BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Allen Holeman Syosset, NY, Respondent.	DECISION Complaint No. 2014043001601 Dated: May 21, 2018

Respondent willfully failed to timely disclose material information on his Form U4 and made false statements to his firm on its annual compliance questionnaire. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Jonathan Golomb, Esq. and Emily Barnes, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Allen Holeman ("Holeman") appeals, and FINRA's Department of Enforcement ("Enforcement") cross-appeals, a May 3, 2017 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Holeman willfully failed to timely amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose three federal tax liens, in violation of NASD IM-1000-1 and FINRA Rules 1120 and 2010.[1] The Hearing Panel concluded that Holeman is subject to a statutory disqualification because his actions were willful and involved the failure to disclose material information. The Hearing Panel also found that Holeman made false statements on his firm's annual compliance questionnaire, in violation of FINRA Rule 2010. For these violations, the Hearing Panel imposed a unitary sanction, fined Holeman $10,000, suspended him for 30 business days, and ordered him to pay hearing costs of $2,566.19. After an independent review of the record, we affirm the Hearing Panel's findings and modify the sanctions.

[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Holeman's Background

While Holeman first registered with FINRA in 1980, he began his career in the securities industry in 1966 as an operations clerk in the compliance department of a FINRA member firm. In July 2003, Holeman joined Fahnestock & Co. (later Oppenheimer & Co.), where he served as a compliance director and then chief compliance officer ("CCO") until May 2013. In November 2013, Holeman joined David Lerner & Associates ("David Lerner" or the "Firm") as CCO, where he is currently employed. Holeman holds multiple licenses, including general securities representative, compliance official, and general securities principal.

II. Factual Background

A. Holeman's Federal Tax Liens and His Failures to Timely Disclose Those Liens

There are three federal tax liens at issue in this matter. On April 14, 2009, the Internal Revenue Service ("IRS") issued a tax lien in the amount of $39,247.89 resulting from Holeman's unpaid taxes in 2006 and 2007. The lien was filed and recorded in the Monmouth County, New Jersey's clerk's office on April 23, 2009. This lien was released on April 10, 2013.

The IRS issued a second lien on September 24, 2009, stemming from Holeman's unpaid 2008 taxes, in the amount of $58,853.40. On October 6, 2009, the lien was filed and recorded in the Monmouth County, New Jersey's clerk's office.

In late October 2009, Holeman entered into an agreement with the IRS to pay off his 2006, 2007, and 2008 tax arrears in installments ("Installment Agreement").

The IRS issued the third lien on May 11, 2011, for the tax year 2009 in the amount of $18,444.42. On May 23, 2011, the lien was filed and recorded in the Monmouth County, New Jersey's clerk's office.

Question 14M on the Form U4 asks: "Do you have any unsatisfied judgments or liens against you?" Holeman repeatedly answered "No" to this question on multiple Form U4 amendments. Holeman's firm filed six amendments to his Form U4 while at Oppenheimer, but none of these amendments included disclosures of the tax liens in effect when the amendments were filed.

Holeman left Oppenheimer in May 2013, and joined David Lerner as CCO in November of that year. In his initial Form U4, filed on November 7, 2013, Holeman continued to answer "No" to Question 14M. He filed two subsequent amendments to his Form U4, on September 15 and December 18, 2014, in which he again denied having any outstanding liens. Notably, the later of these two amendments was filed after FINRA had begun its investigation into Holeman's outstanding and undisclosed liens. *See* Part II.B below.

B. FINRA Investigates Holeman's Failures to Update and Holeman's False Certification of His Firm's Compliance Questionnaire

FINRA first learned of Holeman's liens in 2014 through an industry-wide review, initiated by FINRA's investigative staff, searching for unsatisfied liens and judgments against FINRA registered representatives. Holeman's name appeared on the search reports, and that information was referred to FINRA's New York District Office for further inquiry and investigation.

