4 whether or not he actually knew the lien had been filed.<sup>1</sup>

Au insists that he never received the Notice and because he did not know the IRS filed the lien, he did not commit a willful violation by failing to amend his Form U4 to disclose the lien.

## **II. Facts**

### **A. Respondent and Jurisdiction**

Au began his career in the securities industry in May 1989 at age 18 as a cold-caller. During his 23 years in the securities industry, he was associated with 13 broker-dealers.<sup>2</sup>

In 1998, Au founded Avalon Partners, Inc., a FINRA member broker-dealer he owned and operated until August 2011. Au was also Avalon's chief executive officer, and during the period relevant to the Complaint, from August 2009 to April 2010, he was the firm's chief compliance officer.<sup>3</sup> He held Series 4 (Registered Options Principal), 7 (General Securities Representative), 24 (General Securities Principal), and 63 (Uniform Securities Agent State Law) registrations.<sup>4</sup> Au left Avalon in August 2011 and over the next few years associated with three other FINRA member firms. Au left his last position with a FINRA member firm on November 25, 2013.<sup>5</sup>

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<sup>1</sup> Hearing Transcript ("Tr.") 345-46.

<sup>2</sup> Complainant's Exhibit ("CX-") 1, at 4; Tr. 164-65.

<sup>3</sup> CX-2, at 25-28; Complaint ("Compl.") ¶ 5; Answer ("Ans.") ¶ 5.

<sup>4</sup> Compl. ¶ 4; Ans. ¶ 4.

<sup>5</sup> Tr. 188; CX-1, at 3.

Enforcement filed this Complaint on November 18, 2015, one week before FINRA's jurisdiction over Au would have expired. Because Enforcement filed the Complaint within two years following the effective date of the termination of Au's FINRA registrations, Au remains subject to FINRA jurisdiction for the purposes of this disciplinary proceeding despite no longer being registered or associated with a FINRA member firm.

## **B. Respondent's 2006-2007 Federal Income Tax Filings**

Avalon was a small firm, employing 15 to 20 persons.<sup>6</sup> In 2007 and 2008 revenues fell.<sup>7</sup> In part because of the firm's net capital issues, Au did not cash a number of his commission paychecks.<sup>8</sup> The firm struggled to cope with high turnover, personnel problems, and the volatile market.

Au's wife, Tania Au, was Avalon's office manager. Her role relating to taxes was to gather the relevant documents and give them to her husband.<sup>9</sup> Au filed the couple's 2006 tax return in May 2007. They owed \$308,000 but did not pay it in full until July 2008.<sup>10</sup>

For 2007, the Aus' tax liability was slightly more than \$179,000.<sup>11</sup> Au did not send a check when he filed his 2007 return because he and his wife could not pay the tax.<sup>12</sup> Au testified that in the summer of 2008, when the IRS sent him a demand for payment, he called the telephone number provided and spoke with the IRS revenue agent assigned to his case,<sup>13</sup> who remained Au's IRS contact until the matter was resolved. Au and the agent discussed various payment options. The agent informed Au that he could ask for more time to pay the tax by requesting a hearing under the IRS's collection appeal program ("CAP"). Au did so, and the CAP hearing was held by telephone on November 25, 2008.<sup>14</sup>

At the CAP hearing, Au acknowledged the tax debt and said that he intended to pay it.<sup>15</sup> Immediately after the hearing, an IRS manager sent Au a letter ("CAP letter") summarizing the exchange between Au and the IRS. The CAP letter noted that Au was attempting to obtain a loan to pay the tax, and that he believed an IRS tax lien would impair his ability to obtain the loan and could jeopardize his employment as a stockbroker. Taking these points into consideration, the

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<sup>6</sup> Tr. 278.

<sup>7</sup> Tr. 194.

<sup>8</sup> Tr. 194-95.

<sup>9</sup> Tr. 278-79.

<sup>10</sup> Tr. 118.

<sup>11</sup> Tr. 120.

<sup>12</sup> Tr. 197.

<sup>13</sup> Tr. 197-98.

<sup>14</sup> Tr. 89, 199; CX-4.

<sup>15</sup> Tr. 201.

IRS granted the Aus a 120-day extension to pay the 2007 tax. As to the lien, the CAP letter concluded: “A Notice of Federal Tax Lien will not be filed until March 25, 2009, which is 120 days from the date of this letter. If the tax ... is not fully satisfied by March 25, 2009, a lien will be filed by the Service.”<sup>16</sup>

Au contacted various banks seeking a loan.<sup>17</sup> He also explained his plight to a principal of the firm that performed financial and operations responsibilities for Avalon.<sup>18</sup> The principal directed Au to an accountant in the firm’s personal tax department, to whom Au described his situation.<sup>19</sup>

After reviewing Avalon’s corporate structure and the Aus’ tax returns, the accountant made a series of recommendations. One was to obtain IRS approval to convert Avalon, which had been organized as a C corporation, to an S corporation so that Au, as Avalon’s sole owner, could claim Avalon’s net losses personally to offset the 2007 tax liability.<sup>20</sup> Once he did that, the accountant said, he would refile the Aus’ 2006 and 2007 tax returns.<sup>21</sup> The accountant would also address the problem of Au’s uncashed commission checks for which he had been taxed as if he had received the commissions.<sup>22</sup>

Au hired the accountant, whom he described as “a savior.”<sup>23</sup> Au understood that executing the accountant’s plan would be complicated and time consuming.<sup>24</sup> Tania Au also spoke with the accountant.<sup>25</sup> She understood that the plan involved amending Au’s W-2 forms, changing Avalon’s corporate status, and refiling Avalon’s and the Aus’ tax returns.<sup>26</sup> She described the situation as “extremely stressful”<sup>27</sup> but she and Au believed they were on a path to convert their substantial tax liability into a tax credit.

