

SECURITIES AND EXCHANGE COMMISSION  
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934

Release No. 77375 / March 15, 2016

Admin. Proc. File No. 3-16768

In the Matter of the Application of  
Michael Earl McCune  
For Review of Disciplinary Action Taken by  
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY  
PROCEEDINGS

**Failure to timely disclose material information on Form U4**

Associated person of member firm of registered securities association failed to timely disclose material information concerning bankruptcy and tax liens on Form U4. *Held*, association's findings of violation and imposition of sanctions are *sustained*.

APPEARANCES:

*Michael Earl McCune*, pro se.

*Alan Lawhead, Andrew Love, and Colleen Durbin*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: August 25, 2015

Last brief received: December 7, 2015

Michael Earl McCune (“McCune”) seeks review of a FINRA disciplinary action. FINRA found that McCune, in violation of NASD Rule 2110 and Interpretive Material-1000-1 (“IM 1000-1”) and FINRA Rules 1122 and 2010, willfully failed to timely amend his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) to disclose a bankruptcy, three federal tax liens, and one state tax lien.<sup>1</sup> FINRA suspended McCune in all capacities for six months and imposed a \$5,000 fine. McCune concedes he failed to timely amend his Form U4, but argues, among other things, that he did not act willfully, and that the six-month suspension is inappropriate because it is essentially the equivalent of “a lifetime ban from the industry.”<sup>2</sup> We sustain FINRA’s findings of violation and the sanctions imposed based on our independent review of the record.

## I. Facts

The facts in this case are undisputed.<sup>3</sup> From December 1996 until May 2011, McCune was associated with Royal Alliance Associates, Inc. (“Royal Alliance”), a FINRA member firm. He is currently employed as a registered representative by National Planning Corporation.

### A. McCune’s 1989 bankruptcy

In February 1989, McCune filed a voluntary petition for bankruptcy pursuant to Chapter 13 of the U.S. Bankruptcy Code. The bankruptcy was converted to a Chapter 7 bankruptcy and McCune’s debts were discharged in October 1990. McCune amended his Form U4 to disclose this bankruptcy in December 1996, when he joined Royal Alliance. McCune explained in the Disclosure Reporting Pages of his Form U4 that he had mistakenly omitted the bankruptcy from the earlier iterations of his Form U4. The December 1996 Form U4 McCune signed included a representation by McCune that he would update his Form U4 by filing timely amendments whenever changes occurred to previously reported information.<sup>4</sup>

---

<sup>1</sup> McCune’s violations occurred between 2005 and 2011 and we therefore apply the NASD and FINRA Rules as relevant. NASD IM1000-1 was replaced by FINRA Rule 1122 with some modifications on August 17, 2009. *FINRA Regulatory Notice 09-33*, 2009 WL 1701937, at \*3 (June 15, 2009). None of those modifications are at issue in this proceeding, and the substance of the provision’s prohibitions remained the same in all relevant respects. On December 15, 2008, NASD Rule 2110 was adopted as FINRA Rule 2010 without material change. *FINRA Regulatory Notice 08-57*, 2008 WL 4685588, at \*7 (Oct. 16, 2008).

<sup>2</sup> McCune does not challenge FINRA’s order that he pay hearing costs of \$1,522.94, which we sustain.

<sup>3</sup> In June 2013, McCune and FINRA’s Department of Enforcement reached an agreement to stipulate to most of the facts at issue in this case.

<sup>4</sup> McCune’s failure to timely disclose his 1989 bankruptcy on his Form U4 was not charged by FINRA as a violation, but, as explained below, we find his failure relevant to a determination of whether McCune was aware of his disclosure obligations.

## **B. McCune's awareness of his disclosure obligations**

Royal Alliance required all of its registered representatives, including McCune, to complete an annual compliance questionnaire. McCune testified that he completed the questionnaires during each year of his employment with Royal Alliance. The questionnaire included specific reminders about the need for registered representatives to update their Form U4 and to include information about disclosure events such as bankruptcy filings. Beginning in 2008, the questionnaires also contained specific reminders about the need to disclose liens.

McCune stated during his on-the-record testimony that he received a copy of Royal Alliance's Sales Practices Manual when he joined the firm. Royal Alliance's Sales Practices Manual, dated January 1999, stated:

Failure to amend Form U-4 when there is a change in the information required is considered by the NASD to be a material omission and may result in severe sanctions. The RR must disclose on a new Form U-4, or amend the old U-4, when there are affirmative responses to the questions in Item 22 regarding past or pending legal or regulatory proceedings.

Subsequent versions of Royal Alliance's Sales Practices Manual contained similar warnings about the potential consequences for registered representatives who fail to timely amend their Form U4. The Sales Practices Manual dated September 25, 2009, also stated that registered representatives should review their Form U4 on at least an annual basis to ensure its accuracy.