In October 2014, Enforcement contacted Holeman and asked why he had not disclosed the outstanding liens after they were filed. On November 5, 2014, Enforcement followed up with a letter to Holeman asking for, among other things, a written statement from him explaining whether the liens remained outstanding and why Holeman had not disclosed them. On November 13, 2014, Holeman responded:

> IRS Tax Lien, 4/2009, 10/2009, and 5/2011 are items that were filed against my home. I was advised by an IRS agent that the liens were against physical property not against me personally.

Holeman explained that although he believed the liens were imposed for his failure to pay taxes when due, he did not recall receiving notice of the liens. Holeman also informed FINRA that many of his files and documentation related to FINRA's inquiry were destroyed in Hurricane Sandy.[2]

On November 25, 2014, Enforcement sent another request to Holeman specifically asking for copies of any correspondence, documentation, or other guidance Holeman received from the IRS related to the liens. On December 17, 2014, Holeman again responded in writing, explaining that he did "not believe that there were liens against me personally. The language in Form U4 does not include non-judicial and non-personal liens."

Around this same time period, in December 2014, Holeman completed and submitted a compliance questionnaire to David Lerner, in which Holeman answered "No" to the question, "Do you have any unsatisfied judgment or liens against you."

On or about February 20, 2015, Holeman personally obtained copies of the tax liens from the clerk's office in Monmouth County.

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[2] In light of Holeman's representations that he lost most of his paperwork during Hurricane Sandy, and because he claimed that he never received notice of the tax liens, on July 18, 2016, Enforcement requested that Holeman sign a consent letter to the IRS allowing the agency to release all correspondence related to the matter to FINRA. Holeman never signed the consent. Holeman testified that he separately requested and received information from the IRS regarding its certified mailings and instead of turning it over to FINRA, he gave it to his former counsel. That information was not produced during the proceedings below and is not part of the record.

On March 4, 2015, Holeman gave on-the-record ("OTR") testimony to Enforcement staff regarding the liens. Holeman testified that in or around 2008 he had a conversation with an IRS agent who explained that "the tax filings that they were doing were against [his] property specifically," and reiterated that he did not disclose the liens "[b]ecause I believe they were against my property and not against me personally."

C. Holeman's Untimely Form U4 Amendments

Approximately one month after his OTR testimony, on April 8, 2015, Holeman amended his Form U4.[3] Holeman disclosed the two liens still outstanding, adding the explanation that the liens "are not against 'you' as asked in [the question]. The IRS liens are in favor of the United States on all property and rights to property belonging to the taxpayer." Holeman again updated his Form U4 on August 4, 2015, to disclose for the first time the previously satisfied lien related to the 2006 and 2007 tax years. This disclosure indicates that Holeman first learned of that lien on April 23, 2009, when it was filed. On June 30, 2016, however, Holeman updated his Form U4 (to disclose this action) and deleted his prior disclosure regarding the lien for the 2006 and 2007 tax years. Yet again, on September 27, 2016, Holeman again updated his Form U4, changing his disclosure to read that he first learned of the two outstanding liens on February 20, 2015, when Holeman claims he first went to the clerk's office to obtain copies of the liens, and not on October 20, 2014, when FINRA first contacted Holeman about the liens.

III. Procedural History

On June 13, 2016, Enforcement filed a two-cause complaint against Holeman. The first cause of action alleged that Holeman willfully failed to timely disclose tax lien filings and failed to amend his Form U4 in violation of Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1, and FINRA Rules 1122 and 2010. The second cause of action alleged that Holeman falsely completed David Lerner's annual compliance questionnaire, in violation of FINRA Rule 2010. Holeman denied the allegations, arguing that he never received notice of the liens from the IRS and that the liens were against his property, not him personally, and as such he was not obligated to disclose them on his Form U4.