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<sup>16</sup> CX-4.

<sup>17</sup> Tr. 281, 305.

<sup>18</sup> Tr. 202.

<sup>19</sup> Tr. 203.

<sup>20</sup> A small business corporation may elect to be an S corporation under Subchapter S of Chapter 1 of the Internal Revenue Code, which permits the corporation to pass its federal income taxes through to its shareholders. *See* 26 U.S.C. §1361; <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations>.

<sup>21</sup> Tr. 203-05, 285-86.

<sup>22</sup> Tr. 286.

<sup>23</sup> Tr. 203.

<sup>24</sup> Tr. 204-05.

<sup>25</sup> Tr. 306.

<sup>26</sup> Tr. 285-87.

<sup>27</sup> Tr. 299-300.

The Aus' hired the accountant in early 2009, before the March 25 deadline set by the IRS.<sup>28</sup> Tania Au testified that her husband kept the IRS revenue agent informed about the accountant's work.<sup>29</sup> According to Au, he called the agent repeatedly with updates—in February, March, and April—and the agent encouraged him to complete the process as soon as possible.<sup>30</sup> In addition, Au testified that he had directed the accountant to speak directly to the revenue agent and that in early June 2009 he had appointed the accountant as his personal representative, which allowed the revenue agent to share information about the Aus' taxes with the accountant.<sup>31</sup>

The Aus did not pay their 2007 tax by the March 25, 2009 deadline.

### **C. The Notice of Tax Lien**

On April 3, 2009, the IRS revenue agent assigned to the Aus' case, with whom Au had been working to resolve his tax bill, issued the Notice of Federal Tax Lien for the Aus' 2007 tax debt. The Notice was filed on April 17, 2009, with the Office of the City Register in New York City's Finance Department. The amount of the Aus' unpaid assessment was \$179,641.16.<sup>32</sup>

The IRS creates and maintains computer-generated tax transcripts that document certain events occurring in a taxpayer's account for a given tax year.<sup>33</sup> These may include IRS assessments of liabilities, penalty charges, and interest calculations, and can show other activity, such as notices issued and actions taken by the IRS related to the account.<sup>34</sup>

In preparation for the hearing of this matter, the Aus hired a tax attorney formerly employed in the IRS's chief counsel's office, and authorized her to contact the IRS to obtain documents relating to the lien and the Notice. She obtained the tax transcript for the Aus' 2007 taxes ("tax transcript"). At the hearing, the only direct documentary evidence presented pertaining to service of the Notice upon the Aus was a single entry in the tax transcript stating: "Unclaimed notice of lien filing and right to Collection Due Process hearing."<sup>35</sup> When the attorney asked about the Notice sent to the Aus, the IRS contact told her it does not retain copies of these notices.<sup>36</sup>

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<sup>28</sup> Tr. 202, 205.

<sup>29</sup> Tr. 287-88.

<sup>30</sup> Tr. 205-07.

<sup>31</sup> Tr. 250; Respondent's Exhibit ("RX-") 2, at 2.

<sup>32</sup> CX-5.

<sup>33</sup> Tr. 103.

<sup>34</sup> Tr. 103-104.

<sup>35</sup> RX-2, at 2; Tr. 259-60, 263-64.

<sup>36</sup> Tr. 265-66.

The tax transcript contains only two other entries mentioning the lien. The first shows that the IRS placed the lien on April 10, 2009.<sup>37</sup> The other records removal of the lien on April 9, 2010.<sup>38</sup> Both Au and Tania Au testified unequivocally that they did not receive the Notice<sup>39</sup> and thus did not know the lien was filed.

#### **D. The Levy Notices**

Although the Aus testified that they did not receive the Notice, they did receive other correspondence the IRS sent to their address.

The tax transcript reflects several notifications sent to the Aus prior to the CAP conference. On May 26, 2008, the IRS issued the initial notice of their 2007 tax liability to the Aus.<sup>40</sup> Next, the transcript shows two notifications issued on August 14, 2008, each described as “Collection due process Notice of Intent to Levy.”<sup>41</sup> These are standard notices that typically inform the taxpayer of a liability and demand payment within 10 days.<sup>42</sup> The transcript shows that on August 25, 2008, the Aus signed and returned receipts for these notices.<sup>43</sup>

The Aus received a notice of levy, dated May 5, 2009.<sup>44</sup> A levy is a mechanism for seizing taxpayer property to satisfy an existing tax liability.<sup>45</sup> This levy was directed to Citibank, where the Aus maintained their bank account. The notice informed the Aus that the IRS had attached the funds in their Citibank account because of their unpaid 2007 tax. It stated: “Although we have told you to pay the amount you owe, it is still not paid. This is your copy of a notice of levy we have sent to collect this unpaid amount. We will send other levies if we don’t get enough with this one.” It gave the amount of tax owed and identified “Statutory Additions” of more than \$29,000 that brought their total liability to slightly less than \$209,000.<sup>46</sup> It said nothing about a lien.

The levy notice caught the Aus by surprise. Au testified that he was “bewildered and a little upset” because he had explained his plan of action to the revenue agent and believed that the agent knew and approved of the steps he and his wife were taking to resolve the tax issue.<sup>47</sup>

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<sup>37</sup> RX-2, at 2. It states: “Lien placed on assets due to balance owed.”