## **C. McCune's second and third bankruptcy petitions and four tax liens**

In October 2002, McCune filed a second voluntary petition for bankruptcy under Chapter 13. On October 23, 2003, while the petition was pending, McCune signed an amendment to his Form U4 that was submitted to FINRA by Royal Alliance. In the amendment, McCune responded "no" when asked whether he had filed a bankruptcy petition within the past ten years. McCune's second voluntary bankruptcy petition was dismissed by the bankruptcy court in 2005 without a discharge.<sup>5</sup>

McCune filed a third voluntary petition for bankruptcy under Chapter 13 in May 2005, three months after the dismissal of his 2002 bankruptcy petition. The bankruptcy was converted from Chapter 13 to Chapter 7, and McCune's debts were discharged in May 2006. McCune failed to amend his Form U4 to disclose the 2005 bankruptcy to FINRA until April 7, 2011.

---

<sup>5</sup> McCune's failure to disclose his second voluntary bankruptcy petition on his Form U4 was not charged by FINRA as a violation.

The Internal Revenue Service (“IRS”) and the state of Kansas filed a series of tax liens against McCune beginning in 2009, which McCune also failed to timely disclose to Royal Alliance and to FINRA in an amended Form U4:

- Federal tax lien for \$157,685 filed by the IRS on March 10, 2009;
- State tax lien for \$1,872 filed in the District Court for Johnson County, Kansas on March 31, 2009;
- Federal tax lien for \$258 filed by the IRS on May 3, 2010; and
- Federal tax lien for \$2,559 filed by the IRS on March 4, 2011.

McCune had knowledge and notice of each of these liens and failed to amend his Form U4 to disclose them to FINRA until April 7, 2011.

#### **D. Royal Alliance discovered McCune’s failures to disclose**

In preparing for an audit scheduled for the end of March 2011, Royal Alliance’s independent auditor discovered a possible problem with McCune’s Form U4 disclosures and informed McCune’s supervisor. Royal Alliance then performed a credit check that revealed McCune’s bankruptcies and liens. McCune’s supervisor brought McCune’s failures to make required disclosures on his Form U4 to his attention. McCune made the disclosures on April 7, 2011, in an amended Form U4, and was permitted to resign in May 2011.

#### **E. Procedural history**

On January 13, 2013, FINRA’s Department of Enforcement filed a complaint alleging that McCune willfully failed to amend his Form U4 to disclose his 2005 bankruptcy petition and the four tax lien filings.<sup>6</sup> A hearing was held on July 23, 2013. On April 23, 2014, a FINRA hearing panel issued a decision finding that McCune had engaged in the alleged violations and suspended McCune in all capacities for six months, fined him \$5,000, and imposed hearing costs of \$1,522.94. The hearing panel also determined that McCune was subject to statutory disqualification. McCune appealed the decision to the National Adjudicatory Council (“NAC”), which affirmed the hearing panel’s findings of violation and sanctions. This appeal followed.

## **II. Analysis**

### **A. Standard of Review**

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization (“SRO”) disciplinary

---

<sup>6</sup> FINRA’s complaint initially contained a second cause of action for McCune’s false completion of Royal Alliance’s annual compliance questionnaire, but FINRA withdrew this claim prior to the hearing.

actions.<sup>7</sup> Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violated the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.<sup>8</sup>

### **B. McCune engaged in the conduct found by FINRA.**

McCune does not dispute that he engaged in the conduct found by FINRA. As described above, for six years he failed to amend his Form U4 to reflect his 2005 bankruptcy filing; for two years he failed to amend his Form U4 to reflect the March 2009 federal and state tax liens; for 11 months he failed to amend his Form U4 to reflect the May 2010 federal tax lien; and for more than a month he failed to amend his Form U4 to reflect the March 2011 federal tax lien. Based on our independent review of the record, we find that McCune engaged in the conduct found by FINRA.

### **C. McCune violated FINRA and NASD rules by failing to disclose his bankruptcy and liens.**

We find that McCune's failures to amend his Form U4 to reflect his 2005 bankruptcy and four tax liens violated IM 1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010.

IM 1000-1 requires FINRA members and their associated persons to file, in connection with membership or registration as a registered representative, complete and accurate information.<sup>9</sup> 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 so inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof." These rules apply to a Form U4, which FINRA uses to screen applicants and monitor their fitness for registration within the securities industry.<sup>10</sup> The information contained in Form U4 is important to the investing public and FINRA firms that are evaluating potential hires.<sup>11</sup>

---

<sup>7</sup> See *David M. Levine*, Exchange Act Release No. 48760, 2003 WL 22570694, at \*9 n. 42 (Nov. 7, 2003), *petition denied*, 407 F.3d 178 (3d Cir. 2005).

<sup>8</sup> 15 U.S.C. § 78s(e)(1).

<sup>9</sup> See *Robert E. Kauffman*, Exchange Act Release No. 33219, 1993 WL 483323, at \*2 (Nov. 18, 1993) ("Every person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994).

