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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Allen Holeman

For Review of Action Taken by

Financial Industry Regulatory Authority

File No. 3-18546

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Gary Dernelle
Associate General Counsel

Colleen E. Durbin
Associate General Counsel

FINRA
1735 K Street, N.W.
Washington, D.C. 20006
(202) 728-8816

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I. INTRODUCTION

Allen Holeman appeals a May 21, 2018 Decision of the National Adjudicatory Council ("NAC") to the Securities and Exchange Commission. RP 1009-1011.[1] The record unequivocally demonstrates that Holeman, the chief compliance officer ("CCO") of David Lerner Associates, Inc. ("David Lerner"), a FINRA member, failed to timely amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose three federal tax liens and made false statements to his firm on an annual compliance questionnaire, in violation of FINRA rules. Holeman is subject to a statutory disqualification because he willfully failed to disclose this material information on his Form U4.

The record supports the finding that Holeman was on notice of his federal tax liens at about the time of their filing in 2009. Moreover, there is no question that Holeman was on notice

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[1] "RP" refers to the record page number in the certified record.

of the existence of the liens when he was contacted by FINRA in October 2014; yet he still failed to update his Form U4 to disclose them for several months after that contact. Holeman's failure to disclose his outstanding liens until April of 2015, nearly six years after the liens were entered against him establishes his failure to timely update his Form U4 within 30 days after learning of information required to be disclosed, in violation of Article V, Section 2(c) of FINRA's By-Laws, NASD IM-1000-1, and FINRA Rules 1120 and 2010. The record also reflects that Holeman failed to disclose his outstanding tax liens on David Lerner's annual compliance questionnaire in December 2014, in violation of FINRA Rule 2010.

As he did before the NAC, Holeman contests FINRA's liability findings by making several self-serving and dubious arguments that directly conflict with the evidence in the record. First, Holeman contends that he never received notice, nor was he aware, of any of the three federal tax liens until FINRA contacted him. This claim stands in direct conflict with a position Holeman held earlier in the investigative process that the Internal Revenue Service ("IRS") informed him of the liens but that he believed did not need to disclose the liens because they were against his property and not him personally. Second, Holeman contends that, once FINRA made him aware of the liens in October 2014, he immediately disclosed the liens to David Lerner, which did not discipline Holeman or "release" him from his position as CCO and supported his decision not to disclose the tax liens on his Form U4 for approximately six months. Holeman believes that, because both FINRA and his firm were aware of the liens, he "did not fail to meet his reporting obligations." Finally, Holeman claims that he did not disclose the liens on the advice of counsel, and in any event, several of the Form U4 amendments were filed by his firm without an opportunity for him to review them.

As is described in detail below, none of Holeman's arguments undercut his affirmative obligation to timely update his Form U4 and comply with FINRA rules. On the contrary, the record supports the NAC's findings that Holeman was aware of his federal tax liens beginning in 2009, and he made a conscious decision not to disclose those liens on his Form U4 until confronted by FINRA in October of 2014. Tellingly, even after FINRA made Holeman aware that it was investigating his disclosure failures, he refused to update his Form U4 for over six months. The disingenuous character of Holeman's tortured explanations and excuses for his misconduct are magnified by the fact that, as David Lerner's CCO, he certainly must have known better.

Moreover, the $20,000 fine and four-month suspension the NAC imposed on Holeman, which are consistent with FINRA's Sanction Guidelines and supported by multiple aggravating factors, should be sustained. The NAC found that, for an extended period, Holeman failed to update his Form U4 to disclose his liens to FINRA, thus depriving regulators and the investing public of important information. The NAC also found that Holeman deliberately violated FINRA's disclosure rules, and found troubling Holeman's continued attempts to minimize the importance of his disclosure obligations and the seriousness of his violations. Holeman has not provided any legitimate basis to disturb the NAC's sanctions for his egregious misconduct, and the Commission should affirm these sanctions.

II. BACKGROUND

A. Holeman's Background

Holeman entered the securities industry in 1966 as an operations clerk with a member firm. RP 81. He began working in the legal and compliance department of that firm in 1972, and he worked in compliance capacities at other firms before joining Oppenheimer & Co. Inc. in

2003. *Id.* He served as that firm's chief compliance officer until April 2013. Since November 2013, he has been the chief compliance officer of David Lerner. *Id.*

Holeman first became registered in 1980, when he obtained his Series 4 license (registered options principal), and has since held, among other licenses: Series 7 (general securities representative), Series 9 and 10 (general securities sales supervisor), Series 14 (compliance official), and Series 24 (general securities principal). *Id.*

B. Holeman's Federal Tax Liens

There are three federal tax liens at issue in this matter. On April 14, 2009, the IRS issued a $39,247.89 lien resulting from Holeman's unpaid taxes in 2006 and 2007. RP 457. The IRS filed and recorded the lien with the clerk's office for Monmouth County, New Jersey, on April 23, 2009. RP 82. This lien was released on April 10, 2013. *Id.*

The IRS issued a second lien for $58,853.40 on September 24, 2009, stemming from Holeman's unpaid 2008 taxes. On October 6, 2009, the lien was filed and recorded in the Monmouth County, New Jersey clerk's office. RP 459. During the underlying litigation, this lien remained in effect, but was released in November 2016. RP 705.

Later that same month— in October 2009, Holeman entered into an agreement with the IRS to pay off his 2006, 2007, and 2008 tax arrears in installments ("installment agreement"). RP 445-450.