A one-day hearing was held on January 19, 2017. On May 3, 2017, the Hearing Panel issued its decision. The Hearing Panel found that Holeman willfully failed to timely disclose the three federal tax liens on his Form U4 and falsely completed his firm's annual compliance questionnaire. Finding that Holeman's misconduct was serious but not egregious, the Hearing Panel suspended Holeman for 30 business days and imposed a $10,000 fine. The Hearing Panel concluded that because Holeman's Form U4 violation was willful and the information he failed to disclose was material, Holeman was subject to statutory disqualification. The Hearing Panel also assessed hearing costs of $2,566.19. Holeman appealed the entirety of the Hearing Panel's decision, and Enforcement filed a cross-appeal as to the sanctions imposed.

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[3] A few weeks before Holeman testified on March 4, 2015, Holeman's counsel told FINRA staff that Holeman would be disclosing the tax liens. However, Holeman ultimately changed his mind, because he thought disclosing the liens would be an admission of wrongdoing.

IV. Discussion

For the reasons discussed below, we affirm the Hearing Panel's findings that Holeman violated Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1, and FINRA Rules 1122 and 2010 by failing to timely disclose three federal tax liens, and that Holeman made a false certification on his firm's annual compliance questionnaire in violation of FINRA Rule 2010. We also affirm the Hearing Panel's finding that Holeman is subject to statutory disqualification. We, however, modify the Hearing Panel's unitary sanction of a 30-business-day suspension and $10,000 fine. We have determined that it is appropriate to impose a more significant unitary sanction. Thus, we impose a four-month suspension and a $20,000 fine for Holeman's willful failure to timely amend his Form U4 and his false completion of his firm's compliance questionnaire.

A. Holeman Violated Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-01 and FINRA Rules 1122 and 2010 By Failing To Timely Disclose Federal Tax Liens

The Hearing Panel concluded that Holeman failed to timely update his Form U4 to reflect three federal tax liens, in violation of Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1, and FINRA Rules 1122 and 2010, and that Holeman's failure to update was willful and involved material information such that Holeman is subject to statutory disqualification under the Securities Exchange Act of 1934 ("Exchange Act"). We affirm.

Article V, Section 2(c) of the FINRA By-Laws provides, in pertinent part, that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments" and that "[s]uch amendment…shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." NASD IM-1000-1 and FINRA Rule 1122 both prohibit a member firm, registered representative, or person associated with a member firm from filing with FINRA 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."[4] *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011) ("[E]very person submitting a Form U4 has the obligation to ensure that the information printed on the form is true and accurate.").

The information contained in Form U4 is important to the investing public. *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *16, 29 (Dec. 7, 2009) (stating that

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[4] A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010, which requires associated persons to observe high standards of commercial honor and just and equitable principles of trade. *See N. Woodward Fin. Corp.*, Complaint No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *17 (FINRA NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff'd*, No. 15-3729, slip op. at 1 (6th Cir. June 29, 2015). FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

information about respondent's tax liens, if disclosed on Form U4, would have allowed potential investors to assess "whether [respondent's] tax problems and large financial obligations had a bearing on their confidence in him"), *aff'd*, 671 F.3d 210 (2d Cir. 2012). Information disclosed on the Form U4 is also important to FINRA, other self-regulatory organizations, and state regulators as a means to determine the fitness of individuals seeking to join and remain in the securities industry. *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012). Disclosures on the Form U4 "can serve as an early warning mechanism, identifying individuals with troubled pasts or suspect financial histories" and "[u]ntruthful answers [on the Form U4] call into question an associated person's ability to comply with regulatory requirements." *Id*. Furthermore, "[a] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur." *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *10-12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

Holeman was required to update his Form U4 no later than 30 days after learning of the tax liens. He failed to comply with his obligation to timely amend his Form U4 with accurate current information and did not disclose the liens until April 2015, between four and six years after he should have done so. We find that Holeman was made aware of the tax liens beginning in or around 2009. Holeman admitted in his OTR that he had a conversation with an IRS agent concerning the liens, who allegedly told Holeman the liens were against his property and not him. He also informed FINRA in his November and December 2014 written responses that he was advised telephonically by an IRS agent several years prior that the liens were against his property and not him. Yet Holeman repeatedly answered "No" to Question 14M on multiple Forms U4. Holeman filed multiple amendments to his Form U4 while at Oppenheimer and David Lerner, none of which disclosed the existence of *any* federal tax liens.