<sup>10</sup> See *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at \*6-7 (Apr. 18, 2013), *petition denied*, 575 Fed. App'x. 1 (D.C. Cir. 2014); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at \*8 (Dec. 22, 2008).

<sup>11</sup> See *Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at \*9 (Dec. 7, 2009) (stating that 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

(continued . . .)

A registered representative has a continuing obligation to timely update information required by Form U4 as changes occur.<sup>12</sup> Article V, Section 2(c) of FINRA By-Laws requires member firms and associated persons to report certain events on Forms U4 and to keep the form updated and accurate. The By-Laws further require that these events be reported accurately no later than 30 days after learning of the facts or circumstances giving rise to a reportable event. 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.<sup>13</sup> Failing to timely amend a Form U4 when required violates IM 1000-1 and FINRA Rule 1122 and the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its members and their associated persons under NASD Rule 2110 and FINRA Rule 2010.<sup>14</sup>

#### **D. McCune is subject to statutory disqualification.**

We sustain FINRA's finding that McCune is subject to statutory disqualification because his failure to disclose the bankruptcy and tax liens was willful and constituted material omissions from an application to associate with a member firm. A person is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act if, among other things, "such person . . . has willfully made . . . in any application for membership or participation in, or 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 . . . report . . . any material fact which is required to be stated therein."<sup>15</sup> As described below, we agree with FINRA's analysis that

---

(. . .continued)

financial obligations had a bearing on their confidence in him"), *aff'd*, 671 F.3d 210 (2d Cir. 2012).

<sup>12</sup> See *Amundsen*, 2013 WL 1683914, at \*6; *Mathis*, 2009 WL 4611423, at \*6.

<sup>13</sup> *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at \*6 (Oct. 20, 2011), *reconsideration denied*, Exchange Act Release No. 65863, 2011 WL 6009649 (Dec. 1, 2011).

<sup>14</sup> See *id.* at \*6 (finding that respondent's repeated false answers and failures to amend his Forms U4 are clear violations of IM 1000-1 and NASD Rule 2110); *Mathis*, 2009 WL 4611423, at \*6, \*10 (finding that the failure to file timely Form U4 amendments is a violation of IM 1000-1 and NASD Rule 2110); see also *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at \*8 n.29 (July 2, 2013) ("According to 'our long-standing and judicially-recognized policy . . . a violation of another Commission or NASD rule or regulation . . . constitutes a violation of [NASD] Rule 2110.'" (citing *Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 WL 507864, at \*6 (July 20, 1999)).

<sup>15</sup> 15 U.S.C. §§ 78c(a)(39), 78o(b)(4)(A). In the Form U4, McCune agreed "to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported." Further, he represented that, "to the extent any information previously

(continued . . .)

McCune acted willfully when he failed to disclose the bankruptcy and tax liens, and that the information concerning the bankruptcy and tax liens was material.

### 1. McCune's conduct was willful.

The preponderance of the evidence supports FINRA's finding that McCune's conduct was willful. A willful violation of the securities laws means "intentionally committing the act which constitutes the violation."<sup>16</sup> The laws do not require that the actor "also be aware that he is violating one of the Rules or Acts."<sup>17</sup> If McCune voluntarily committed the acts that constituted the violation, then he acted willfully.

McCune knew about the bankruptcy and liens but failed to amend his Form U4, despite representing on earlier occasions that he would update the Form by filing timely amendments. As early as 1996, when McCune joined Royal Alliance and amended his Form U4 to disclose his 1989 bankruptcy, he was aware of his obligation to disclose bankruptcy petitions on Form U4. In the 1996 amendment to his Form U4, McCune explained that he had omitted the 1989 bankruptcy from his previous Form U4 by mistake. Yet McCune failed to amend his Form U4 to disclose his 2005 bankruptcy until this failure was brought to his attention by his supervisor six years later.<sup>18</sup>

McCune's responses on Royal Alliance's annual compliance questionnaires during his employment with the firm are further evidence that he acted willfully in failing to amend his Form U4.<sup>19</sup> For each year from 2003 through 2010, Royal Alliance's annual compliance

---

(. . .continued)

submitted is not amended, the information provided in this form is currently accurate and complete." *See also Mathis*, 671 F.3d at 219-20 (finding that a failure to amend Form U4 to disclose tax liens constituted a willful violation under Exchange Act Section 3(a)(39)).

<sup>16</sup> *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965); *see also Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (citing *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)); *Craig*, 2008 WL 5328784, at \*4 (finding that respondent willfully violated IM 1000-1 and NASD Rule 2110 by providing false answers on his Form U4).

<sup>17</sup> *Wonsover*, 205 F.3d at 414 (citing *Gearheart & Otis, Inc. v. SEC*, 348 F.2d 798 (D.C. Cir. 1965)).