<sup>38</sup> RX-2, at 3. It states: “Removed lien.”

<sup>39</sup> Tr. 163, 289, 295.

<sup>40</sup> RX-2, at 1.

<sup>41</sup> RX-2, at 2.

<sup>42</sup> Tr. 84.

<sup>43</sup> RX-2, at 2.

<sup>44</sup> CX-6; Tr. 212-13.

<sup>45</sup> Tr. 109-10.

<sup>46</sup> RX-6.

<sup>47</sup> Tr. 213-14.

Tania Au, too, testified that she believed the revenue agent knew their plan and approved it.<sup>48</sup> She told Au to call the agent and he did so.<sup>49</sup>

Au testified that the agent explained that an automated system generated the levy notice and he would lift it.<sup>50</sup> Au also testified that the agent said nothing about the existence of a lien.<sup>51</sup> As promised, the IRS revenue agent released the levy. The AUs received a copy of the Release of Levy, dated May 21, 2009, just over two weeks after the date of the levy notice.<sup>52</sup>

Au testified that it was even more upsetting when he received two additional levy notices in July 2009.<sup>53</sup> It was surprising, according to Au, because by this time he believed the revenue agent knew the accountant had completed the conversion of Avalon to S corporation status, and that the AUs were well on the way to resolving the problem.<sup>54</sup>

One notice was directed to Citibank, again attaching the AUs' funds. Dated July 24, 2009, it was identical to the May levy notice except for the computation of the total amount due.<sup>55</sup> Like the first one, it made no mention of a tax lien.

The other was directed to Avalon. It had a different title: Notice of Levy on Wages, Salary, and Other Income ("Wage Levy Notice"). It was also dated July 24, 2009, and stated in bold capital letters "THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE." Unlike the other levy notices, the Wage Levy Notice made a single reference to a lien. Near the bottom of the page, in non-capitalized, regular font, it stated:

"The Internal Revenue Code provides that there is a lien for the amount shown above. Although we have given the notice and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us: (1) this taxpayer's wages and salary that have been earned but not paid, as well as wages and salary earned in the future until this levy is released, and (2) this taxpayer's other income that you have now or for which you are obligated."<sup>56</sup>

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<sup>48</sup> Tr. 295-96.

<sup>49</sup> Tr. 296.

<sup>50</sup> Tr. 214.

<sup>51</sup> Tr. 214-15.

<sup>52</sup> RX-7.

<sup>53</sup> Tr. 216.

<sup>54</sup> Tr. 216-17.

<sup>55</sup> RX-10.

<sup>56</sup> RX-8.

Au testified that he may have read the sentence with the reference to a lien, but if he did, he did not grasp its significance.<sup>57</sup> Tania Au testified that she did not notice it.<sup>58</sup>

After receiving the July notices, Au again called the revenue agent. He asked why the agent had filed them when he knew the Aus were going to erase their liability and receive a tax refund. According to Au, the agent once again said the issuance of the levy notice was automated and that he would release the levies.<sup>59</sup> Tania Au corroborated her husband's statement, testifying that when her husband called, the revenue agent gave the same explanation as before: an automated system issued them, and he would have them lifted.<sup>60</sup>

Less than two weeks later, the revenue agent issued a release of levy to Avalon, dated August 3, 2009, stating that "all wages, salary and other income now owed to or becoming payable" to the Aus "are released from the levy."<sup>61</sup> On August 23, the agent signed a release of levy on the Aus' Citibank funds.<sup>62</sup> The releases made no reference to the existence of a lien.

Although receiving the levy notices upset the Aus, the agent's explanation that an automated system issued the notices, and the fact that he quickly lifted them, reassured them. They felt this meant the IRS was satisfied with their efforts to resolve the underlying 2007 tax assessment.<sup>63</sup> Tania Au testified that she believed the IRS revenue agent, who had dealt with their case throughout, would not have lifted the levies unless he knew and approved of their efforts.<sup>64</sup>

On March 10, 2010, while the lien was still in place, Au amended his Form U4, the only time he did so in the period relevant to this case. He answered "No" to Question 14M, asking, "Do you have any unsatisfied judgments or liens against you?"<sup>65</sup> Au testified that during this period, he did not know the IRS filed a lien against him.<sup>66</sup>

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<sup>57</sup> Tr. 229-31.

<sup>58</sup> Tr. 298.

<sup>59</sup> Tr. 217-18.

<sup>60</sup> Tr. 297.

<sup>61</sup> RX-9.

<sup>62</sup> RX-11.

<sup>63</sup> Tr. 296-97.

<sup>64</sup> Tr. 296-97.

<sup>65</sup> Tr. 43-44; CX-12, at 12.

<sup>66</sup> Tr. 221-22.



## E. The Tax Expert's Testimony

Enforcement's chief witness at the hearing was a tax lawyer offered as an "expert in IRS practice and procedure."<sup>67</sup> He testified about his understanding of standard IRS procedures and he explained entries in the Aus' tax transcript.