The IRS issued a third lien for $18,444.42 on May 11, 2011, for the tax year 2009. On May 23, 2011, the lien was filed and recorded in the Monmouth County, New Jersey clerk's office. RP 461. As of the underlying litigation, this lien remains in effect. RP 82.

C. Holeman Fails to Disclose His Federal Tax Liens on Several Forms U4 and on David Lerner's Annual Compliance Questionnaire

Question 14M on the Form U4 asks: "Do you have any unsatisfied judgments or liens against you?" Holeman repeatedly answered this question "No" on multiple Form U4 amendments. Between August 2010 and August 2012, Oppenheimer filed six amendments to Holeman's Form U4, but none of these amendments included a disclosure of the tax liens in effect when the amendments were filed. RP 509-556.

Holeman left Oppenheimer in May 2013, and he joined David Lerner as CCO in November of that year. In the initial Form U4 for his association with David Lerner, filed on November 7, 2013, Holeman continued to answer "No" to question 14M. RP 557-565. The firm filed two subsequent amendments to his Form U4, on September 15 and December 18, 2014, in which Holeman again denied having any outstanding liens. RP 567-582. Notably, the later of these two amendments was filed after FINRA contacted Holeman concerning his outstanding and undisclosed liens. *See* Section D *infra.*

During this period, in December 2014, Holeman completed a David Lerner compliance questionnaire, in which Holeman answered "No" to the question, "Do you have any unsatisfied judgments or liens against you?" RP 639-642.

D. Holeman Attempts to Justify His Failures to Disclosure

In 2014, FINRA staff conducted a LexisNexis search of a group of registered representatives to determine whether they had outstanding liens or judgments. RP 214-215. Because of this search, FINRA identified Holeman as among the representatives having outstanding liens, and FINRA began an investigation that resulted in this disciplinary action. *Id.* In October 2014—prior to Holeman submitting his compliance questionnaire to David Lerner

and amending his Form U4 in December 2014—Enforcement telephoned Holeman and asked him about the outstanding liens. RP 395.

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 the liens. RP 623-626. In response, 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. RP 628-629. Holeman explained in his written response: "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." RP 628. Holeman represented that that he entered into an "installment arrangement with the IRS to reduce liability." *Id.* FINRA's letter also asked why Holeman did not disclose the liens to Oppenheimer or David Lerner. RP 623. Holeman responded, "I understood these were not against me but against my physical property." RP 628. In addition, FINRA's letter to Holeman requested that he "[p]rovide a written statement whether or not there is a lien on your residential home. If yes, provide documentation surrounding those liens." RP 624. Again, Holeman reiterated, "It is my understanding that the IRS liens are against the property." RP 628. Holeman also said he had no documentation related to the liens because he lost his files and records relevant to the inquiry in Hurricane Sandy. *Id.*

On December 17, 2014, in response to a second letter sent to him by Enforcement, Holeman again responded in writing, reiterating that he lost his documentation related to the IRS in a hurricane, explaining that he received the advice described in his earlier letter by telephone several years earlier, and that he was "seeking clarification and [had] placed calls to the IRS" regarding the liens. RP 631-632. Holeman continued to assert 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." *Id.*

On March 4, 2015, Holeman gave on-the-record ("OTR") testimony to Enforcement staff regarding the liens. Holeman testified that, in 2009, he had a conversation with an IRS agent who explained, "the tax filings that they were doing were against [Holeman's] property specifically." RP 644-645. He reiterated that he did not disclose the liens because they were against his residential property and not against him personally.

On July 17, 2015, in response to a Wells Notice Enforcement sent to Holeman notifying him that it had made a preliminary determination to recommend disciplinary action against him, Stephen Wexler, who at the time served as Holeman's attorney, sent a letter to FINRA that explained the basis for Holeman's position that he was under no obligation to disclose the liens because they were against his property and not him personally (the "Wexler Letter"):

> Mr. Holeman when making arrangements with the IRS was under an understanding that any liens imposed by the IRS were not against him personally and consequently did not believe that question 14M in his Form U4 required a "yes" response. That question specifically states as follows: Do you have any unsatisfied judgment or liens against you? The question as phrased incorrectly suggests that there can be a legal lien against a person ("you"). However, liens are only against property and there have not been any such liens against a person ("you") since the abolition of slavery one hundred and fifty (150) years ago. Following the manner in which the question is written, Mr. Holeman did not respond "yes" believing that his response was accurate at the time. There was no willful intent on Mr. Holeman's part to omit this disclosure. At worst it appeared to be innocent (not willful) because his answer to 14M was entirely accurate and there was not intent to deceive. RP 452.

E. Holeman's Untimely Form U4 Amendments

On April 8, 2015, about a month after his OTR testimony, and six months after FINRA first contacted him about the liens, Holeman amended his Form U4. RP 583-591. Holeman disclosed the two liens still outstanding, adding the explanation that the liens "are not against

'you' as asked in 14M. The IRS liens are in favor of the United States on all property and rights to property belonging to the taxpayer." RP 589.

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. RP 593-598. This disclosure states that Holeman first learned of that lien on April 23, 2009, when it was filed. RP 598. On June 30, 2016, however, Holeman updated his Form U4 (to disclose the instant disciplinary action) and deleted his prior disclosure regarding the lien for the 2006 and 2007 tax years. RP 599-612. Still later, 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 personally obtained copies of the tax liens from the clerk's office in Monmouth County, and not on October 20, 2014, as previously represented.[2] RP 613-621.