Holeman maintains on appeal that he never received notice of the liens and believed only that he was subject to the IRS Installment Agreement. We find Holeman's arguments specious and agree with the Hearing Panel that Holeman was on notice of liens at or about the time of their filing. First, we note that in Holeman's responses to FINRA and at his OTR, Holeman refers to both the "liens" and "installment agreement," which indicates that he was aware that the liens existed and that they were different than the Installment Agreement.

Furthermore, we believe that the record supports the conclusion that in fact Holeman received actual notice of the liens at or around the time the liens were filed. Each tax lien notice shows the correct residential address for Holeman, where he resided at the time the liens were filed and continues to reside. A report issued by the Office of the Audit of the Treasury Inspector General for Tax Administration indicates that "substantially all" of lien notices were mailed in a timely manner.[5] Under the "mailbox rule," we may presume that documents mailed in the regular course of business were received. *Robert M. Fuller*, 56 S.E.C. 976, 990 (2003). Holeman's "'mere denial of receipt' is not sufficient to rebut the presumption." *Dep't of Enforcement v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *28

[5] The Office of the Audit of the Treasury Inspector General for Tax Administration's annual audit reports for the years covering Holeman's tax liens were admitted into evidence at the hearing below.

(FINRA NAC Mar. 9, 2015). In addition, Holeman declined to execute the consent to authorize the IRS to release Holeman's relevant records to Enforcement. He also provided his former counsel with documentation that he requested from the IRS regarding his liens, which was not turned over to FINRA or produced during the hearing below. We agree with the Hearing Panel that Holeman's unexplained refusal to authorize FINRA to reach out to the IRS, his additional refusal to turn over any potentially exculpatory information he received from the IRS, combined with the admissions made in his OTR and other correspondence concerning his conversations with IRS agents, warrant an inference that the information sought by Enforcement through its consent request would establish that the IRS had in fact provided Holeman with contemporaneous notice of the liens, consistent with its ordinary practice.

Holeman also now claims, contrary to his previous assertions, that he was not aware of the federal tax liens until February 20, 2015, when he went to the Monmouth County clerk's office to obtain copies of the liens. Holeman's claim that he did not have notice of the liens, notwithstanding FINRA's ongoing investigation into his failures to disclose, until he went to the clerk's office, is contradicted by the evidence and common sense. FINRA first contacted Holeman in October 2014 about the liens, yet he seems to maintain that he did not actually have knowledge of them until he confirmed their existence. We have dismissed a similar rationale in *Dep't of Enforcement v. Elgart*, in which respondent argued that mere notice of a lien does not validate its actual existence or amount. The NAC noted that respondent "could have chosen to explain in the comment section on Form U4's Disclosure Reporting Pages any disputes he may have had regarding his tax liens, but any such disputes did not excuse his basic obligation to disclose the liens on Form U4." *Dep't of Enforcement v. Elgart*, Complaint No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *17 n.8 (FINRA NAC Mar. 16, 2017), *aff'd*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017), *appeal docketed*, No. 17-15283 (11th Cir. Nov. 28, 2017). Likewise, Holeman's decision to ignore the existence of the liens for several months after FINRA began its investigation does not excuse Holeman's disclosure obligations.[6]

Finally, Holeman argues that the fact that the Firm was aware of FINRA's investigation somehow negates his culpability. However, the Firm's knowledge of the investigation did not relieve Holeman of his obligation to timely disclose the liens on his Form U4. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *15 (Dec. 22, 2008) (noting that a