The expert testified that "the IRS is charged with collecting tax in the least intrusive manner possible."<sup>68</sup> Typically, a revenue agent ascertains why taxpayers fail to pay taxes owed and explores various collection options such as installment payments.<sup>69</sup> Filing a federal tax lien "is viewed as the ultimate hammer" among collection alternatives.<sup>70</sup> The expert described three steps in creating a federal tax lien: (i) assessment of the amount of tax to be paid, which can be, as in this instance, by the taxpayer's calculations in a submitted return; (ii) issuance of a notice, and typically several notices, to the taxpayer demanding payment; and (iii) if the tax is not paid, automatic creation of a lien by operation of law.<sup>71</sup> A lien does not have to be filed to exist. Thus, when the Aus did not pay the tax following issuance of the liability notices, the lien was created automatically, even though the IRS had not yet filed it.<sup>72</sup>

When a lien is created, IRS practice is to conduct an analysis of the particular case to determine why the taxpayer did not pay, and explore alternatives such as installment payments or a compromise agreement to satisfy the liability.<sup>73</sup> If the IRS determines less coercive collection alternatives are insufficient to protect the government's interest in collecting the tax, it may decide to file the lien with the appropriate office.<sup>74</sup> Before doing so, the IRS repeats its review to ensure that it is taking the least intrusive collection action available.<sup>75</sup> The IRS is not required to inform the taxpayer in advance of filing, but once it files the lien, it must provide the taxpayer with notice of the filing.<sup>76</sup>

The Notice of Lien consists of three pages, each containing the same information. In this instance, the IRS filed the page of the Notice marked "Part 1" with the New York City Department of Finance's Office of the City Register. The IRS retained the page marked "Part 2," and sent the page marked "Part 3" to the Aus as required.<sup>77</sup> Such a notice is supposed to be

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<sup>67</sup> Tr. 69.

<sup>68</sup> Tr. 86-87, 100.

<sup>69</sup> Tr. 87-88.

<sup>70</sup> Tr. 87.

<sup>71</sup> Tr. 81.

<sup>72</sup> Tr. 81, 86.

<sup>73</sup> Tr. 86-87, 100.

<sup>74</sup> Tr. 100.

<sup>75</sup> Tr. 100.

<sup>76</sup> Tr. 101.

<sup>77</sup> CX-5, at 1; Tr. 101-02.

delivered to the taxpayer “either in person, left at the dwelling unit or sent by certified, registered mail.”<sup>78</sup>

The tax transcript entry documenting the Au lien filing, dated April 10, 2009, states: “Lien placed on assets due to balance owed.”<sup>79</sup> As noted above, the only reference to the Aus’ copy of the Notice states it was unclaimed.<sup>80</sup> That it was unclaimed did not affect the status of the filed lien; according to the expert, the purpose of the Aus’ copy of the Notice was simply to inform them of their rights to appeal the lien filing.<sup>81</sup>

On August 21, 2009, the Aus filed amended returns for tax years 2006 and 2007.<sup>82</sup> The amended 2007 return reduced the Aus’ self-assessed liability for 2007 by \$12,000; the amended 2006 return reduced their liability for 2006 by \$61,000.<sup>83</sup> The amended figures prompted the IRS to recalculate its previous assessments of interest and penalties,<sup>84</sup> and to credit the amounts now due the Aus to their 2007 tax debt.<sup>85</sup>

In November 2009, the Aus filed their 2008 return. Because of the losses Avalon sustained in 2008, the return calculated they had no taxable income but, instead, a nearly \$600,000 loss. With no tax due for 2008, the IRS transferred tax funds withheld by the government in 2008 to further reduce the Aus’ 2007 liability.<sup>86</sup>

After processing the returns, the IRS calculated that the Aus’ 2008 loss claim reduced their 2006 tax by more than \$175,000. Since they had already paid the 2006 tax bill in its entirety, the IRS applied this amount as a credit against the Aus’ 2007 liability.<sup>87</sup> The Aus’ changed circumstances required recalculation of the interest and late payment penalties previously assessed. Consequently, the IRS removed the tax lien and issued a refund check for \$658 in April 2010.<sup>88</sup>

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<sup>78</sup> Tr. 102.

<sup>79</sup> RX-2, at 2.

<sup>80</sup> RX-2, at 2; Tr. 102, 107.

<sup>81</sup> Tr. 107-08.

<sup>82</sup> Tr. 120.

<sup>83</sup> Tr. 120-21.

<sup>84</sup> Tr. 121-22.

<sup>85</sup> Tr. 124-25.

<sup>86</sup> RX-3; Tr. 126-27.

<sup>87</sup> Tr. 128-29.

<sup>88</sup> Tr. 129-30.

### **III. The Complaint and Answer**

More than five years later, on November 18, 2015, Enforcement filed the Complaint in this proceeding, without taking Au's investigative testimony.<sup>89</sup>

The Complaint's single cause of action alleges that Au willfully failed to amend his Form U4 to disclose the unsatisfied tax lien in violation of Article V, Section 2(c) of FINRA's By-Laws, NASD IM-1000-1, FINRA Rule 1122, NASD Rule 2110, and FINRA Rule 2010.<sup>90</sup> Characterizing Au's misconduct as egregious, Enforcement recommends a suspension in all capacities for six months and a fine of \$10,000.

A finding that Au willfully failed to disclose the tax lien and that the omission was material would subject him to statutory disqualification from the securities industry pursuant to Sections 3(a)(39) and 15(b)(4)(a) of the Securities Exchange Act of 1934.<sup>91</sup> FINRA's By-Laws provide that a person subject to statutory disqualification cannot be associated with any FINRA member firm unless the firm obtains permission from FINRA.<sup>92</sup> The United States Court of Appeals for the Second Circuit has characterized the consequence of statutory disqualification as "potentially a more severe sanction than a monetary penalty or temporary suspension."<sup>93</sup>

In his answer, Au claims he never received the Notice of Lien. He insists that during the relevant period, he was aware he owed the tax but was working to resolve the liability. Because Au was unaware the lien had been filed, and therefore had no notice requiring him to amend his Form U4, he argues that the Complaint should be dismissed.