III. PROCEDURAL HISTORY

FINRA's Department of Enforcement filed a two-cause complaint on June 13, 2016. RP 7-11. The first cause of action alleged that Holeman willfully failed to timely amend his Form U4 to disclose three federal tax liens, in violation of Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1 and FINRA Rules 1120 and 2010. RP 8-10. The second cause of action alleged that Holeman made false statements on his firm's annual compliance questionnaire, in violation of FINRA Rule 2010. Holeman denied the allegations and a hearing was held on January 19, 2017. RP 197-438.

In light of Holeman's earlier representations to Enforcement during its investigation that he lost most of his paperwork during Hurricane Sandy, and because he claimed that he never

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[2] Holeman testified that he never actually saw the liens until February 2015, so he amended his Form U4 to "correct the record" regarding his disclosure of when he "first learned" of the liens, changing the date from October 20, 2014, to February 20, 2015. RP 358.

received notice of the tax liens, Enforcement requested, on July 18, 2016, that Holeman sign a consent letter to the IRS allowing the agency "to provide [to FINRA] any documentation of certified mailings to you." RP 635. Holeman never signed the consent. RP 404. Holeman testified that he separately requested and received information from the IRS regarding its certified mailings and instead of providing the information to FINRA, he gave it to his former counsel, Stephen Wexler, who was not the attorney who represented Holeman at the hearing. RP 404-405. Holeman represents in his brief before the Commission that the IRS allegedly did not have any copies of the certified mailings. Opening Br. at 7.[3]

At his disciplinary hearing, Holeman changed his narrative. Instead of asserting, as he did in his written responses to FINRA and his OTR, that he did not disclose the liens because they were against his property, Holeman denied at the hearing that he was aware of the liens when they were filed. RP 348. While in his previous representations to FINRA Holeman claimed he never received actual notice of the liens, at the hearing Holeman began to argue that he wasn't even *aware* there were any liens filed at all. Holeman maintained that his conversation with the IRS agent related only to an installment agreement for payment on his back taxes, and he understood that the government would impose a lien against his property only if he failed to pay the installments. RP 349. Holeman explained that his December 2014 letter to Enforcement, where he appeared to acknowledge the existence of the liens, reflected only what

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[3] The NAC properly concluded that this allegedly exculpatory information that Holeman turned over to his former attorney was not produced at any point during the proceedings and as such is not part of the record. Holeman refused to give FINRA consent to ask the IRS for confirmation of the liens being sent and now comically points to FINRA's lack of confirmation as a deficiency in its case. In the same breath, he states that he had evidence that the IRS did not have copies of return receipts from the liens ever being sent, but instead of giving them to FINRA, the Hearing Panel, or the NAC, he simply proclaimed it to be so. The Commission should strike any attempts by Holeman to use the information that he refused to allow FINRA access to as a defense.

he learned in his initial October 2014 communication with Enforcement, so he "understood that these [liens] may have been filed, but ... didn't have any evidence that they were filed at this point." RP 354. Holeman admitted that, in December 2014, he completed the amended Form U4 and submitted a compliance questionnaire to his firm failing to disclose the very liens about which Enforcement had already raised questions. RP 355-357.

Enforcement presented evidence at the hearing that the IRS is required to notify taxpayers within five business days after a federal tax lien is filed. The lien notice must be given in person, left at the taxpayer's home or business, or sent by certified or registered mail to the taxpayer's last known address. RP 265; 679-695.[4]

The Hearing Panel issued its decision on May 3, 2017, finding that Holeman violated Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1 and FINRA Rules 1120 and 2010 by failing to timely amend his Form U4 to disclose three federal tax liens. RP 743-757. The Hearing Panel concluded that Holeman was on notice of the liens at about the time of their filing, and that Holeman's hearing testimony concerning when he learned of the liens was not credible because it was inconsistent with Holeman's previous representations to FINRA. The Hearing Panel also determined that Holeman violated FINRA Rule 2010 for making false statements on his firm's compliance questionnaire. The Hearing Panel suspended Holeman in all capacities for 30 days and fined him $5,000. *Id.* The Hearing Panel also found that Holeman's conduct was willful and thus that he was subject to a statutory disqualification. *Id.*

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[4] Although Enforcement presented evidence that it was standard practice for the IRS to send written notice to individuals subjected to liens within five days of filing, Enforcement was unable to present any documentary evidence that Holeman personally received such notice because Holeman would not consent to Enforcement's request to seek documents from the IRS.

Holeman appealed the Hearing Panel's decision to the NAC. RP 759-760. Enforcement cross-appealed the decision with respect to the sanctions imposed by the Hearing Panel. RP 763-764. The NAC affirmed the Hearing Panel's findings. RP 993-1006. The NAC found that, over an extended period, Holeman failed to timely amend his Form U4 to disclose three federal tax liens, thus depriving regulators, employing firms, and the investing public of critical information. The NAC also found that Holeman provided a false answer to his firm on its annual questionnaire when he responded "NO" to the question concerning whether he had any outstanding liens. The NAC increased the sanction and fined Holeman $20,000 and imposed a four-month suspension. The NAC found that Holeman's violations were egregious. The NAC was particularly troubled by Holeman's deliberate failures to amend his Form U4 for over six years, and then even after FINRA had begun its investigation, as well as the fact that Holeman, as the CCO of David Lerner, is responsible for managing compliance issues at his firm, and must understand the importance of prompt and accurate disclosures. This appeal followed. RP 1009-1012.