[6] Even if we credited Holeman's assertion that he first learned of his federal tax liens in February 2015 (which we do not), he did not amend his Form U4 to disclose the existence of the liens until April 8, 2015 – outside the 30 day amendment window.

representative "cannot shift his responsibility to comply with [FINRA] rules to his firm"); *see also Guang Lu*, 58 S.E.C. 43, 56 (2005) (rejecting defense that firm's president advised against Form U4 disclosure), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006).[7]

B. Holeman Is Statutorily Disqualified

Like the Hearing Panel, we next consider the separate question of whether Holeman is statutorily disqualified. We affirm the Hearing Panel's finding that he is. A person is subject to a statutory disqualification under Article III, Section 4 of FINRA's By-Laws and Section 3(a)(39)(F) of the Exchange Act if he, among other things:

> has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

15 U.S.C. § 78c(a)(39)(F).

We find that Holeman acted willfully in failing to timely disclose material information – his federal tax liens – on his Forms U4.

1. Holeman's Actions Were Willful

In order to find a willful violation of federal securities we must find "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). Thus, if Holeman "voluntarily committed the acts that constituted the violation, then he acted willfully." *Elgart*, 2017 FINRA Discip. LEXIS 9, at *19.

Holeman maintains that his failures to disclose were not willful, and on appeal claims he was not aware of the federal tax liens. He maintains that he never received notice of the liens and believed only that he was subject to the IRS Installment Agreement. As discussed above, we find Holeman's arguments hollow and agree with the Hearing Panel that Holeman was on notice

[7] In support of his claim that the Firm was aware of FINRA's investigation, Holeman attaches the declarations of John Dempsey, Jr., President and CEO of David Lerner, and Joseph Pickard, Executive Vice President and General Counsel of David Lerner, to his opening brief. However, Holeman did not move to adduce this additional evidence as required under FINRA Rule 9346(b). Therefore the declarations were not considered as part of this decision. Nonetheless, we note that the declarations are not material and that Holeman failed to show good cause for failing to introduce the evidence below.

of the liens at or about the time of their filing and failed on nine occasions to update his Form U4 to disclose the liens.[8]

Holeman separately argues that he did not believe that he was obligated to disclose the federal tax liens because they attached to his property, rather than to him. This contention is nonsensical for two key reasons. First, it is simply not plausible that a CCO with over 40 years of compliance experience in the securities industry would not know or understand what a "lien" is and whether it needs to be disclosed on a Form U4. Second, a lien can only apply to property – it cannot attach to a person – making Holeman's justifications for not disclosing illogical. A "lien" is defined as "[a] legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied." *Lien*, Black's Law Dictionary (7th ed. 1999). Holeman's tortured explanation, if true, would render Question 14M meaningless as applied to liens.[9] Holeman's claimed misinterpretation of Question 14M is not rooted in the text of the question itself, which is "unambiguous" and "contains no limitations on the kinds of liens required to be disclosed." *Tucker*, 2012 SEC LEXIS 3496, at *36-37, 38 n.44.

Finally, Holeman argues, for the first time on appeal and without any supporting evidence, that he relied on advice of counsel regarding his disclosure obligations. Holeman claims that he changed the date he learned of the liens from October 20, 2014, to February 20, 2015, based on advice from his attorney. He also claims that he did not allow FINRA access to IRS information based on advice of counsel. Generally, a claim of reliance on the advice of counsel requires a respondent to provide evidence that the respondent consulted with and made full disclosure to counsel; asked for advice on the legality of a proposed course of action; received advice that it was legal; and relied on the advice in good faith. *Dep't of Enforcement v. Fox Fin. Mgmt.*, Complaint No. 2012030724101, 2017 FINRA Discip. LEXIS 3, at *34 (FINRA NAC Jan. 6, 2017). Even when a respondent satisfies these requirements, however, it has been held that the reliance is not a complete defense, but only one factor for consideration. *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). Holeman has not presented any evidence, save his self-serving testimony, that supports his claims of reliance on counsel. *See SEC v. McNamee*, 481