<sup>18</sup> McCune was also reminded of his obligation to disclose bankruptcies on his Form U4 when he filed an amendment to his Form U4 in October 2003. It is unclear from the record why McCune filed this amendment; however, in the amendment, McCune was asked whether he had filed a bankruptcy petition within the past ten years. McCune responded "No."

<sup>19</sup> *See Mathis*, 671 F.3d at 219 (finding that respondent's failure to disclose liens despite the specific reference to "any liens . . . entered against [him], which were not previously disclosed on Form U-4" in his firm's annual compliance certification "serves only to corroborate the SEC's conclusion that [respondent's] failure to amend [his ] Form U-4 was intentional").

questionnaire included a reminder about a registered representative's duty to report information about bankruptcies. After McCune filed for bankruptcy in May 2005, he completed annual compliance questionnaires in September 2005 and July 2006 in which he answered "Yes" when asked whether he understood that registered representatives have a continuing obligation to update their Form U4 as changes occur, including information regarding bankruptcies. McCune also answered "Yes" when asked whether he had reviewed his Form U4 in the last twelve months to ensure its accuracy and when asked whether his Form U4 was current to date.

Beginning in 2008, Royal Alliance's annual compliance questionnaires contained a specific reminder about a registered representative's responsibility to report any liens. McCune completed an annual compliance questionnaire in July 2008 – less than a year before the IRS filed a tax lien against him in March 2009 – in which he answered "Yes" when asked whether he understood that he had a continuing obligation to update information contained in his Form U4 as changes occur, including information regarding liens. In the 2009 and 2010 annual compliance questionnaires, McCune answered "Yes" when asked whether he understood his responsibility to immediately report any liens. McCune clearly was aware of the requirement to amend his Form U4 to disclose bankruptcies and liens. McCune therefore acted willfully because he intended to commit the acts that constituted the violation – failing to amend his Form U4 for a period ranging from more than a month to six years to disclose his bankruptcy and liens.<sup>20</sup>

McCune argues that his actions were not willful, and that he did not have "intent to commit the act that constitutes the violation." He says he does not understand how his actions can be willful "without intent to commit the act he is accused of committing" and without a finding that he "was aware of the rule he violated or that he acted with a culpable state of mind." McCune need not have acted with a culpable state of mind or even been aware that he was violating a rule. Acting willfully, *i.e.*, intending to commit an act, is different from acting with scienter, *i.e.*, intending to deceive.<sup>21</sup> A determination of willfulness does not require a finding that the respondent acted with scienter or that the respondent was aware he was violating the

---

<sup>20</sup> See, e.g., *id.* at 218-19 (finding that failure to amend Form U4 to reflect tax liens was willful where Mathis knew about the liens and Form U4 that Mathis signed before the entry of the liens had warned him of his continuing obligation to disclose changes to previously reported answers).

<sup>21</sup> See *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at \*9 (Dec. 5, 2014).



law.<sup>22</sup> This distinction has governed the securities laws for half a century.<sup>23</sup> McCune has not pointed to any authority supporting his argument that willfulness, as applied in this context, requires more than intentionally committing the act that constitutes the violation.<sup>24</sup>

## **2. The bankruptcy and liens McCune failed to disclose were material.**

We sustain FINRA's finding that the bankruptcy and liens McCune failed to disclose were 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.<sup>25</sup> McCune's employer, his

---

<sup>22</sup> See, e.g., *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at \*11 (Nov. 9, 2012) (finding that Respondent acted willfully where his false answers on Form U4 were neither involuntary nor inadvertent).

In addition, the Commission has repeatedly ruled that a person acts willfully when committing violations that had no scienter or negligence requirement, as is true of the rules McCune violated. See *Maria T. Giesige*, Exchange Act Release No. 60000, 2009 WL 1507584, at \*6 n.10 (May 29, 2009) (applying *Wonsover* standard to find willfulness with regard to Securities Act Section 5 non-scienter violations); *Robert G. Weeks*, Exchange Act Release No. 48684, 2004 WL 828, at \*12-13, \*16 (Oct. 23, 2003) (same).

<sup>23</sup> See *Wonsover*, 205 F.3d at 414-15 (quoting *Gearhart & Otis v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)); *Tager*, 344 F.2d at 8. Although *Wonsover*, *Gearhart*, and *Tager* each interpreted the meaning of willfulness in the context of Section 15(b) of the Exchange Act, the Commission has uniformly applied the same meaning to Exchange Act Section 3(a)(39)(F)'s willfulness requirement. See, e.g., *Neaton*, 2011 WL 5001956, at \*7. The Second Circuit Court of Appeals has done the same. See *Mathis*, 671 F.3d at 217-18 ("Given the parallel language and common purpose of the provisions located in both [Section] 3 and [Section] 15 of the Exchange Act, *Tager's* formulation of 'willfulness' naturally extends to willful violations under Section 3 involving Forms U-4.").