IV. ARGUMENT

The NAC's findings that Holeman, a CCO with over four decades of experience in the securities industry, failed to timely update his Form U4 to disclose three federal tax liens, did so willfully and is thus subject to a statutory disqualification, and made false statements concerning those liens on his firm's annual compliance questionnaire, are fully supported by the evidence. The NAC's sanctions reflect the egregiousness of Holeman's years-long failure to disclose material financial information —Holeman first learned of the liens in 2009 but did not disclose them on his Form U4 until April 2015, and even that disclosure came six months after FINRA

first confronted Holeman about the outstanding liens. The Commission should affirm the NAC's findings and sanctions in all respects.

A. Holeman's Failures to Timely Update His Form U4 with Information About His Tax Liens Violates NASD and FINRA Rules

Under FINRA rules, a registered person is obligated to make sure his Form U4 is accurate. 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 provides that "[t]he filing with the Association of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade."[5] Similarly, FINRA Rule 1122 provides that "[n]o member or person associated with a member shall file 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." A violation of any FINRA Rule, including the rules concerning Form U4 disclosures, violates FINRA Rule 2010, which require associated persons to observe high standards of commercial honor and just and equitable principles of trade. *See Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

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[5] FINRA Rule 1122 became effective on August 17, 2009, superseding NASD IM-1000-1 without substantive changes at issue here. Therefore, NASD IM-1000-1 applies to Holeman's conduct before August 17, 2009; FINRA Rule 1122 applies to Holeman's conduct beginning August 17, 2009. *See* FINRA Regulatory Notice 09-33, 2009 FINRA Lexis 96 (June 2009).

The NAC correctly found that Holeman failed to update timely his Form U4, in violation of FINRA rules. Holeman knew about the liens well before he disclosed them. First, he discussed the initial liens with the IRS in 2009. He had a conversation with an IRS agent regarding his installment agreement who supposedly told him, "the tax filings that they were doing were against [Holeman's] property specifically." RP 645. Holeman also stated that the IRS agent "advised [him] that these liens] were going to be filed as against the property." RP 646. Furthermore, when asked by FINRA staff in November 2014 why he had not disclosed the liens, Holeman wrote, "I *understood* these were not against me but were against physical property." (emphasis added). The following month, in response to a follow-up request for information from FINRA staff, Holeman responded, "As indicated in the prior response, I do not believe that there were liens against me personally. The language in Form U4 does not include non-judicial and non-personal liens." RP 631. In response to a question about how and when he was told by an IRS agent that the liens were against property and not him personally, Holeman wrote, "I do not recall the date but it was several years ago and to the best of my recollection it was by telephone." RP 632. Holeman's own words show that he was aware of the liens at or about the time they were imposed, and that he affirmatively decided that they need not be disclosed.

However, even if the Commission were to credit Holeman's claims that he was not aware of the liens before he was contacted by FINRA, which we strongly believe it should not, Holeman still chose to wait approximately six months to update his Form U4. There is no dispute that FINRA telephoned Holeman in October 2014 to inquire about Holeman's failures to disclose the tax liens, but he nevertheless did not update his Form U4 to actually make the disclosures until April 2015. Accordingly, the Commission should sustain the NAC's finding

that Holeman failed to timely disclose three federal tax liens on his Form U4, in violation of Article V, Section 2(c) of the FINRA By-Laws, NASD IM-1000-1, NASD Rule 2010, and FINRA Rules 1122 and 2010.

B. Holeman's False Response on His Firm's Annual Compliance Questionnaire Violates FINRA Rule 2010

The NAC also correctly concluded that Holeman provided a false response to David Lerner on its annual compliance questionnaire. When Holeman submitted the questionnaire to his employer in December 2014, he had two outstanding tax liens. Holeman, however, falsely stated that he had none, even though Enforcement had contacted Holeman by telephone in October 2014 inquiring about the liens and then sent Holeman a written request for information concerning his outstanding liens on November 5, 2014, to which Holeman responded on November 13, 2014.

By making this false statement on his compliance questionnaire, Holeman violated 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) (quoting *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9 (NASD NAC May 7, 2003)), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012); *accord James A. Goetz*, 53 S.E.C. 472, 477-78 (1998) (finding that a registered representative's false statements on firm's forms reflect directly on his ability to comply with regulatory requirements fundamental to the securities industry).

Therefore, the Commission should affirm the NAC's finding that Holeman's false certification violated FINRA Rule 2010.

C. Holeman Is Subject to Statutory Disqualification Because He Willfully Failed to Disclose Material Information on His Form U4

The NAC also correctly found that Holeman was subject to statutory disqualification because of his willful failure to timely disclose his liens on his Form U4. A person is subject to "disqualification" with respect to FINRA membership, or association with a FINRA member, if that person is subject to any "statutory disqualification" under Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"). FINRA By-Laws Article III, Sec. 4. Section 3(a)(39)(F) of the Exchange Act provides that a person is statutorily disqualified if such person has, among other things,

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

15 U.S.C. § 78c(a)(39)(F) (emphasis added). This statutory provision applies to a representative who has willfully provided false or misleading statements on a Form U4 with respect to a material fact or who willfully failed to amend a Form U4 with material information that is required on the Form U4. *See, e.g.*, *McCune*, 2016 SEC LEXIS 1026, at *13-23 (finding that applicant was statutorily disqualified for willfully failing to amend Form U4); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *37-41 (Apr. 18, 2013) (finding that applicant was statutorily disqualified for willfully providing material false information on, and excluding material information from, a Form U4), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014).