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[8] Holeman maintained at oral argument that the six amendments to his Form U4 at Oppenheimer were administrative and ministerial in nature, and that he never saw them before they were filed. This is no defense. "It was [Holeman's] responsibility to supply accurate information on the Form U4, and he had an obligation to review it before allowing his signature to be affixed to it acknowledging and consenting to its filing." *Elgart*, 2017 SEC LEXIS 3097, at *18.

[9] The NAC has previously found that tax liens are imposed against the taxpayer, and not merely against a taxpayer's property. In *Mathis*, we quoted language contained in a notice of federal tax liens that the United States had a lien on all property and rights to property belonging to the respondent, and concluded that the notice of the lien "clearly and unambiguously informed Mathis that the IRS had entered liens against him." *Dep't of Enforcement v. Mathis*, Complaint No. C10040052, 2008 FINRA Discip. LEXIS 49, at *19-20 (FINRA NAC Dec. 12, 2008), *aff'd*, 2009 SEC LEXIS 4376, *aff'd*, 671 F.3d 210.

F.3d 451, 456 (7th Cir. 2007) (respondent "offered nothing other than his say-so," which was insufficient to establish reliance on advice of counsel).

Holeman "was aware of his tax liens and of the straightforward requirement to disclose tax liens on his Form U4, yet he voluntarily did not timely update his Form U4 to disclose his tax liens." *Elgart*, 2017 FINRA Discip. LEXIS 9, at *40. Therefore, Holeman willfully violated NASD and FINRA Rules.

2. Holeman's Federal Tax Liens are Material

Having found that Holeman acted willfully, we turn next to the question of whether the federal tax liens are material for purposes of disclosure on Holeman's Forms U4. We find that they are. As we have noted, "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, it is presumed that essentially all the information that is reportable on the Form U4 is material." *Dep't of Enforcement v. McCune*, Complaint No. 2011027993301, 2015 FINRA Discip. LEXIS 22, at *15 (FINRA NAC July 27, 2015), *aff'd*, 2016 SEC LEXIS 1026, *aff'd*, 672 F. App'x 865. Applying this materiality standard to the circumstances here, we find that a reasonable employer, regulator, or customer would have viewed the tax liens as extremely relevant to Holeman's abilities to discharge his duties as CCO. *See, e.g.*, *Dep't of Enforcement v. Toth*, Complaint No. E9A2004001901, 2007 NASD Discip. LEXIS 25, at *34-35 (NASD NAC July 27, 2007), *aff'd*, Exchange Act Release No. 58074, 2008 SEC LEXIS 1520 (July 1, 2008), *aff'd*, 319 F. App'x 184 (3d Cir. 2009).

Holeman maintains that the liens are not material because they had no potential impact on firm customers, because he has no customers of his own. We disagree. In light of Holeman's role as CCO, in which he is tasked with overseeing compliance and providing guidance to others at his firm, we find his federal tax liens especially material. As noted by the Hearing Panel, "Holeman's failure to meet his own obligations calls into question his vigilance in ensuring that others at his firm satisfy their responsibilities." It is well-established that the existence of tax liens is material information for regulators, employers, and customers. *See Mathis*, 671 F.3d 210, 219-20 (2d Cir. 2012). "Materiality is an objective standard 'involving the significance of an omitted or misrepresented fact.'" *McCune*, 2016 SEC LEXIS 1026, at *23 (*quoting TSC Indus., Inc.*, 426 U.S. 438, 445 (1976)). Moreover, providing untruthful responses to questions on the Form U4 raises serious questions about Holeman's ability to comply with regulatory requirements. *Tucker*, 2012 SEC LEXIS 3496, at *26; *Harari*, 2015 FINRA Discip. LEXIS 2, at *25-26. Thus, we find that Holeman's federal tax liens constituted material information that should have been disclosed.