<sup>24</sup> McCune also argues that since he was not aware that FINRA's BrokerCheck program existed until a few weeks before he separated from Royal Alliance in 2011, he did not intend to "defraud the system." He asserts that "it is totally implausible" that the "Exchange Act could have even remotely anticipated the Internet and the Broker Check system." As explained above, this argument is inapposite because intent to defraud is not an element of a violation of the FINRA Rules at issue here nor is it a prerequisite to a finding of willfulness. Moreover, as a registered representative, McCune was responsible for his compliance with FINRA's rules and his attempts to obfuscate his responsibility because of his lack of appreciation of the BrokerCheck program are not persuasive. See *Neaton*, 2011 WL 5001956, at \*7.

<sup>25</sup> *Mathis*, 671 F.3d at 219 (holding that "[t]he SEC employed the proper and familiar test for materiality set forth in *TSC Indus., Inc. v. Northway, Inc.*," 426 U.S. 438, 449 (1976), and finding "no difficulty in affirming the SEC's conclusion that the tax liens were material" given

(continued . . .)

regulators, and his customers all would have viewed McCune's bankruptcy and tax liens as significantly altering the total mix of information made available because the information would have: 1) alerted his firm to the outside financial pressures he was facing; 2) allowed customers to assess whether the bankruptcy and liens had a bearing on his ability to provide them with appropriate financial advice; and 3) provided his regulators with early notice about his financial difficulties and ability to manage his financial obligations.<sup>26</sup> The significance of McCune's bankruptcy and tax liens is even more apparent when viewed in light of the number and total amount of the tax liens (four liens for a total of \$162,374 owed), the fact that McCune had filed for bankruptcy before, and the lengthy period of time during which the information was not disclosed. We therefore agree with FINRA that McCune's bankruptcy filing and tax liens constituted material information.

McCune argues that FINRA erred by failing to take into consideration "the actual experience of [his] actual clients" and points out that "the required disclosures have been made for over four years and yet nearly all of these clients have chosen to remain as clients." But whether McCune's clients subjectively viewed the bankruptcy and tax liens as material is not relevant. Materiality is an objective standard "involving the significance of an omitted or misrepresented fact."<sup>27</sup>

**E. FINRA and NASD rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.**

We find that the FINRA and NASD rules requiring associated persons to file complete and accurate information on Forms U4 are consistent with the purposes of the Exchange Act. Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry" because it enables regulators and the public to determine and monitor the fitness of securities professionals.<sup>28</sup> Thus, the form "ultimately serves as a means of

---

(. . .continued)

the Commission's determination that the registered representative's failure to disclose the liens on Form U4 "significantly altered the total mix of information available to [FINRA], other regulators, employers, and investors.").

<sup>26</sup> See *Mathis*, 2009 WL 4611423 at \*9 (citing *TSC Indus., Inc.*, 426 U.S. at 449) (finding respondent's undisclosed tax liens to be material); *Tucker*, 2012 WL 5462896, at \*11 (finding that respondent's judgments, bankruptcies, and liens were significant because they cast doubt on respondent's ability to manage his personal financial affairs and provide investors with appropriate financial advice).

<sup>27</sup> *TSC Indus., Inc.*, 426 U.S. at 445. In determining materiality, it does not matter whether "disclosure of the omitted fact would have caused the reasonable investor to change" his behavior. *Id.* at 449.

<sup>28</sup> *Amundsen*, 2013 WL 1683914, at \*6. See Exchange Act Section 15A(b)(6) (requiring that registered securities association's rules be designed to prevent fraudulent and manipulative  
(continued . . .)

protecting the investing public.”<sup>29</sup> IM 1000-1 and FINRA Rule 1122 are designed to facilitate such protection by requiring members and associated persons to file accurate and complete Forms U4.

We also find that FINRA applied IM 1000-1 and FINRA Rule 1122 here in a manner consistent with the purposes of the Exchange Act. The bankruptcy and tax liens were specific disclosure items on McCune’s Form U4 and they cast doubt on his ability to manage his personal financial affairs and provide appropriate financial advice to investors.<sup>30</sup>

We further find that NASD Rule 2110 and FINRA Rule 2010 are consistent with the purposes of the Exchange Act. These rules reflect the mandate of Exchange Act Section 15A(b)(6), which requires, among other things, that FINRA design its rules to “promote just and equitable principles of trade.”<sup>31</sup> As we have stated, “[t]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. NASD Rule 2110 [and FINRA Rule 2010] protect[] investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. NASD Rule 2110 [and FINRA Rule 2010] ha[ve] proven effective through nearly 70 years of regulatory experience.”<sup>32</sup>

We agree with FINRA’s determination that McCune engaged in conduct inconsistent with just and equitable principles of trade by failing to timely amend his Form U4. We therefore find that NASD Rule 2110 and FINRA Rule 2010 were applied in a manner consistent with the

---

(. . .continued)

practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest); *Order Approving Proposed Rule Change to Adopt FINRA Rule 1122 (Filing of Misleading Information as to Membership or Registration) in the Consolidated FINRA Rulebook*, Exchange Act Release No. 59789, 2009 WL 1405777, at \*1 (Apr. 20, 2009) (finding that FINRA’s adoption of NASD IM 1000-1 as FINRA Rule 1122 is consistent with the requirements of the Exchange Act).