1. Holeman's Actions Were Willful

The NAC properly concluded that Holeman's failures to amend his Form U4 to disclose the existence of three federal tax liens were willful. Acting "willfully" means to "[v]oluntarily commit[ ] the acts that constitute[ ] the violation." *McCune*, 2016 SEC LEXIS 1026, at *15; *see also Amundsen*, 2013 SEC LEXIS 1148, at *38 ("A failure to disclose is willful under Exchange Act § 3(a)(39)(F) if the respondent of his own volition provides false answers on his Form U4."). A finding of willfulness "do[es] not require that the actor 'also be aware that he is violating one of the Rules or Acts'" or that he "acted with a culpable state of mind" or "scienter." *McCune*, 2016 SEC LEXIS 1026, at *15, 19 (citing, *inter alia*, *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000), and *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41-43 (Nov. 9, 2012)). On the other hand, an "inadvertent filing of an inaccurate form" is not something that would support a finding of willfulness. *Mathis v. SEC*, 671 F.3d 210, 218 (2d Cir. 2012).

The record supports the finding that Holeman was aware of the federal tax liens on or around the time they were recorded. Holeman's knowledge of the liens is established by his original explanation for his nondisclosure that he asserted in his November and December 2014 correspondence to Enforcement and during his OTR testimony—Holeman made an affirmative decision not to disclose the liens because, he argues, they were filed against his property, not him personally. His knowing decision not to disclose the liens plainly demonstrates that he acted willfully.

The Commission has rejected similar defenses to allegations of willfulness that—like Holeman's argument that Question 14M did not apply to liens filed against property—were based on interpretations of Form U4 disclosure questions that were contrary to their plain

language, limitations that did not exist in the text of the questions, or a respondent's alleged confusion or lack of understanding about the meaning of Form U4 disclosure questions. *See, e.g., Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *29-30 (Oct. 20, 2011) (finding respondent acted willfully because his interpretation of Form U4 disclosure questions was "contrary to its plain language" or not suggested by the question itself); *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *21-22 (Dec. 7, 2009) (holding respondent's suggestion that only securities-industry related liens needed to be disclosed was not supported by the plain language of the Form U4 disclosure question), *aff'd*, 671 F.3d 210 (2d Cir. 2012); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *15-16 (Dec. 22, 2008) (rejecting respondent's arguments that "he did not understand the questions on the Form U4" and "that he did not know that he needed to disclose misdemeanors," and holding that "ignorance of the NASD's rules is no excuse for their violation"). Thus, when a respondent's alleged misunderstanding of a Form U4 disclosure question is objectively unreasonable—like Holeman's purported misunderstanding of the unambiguous question about liens—providing incorrect answers to those questions, or failing to update the answers with accurate information, is willful conduct.

2. The Liens Are Material

On appeal, Holeman does not contest the fact that that the liens were material. Opening Br. at 10. Nor could he. It is well established that information about liens is material. "In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available." *McCune*, 2016 SEC LEXIS 1026, at *21-22 (finding that the tax liens and bankruptcy that respondent failed to disclose were material).

Rather, Holeman maintains that because both FINRA and his firm were aware of the existence of the liens, and because he is not licensed to sell any products nor have any customers, materiality is not at issue because the information was disclosed to his employer. Holeman contends that, because he told his employer about the liens, "he did not fail to meet his own reporting obligations but ensured that his employer was made aware of the totally mix of information relating to the liens." Opening Br. at 10.

Holeman's arguments demonstrate a shocking lack of understanding concerning the importance of the Form U4 from someone who has four decades of experience in the securities industry, with most of that time spent in the compliance arena. The Form U4 is not only important to FINRA and an employer firm, it "is a critically important regulatory tool." *See Amundsen*, 2013 SEC LEXIS 1148, at *24. The duty to provide accurate information on a Form U4 and to amend Form U4 to provide current information "assures regulatory organizations, employers, and members of the public that they have all of the material, current information about the registered representative with whom they are dealing." *McCune*, 2016 SEC LEXIS 1026, at *12. Through his circumvention of his Form U4 disclosure obligations, Holeman deprived other stakeholders, such as the investing public, other self-regulatory organizations, and state regulators, of critical information about his financial history. Thus, Holeman's liens are material, and they should have been disclosed on his Form U4.

E. Holeman's Defenses Are Without Merit[6]

Holeman makes several arguments in a general defense to the NAC's findings of liability. Each is without merit, and the Commission should disregard them all.

1. Holeman Was Aware of the Liens

In his brief, Holeman maintains that he was not aware of the tax liens, and was only aware of the installment agreement. He argues that a partial, unattributed OTR quote,[7] and the fact that his installment agreement did not indicate that a lien had been filed, supports his claim that he lacked knowledge of the liens.[8] Opening Brief at 4. These two minor points, however, do not outweigh the compelling evidence that supports the NAC's conclusion that Holeman had been aware of the existence of liens long before FINRA's investigation.[9] Numerous oral and

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[6] Holeman has requested oral argument. Opening Br. at 14. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record, Holeman's request for oral argument should be denied. *See* Commission Rule of Practice 451, 17 C.F.R. § 201.451 (2018) (providing for Commission consideration of appeals based on the "papers filed by the parties" unless the "decisional process would be significantly aided by oral argument").

