BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Robert Henderson Miramar, FL, Respondent.	DECISION Complaint No. 2017053462401 Dated: December 29, 2022

Respondent engaged in unapproved outside business activities and willfully failed to amend timely his Form U4 to disclose four federal tax liens. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Megan Davis, Esq., Michael Perkins, Esq., Kay Lackey, Esq., David Monachino, Esq., Matthew Minerva, Esq., Jennifer Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Richard E. Brodsky, Esq.

Decision

Robert Henderson appeals a Hearing Panel decision. The Hearing Panel found that Henderson engaged in three outside business activities ("OBAs") without providing written notice to his then-employer, IFS Securities ("IFS"), and willfully failed to amend timely his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose four federal tax liens totaling $368,221. For this misconduct, the Hearing Panel suspended Henderson for thirteen months and fined him $30,000.

After a thorough review of the record, we affirm the Hearing Panel's findings and the sanctions imposed. Because we affirm the finding that Henderson's failure to amend timely his Form U4 was willful, he is statutorily disqualified.

I. Background

Henderson first registered with FINRA in September 1983 and joined IFS in December 2010 as a general securities representative and investment company and variable contracts products representative. Henderson's employment with IFS ended in November 2019, when IFS ceased its broker-dealer business. He is currently associated with another FINRA member firm. Henderson testified that he currently does not perform any duties requiring registration because Florida denied his application for securities registration pending the outcome of this matter.

Henderson is also a certified financial planner and holds insurance agent and real estate broker licenses. He hosted an investment-related talk show on local Florida radio from 2005 through 2020. Henderson also contributed to two books, published in 2015 and 2016, that provided tax advice to small businesses.

II. Procedural History

The Department of Enforcement began disciplinary proceedings on December 6, 2019, when it filed a two-cause complaint alleging that Henderson engaged in misconduct while he was associated with IFS. Enforcement specifically alleged that Henderson: (1) from December 2010 through October 2018, engaged in three OBAs without providing written notice to IFS, in violation of FINRA Rules 3270 and 2010; and (2) from October 2014 through October 2018, failed to amend timely his Form U4 to disclose four federal tax liens totaling $368,221, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010, and that Henderson's failure to disclose timely was willful.

Henderson argued before the Hearing Panel that disclosure of his involvement in the three OBAs was not required under FINRA rules because he was merely a passive investor. Henderson acknowledged his untimely disclosure of the tax liens, but argued that he acted negligently, not willfully, and that the liens were not material. The Hearing Panel rejected these arguments. The Hearing Panel found that the federal tax liens were material, and Henderson's failure to disclose the tax liens timely was willful. Henderson, therefore, is statutorily disqualified.

For Henderson's failure to provide IFS with prior written notice of his involvement with the OBAs, the Hearing Panel fined Henderson $10,000 and suspended him in all capacities for four months. For failing to disclose timely four federal tax liens, the Hearing Panel fined Henderson $20,000 and suspended him in all capacities for nine months, to run consecutively to the four-month suspension.

Henderson timely appealed the Hearing Panel's decision. On appeal, Henderson concedes that he did not give IFS prior written notice of his involvement in the OBAs but claims he was a "passive investor" in these businesses and therefore he is exempt from FINRA's notice requirement. Henderson also maintains that he should not be subject to statutory disqualification because his failure to disclose the federal tax liens timely was neither willful nor material. As discussed in detail below, we reject Henderson's arguments and affirm the Hearing Panel's findings and sanctions.

III. Facts

The parties stipulated to many of the facts in this case; therefore, few facts are in dispute.

A. Henderson's Involvement with Three Undisclosed Outside Businesses

When Henderson associated with IFS in December 2010, he disclosed three OBAs to the firm and on his Form U4. At that time, he disclosed The Henderson Financial Group, The Henderson Realty Group, and serving as a host of an "educational" radio talk show about "business, finance, investment, budgeting, etc." on two local Florida radio stations. Henderson did not, however, disclose to IFS his ongoing involvement with two other businesses: SWH Holdings Corp. ("SWH") and 2001 Florida, LLC (also known as 2001 LLC) ("2001 Florida").[1] As discussed below, Henderson had been involved with these two businesses well before IFS employed him. Henderson later failed to disclose a third business, RHPTJ Managers, LLC ("RHPTJ"), which he created while he was associated with IFS.

1. SWH

In 1999, Henderson and two partners formed SWH to purchase real estate and build condominiums in Florida. The articles of incorporation for SWH were filed in Florida in September 1999 and listed Henderson as the company's president, secretary, and a director. Henderson also owned 10 percent of SWH's stock.

By 2006, SWH had built and sold 14 condominium units. Henderson testified that he "oversaw" the builder of the condominium project, was the "go to" person on the project for SWH, and was the lead partner who worked with the building's designer, ES. Henderson testified that ES "had the know how" for the project with "an office, a team of engineers, architecture [sic]. So [ES] put everything together, the plans, the drawings, the concept" for the project. Henderson was not involved in drafting the declaration of condominium required in Florida, obtaining construction permits, or designing the building.

Henderson's involvement with SWH continued after he began working for IFS in 2010. Henderson maintained a checking account for SWH using his IFS business address, collected rent payments from tenants, paid on SWH's behalf condominium fees and real estate taxes, and authorized the filing of SWH's corporate tax returns. In October 2017, SWH sold its last condominium unit and Henderson received $61,266 from that sale, which was approximately 10% of the proceeds.