<sup>29</sup> *Amundsen*, 2013 WL 1683914, at \*6.

<sup>30</sup> *See Tucker*, 2012 WL 5462896, at \*11.

<sup>31</sup> 15 U.S.C. § 78o-3(b)(6).

<sup>32</sup> *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at \*2 (July 3, 2008); *Rule Change Approved Without Modification*, Exchange Act Release No. 58643, 2008 WL 4468749 (Sept. 25, 2008).

purposes of the Exchange Act.<sup>33</sup>

### III. Sanctions

#### A. Standard of Review

Exchange Act Section 19(e)(2) directs us to sustain FINRA’s sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.<sup>34</sup> As part of this review, we must consider any aggravating or mitigating factors<sup>35</sup> and whether the sanctions imposed by FINRA are remedial in nature and not punitive.<sup>36</sup> As discussed below, we find the sanctions imposed on McCune are consistent with the statutory requirements and sustain them.

#### B. The sanctions imposed by FINRA are neither excessive nor oppressive and are necessary for the protection of investors.

For his violations, FINRA fined McCune \$5,000 and suspended him for six months. Although the Commission is not bound by FINRA’s Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).<sup>37</sup> For misconduct involving the late filing of amendments to Form U4, the Sanction Guidelines recommend a fine

---

<sup>33</sup> McCune cites a report by the Government Accountability Office, which recommended retroactive reviews of FINRA’s rules to “systematically assess whether its rules are achieving their intended purpose and take appropriate action, such as maintaining rules that are effective and modifying or repealing rules that are ineffective or burdensome.” *See Securities Regulation: Opportunities Exist to Improve SEC’s Oversight of the Financial Industry Regulatory Authority* (GAO-12-625) (May 30, 2012), available at <http://www.gao.gov/products/GAO-12-625>. Nothing in the report changes our conclusion that in this case FINRA’s rules were applied in a manner consistent with the purpose of the Exchange Act.

<sup>34</sup> 15 U.S.C. § 78s(e)(2). McCune does not allege, and the record does not show, that FINRA’s sanctions imposed an undue burden on competition.

<sup>35</sup> *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

<sup>36</sup> *PAZ Sec.*, 494 F.3d at 1065 (“The purpose of the order [must be] remedial, not penal.”) (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)); *see also FINRA Sanction Guidelines* at 2 (2015) (“Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.”).

<sup>37</sup> *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at \*2-6 (Apr. 17, 2014) (citation omitted).

of between \$2,500 and \$37,000.<sup>38</sup> For egregious cases, such as those involving repeated failures to file, untimely filings, or false, inaccurate, or misleading filings, the guidelines recommend considering a suspension of up to two years or a bar.<sup>39</sup> The Sanction Guidelines also describe several “principal considerations” in determining sanctions for the failure to timely file amendments to Form U4, including the nature and significance of the information at issue.<sup>40</sup> These considerations are in addition to the principal considerations set forth in the Sanctions Guidelines that apply to every case.<sup>41</sup>

We agree with FINRA that McCune’s willful and repeated failures to timely file amendments to his Form U4 warrant a \$5,000 fine and six-month suspension. FINRA found, and we agree, that McCune’s violations were egregious. For a lengthy period of time—ranging from over one month to six years—McCune repeatedly failed to file timely amendments to his Form U4 to disclose his 2005 bankruptcy petition and four tax liens.<sup>42</sup> For the reasons discussed above, information about McCune’s bankruptcy petition and tax liens was significant and important to his customers, his employer, and his regulators.

We, like FINRA, are troubled by McCune’s continued attempts to minimize the importance of his disclosure obligations and the seriousness of his violations. Specifically, McCune testified that the compliance questionnaires and sales practice manuals are “thick” documents, and that “nobody wants to hear” it, but “the truth” is that “nobody reads them” and that he, too, did not read them. McCune also testified and stated in his answer to the FINRA Enforcement Department’s complaint that at some point during his employment with Royal Alliance he attempted to use the firm’s computerized process to update his Form U4, but he could not figure out how to use it and did not pursue the matter further. McCune’s testimony reflects that he failed to appreciate the importance of his responsibilities and regulatory obligations as a registered representative.

---

<sup>38</sup> *FINRA Sanctions Guidelines* at 69.

<sup>39</sup> *Id.* at 70.