### **IV. Discussion**

#### **A. The Applicable Rules**

Under the applicable by-laws and rules a representative's obligation to amend his Form U4 is triggered by notice of an occurrence requiring disclosure.

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<sup>89</sup> Enforcement required Au to testify in an on-the-record interview in January 2015, before issuing the Complaint in this proceeding, but did not question him about the tax lien, as the focus of the interview was not on Au's Form U4. Enforcement took no disciplinary action relating to the subject of that investigation. Tr. 223-24.

<sup>90</sup> FINRA Rule 1122 became effective on August 17, 2009, superseding NASD IM-1000-1 without substantive change, although with some modifications not at issue here. FINRA Regulatory Notice 09-33, 2009 FINRA LEXIS 96, at \*3 (June 2009). FINRA Rule 2010 became effective on December 15, 2008, superseding NASD Rule 2110, with no material change. FINRA Regulatory Notice 08-57, 2008 FINRA LEXIS 50, at \*32 (Oct. 2008). NASD IM-1000-1 applies to Au's conduct prior to August 17, 2009, and FINRA Rule 1122 applies to Au's conduct afterwards. See Rule Conversion Chart: NASD to FINRA, <http://www.finra.org/ruleconversionchart/>.

<sup>91</sup> See *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at \*13-14 (Mar. 15, 2016); *Mathis v. SEC*, 671 F.3d 210, 210-11 (2d Cir. 2012).

<sup>92</sup> FINRA By-Laws, Art. III, Sections 3(b) & (d).

<sup>93</sup> *Mathis*, 671 F.3d at 215-16.

Article V, Section 2(c) of FINRA's By-Laws requires registered persons to keep their applications for registration current by filing amendments to their Forms U4 "not later than 30 days *after learning* of the facts or circumstances giving rise to the amendment" (emphasis added). NASD IM-1000-1 and FINRA Rule 1122 prohibit registered representatives from filing information with FINRA concerning membership or registration "which is incomplete or inaccurate so as to be misleading" and state "the failure to correct such filing *after notice thereof*" may violate just and equitable principles of trade and justify disciplinary action (emphasis added).

Violations of NASD IM-1000-1 and FINRA Rule 1122 also violate NASD Rule 2110 and FINRA Rule 2010, both of which impose on registered representatives the obligation to observe "high standards of commercial honor and just and equitable principles of trade."<sup>94</sup>

**B. Enforcement's Contention that Respondent Knew or Should Have Known of Lien Filing, and Therefore Acted Willfully**

First, Enforcement contends that Au's failure to amend his Form U4 was willful because he knew the IRS had filed its lien but chose not to amend the Form U4. Enforcement stresses that Au "became aware of the debt giving rise to the lien as early as the autumn of 2008."<sup>95</sup> The IRS unequivocally put Au "on notice" that if he did not pay the tax by March 25, 2009, it would file a lien.<sup>96</sup> Enforcement insists Au's claim that he was unaware of the lien filing is false.<sup>97</sup> Furthermore, Enforcement points out that the IRS sent the Notice of Lien to the correct address, and Au received a number of other notifications the IRS sent there. Enforcement argues that since other mailings reached Au at his address, the Notice must also have been delivered, and because he believed the filing of a lien might hurt his career (as the IRS noted in the CAP letter),<sup>98</sup> Au must have "intentionally avoided" accepting it.<sup>99</sup>

Second, Enforcement contends that even if Au did not receive the Notice, the evidence circumstantially establishes that Au knew, or should have known, the IRS had filed the lien, and therefore his failure to amend his Form U4 was willful.

Third, in an argument similarly relying on circumstantial inferences, Enforcement urges the Panel to find, based on the expert's testimony, that pursuant to general IRS practice the revenue agent assigned to the Aus' case would have informed Au of the lien in the course of

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<sup>94</sup> *McCune*, 2016 SEC LEXIS 1026, at \*12.

<sup>95</sup> Dep't of Enforcement's Pre-Hearing Brief ("Enforcement's Pre-Hrg. Br."), at 3.

<sup>96</sup> Tr. 337-41.

<sup>97</sup> Tr. 335-36, 341.

<sup>98</sup> Enforcement's Pre-Hrg. Br., at 6.

<sup>99</sup> Tr. 339, 342-44.

their conversations, and that the Aus' personal representative also would have informed them of the lien after speaking to the revenue agent.<sup>100</sup>

Fourth, Enforcement argues that in July 2009, when Au received the Wage Levy Notice containing a reference to a lien, he must have realized that the lien had been filed, triggering his obligation to amend his Form U4.<sup>101</sup> Enforcement's position is that even if the Panel credits Au's testimony that he did not receive the Notice, the panel should give the Wage Levy Notice the same weight as service of the original lien filing Notice.<sup>102</sup>

We address these contentions in order.