2. 2001 Florida

The articles of organization for 2001 Florida were filed in 2003 and listed Henderson as a "member or an authorized representative of a member" of the business. 2001 Florida owned and operated a 10-unit residential apartment building in Miami, Florida. The 2006 limited liability

---

[1] This entity changed its name from 2001 LLC to 2001 Florida LLC in 2017.

annual report for 2001 Florida listed Henderson's sister-in-law, LH, as a manager of the company. Henderson was also listed as a "manager" with LH in the 2007 limited liability company annual report. He remained a named manager of 2001 Florida until its articles of incorporation were amended in 2017.

After the IRS garnished LH's business bank account to recover back taxes, Henderson in February 2017 opened and maintained a checking account for 2001 Florida. Henderson was the signatory on the account, and he funded it. He also subsequently loaned LH several thousand dollars to run 2001 Florida. On 2001 Florida's behalf, Henderson collected tenant rent checks from the property manager and deposited them into the bank account Henderson established for 2001 Florida. Until 2017, Henderson also issued checks from this account to pay expenses associated with the business when LH directed him to do so.

At the hearing, Henderson claimed that LH identified him as "manager" of 2001 Florida without his knowledge. While Henderson understood the manager of an LLC to be "someone who manages, makes decisions," he denied he had a managerial role in the business. LH testified she did not inform Henderson that she planned to name him as a manager on 2001 Florida's corporate documents and stated that she certified falsely that Henderson was a manager. The Hearing Panel found neither Henderson's nor LH's testimony credible on these points. Henderson does not contest the panel's credibility findings, and we defer to them. *See Dep't of Enf't v. Vungarala*, Complaint No. 2014042291901, 2018 FINRA Discip. LEXIS 26, at *97 (FINRA NAC Oct. 2, 2018) (finding that respondent failed to set forth the "substantial evidence" necessary to set aside the Hearing Panel's credibility findings), *aff'd*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938 (Nov. 20, 2020).

In 2014 and 2015, Henderson received Schedule K-1 tax forms showing his share of 2001 Florida's profit, loss, and capital as 50 percent. Those forms allocated $5,720 in "ordinary business loss" to Henderson in 2014 and $1,078 in "ordinary business income" to Henderson in 2015. Henderson also listed the income and losses from 2001 Florida on his personal income taxes. On his personal income tax returns for 2016, Henderson reported a "nonpassive loss" of $6,801 from 2001 Florida.

3. RHPTJ

Henderson formed RHPTJ in 2014 while IFS employed him. He did not disclose the business to or obtain approval from IFS prior to forming RHPTJ. Henderson is the manager and sole member of RHPTJ. The company's 2014 income tax return identified Henderson as chief executive officer. RHPTJ's monthly bank account statements were mailed to Henderson's IFS address, and Henderson was the sole signatory on the account.

Henderson characterizes RHPTJ as a "passive holding company" that he formed to reimburse his and his wife's health insurance premiums. To do so, Henderson loaned RHPTJ money to purchase office equipment, which RHPTJ then leased to Henderson Financial Group for five years for $1,359 per month. RHPTJ then used these rent payments to reimburse Henderson for previously paid health insurance premiums. RHPTJ also paid Henderson's wife $307 per month for her role as a bookkeeper for the company.

B. IFS's Policies Required Prompt Written Disclosure of OBAs

As a condition of his employment with IFS, Henderson executed the firm's representative and independent contractor's agreement, which included, in part, the obligation to disclose "all employment, contractual or business relation or interests with any person or entity." IFS's written supervisory procedures ("WSPs") also required its registered representatives to disclose all OBAs. The firm's WSPs unequivocally stated that "[w]hen individuals are hired, they will be required to disclose all outside business activities." In addition, "[u]pon hire, the individuals are advised that from this point on, PRIOR to engaging in any outside employment or receiving any outside compensation, they must request, and receive permission, in writing." The firm's WSPs also required representatives like Henderson to execute annual certification forms that documented the representative's participation in any OBA. At IFS's annual compliance meeting, "all registered personnel are required to sign a statement indicating that they are not engaged in any outside business activities for which they have not received formal written approval."

IFS required Henderson to complete a separate "Notification of Outside Business Activity Form" for each outside business activity. The purpose of the form was to provide to the firm information about "such things as a registered representative's role, ownership interest and nature of an outside business," information which IFS used "to help it decide if a proposed activity is acceptable."

Henderson admits that while he disclosed other OBAs to IFS, he did not disclose his involvement in SWH, 2001 Florida, or RHPTJ. The record shows, for example, in December 2010, Henderson completed the firm's Notification of Outside Business Activity Form in which he disclosed two new OBAs: the "owner/broker and president" of The Henderson Realty Group and a talk show host for a local radio program. In December 2012, Henderson completed another Notification of Outside Business Activity Form in which he disclosed that he was a "partner" in Henderson Insurance. In March 2012, Henderson completed a Personal Activity Questionnaire as part of a FINRA examination of the firm. When asked whether he was "engaged in any outside employment/activity for which [he was] compensated," Henderson answered "No."[2] In July 2014, Henderson completed an updated firm compliance questionnaire that asked him to describe all "outside business activity/activities." On this form, Henderson disclosed The Henderson Financial Group, Henderson Insurance, The Henderson Realty Group, that he was a radio host, and that he served as a volunteer guardian ad litem. Henderson did not disclose his involvement in SWH, 2001 Florida, or RHPTJ in this questionnaire.