<sup>40</sup> FINRA found, and we agree, that McCune’s failure to timely amend his Form U4 does not implicate the other two principal considerations applicable to Form U4 violations: whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with the firm; and whether a firm’s misconduct resulted in harm to a registered person, another member firm, or any person or entity. *See id.* at 69.

<sup>41</sup> *Id.* at 6-7.

<sup>42</sup> We agree with FINRA’s determination that the extended period of time during which McCune failed to amend his Form U4 is an aggravating factor. *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 9) and 70.

We credit McCune's candor in admitting that he failed to timely amend his Form U4.<sup>43</sup> McCune testified that his failure to read Royal Alliance's sales manual and compliance questionnaires was not an excuse, and he admitted that in the past his attitude toward his obligations "was not what it should have been." Nonetheless, given the circumstances of McCune's past failures, his admissions do not outweigh our concern that his conduct presents a continuing threat to investors and that a fine and a suspension from the industry is warranted.

We agree with FINRA's determination that allowing McCune to remain in the industry with no period of suspension would not serve the interests of his customers, or the industry as a whole. Self-regulatory organizations, state regulators, and broker-dealers critically rely upon Form U4 to determine whether an applicant is fit for registration as a securities professional.<sup>44</sup> Thus, candor and forthrightness in filing and amending Form U4 is essential to the effectiveness of the screening process.<sup>45</sup> A suspension will allow McCune to reflect on the requirements for securities professionals and for association with a member firm.

### C. We reject McCune's remaining arguments.

We agree with FINRA that McCune's misconduct was not the result of a momentary lapse of judgment or negligence which might be a mitigating factor.<sup>46</sup> We also reject McCune's argument that his lack of prior compliance issues is a mitigating factor. We have repeatedly held that a lack of a disciplinary history is not a mitigating factor because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.<sup>47</sup>

McCune's argument that the sanctions imposed are not in the public interest because he has taken good care of his customers is also unpersuasive. Our public interest inquiry focuses on the welfare of investors generally, and the absence of customer harm is not a mitigating factor.<sup>48</sup>

---

<sup>43</sup> See *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at \*9 (Jan. 6, 2012) (sustaining FINRA's sanctions assessment, including that "it provide[d] some measure of mitigation that the [respondent] ha[d] been forthcoming in admitting throughout these proceedings that he" committed the alleged misconduct).

<sup>44</sup> See *Douglas J. Toth*, Exchange Act Release No. 58074, 2008 WL 2597566, at \*8 (July 1, 2008); *Rosario R. Ruggiero*, Exchange Act Release No. 37070, 1996 WL 164175, at \*3 (Apr. 5, 1996).

<sup>45</sup> *Ruggiero*, 1996 WL 164175, at \*3.

<sup>46</sup> *FINRA Sanction Guidelines* at 7 (Principal Considerations in Determining Sanctions, No. 13). As discussed above, McCune's repeated failures to provide timely disclosure were willful.

<sup>47</sup> See, e.g., *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at \*8 (Feb. 20, 2014).

<sup>48</sup> *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at \*13 (Jan. 9, 2015).

Furthermore, McCune deprived his customers, his employer, FINRA, and investors generally, of important information regarding his bankruptcy and liens.<sup>49</sup>

McCune alleges—without providing any support for the claim—that the suspension essentially amounts to a bar from the industry because during the year in which FINRA initiated its action against him, 95% of those suspended as a result of violations involving Form U4, regardless of the duration, were no longer in the securities industry after the suspension. However, the fact that McCune’s suspension may make it more difficult to find another job in the securities industry is a collateral consequence arising from his misconduct, which we have made clear is not mitigating.<sup>50</sup> Furthermore, although McCune speculates that he may not be employed in the securities industry in the future, he is currently associated with a registered broker-dealer, and the fine and suspension encourage McCune and others to comply with their disclosure obligations.<sup>51</sup>

We find no merit in McCune’s argument that FINRA violated his due process rights when it declined to consider “any policy arguments related to the fairness of McCune’s statutory disqualification and any subsequent FINRA proceeding related to that disqualification.”<sup>52</sup> FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction.<sup>53</sup> Instead, a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39)(F) whenever there has been, among other things, a determination that a person willfully

---

<sup>49</sup> See *Neaton*, 2011 WL 5001956, at \*12 (disagreeing with Respondent’s assertion that no one was harmed by his failure to amend his Form U4 in a timely manner).

<sup>50</sup> See, e.g., *Houston*, 2014 WL 936398, at \*8 (finding that any collateral consequences suffered as a result of misconduct or the disciplinary proceeding that followed, such as impact on reputation, career, or finances, is not a mitigating factor); *Craig*, 2008 WL 5328784, at \*7 (rejecting the argument that the amount of time, money, and loss of work suffered as a result of misconduct was a mitigating circumstance). In his reply brief, McCune argues that the reference by FINRA’s Department of Enforcement to *Houston* and *Craig* was inappropriate because the underlying misconduct in those cases was sufficiently different from his. But FINRA’s Department of Enforcement cited *Houston* and *Craig* solely for the general principle that collateral consequences are not mitigating.