[7] Holeman maintains that his actual OTR testimony was that "in review of the installment agreement with an IRS agent . . . the agent read a disclosure that the IRS may file a lien. . ." This language quoted by Holeman in his brief, in which he accuses the NAC of misquoting his OTR (which it did not), did not come from the OTR, but rather from Holeman's self-serving hearing testimony, when Holeman's story about his knowledge of the liens had changed, which was discredited by the Hearing Panel and the NAC. See RP 406. Furthermore, this explanation does not address Holeman's 2011 tax lien, which was filed two years after the installment agreement.

[8] Holeman's brief provides no citations to the record, as required by Commission Rule of Practice 450(b)("Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant"). 17 C.F.R. § 201.450 (2018). The lack of citations to the record in support of his brief further undermines Holeman's arguments that he was not aware of the liens.

[9] Holeman maintains that the NAC erred in referring to Enforcement's "investigation" of Holeman's Form U4 disclosure issues, stating that it was merely an "inquiry" that was not reportable on a Form U4 filing. This statement evidences Holeman's confusion about his reporting obligations. This case is not about whether Holeman failed to disclose a formal

written statements made to FINRA indicate that Holeman knew of the liens but that felt that he didn't need to disclose them, because he argued, over and over again, the liens were against his property.

It was not until his disciplinary hearing that Holeman began to argue that he was only aware of the installment agreement with the IRS and never the liens. The Hearing Panel concluded, and the NAC affirmed, that Holeman's hearing testimony regarding when he learned about the existence of the liens was not credible in light of the fact that it was inconsistent with Holeman's previous statements.[10] RP 751, n. 59. Furthermore, the fact that he refused to allow FINRA to contact the IRS, and refused to turn over the allegedly exculpatory information he received from the IRS, suggests that Holeman was indeed long aware of the liens.[11]

FINRA investigation on his Form U4 (as he would be required to do on Question 14G of the Form U4), but rather whether Holeman failed to disclose the existence of three federal tax liens no later than 30 days after being made aware, by a FINRA inquiry or investigation, of the existence of those liens. Moreover, FINRA's November 4, 2014 letter to Holeman clearly states in its opening sentence: "In connection with ***our [FINRA's] investigation***. . ." RP 623. (emphasis added)

[10] The initial fact-finder's credibility determinations are entitled to considerable deference. *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *12 n.45 (Mar. 31, 2016) (explaining that credibility determinations "based on hearing the witness's testimony and observing demeanor. . . are entitled to considerable deference"), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

[11] *See Int'l Union, United Automobile, Aerospace and Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1336 (1972) (citing 2 J. Wigmore, Evidence § 285 (3d ed. 1940) ("When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.")). The application of such an inference here does not shift the burden of proof to Holeman, as it merely buttresses the proof supplied by Holeman's own OTR testimony and written responses to FINRA that acknowledged his awareness of the liens. *Compare generally Dep't of Enforcement v. Fawcett*, Complaint No. C9A040024, 2005 NASD Discip. LEXIS 31, at *21 (NASD Hearing Panel May 24, 2005) ("[E]ven if an adverse inference is drawn, the inference 'may be employed to complete a chain of reasoning on a point partially established by direct evidence, but it cannot be used to fill a void where there is otherwise no evidence.'"), *aff'd*, 2007 NASD Discip. LEXIS 2 (NASD NAC Jan. 8, 2007), *aff'd*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598 (Nov. 8, 2007).

2. No Reliance on Counsel

Holeman maintains that the Wexler Letter supports his contention that he relied on counsel "in completing the annual questionnaire and the disclosure of his responses to his employer." Opening Br. at 12. The Wexler Letter proves no such thing.

To succeed on a reliance on counsel claim, Holeman must demonstrate that he: (1) made complete disclosure of the relevant facts of the intended conduct to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994).

Holeman has provided no evidence that he consulted with an attorney to determine whether he needed to disclose the liens on his Form U4 when he first learned of their existence in 2009. If the Commission were to credit Holeman's assertion that Question 14M on the Form U4 is ambiguous and confusing—which we strongly maintain it is not—it would have been incumbent on Holeman to try to obtain advice on the matter. *See Mathis*, 2009 SEC LEXIS 4376, at *21-22 ("if [respondent] found [the Form U4 question about liens] to be ambiguous, it was his duty to determine whether disclosure was required").

In addition, there is no evidence that Holeman relied on advice of counsel to delay updating his Form U4 when he became aware of FINRA's investigation in October 2014. The Wexler Letter is simply a response to a Wells Notice that attempts to justify Holeman's position for not disclosing the liens. It is not—as a reliance on counsel defense requires—legal advice to Holeman. Moreover, it was Holeman—not Wexler—who made the decision to delay disclosing his tax liens to FINRA after FINRA had begun its investigation. During Holeman's March 2015 OTR, Wexler explained that, despite Wexler's February 2015 representations to Enforcement

that Holeman would soon disclose the liens, "it has not been done because ***my client has very recently advised me*** **that** he feels that to do that would be an admission of wrongdoing from the get-go, and his position is that he did not do anything wrong and, therefore, he doesn't want to do anything that would be misconstrued as an admission." RP 363 (emphasis added).