In his 2015 and 2016 representative acknowledgment forms, Henderson represented to IFS that he understood "that prior to engaging in an outside business activity, [he] must notify in writing [his] intent to participate in such outside business activity. Before doing such, [he] agree[d] that [he] [could not] participate in the outside business activity." Henderson understood that it was "the exclusive opinion of the firm" to decide whether the OBA conflicted with his employment agreement.

---

[2] Henderson testified at the hearing that he answered "No" because he believed he was not engaged in an OBA.

Despite the firm's compliance forms and acknowledgment forms related to OBAs that Henderson completed, he did not disclose his involvement with SWH, RHPTJ, and 2001 Florida until 2018, after FINRA asked him why he had not disclosed these OBAs in a FINRA Rule 8210 request and during an on-the-record interview with FINRA in December 2017. Henderson first disclosed on his Form U4 his connections with SWH and RHPTJ on January 2, 2018, and his connection with 2001 Florida on October 4, 2018. Prior to these Form U4 disclosures, IFS was not aware of Henderson's involvement with SWH, 2001 Florida, or RHPTJ.

C. Henderson's Record of Federal Tax Lien Disclosures

In addition to four tax liens filed in 2014 that are the subject of this disciplinary proceeding, Henderson failed to disclose timely eight earlier tax liens that were the subject of a 2015 FINRA cautionary action letter. We accordingly discuss his record of disclosures with respect to both sets of liens.

1. The Eight Prior Tax Liens and FINRA's Cautionary Action Letter

The IRS filed eight federal tax liens totaling approximately $189,366 against Henderson from October 1991 to August 2006. In 2006, Henderson engaged a tax resolution company, Fortress Financial Services, Inc. ("Fortress"), to assist him with resolving his outstanding tax issues with the IRS. Fortress filed a power-of-attorney form with the IRS in February 2015, and thereafter received copies of all IRS correspondence issued to Henderson, including the IRS's notices of tax liens sent to Henderson. Henderson did not disclose these federal tax liens on his Form U4.

While conducting a cycle examination of IFS, FINRA's Department of Member Supervision discovered these eight federal tax liens. On December 30, 2015, FINRA issued a cautionary action letter to Henderson based on his failure to disclose these eight federal tax liens. The letter cited Henderson's "[f]ailure to comply with Article V, Section 2 of the [FINRA] By-Laws . . . in that while you were associated with various member firms, you failed to disclose liens that were filed against [you] by the Internal Revenue Service during the period October 1991 through August 2006." The letter warned Henderson that "in accordance with long-standing FINRA practice, [the cautionary action] will be taken into consideration in determining any future matter should repeat violations occur."

In his January 2016 response to the cautionary action letter, Henderson wrote that he "will maintain records and update information on my U4 upon receipt of notification of U4 amendable activities." He pledged to "work closely" with his supervisor at IFS "to ensure that all information reflected" on his Form "U4 is accurate and updated."[3]

[3] Between May 21 and June 11, 2014, the IRS recorded three additional notices of tax liens against Henderson and his wife, totaling approximately $535,250. Henderson disclosed these three liens on his Form U4 on July 8, 2014, but mistakenly listed one lien amount as $100,842.18 instead of the correct amount of $10,842.18.

2. The Four Liens

The IRS filed four additional federal tax liens (the "Four Liens") against Henderson between October and December 2014, totaling $368,221. The Four Liens were recorded against Henderson in the public records of Broward County, Florida, where Henderson resides. Henderson's untimely disclosure of the Four Liens is the subject of this disciplinary action. Henderson acknowledges that he spoke with Fortress about the Four Liens in early 2015. He stipulated, however, that he did not rely on Fortress for legal advice regarding his obligation to disclose his tax liens to the Central Registration Depository ("CRD"®).

Henderson does not dispute the following regarding the Four Liens:

- The IRS recorded the first lien ("First Lien") for $68,621 in October 2014. The First Lien related to taxes that Henderson failed to pay in 2012. The IRS sent notice of the First Lien to Henderson at his residential address. Henderson satisfied the First Lien and the IRS released it on August 12, 2015.

- The IRS recorded the second lien ("Second Lien") for $56,128 in November 2014, which related to taxes that Henderson failed to pay in 2013. The IRS sent notice of the Second Lien to Henderson at his residential address. Henderson satisfied the Second Lien and the IRS released it on November 13, 2015.

- The IRS recorded the third lien ("Third Lien") for $135,631 and the fourth lien ("Fourth Lien") for $107,840 in December 2014. The Third and Fourth Liens related to taxes Henderson failed to pay from 2008 through 2011. The IRS sent notice of the Third and Fourth Liens to Henderson at his then-current IFS business address.

- In October 2016, the IRS accepted Henderson's offer of $5,000 per month to repay the tax liability reflected in the Third and Fourth Liens.