### 1. The "Mailbox Rule"

Enforcement argues that because Au acknowledges "receiving *multiple* pieces of correspondence from the IRS *except* the lien notification," his claim that he did not receive the lien notice is "simply not reasonable," and should not be believed.<sup>103</sup> Thus, Enforcement urges the Panel to find that Au received the Notice but "intentionally failed to pick it up at the post office" and argues he "cannot avoid responsibility for his actions by claiming that he never saw the notice of lien."<sup>104</sup>

This argument invokes the "mailbox rule," which holds that evidence of mailing documents following regular mailing practices in the regular course of business is *prima facie* evidence that they were mailed, and creates a rebuttable presumption that they were received.<sup>105</sup> For example, it has been held that evidence that a clearing firm mailed 19 documents in the ordinary course of business established a presumption that the respondent received the documents. The presumption was buttressed by the absence of any record that the documents were not delivered, and by the local postmaster's testimony explaining post office procedures to ensure delivery of the mailings. In these circumstances, the respondent's claim that he did not receive them was insufficient to rebut the presumption.<sup>106</sup>

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<sup>100</sup> Tr. 341-42.

<sup>101</sup> Tr. 343, 353-54.

<sup>102</sup> Tr. 354-55.

<sup>103</sup> Enforcement's Pre-Hrg. Br., at 6 (emphasis in original).

<sup>104</sup> Tr. 351; Enforcement's Pre-Hrg. Br., at 11, citing *Dep't of Enforcement v. Mathis*, No. C10040052, 2008 FINRA Discip. LEXIS 49, at \*16 (NAC Dec. 12, 2008), *aff'd*, 671 F.3d 210 (rejecting respondent's claim that he did not review notices of tax liens before forwarding them to his accountant, stressing that representatives are required to keep their Forms U4 accurate and current).

<sup>105</sup> *Robert B. Fuller*, 56 S.E.C. 976, 990-91 (2003).

<sup>106</sup> *Id.*, at 992.

As noted, the presumption created by application of the mailbox rule is rebuttable. In this case, the AUs both testified they did not receive the Notice.<sup>107</sup> In her uncontradicted testimony, Tania Au testified that, during the relevant period, because she “always came home first,” she “always picked up the mail” in their apartment building lobby mailbox. While living there from 2008 through 2010, she received several notices of the post office holding a certified or registered letter.<sup>108</sup> On each of those occasions, she promptly retrieved it from the post office because “that is what you do.” She testified that in early 2009, the AUs were planning to amend their returns and expected they “would be getting a refund to wipe out this liability”; thus, they “were anxious to get any communication from the IRS.” Consequently, she “probably would have ran [sic] to the post office to get it” if she saw a notice that the post office had a letter from the IRS.<sup>109</sup>

The Hearing Panel finds this testimony credible after carefully considering the witness’s demeanor and her testimony as a whole. As Enforcement conceded when pressed, there is simply no evidence that either Au or his wife saw a notification that the Notice was being held at the post office and intentionally ignored it.<sup>110</sup> The fact that in the CAP hearing Au expressed a desire to avoid having a lien filed against him is not evidence that he ignored the Notice.

After the hearing concluded, each party submitted a list of case citations for the Panel’s consideration. One case Enforcement submitted to support its position is a National Adjudicatory Council (“NAC”) decision, *Department of Enforcement v. Harari*.<sup>111</sup> *Harari* is a case involving a failure to amend Form U4 to disclose a total of four liens. The respondent denied he received notice of any of them. The NAC observed that IRS documents showing the notices of the liens were mailed to the respondent in the regular course of business created “a presumption that the notices were received,” and as a result concluded that the respondent’s “mere denial of receipt is not sufficient to rebut the presumption.”<sup>112</sup>

However, as the NAC pointed out, the respondent in *Harari* admitted “he had notice of something he understood to be a lien” for more than a year before he amended his Form U4. Furthermore, in *Harari* there were multiple lien notices sent to both Harari and his wife by certified mail. Unlike here, in *Harari* there was no evidence showing that the notices had not been delivered. The circumstances in *Harari*—admission of the respondent, evidence of multiple lien notices, no evidence of non-delivery—amply supported the NAC’s rejection of the

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<sup>107</sup> Tr. 162-63, 295.

<sup>108</sup> Tr. 277, 289-91.

<sup>109</sup> Tr. 289-92.

<sup>110</sup> Enforcement argued that “Au cannot avoid responsibility . . . by claiming that he never saw the notice of lien because he intentionally failed to pick it up at the post office.” When asked “what evidence do we have” that Au intentionally failed to pick up the Notice, Enforcement’s counsel conceded: “We don’t. That is a posit.” Tr. 351.

<sup>111</sup> No. 2011025899601, 2015 FINRA Discip. LEXIS 2 (NAC Mar. 9, 2015); Enforcement’s List of Case Citations.

<sup>112</sup> *Harari*, 2015 FINRA Discip. LEXIS 2, at \*27-28.

respondent's "mere denial of receipt."<sup>113</sup> Here, the tax transcript entry showing the Notice was unclaimed corroborates the Aus' denial of receipt of the Notice.<sup>114</sup>

Enforcement also cites to a United States Postal Service Domestic Mail Manual found on a government website and argues that the 2007 tax transcript entry that the Notice was unclaimed is evidence that Au failed to claim the Notice after learning of a postal service delivery attempt.<sup>115</sup> The Panel finds this unpersuasive. Enforcement presented no evidence that the Postal Service followed the practices described in the Manual or that it placed a document showing attempted delivery in the Aus' mailbox. The tax transcript contains no specific entry documenting the issuance of the Notice.

## 2. Evidence that Au "Should Have Known"

Enforcement, emphasizing that the "relevant inquiry is whether the Respondent knew or reasonably should have known under the particular facts and circumstances that his conduct was improper,"<sup>116</sup> cites two cases in its pre-hearing brief.<sup>117</sup> Neither case, however, involves a failure to amend a Form U4.