Thus, as Holeman has not established any of the required elements, reliance on counsel is not an applicable defense to any aspect of Holeman's liability for his failures to make the required disclosures.

3. Acquiescence of Holeman's Firm

Holeman also broadly argues the fact that David Lerner was aware of FINRA's investigation into his disclosure violations, and supported him and his disclosure decisions rather than disciplining him, relieved Holeman of his obligation to update his Form U4 and excuses his misconduct.[12] However, merely informing his firm did not relieve Holeman of his affirmative obligation to update his Form U4. The responsibility rests squarely on a registered person to answer the Form U4 questions correctly. *See Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at *22 (Jan. 14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006) (rejecting applicant's claim that his failure to disclose on a Form U4 a termination for cause should be excused because the firm's president advised him not to disclose it); *see also Douglas J. Toth*, Exchange Act Release No. 58074, 2008 SEC LEXIS 1520, at *25 (Jul. 1, 2008) (holding that "primary responsibility for maintaining the accuracy of a Form U4 lies with the registered representative") *aff'd,* 319 F. App'x 184 (3d Cir. 2009); *Frank R. Rubba*, 53 S.E.C. 670, 674

[12] Holeman references an email that David Lerner's General Counsel sent to FINRA on March 15, 2015, and affidavits by David Lerner's General Counsel and President, that acknowledge that Holeman disclosed the liens to his employer. None of this was part of the record before the NAC and should be stricken by the Commission. Regardless, David Lerner's acceptance of Holeman's violations of FINRA rules does not excuse Holeman's misconduct.

(1998) ("We wish to reiterate that the responsibility for maintaining the accuracy of the Form U4 . . . lies with the registered representative"). Therefore, regardless of whether David Lerner expressed support for Holeman, it does not absolve him of his failure to comply with FINRA rules.

4. Oppenheimer's U4 Amendments

Holeman maintains that he is not responsible for the amendments made to his Form U4 at Oppenheimer because they were administrative in nature and submitted to FINRA by another department at the firm. Opening Br. at 8. This does not release Holeman of his responsibility to make sure the form is accurate.[13]

If someone at the representative's firm has the delegated responsibility for processing the filing of amendments to Forms U4, it is still the registered representative's obligation to cause that delegated person to make the required update. *See, e.g.*, *NASD Notice to Members 97-31*, 1997 NASD LEXIS 35, at *2, 5 (May 1997) (explaining that Form U4 "requires applicants for registration to . . . keep all information on Form U-4 current" and that registered persons "must cause the firm(s) with which he or she is associated to file an amended Form U-4" to update address information); *Dist. Bus. Conduct Comm. v. Haw*, Complaint No. C8A900078, 1993 NASD Discip. LEXIS 241, at *16 (NASD NBCC Sept. 3, 1993) ("The burden of updating Forms U-4 to keep all information current rests with the registered person, not the member firm"). Delegation of responsibility to another employee or department does not relieve

[13] Holeman also maintains that there would have been no corrections to make to the amendments concerning the liens at Oppenheimer, or any disclosures to David Lerner concerning the same when he joined the firm, since he maintains that he wasn't even aware of the liens. As addressed numerous times in the brief, both the Hearing Panel and the NAC properly concluded that Holeman's contention that he was not aware of the liens is not credible in the face of ample, contrary evidence.

Holeman of "his obligation to make certain that appropriate filings were made." *David Adam Elgart*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097, at *18 (Sept. 29, 2017). It was Holeman's responsibility to supply his firms with accurate information for his 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.

5. Ambiguity of Question 14M

Although he seems to have abandoned his earlier argument that he did not disclose the liens because they were against his "property," and has gone all-in on his argument that he was not aware of the liens at all, Holeman still maintains that Question 14M on the Form U4 is ambiguous. Opening Br. at 10. Commission precedent refutes this assertion.

Holeman's alleged misunderstanding of the liens question has no basis in the text of the question itself, which the Commission has repeatedly has found "unambiguous" and "contains no limitations on the kind of liens required to be disclosed." *Tucker*, 2012 SEC LEXIS 3496, at *36-37, 37 n.44; *see also Mathis*, 2009 SEC LEXIS 4376, at *21-22, 28 (holding that Form U4's liens question "contains no limitations on the kinds of liens required to be disclosed," that "the plain language of the Form U4 . . . asks for 'any' liens," and that "there is nothing ambiguous about whether an IRS tax lien constitutes a 'lien'"); *cf. Amundsen*, 2013 SEC LEXIS 1148, at *31 (finding that respondent's testimony about his interpretations of Form U4 disclosure questions lacked credibility, where the definition of a term in one disclosure question was "written in plain language" and where another disclosure question was "explicit and unambiguous").

In addition, Holeman's extensive industry experience makes his claimed misunderstanding of the liens question even more incredible. Holeman has four decades of

industry experience, most of it spent as a compliance officer. *Cf. Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (noting that registered representative's "claimed ignorance of his obligations is only aggravated in light of his fifteen years[']' experience in the securities industry"); *Walter T. Black*, 50 S.E.C. 424, 425 (1990) (stating that "it is difficult to credit Black's claim that he did not know he was violating NASD rules" when he had "15 years' experience in the securities business").