3. Henderson Received Prompt Notice of the Four Liens, but Failed to Disclose Them Timely

Henderson does not dispute that he first learned of the Four Liens "within a reasonable period of time after they were recorded in 2014." Nonetheless, Henderson did not disclose timely the Four Liens on his Form U4.

a. Henderson, Through IFS, Received a Series of Notices Directing Disclosure of the Four Liens or an Explanation

On May 4, 2015, FINRA's Department of Credentialing, Registration, Education, and Disclosure ("CRED") wrote to IFS regarding several liens it believed had been filed against Henderson that were not reported in CRD. CRED, in relevant part, asked about: (1) a lien for $68,620.97 filed in Broward County, Florida, with the docket/case number 112573889 (the First Lien); and (2) a lien for $56,128.24 filed in Broward County, Florida, with the docket/case

number 112622232 (the Second Lien). CRED further directed that if Henderson believed the liens were not reportable, IFS must provide a written explanation and supporting documentation.

Henderson received and reviewed CRED's May 2015 disclosure notice. In October 2015, IFS followed up with Henderson requesting his response to CRED's May 2015 notice, which remained outstanding. On January 5, 2016, IFS provided CRED with Henderson's response dated October 30, 2015. Henderson stated that "the tax liens in question are presently disclosed on my U4 as a lump sum. The liens in question are federal tax liens and all of my tax liens are being actively addressed with the IRS by my tax attorneys." Henderson admitted at the hearing that his response was inaccurate.[4] While Henderson disclosed three other federal tax liens that are not part of this proceeding in a July 2014 amendment to his Form U4, he did not disclose the First or Second Liens as part of that disclosure.

On August 30, 2016, CRED sent two additional notices to IFS regarding liens that it believed had been filed against Henderson but that were not disclosed on his Form U4. In the first notice, CRED described a lien in the amount of $135,631.44 that the IRS had filed on December 30, 2014, in Dade County, Florida, with the docket/case number 886661 (the Third Lien).[5] In the second notice, CRED described a lien in the amount of $107,840.39 that the IRS had filed on December 30, 2014, in Dade County, Florida, with the docket/case number 886662 (the Fourth Lien).[6] CRED informed IFS that the liens appeared to be financial events that should be disclosed on Henderson's Form U4.

In February 2017, IFS submitted to CRED a signed statement by Henderson responding to CRED's August 2016 notices. In his response, Henderson stated:

> Regarding the liens recorded in Dade County on December 10, 2014 in the amounts of $135,631.44 and $107,840.39, I had no prior knowledge of these specific liens. As indicated previously, I am working with a tax attorney who communicates with the IRS and received correspondence on my behalf. It is worth noting that these liens were both recorded in Dade County and lists my previous business address as my residence address. It is my understanding that the liens in question are part of the aggregate total lump sum previously disclosed however, I can update my U4 to list these as well.

---

[4] Henderson testified at the hearing that he believed at the time that "every lien that I ever had FINRA had investigated all undisclosed liens and there were no more as of December [2015]." Henderson admitted at the hearing that he is "aware now" that the 2015 cautionary action letter did not include the Four Liens at issue in this disciplinary action, that he made a "gross mistake," and that he is "not denying" that he did not disclose timely the Four Liens.

[5] The IRS recorded the Third Lien in both Broward and Dade Counties.

[6] The IRS recorded the Fourth Lien in both Broward and Dade Counties.

> It was not my intention to knowingly withhold information from my U4.
>
> Negotiations with the IRS were completed in October of 2016 and I am currently on a payment plan for outstanding amounts owed.

After receiving Henderson's statement asserting that he disclosed the Third and Fourth Liens as part of a lump sum, CRED, on February 14, 2017, issued a fourth disclosure notice to IFS. CRED directed Henderson through IFS to "amend [Form U4] disclosure questions with 'yes' to 14M, if applicable" and "if separate liens were filed" to "provide details of each lien."[7] On March 2, 2017, Henderson through IFS amended his Form U4 to disclose the Second, Third, and Fourth Liens. Henderson's disclosure did not include the First Lien, and otherwise remained inaccurate. Henderson stated on the Form U4 that he learned of these three liens on December 1, 2016, from his firm's compliance department. Henderson later admitted that he first learned of the Four Liens from the IRS's notices around the time they were recorded in 2014. Henderson contends that while he knew about these liens, he was "confused" and thought the Third and Fourth Liens were "duplicate" liens.

b. FINRA Rule 8210 Requests Concerning Henderson's Ongoing Nondisclosure of the First Lien

On August 3, 2017, FINRA's Department of Member Supervision sent Henderson a FINRA Rule 8210 request stating that "[a] search of the records of Broward County, Florida and FINRA's CRD system discloses" the existence of the Four Liens. The request included copies of the IRS notices of the Four Liens and directed Henderson to provide a written statement describing the reason he had failed to amend or timely amend his Form U4 to disclose the Four Liens. While Henderson's March 2, 2017 amended Form U4 had disclosed the Second, Third, and Fourth Liens, Henderson still had not disclosed the First Lien.

In his response to the August 2017 information request, Henderson through counsel represented that the Four Liens are the result of "redundant filings" and that the "newly-discovered liens" were addressed by the 2015 cautionary action. Henderson also attached a copy of his payment plan with the IRS, which he represented was inclusive of all outstanding liens.

On October 4, 2018, Henderson ultimately amended his Form U4 to disclose the First Lien. Henderson, however, falsely represented on the Form U4 that he first learned of this lien from his firm's compliance department on October 4, 2018.