In one, the SEC applied the "knew or reasonably should have known" standard to the question of whether a respondent should have known his conduct was improper in determining whether he acted willfully.<sup>118</sup> However, the question here is not whether Au knew or should have known it was improper for him to fail to amend his Form U4 after learning a lien was filed. The question is whether Au knew the IRS filed the lien, triggering his disclosure obligation.

In the second case a federal court reviewing an SEC settlement upheld longstanding precedent that in the context of considering the element of scienter, "'willfully' means intentionally committing the act which constitutes the violation, and there is no requirement that the actor also be aware that he is violating one of the Rules or Acts."<sup>119</sup> Here, in contrast, the question is whether Au should be found liable for willfully failing to amend his Form U4 without evidence sufficient to establish he received notice that there was a lien he needed to disclose.

The CAP letter's deadline for Au to pay the tax did not constitute notice that he had to amend his Form U4. As Enforcement's expert testified, the IRS tries to collect taxes in the least coercive manner possible, and offers alternatives to immediate payment when appropriate. The

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<sup>113</sup> *Id.* at \*27.

<sup>114</sup> RX-2, at 2.

<sup>115</sup> Enforcement's List of Case Citations.

<sup>116</sup> Tr. 347-48.

<sup>117</sup> Enforcement's Pre-Hrg. Br., 9-10, citing *Christopher LaPorte*, Exchange Act Release No. 39171, 1997 SEC LEXIS 2058 (Sept. 30, 1997), and *Arthur Lipper Corp. v. SEC*, 547 F.2d 171 (2d Cir. 1976).

<sup>118</sup> *LaPorte*, 1997 SEC LEXIS 2058, at \*8 n.2.

<sup>119</sup> *Arthur Lipper Corp.*, 547 F.2d at 180 (quoting *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965)).

IRS was not required to file the lien when Au missed the deadline. Missing the deadline did not trigger Au's obligation to amend his Form U4, and did not place him in violation of the by-laws and NASD and FINRA rules. The IRS did not file the lien until April 17, almost a month after the March 25, 2009 deadline.

Enforcement cites another case holding that just because a registered representative contests a lien, he is not excused from disclosing it.<sup>120</sup> The case is inapposite. Unlike the respondent in the cited case, Au is not arguing here that contesting the lien excused him from amending his Form U4. Au did not contest the lien. Au's defense is that he did not know the lien had been filed and therefore did not know he should amend his Form U4. His testimony about his accountant's advice to amend his tax returns is evidence of his reasonable belief that his tax liability would be erased, and was not offered to excuse him from the obligation to amend his Form U4.

Finally, Enforcement cites a case in which the NAC held that a respondent's failure to amend his Form U4 to disclose five federal tax liens was not excused by the respondent's claim that "he did not extensively review the notices of tax liens before forwarding them to his accountant to handle."<sup>121</sup> Thus, Enforcement contends, Au may not avoid liability because he did not read with sufficient care the July 2009 Wage Levy Notice and realize it mentioned the existence of a lien. As we discuss more fully below, we hold that, under the circumstances present in this case, the Wage Levy Notice's single mention that "the IRS Code provides that there is a lien" did not suffice as notice to Au that a lien had been filed, and it was not unreasonable that Au, when he saw it, did not take it to mean the IRS had filed a lien.

### 3. The Wage Levy Notice

Enforcement contends that even if the Panel accepts Au's testimony that he did not receive the Notice of the lien filing, he did acknowledge receiving the Wage Levy Notice. Enforcement relies on its expert's testimony that a single sentence in the Wage Levy Notice is the "one piece of direct evidence" that Au received notice of the lien's existence.<sup>122</sup> Enforcement argues that the Wage Levy Notice accomplished what the undelivered lien Notice intended: it informed Au "of the existence of an outstanding tax lien against him," and triggered his obligation to amend his Form U4.<sup>123</sup>

The sentence at issue in the Wage Levy Notice states: "The Internal Revenue Code provides that there is a lien for the amount shown above."<sup>124</sup> The Aus claim that the significance

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<sup>120</sup> Enforcement's List of Case Citations; *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at \*38, n.44 (Nov. 9, 2012).

<sup>121</sup> *Mathis*, 2008 FINRA Discip. LEXIS 49, at \*16.

<sup>122</sup> Tr. 138-39.

<sup>123</sup> CX-8; Tr. 350-51.

<sup>124</sup> CX-8; Tr. 220, 313.



of the sentence escaped them. Au testified that his focus was on “contacting [the revenue agent] and getting the levies lifted.”<sup>125</sup> According to Au, he either skipped over this sentence or failed to understand its significance because, in his words, “I got a levy on my bank accounts. My money was frozen. I had no idea why ... because I had what I considered to be a good communication with the IRS ... [and] I had bills, responsibility to pay rent.”<sup>126</sup> Au testified that he believed by putting the accountant and the revenue agent in direct communication, he was ensuring that the revenue agent concurred that “what we were doing we were doing correctly.”<sup>127</sup> The revenue agent removed the levy; to Au, “that ... was the absolute most important thing.”<sup>128</sup> Tania Au testified that she does not remember seeing the sentence.<sup>129</sup> She testified that after hiring the accountant and keeping the revenue agent informed, “there was an understanding” and she did not think there was a risk that a lien would be filed.<sup>130</sup>

The Panel finds this testimony credible. We also note that the Wage Levy Notice to Avalon was not designed to inform the Aus that a lien had been filed. A comparison of it with the undelivered Notice makes this clear. The Notice leaves no room for doubt as to what it is. It unambiguously identifies itself as “Notice of Federal Tax Lien.”<sup>131</sup> The sentence in the Wage Levy Notice about a lien is not so clear. It is not in bold font. It does not unambiguously convey the fact that the IRS has filed a lien against the Aus. It refers to what the “Internal Revenue Code provides.” It was designed to notify Avalon that the Aus’ wages, salary, and other income had been attached. The Panel finds it credible that Au would not have caught the significance of the sentence Enforcement relies on and reasonable to conclude that it did not put him on notice of the filing of the lien against them.