<sup>51</sup> As such, we reject McCune’s argument that the sanction was or would be “ineffective.”

<sup>52</sup> Because FINRA is not a state actor and is not subject to constitutional requirements, it could not have violated McCune’s due process rights. See, e.g., *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at \*6 n.40 (Mar. 19, 2013).

<sup>53</sup> *Anthony A. Grey*, Exchange Act Release No. 75839, 2015 WL 5172955, at \*11 n.60 (Sept. 3, 2015).

failed to disclose material information on a Form U4.<sup>54</sup> Considerations of “fairness” or policy arguments do not bear upon the automatic statutory disqualification imposed upon McCune.

Finally, McCune objects to FINRA’s finding that “comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings.” We have repeatedly stated that pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement.<sup>55</sup> We, therefore, agree with FINRA that in considering the sanction on McCune, any comparisons to sanctions in settled cases are inappropriate.<sup>56</sup>

---

<sup>54</sup> As explained above, pursuant to Exchange Act Section 3(a)(39)(F), a person is subject to a statutory disqualification where, among other things, that person willfully has made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization. 5 U.S.C. § 78c(a)(39)(F); *see also* Exchange Act Section 15(b)(4)(A), 5 U.S.C. § 78o(b)(4)(A).

A disqualified person cannot become or remain associated with a FINRA member unless (i) a member firm sponsoring that person's employment files a Form MC-400 application for his or her proposed continued association with the member notwithstanding his or her statutory disqualification, and (ii) FINRA approves the application. *See Nicholas Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at \*2 (June 26, 2014) (citing *FINRA By-Laws*, Art. III, § 3(b), (d)) (summarizing the statutory disqualification review process); FINRA Rules 9520-9527 (setting forth eligibility procedures pursuant to which FINRA may allow a person to become or remain associated with a member despite the existence of a statutory disqualification); *see also* Exchange Act Rule 19h-1, 17 C.F.R. § 240.19h-1 (prescribing the form and content of, and establishing the mechanism by which, the Commission reviews proposals submitted by SROs to allow persons subject to a statutory disqualification to become or remain associated with member firms; *Provision for Notices by Self-Regulatory Organizations of Disciplinary Sanctions; Stays of Such Actions; Appeals; and Admissions to Membership or Association of Disqualified Persons*, Exchange Act Release No. 13726 (July 8, 1977), 42 Fed. Reg. 36,411 (July 14, 1977) (adopting Rule 19h-1); *Notice by Self-Regulatory Organizations of Proposed Admission to, or Continuance in, Membership or Participation of Certain Persons Subject to Statutory Disqualifications*, Exchange Act Release No. 18278 (Nov. 20, 1981), 46 Fed. Reg. 5654 (Dec. 3, 1981) (adopting amendments to Rule 19h-1).

<sup>55</sup> *See, e.g., Houston*, 2014 WL 936398, at \*7.

<sup>56</sup> *See, e.g., id.*; *see also FINRA Sanction Guidelines* at 1 (noting that the “guidelines do not prescribe fixed sanctions for particular violations” and acknowledging “the broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle”).



Therefore, we conclude that the \$5,000 fine and six-month suspension are neither excessive nor oppressive and are remedial.<sup>57</sup> By willfully failing to timely disclose material information on his Form U4, McCune demonstrated his inability to fulfill the high standards of conduct demanded of associated persons.<sup>58</sup> The fine and suspension will encourage McCune to make complete and accurate disclosures in the future and will emphasize to others the importance of accuracy of the information in Form U4.<sup>59</sup>

An appropriate order will issue.<sup>60</sup>

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields  
Secretary

---

<sup>57</sup> McCune argues that the sanctions imposed by FINRA conflict with the Eighth and Fourteenth Amendments of the U.S. Constitution because they constitute an excessive fine and violate due process. FINRA is a private actor and not a state actor subject to constitutional requirements. *See D.L. Cromwell Invests., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161-62 (2d Cir. 2002) (holding that NASD, FINRA's predecessor, was not a state actor and thus was not subject to the requirements of the Fifth Amendment); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206-07 (2d Cir. 1999) (rejecting plaintiff's claim that NASD violated her rights under the Fifth and Seventh Amendments because NASD was a private actor, not a state actor).

<sup>58</sup> *See Mathis*, 2009 WL 4611423, at \*12.

<sup>59</sup> *Id.*

<sup>60</sup> We have considered all of the parties' remaining contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 77375 / March 15, 2016

Admin. Proc. File No. 3-16768

In the Matter of the Application of  
Michael Earl McCune  
For Review of Disciplinary Action Taken by  
FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Michael Earl McCune, and the assessment of costs imposed, is sustained.

By the Commission.

Brent J. Fields  
Secretary