---

[7] Question 14M of Form U4 asks, "Do you have any unsatisfied judgments or liens against you?"

IV. Discussion

We affirm the Hearing Panel's findings that Henderson engaged in undisclosed OBAs and willfully failed to amend timely his Form U4 to disclose the Four Liens. We discuss the violations in detail below.

A. Henderson Participated in Undisclosed OBAs

FINRA Rule 3270 prohibits associated persons from engaging in any business activity outside the scope of their relationship with their employer firm, unless they have provided prompt written notice to the member in such form as specified by the member.[8] FINRA Rule 3270 applies to "all outside business activities, not just securities-related activities." *Dep't of Enf't v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *12 (FINRA NAC July 26, 2016); *see also NASD Notice to Members 01-79*, 2001 NASD LEXIS 85, at *2 (Dec. 2001) (emphasizing that registered persons must "report, in writing, any and all types of business that they plan to conduct away from their firms, whether or not it involves a security"). "Passive investments," however, are "exempted from" the notice requirements of Rule 3270.

To comply with the prompt notification requirement, the associated person must "disclose outside business activities at the time when steps are taken to commence a business activity unrelated to his relationship with his firm." *Dep't of Enf't v. Schneider*, Complaint No. C10030088, 2005 NASD Discip. LEXIS 6, at *13-14 (NASD NAC Dec. 7, 2005); *see Micah C. Douglas*, 52 S.E.C. 1055, 1058-59 (1996); *see also Dep't of Enf't v. Abbondante*, Complaint No. C10020090, 2005 NASD Discip. LEXIS 43, at *31 (NASD NAC Apr. 5, 2005) (rejecting argument that representative was not required to disclose outside business activity when outside business was formed to conduct future business), *aff'd*, 58 S.E.C. 1082 (2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). The rule "attaches potential liability to a respondent regardless of whether he received compensation for an outside business activity." *Schneider*, 2005 NASD Discip. LEXIS 6, at *15.

The purpose of the OBA rule "is to ensure that firms receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to

---

[8] FINRA Rule 3270 states:

> No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of Rule 3280 [Private Securities Transactions of an Associated Person] shall be exempted from this requirement.

such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law." *Dep't of Enf't v. Giblen*, Complaint No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at *12 (FINRA NAC Dec. 10, 2014); *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, *31-32 (Sept. 30, 2016) ("Akindemowo's failure to provide the written notice required by the rule frustrated [his firm's] ability to assess the risks that his outside business activities may cause harm to potential investors and to manage those risks by taking appropriate action."). FINRA's OBA rule prevents harm to the investing public, and to FINRA member firms, by allowing these firms to monitor in a timely manner their registered representatives' OBAs. *See Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at *2 (Sept. 6, 1988) (explaining that proper disclosure of an associated person's outside business activities may prevent a member firm's entanglement in legal difficulties). "When adhered to, [the OBA rule] is prophylactic and allows FINRA [member] firms to oversee their employees' outside business activities, or to prohibit the activities altogether." *Giblen*, 2014 FINRA Discip. LEXIS 39, at *26-27.

On appeal, Henderson does not dispute that his activities with SWH, 2001 Florida, or RHPTJ were unrelated to his relationship with IFS. And Henderson concedes that he did not provide IFS with prior written notice of his involvement with SWH, 2001 Florida, or RHPTJ. He argues, however, that he was exempt from the notice requirement under FINRA Rule 3270 because he was merely a "passive investor" in each of the three OBAs. Henderson argues that FINRA does not define what constitutes a "passive investment" for purposes of the exception to Rule 3270, and that his role in each of the three OBAs did not amount to "material participation" under the Commission's reasoning in *Abbondante*, 58 S.E.C. 1109.

In *Abbondante*, the Commission found that the respondent's activities in an OBA "were not passive" when the respondent organized the outside business and opened the company's bank account, distributed proceeds from the company, created account documents, and received a portion of the company's proceeds. *Id.* The Commission held that the respondent was not exempt from the requirements of FINRA's OBA rule. *Id.* The Commission explained that in approving the OBA rule, it "did not intend for the 'passive investment' exception to include activities in which the associated person materially participates." *Id.* "To permit a passive investment exemption for a registered representative's material participation would frustrate the stated purposes of the [OBA] rule."[9] *Id.*

We likewise find that Henderson's numerous, significant activities at the three outside businesses at issue here demonstrate that he was not a "passive investor" in SWH, 2001 Florida, or RHPTJ. *See id.* Many of Henderson's activities mirror those of respondent Abbondante. *See id.* For SWH, Henderson was an officer and 10 percent owner of the company's stock. He also oversaw the builder of the company's condominium project; maintained the company's checking

---

[9] While the Commission did not expressly define "material participation," it gave the example of a respondent completing a questionnaire to solicit business with a state as constituting an outside business activity requiring disclosure. *Id.* n.68.

account; collected rent payments; paid condominium fees and real estate taxes; authorized the filing of the company's tax returns; and distributed the proceeds from the sale of the company's last condominium unit to himself and two partners.

At 2001 Florida, Henderson was named as and performed the responsibilities of a "manager" of the company that owned and operated a 10-unit residential apartment complex. Henderson helped collect and deposit rent checks; established and funded a checking account for the company; and issued checks to pay company expenses. He also reported a "nonpassive loss" from the company on his personal income tax return.