For these reasons, we decline to hold that the reference to a lien in the July 2009 Notice of Levy on Wages, Salary, and Other Income constituted notice of the filing of the tax lien and rendered his failure to amend his Form U4 willful.

#### **4. Expert Testimony on What Should Have Occurred**

Enforcement’s expert provided the Panel with useful information about IRS procedures and tax transcripts, but when he testified about what he thought occurred in the interactions between the Aus and the IRS, he necessarily based his testimony on surmise. For example, he testified, as noted above, that the taxpayer’s copy of the Notice of Federal Tax Lien “is supposed to be sent either in person, left at the dwelling unit or sent by certified, registered mail”; in this

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<sup>125</sup> Tr. 220.

<sup>126</sup> Tr. 229-31.

<sup>127</sup> Tr. 230.

<sup>128</sup> Tr. 231-32.

<sup>129</sup> Tr. 299.

<sup>130</sup> Tr. 294.

<sup>131</sup> CX-5.

case, he testified, when “the post office went to deliver it, no one signed for it, so it was returned.”<sup>132</sup> But the only documentary evidence relating to the Notice is the single tax transcript entry stating the Notice was unclaimed.<sup>133</sup> The expert subsequently conceded, “whether the notice was *rejected or just never arrived at the [Aus’] door, we don’t know.*”<sup>134</sup> As Au argued, Enforcement’s expert “does not know what happened here”<sup>135</sup> and the available evidence does not provide a sufficient basis for concluding, as Enforcement does, that the Aus declined to sign for the mailing. The only testimonial evidence, aside from the Aus’, came from their tax lawyer, who testified that she interviewed a staff person at the Taxpayer Services Office of the IRS, as well as the staff person’s supervisor, and both said that the transcript reference to “Unclaimed notice of lien filing” means “the notice was not delivered.”<sup>136</sup>

Enforcement’s expert also opined that when Au appointed the accountant to represent him to the IRS, the accountant “would have been informed of the existence of the lien.”<sup>137</sup> Again, this is surmise. The expert testified about what *he* would have done if *he* had represented Au: “if it were me,” he said, he would have found out that a lien had been filed, and it is “hard to believe that representative ... would not have told [Au] that the lien had been filed.”<sup>138</sup> The expert continued: “at least the representative, if not the IRS and Mr. Au would have included a discussion or acknowledgment that the lien had been filed. And that in order to remove the lien, he needs to full pay [sic] ... *it is circumstantial that someone would have said something.*”<sup>139</sup> The expert testified that he based this conclusion on his “experience interacting with revenue officers in similar circumstances.” However, he conceded, “the IRS is a large organization, so everyone is different.”<sup>140</sup>

Thus, the expert’s testimony was conjecture based on what he believed should have occurred, and what he would have done in the accountant’s place. He could not know what the revenue agent said to Au and to the Aus’ personal representative, or what the Aus’ personal representative said to Au. Although it is possible that they *could* have told Au, the circumstantial evidence does not provide a sufficient basis to find that the revenue agent or accountant informed Au that a lien had been filed.

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<sup>132</sup> Tr. 102-03.

<sup>133</sup> RX-2, at 2.

<sup>134</sup> Tr. 135 (emphasis added).

<sup>135</sup> Tr. 380.

<sup>136</sup> Tr. 266-67.

<sup>137</sup> Tr. 341-42.

<sup>138</sup> Tr. 135-36.

<sup>139</sup> Tr. 139 (emphasis added).

<sup>140</sup> Tr. 140.

## V. Conclusion

In this FINRA disciplinary proceeding, Enforcement bears the burden of proof of establishing every element of the charge against Au by a preponderance of the evidence.<sup>141</sup> A preponderance of the evidence is a higher standard of proof than “substantial evidence.”<sup>142</sup>

For the reasons set forth above, the Panel concludes that Enforcement failed to establish by a preponderance of the evidence that Au received notice that the lien had been filed against him and that Au willfully failed to amend his Form U4 to disclose the lien.

We decline to hold that Au violated FINRA’s by-laws and NASD and FINRA rules by not disclosing a lien he did not know had been filed against him. Therefore, we dismiss the Complaint.

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Matthew Campbell  
Hearing Officer  
For the Hearing Panel

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<sup>141</sup> *John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at \*12 n.9 (July 25, 2008) (citing *David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) (a preponderance of the evidence is the level of proof required in self-regulatory organization disciplinary proceedings); *Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992) (preponderance of the evidence is the correct standard of proof in an NASD proceeding).

<sup>142</sup> *Audifferen*, 2008 SEC LEXIS 1740, at \*12 (“[T]he preponderance standard is a higher standard of proof than substantial evidence ... ‘substantial evidence’ standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.”) (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).