F. The NAC's Sanctions Are Neither Excessive Nor Oppressive and Serve to Protect the Investing Public

The sanctions the NAC imposed for Holeman's misconduct—a four-month suspension and $20,000 fine—are appropriately remedial and neither excessive nor oppressive. The Commission looks to FINRA's Sanction Guidelines ("Guidelines") as a benchmark for its review. *McCune*, 2016 SEC LEXIS 1026, at *29. The Guideline for untimely Form U4 amendments recommend a fine of $2,500 to $37,000.[14] In a case where aggravating factors predominate, the Guideline also recommends a suspension of 10 business days to six months.[15] The Principal Considerations specifically applicable to Form U4 violations include: the nature 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.[16]

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[14] *See FINRA Sanction Guidelines* 71 (2018), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf

[15] *Id.*

[16] *Id.* The NAC was also directed to consider whether a lien or judgment that was not timely disclosed has been satisfied. *Id.* Although one of the liens had been satisfied at the time of the underlying litigation, this should not be given 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 remained.

The NAC properly concluded that aggravating factors predominated Holeman's misconduct and warranted a finding Holeman's violations were egregious. First, the NAC considered the nature and significance of the information that Holeman failed to disclose.[17] 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). Second, the NAC also concluded that the number and dollar value of the disclosable events were aggravating—there were three federal tax liens in excess of $116,000.[18] Third, the NAC correctly determined that Holeman's failures to disclose the liens on his firm's compliance questionnaire and the Forms U4 were deliberate.[19] Even after Holeman knew that FINRA was investigating his failures to disclose his tax liens, he still chose not to disclose them on his firm's annual compliance questionnaire or the Form U4. Finally, 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.[20] Even after FINRA notified him that the liens existed, Holeman still falsely completed his firm's compliance questionnaire, failed to even investigate the liens for four months, and waited an additional two months to disclose them on his Form U4.

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17 *Id.* (Principal Considerations in Determining Sanctions, No. 1).

18 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

19 *Id.* (Principal Considerations in Determining Sanctions, No. 3).

20 *Id.* (Principal Considerations in Determining Sanctions, No. 4).

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 timely 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. This concern is amplified by Holeman's position as David Lerner's CCO. He is responsible for managing compliance issues at David Lerner, with the goal of assisting his firm in complying with its regulatory requirements.

"A representative's truthfulness in answering the financial disclosure questions on the Form U4 is a particularly critical measure of fitness for the industry because a commitment to accurate, complete, and non-misleading financial disclosure is central to any securities professional's responsibilities." *Tucker*, 2012 SEC LEXIS 3496, at *34. "Untruthful answers call into question an associated person's ability to comply with regulatory requirements." *Id.* at *26. Considering the nature of Holeman's violations, the fact that Holeman is the CCO of his firm, the numerous aggravating factors, and the absence of any mitigation, the NAC correctly found that Holeman's disclosure violations were egregious. A four-month suspension and $20,000 fine serve to remediate Holeman's misconduct and stress the importance of holding seasoned industry professionals, particularly those with extensive compliance experience, responsible for adhering to FINRA's rules and their firms' policies and procedures. A strong sanction is appropriate to remedy Holeman's violation and deter him from engaging again in similar violations.

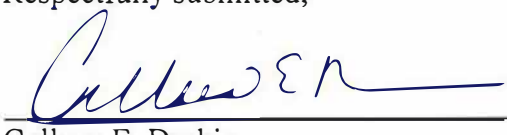
The Commission should sustain the four-month suspension and the $20,000 fine imposed on Holeman for his violations. Considering the aggravating factors, the absence of mitigation,

and that the Guidelines recommend suspensions of up to two years or a bar, the sanctions imposed on Holeman are not excessive or oppressive.

V. CONCLUSION

The NAC correctly found that Holeman willfully failed to timely disclose on his Form U4 material information about three federal tax liens, and provided a false answer about two of those liens to his firm on its annual compliance questionnaire. Holeman's years-long willingness to conceal material information about his financial obligations violated FINRA's fundamental principles of disclosure and cooperation, and undermined the investor protection purposes of FINRA's rules. The Commission should sustain the findings and the meaningful sanctions that the NAC imposed.

Respectfully submitted,



Colleen E. Durbin
Associate General Counsel
FINRA
1735 K Street NW
Washington, D.C. 20006
Tel: (202) 728-8835

Dated: September 17, 2018

CERTIFICATE OF SERVICE

I, Colleen Durbin, certify that on September 17, 2018, caused the original and three copies of the Brief of the Financial Industry Regulatory Authority in Opposition to Application for Review, Administrative Proceeding No. 3-18546, to be served by messenger on:

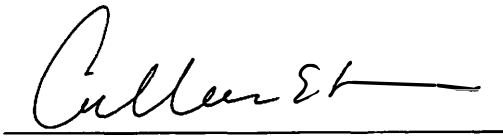
Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090

and via overnight FedEx and electronic mail to:

Allen Holeman
David Lerner Associates, Inc.
477 Jericho Turnpike
Syosset, NY 11791-9006
allencco@gmail.com

Different methods of service were used because courier service could not be provided to applicant.

Respectfully submitted,



Colleen Durbin
Associate General Counsel
FINRA – Office of the General Counsel
1735 K Street, N.W.
Washington, D.C. 20006
P: (202) 728-8816
F: (202) 728-8264
Colleen.Durbin@finra.org