Henderson is the founder and "manager" of RHPTJ. He created the company as a tax strategy to reimburse himself and his wife for their health insurance premiums. RHPTJ owns and leases office equipment to The Henderson Financial Group. RHPTJ then uses these rent payments from The Henderson Financial Group to reimburse Henderson for his and his wife's health insurance premiums that Henderson previously paid. Henderson is the sole signatory on RHPTJ's bank account, and he authorized the filing of the company's tax returns, which show thousands of dollars in compensation to officers, salaries and wages to employees, and expenses related to a company car for RHPTJ.

We find that Henderson's activities with SWH, 2001 Florida, and RHPTJ were not passive and therefore required disclosure in accordance with FINRA rules. We affirm the Hearing Panel's findings that Henderson violated FINRA Rules 3270 and 2010 by engaging in three undisclosed OBAs.[10]

B. Henderson Willfully Failed to Disclose Timely the Four Liens on His Form U4

We also affirm the Hearing Panel's findings that Henderson failed to amend timely his Form U4 to disclose the Four Liens, in violation of Section 2 of Article V of the FINRA By-Laws and FINRA Rules 1122 and 2010. In addition, we agree that Henderson's actions were willful and involved material information, thereby subjecting Henderson to statutory disqualification under the Securities Exchange Act of 1934 ("Exchange Act").

---

[10] A violation of FINRA Rule 3270 is also a violation of FINRA Rule 2010, which requires associated persons to observe high standards of commercial honor and just and equitable principles of trade. *See Dep't of Enf't v. Ghosh*, Complaint No. 2016051615301, 2021 FINRA Discip. LEXIS 32, at *34 (FINRA NAC Dec. 14, 2021). FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

1. Untimely Amendments to Forms U4

Article V, Section 2 of the FINRA By-Laws requires applicants for FINRA registration to provide FINRA "reasonable information with respect to the applicant as [FINRA] may require." 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 any "[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." FINRA Rule 1122 prohibits a member firm, registered representative, or person associated with a member firm from filing with FINRA information with respect to membership or registration "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."[11] *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011). This requirement applies to the Form U4, which FINRA and other self-regulatory organizations use to screen applicants and monitor their fitness for registration within the securities industry. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008).

The information contained in Form U4 is important not only to regulators but also to employers and the investing public. *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *16, 29 (Dec. 7, 2009), *aff'd*, 671 F.3d 210 (2d Cir. 2012); *Dep't of Enf't v. Elgart*, Complaint No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *14 (FINRA NAC Mar. 16, 2017), *aff'd*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017). "Because [r]egistration of broker-dealers is a means of protecting the public, every person submitting a Form U4 has the obligation to ensure that the information provided on the form is true and accurate." *Neaton*, 2011 SEC LEXIS 3719, at *16; *see also Mathis*, 2009 SEC LEXIS 4376, at *16 ("[T]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of the screening process."); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *19 (Nov. 9, 2012) (stating that "FINRA 'cannot investigate the veracity of every detail in each document filed with it, [and] must depend on its members to report to it accurately and clearly in a manner that is not misleading'"). Furthermore, "[a] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur." *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *10-12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

Question 14M of the Form U4 requires registered representatives to disclose any unsatisfied judgments or liens against them. It is undisputed that the IRS filed the Four Liens

---

[11] A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010. *See Dep't of Enf't v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *25 n.10 (FINRA NAC Mar. 9, 2015); *Dep't of Enf't v. N. Woodward Fin. Corp.*, Complaint No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *17 (FINRA NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff'd*, No. 15-3729, slip op. at 1 (6th Cir. June 29, 2016).

against Henderson in 2014. Henderson has admitted that he knew about the Four Liens at or around the time the IRS filed them. He also stipulated that he "will not be asserting in this proceeding that he believed the First, Second, Third and Fourth Tax Liens related to liens that he had previously disclosed on Forms U4." Henderson, moreover, does not dispute that he understood he was obligated to disclose tax liens on his Form U4 within 30 days of learning of them, but failed to do so here in violation of FINRA's By-Laws and rules.[12] Indeed, Henderson did not disclose the Second, Third, and Fourth Liens on his Form U4 until March 2, 2017, and he disclosed the First Lien on October 4, 2018—and only after FINRA discovered the Four Liens and sent him multiple notices about disclosing them.

We conclude that Henderson's failures to disclose timely the Four Liens violated Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010.

2. Henderson Is Statutorily Disqualified

We also affirm the Hearing Panel's findings that Henderson's failures to disclose timely the Four Liens were willful and the Four Liens were material, and, as a result, Henderson is statutorily disqualified. FINRA's By-Laws provide that a person subject to a statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act, cannot be associated with a FINRA member firm unless the firm obtains permission from FINRA. *See* Sections 3(b), 3(d), and 4 of Article III of the FINRA By-Laws. A person is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act if such person has, among other things,

> willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, . . . 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). This statutory provision applies to representatives who willfully have provided on a Form U4 false statements with respect to a material fact or who willfully have failed to amend Form U4 with material information that is required to be disclosed 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).