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Because we find that Holeman willfully failed to timely disclose material information on his Form U4, Holeman is statutorily disqualified.

C. Holeman's Untruthful Compliance Certification

In addition to his failure to timely disclose his federal tax liens, in December 2014 Holeman submitted an annual compliance certification to David Lerner that falsely denied the

existence of those liens. The questionnaire asked, "Do you have any unsatisfied judgments or liens against you?" Holeman responded, "No," when in fact he had two tax liens in effect. Holeman made this certification even after he was aware that FINRA was investigating his failures to disclose the liens.

Holeman's false statement on his compliance questionnaire violates the ethical standards of FINRA Rule 2010. "A registered representative's failure to disclose material information to his firm violates [Rule 2010], and calls into question the registered representative's 'ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public."' *Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *30 (FINRA NAC Feb. 24, 2011), *aff'd in relevant part*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012). Therefore, we affirm the Hearing Panel's finding that Holeman's false certification is a violation of FINRA Rule 2010.

V. Sanctions

For his violations of NASD and FINRA rules, the Hearing Panel imposed a unitary sanction for both causes of action, consisting of a $10,000 fine and a 30-business-day suspension. Both Holeman and Enforcement have appealed the sanctions as imposed. Holeman argues that he should not be sanctioned at all, and Enforcement counters that the sanction imposed by the Hearing Panel should not be imposed as a unitary sanction and that it is too low. We agree in part with Enforcement and modify the sanctions.[10]

In assessing the sanctions for Holeman's violations, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions (the "Principal Considerations").[11] The Guideline for late filings of amendments to Form U4 recommend a fine of $2,500 to $37,000.[12] In a case where aggravating factors predominate, the Guideline also recommends a suspension of 10 business days to six months.[13] The Principal Considerations specifically applicable to Form U4 violations include: the nature

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[10] We agree with the Hearing Panel that because Holeman's violations stem from the same underlying misconduct, it is appropriate to impose a unitary sanction. *See Dep't of Enforcement v. Riemer*, Complaint No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at *21 n.6 (FINRA NAC Oct. 5, 2017), *appeal docketed*, Admin. Proc. No. 3-18262 (SEC Oct. 20, 2017).

[11] *See FINRA Sanction Guidelines* 71 (2018), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*]. We look to the most recent Guidelines in effect during the pendency of this appeal. The 2017 Guidelines "are effective as of the date of publication, and apply to all disciplinary matters, including pending matters." *Id*. at 8.

[12] *Id*. at 71.

[13] *Id*.

and significance of the information at issue; the number, nature, and dollar value of the disclosable events at issue; whether the omission was in an intentional effort to conceal information; and the duration of the delinquency.[14]

We find that these considerations aggravate Holeman's misconduct and warrant a finding that Holeman's violations were egregious. First, we consider the nature and significance of the information that Holeman failed to disclose.[15] The information related to his tax liens expressly implicate Holeman's financial stability, judgment, ability to manage his personal finances, and "constituted serious financial problems critical to evaluating his fitness to associate in the securities industry and the firm's ability to assess his business judgment." *Tucker*, 2012 SEC LEXIS 3496, at *32 & n.36 (citing *Mathis*, 2009 SEC LEXIS 4376, at *29). We also find the number, and dollar value of the disclosable events aggravating—there were three federal tax liens in excess of $116,000.[16] We next conclude that Holeman's failures to disclose the liens on his firm's compliance questionnaire and the Forms U4 were deliberate.[17] Finally, we find it aggravating that Holeman's failures to disclose the liens continued for an extended period of time, ranging from four to six years, and were not disclosed until discovered by FINRA. Even after notice from FINRA Holeman still falsely completed his firm's compliance questionnaire, failed to even investigate the liens for four months, and waited an additonal two months to disclose.[18]

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[14] *Id*. at 71. We are also directed to consider whether a lien or judgment that was not timely disclosed has been satisfied. *Id*. Although one of the liens has been satisfied, we do not believe this consideration provides any measurable mitigative weight in light of the fact that Holeman did not disclose this lien on multiple Forms U4 prior to its satisfaction, and two outstanding federal tax liens remain.