a. Henderson Acted Willfully

While Henderson acknowledges his violations with respect to his untimely Form U4 disclosures, he challenges the Hearing Panel's finding that those violations were willful and, consequently, result in his statutory disqualification. We find that Henderson acted willfully. "A

---

[12] Henderson later satisfied the First and Second Liens, which the IRS released in August and November 2015, respectively. Henderson agreed to a payment plan with IRS in 2016 to repay the tax liability reflected in the Third and Fourth Liens.

willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'" *Tucker*, 2012 SEC LEXIS 3496, at *41 (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)); *see also Mathis*, 671 F.3d at 216-18 (explaining that "willfulness" does not require awareness that one "is violating one of the Rules or Acts," and holding that a person may be subject to statutory disqualification under Section 3(a)(39) as long as he "intentionally submitted an application to register with a FINRA member knowing that the application contained material false information"); *Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *38 (July 31, 2019) (requiring "subjective[] intent[] to omit material information" for a willful violation). "A failure to disclose is willful . . . if the respondent of his own volition provides false answers on his Form U4." *See Tucker*, 2012 SEC LEXIS 3496, at *24-25; *see also McCune*, 2016 SEC LEXIS 1026, at *18 (finding that respondent acted willfully when he knew about a bankruptcy and liens but failed to amend his Form U4 to disclose them).

The record amply reflects that Henderson consciously disregarded his duty to disclose the information about the Four Liens from his Forms U4 well beyond 30 days after learning of the liens, thereby evidencing a subjective intent to omit them. Henderson has admitted that he knew about the Four Liens at or around the time the IRS recorded them in 2014, but he failed to disclose them until March 2017 (Second, Third, and Fourth Liens) and October 2018 (First Lien). And when he finally disclosed the Four Liens, Henderson claimed that he learned of the liens years after he had actual notice of them from the IRS in 2014, which he later admitted at the hearing was untrue. *See, e.g.*, *Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *13-14 (Oct. 31, 2018) (finding respondent acted willfully for purposes of statutory disqualification when he knew about tax liens and a bankruptcy when they arose and knew of his obligation to report them on Form U4 but did not).

Henderson contends that he was confused about whether he was required to disclose the Four Liens, had no "intent to deceive" by not disclosing them, and was merely "inept." He claims that he misunderstood how many liens the IRS had filed against him, the amounts, and what tax periods they covered. To that end, Henderson maintains that he erroneously believed the 2015 cautionary action covered the Four Liens. Henderson's purported reliance on the language of the cautionary action letter is not reasonable and factually unsupportable. The cautionary action letter states plainly that Henderson failed to disclose tax liens that the IRS filed against him "during the period October 1991 through August 2006." The IRS filed the Four Liens against Henderson in 2014 for unpaid taxes from 2008-2013.

Henderson further suggests that he was confused by CRED's May 4, 2015 notice seeking an explanation for his failure to disclose the First and Second Liens. Even if Henderson was confused, "it was his duty to determine whether disclosure was required," which he failed to do here. *See Craig*, 2008 SEC LEXIS 2844, at *14 ("If Craig had any doubt about the disposition of his conviction, it was his duty to determine whether the information he was providing on Form U4 was complete and accurate."). After receiving the cautionary action letter in December 2015, Henderson assured FINRA that he would "work closely with [his supervisor] at [his] broker dealer, presently IFS Securities, to ensure that all information reflected on [his] U4 is accurate and updated." Henderson admitted at the hearing that he did not do that regarding the Four Liens.

Henderson argues that the D.C. Circuit's holding in *Robare Group. v. SEC*, 922 F.3d 468, 479 (D.C. Cir. 2019), precludes a finding that Henderson acted willfully here. We disagree and find that Henderson's conduct falls within the willfulness parameters of *Robare*. In *Robare*, the court considered the term "willfully" as it is used in Section 207 of the Investment Advisers Act of 1940. *Id.* at 479-80. Section 207 prohibits willfully omitting to state a material fact that is required in an investment adviser registration application. *Id.* at 479. Like Section 3(a)(39) of the Exchange Act, Section 207 incorporates the requirement that one have acted "willfully" when committing the violation. *Id.* The D.C. Circuit explained, "[t]he statutory text signals that" liability may be imposed only when it is shown that the petitioner "subjectively intended to omit material information from" the required disclosures. *Id.* The court noted that "[e]xtreme recklessness may constitute a lesser form of intent." *Id.*

Henderson was at least extremely reckless when he failed to disclose the Four Liens timely and therefore acted willfully here. The D.C. Circuit has held that extreme recklessness is "an extreme departure from the standards of ordinary care which presents a danger of misleading [investors] that is either known to the defendant or is so obvious that the actor must have been aware of it." *Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008). Despite repeated notices from FINRA directing him to disclose the liens, Henderson did not follow through on his assurances to FINRA and took no action to disclose them until years after he admittedly knew about them. Thus, based on Henderson's knowing failures to act, his Forms U4 did not accurately reflect the status of his outstanding tax liens for years. This is not a case of an "inadvertent filing of an inaccurate form [that] would not support a finding of willfulness." *See Riemer*, 2018 SEC LEXIS 3022, at *13. Rather, Henderson's "failure to take any steps to probe the liens or resolve his apparent confusion about whether the liens needed to be disclosed in response to a question asking whether he had any unsatisfied liens against him was such an extreme departure from the standards of ordinary care that the danger of misleading investors by not disclosing the liens was so obvious that he must have been aware of it." *See Holeman*, 2019 SEC LEXIS 1903, at *42. After more than 30 years as a broker, Henderson should have understood the importance of timely and accurate disclosures, and his voluntary refusal to update his Form U4 reflects a conscious disregard of his disclosure obligations.