There are three other principal considerations applicable to Form U4 violations that are not relevant to this matter: whether the failure to disclose or timely to disclose delayed any regulatory investigation; whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and whether the respondent's misconduct resulted directly or indirectly in injury to other parties, including the investing public, and, if so, the nature and extent of the injury. *Id*. Because these considerations do not apply, we do not consider them either aggravating or mitigating.

[15] *Id*. (Principal Considerations in Determining Sanctions, No. 1).

[16] *Guidelines*, at 71 (Principal Considerations in Determining Sanctions, No. 2).

[17] *Id*. (Principal Considerations in Determining Sanctions, No. 3).

[18] *Id*. (Principal Considerations in Determining Sanctions, No. 4).

The Hearing Panel concluded that Holeman's nondisclosures were merely negligent, and that his violations were serious but not egregious.[19] We disagree. We conclude based on the number of aggravating factors and the absence of any real mitigation that Holeman's misconduct was egregious and necessitates a sanction more meaningful than that imposed by the Hearing Panel. FINRA rules obligate individuals to make truthful and accurate disclosures. Holeman's false certification on his firm's compliance questionnaire and his repeated failures to amend his Form U4 to disclose material information about his financial problems raise serious questions about his ability to comply with regulatory requirements and demonstrate that he is currently unable to meet the high standards required of those employed in the securities industry.

Finally, we agree with Enforcement that a "chief compliance officer's false statements to his firm on a compliance questionnaire constitute a particularly serious violation." As David Lerner's CCO, Holeman is the steward of his firm's compliance culture. He is responsible for managing compliance issues at David Lerner, including ensuring that his firm is complying with its regulatory requirements and that its employees are complying with internal policies and procedures. We find it deeply troubling that Holeman was aware of FINRA's investigation into his failure to disclose his federal tax liens, yet he failed to timely amend his Form U4 and falsely certified to David Lerner that no such liens existed. Holeman has four decades of experience in the securities industry, specifically in the area of compliance. He cannot legitimately claim any lack of understanding as to the importance of answering truthfully on a compliance questionnaire or the Form U4.

Therefore, in light of the aggravating factors and Holeman's position as CCO, we impose a four-month suspension and a $20,000 fine. We believe that these sanctions serve to remediate Holeman's misconduct and stress the importance of holding compliance officers responsible for adhering to the rules, policies, and regulations that they themselves are tasked with enforcing.

VI. Conclusion

Holeman failed to timely amend his Form U4 to disclose three federal tax liens, in violation of NASD IM-1000-1, and FINRA Rules 1122 and 2010, and falsely completed his firm's annual compliance questionnaire, in violation of FINRA Rule 2010. For these violations, we suspend Holeman for four months and fine him $20,000. Holeman's failures to disclose were willful, and the omitted information was material; thus, Holeman also is statutorily disqualified.

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[19] We do not find evidence in the record to support the Hearing Panel's conclusion that Holeman's nondisclosures were merely negligent. Holeman was aware of his federal tax liens. As a CCO with over 40 years of compliance experience in the industry, he was also surely aware of the meaning of Question 14M on the Form U4 and the importance of timely and truthful disclosures. Yet he chose not to timely update his Form U4, even after FINRA began its investigation. We believe the record supports a finding that Holeman's failures to timely disclose were at least reckless. *Id*. at 8.

We also affirm the Hearing Panel's imposition of hearing costs in the amount of $2,566.19 and impose appeal costs of $1,645.89.[20]

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

[20] Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.