b. <u>The Tax Liens Were Material</u>

We also find that the Four Liens that Henderson failed to disclose timely 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." *McCune*, 2016 SEC LEXIS 1026, at *21-22. The NAC has found that "essentially all the information that is reportable on the Form U4 is material." *Dep't of Enf't v. McCune*, Complaint No. 2011027993301, 2015 FINRA Discip. LEXIS 22, at *15 (FINRA NAC July 27, 2015), *aff'd*, 2016 SEC LEXIS 1026, *aff'd*, 672 F. App'x 865. And indeed, the Commission has held repeatedly that information about tax liens is material. *See, e.g.*, *Holeman*, 2019 SEC LEXIS 1903, at *34 (finding over $116,000 in undisclosed tax liens material); *McCune*, 2016 SEC LEXIS 1026, at *21-22 (finding that the tax liens and bankruptcy that respondent failed to disclose were material); *Tucker*, 2012 SEC LEXIS 3496, at *47 (finding judgments, liens, and bankruptcies to be material). Henderson's liens totaled $368,221 and were not disclosed until March 2017 (Second, Third, and Fourth Liens) and

October 2018 (First Lien), years after they were filed and Henderson received notice of them. The First Lien remained unsatisfied for approximately 11 months. The Second Lien remained unsatisfied for approximately 13 months. The Third and Fourth Liens are still unsatisfied and were undisclosed for more than two years.[13] *See Riemer*, 2018 SEC LEXIS 3022, at *16 (finding the failure to disclose liens and bankruptcies on Form U4 to be material omissions after considering the number and dollar amount of the liens and period during which the information was not disclosed). Without question, a reasonable employer, regulator, or investor would consider a broker-dealer employee with four federal tax liens as "significantly altering the total mix of information." *See McCune*, 2016 SEC LEXIS 1026, at *22.

Henderson concedes that, "taken by themselves, $368,000 of liens are material." He argues, however, that because he disclosed in July 2014 three other tax liens totaling $625,000, his subsequent disclosure of the Four Liens would not have "significantly altered the total mix of information available." Henderson asserts that the materiality of the Four Liens depends on whether they would have "changed people's minds" or "perception" about his ability to manage his finances. The Commission has explained that when "determining materiality, it does not matter whether disclosure of the omitted fact would have caused the reasonable investor to change his behavior." *McCune*, 2016 SEC LEXIS 1026, at *23 n.27. Here, a substantial likelihood exists that a reasonable employer or regulator or the investing public would have viewed the Four Liens as significant to an assessment of Henderson's then-current ability to manage his financial obligations. The Four Liens related to a later tax period than those disclosed in July 2014. The recency of the Four Liens made them relevant to the current economic pressure he was under to repay his debts to the IRS. The investing public was not made aware of the Four Liens until Henderson's amendments of his Form U4 in 2017 and 2018—between three and four years after the IRS filed the liens. A reasonable investor would want to know that Henderson's financial difficulties continued and were even greater after September 2014 than when he amended his Form U4 in July 2014. *See Holeman*, 2019 SEC LEXIS 1903, at *34.

Henderson also argues that the Four Liens were not material because his current firm hired him despite knowing his history of not timely disclosing tax liens. The materiality standard, however, is an objective one and applies to a reasonable employer, regulator, or investor. *See Mathis*, 671 F.3d at 219, 220 (holding that "[t]he SEC employed the proper and familiar test for materiality set forth in *TSC Industries, 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 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"). The subjective decision to hire

---

[13] While Henderson did not disclose the First Lien until October 2018 (approximately four years after the IRS notice), he satisfied, and the IRS released, the lien in August 2015. Likewise, while Henderson did not disclose the Second Lien until March 2017 (approximately 13 months after the IRS notice), he satisfied, and the IRS released, the lien in November 2015. As of the date of the hearing in this case, the Third and Fourth Liens remain unsatisfied, but Henderson is making installment payments to the IRS.

Henderson notwithstanding his history of omissions does not negate the materiality of the untimely disclosure of the Four Liens.

In summary, we find Henderson willfully failed to disclose timely the Four Liens on his Form U4, and the Four Liens constituted material information that was required to be stated on the Form U4. As a result, Henderson is statutorily disqualified.[14]

C. Henderson's Additional Procedural Argument

In June 2021, Henderson filed a motion pursuant to FINRA Rule 9280 for sanctions against Enforcement based on a misstatement in Enforcement's pre-hearing brief concerning the total amount of Henderson's outstanding taxes associated with the eight notices of tax liens that were the subject of the 2015 cautionary action letter. When describing the eight liens, Enforcement wrote: "From at least 1991 through 2006, Henderson failed to pay his income taxes, owing more than $400,000 in unpaid taxes to the federal government." The actual amount of Henderson's tax liability for the period (1989 and 1996 to 2000) was $189,366.[15] Henderson argued that Enforcement's inaccurate calculation was an act of sanctionable conduct because it served to mislead the adjudicator and Enforcement has an obligation to ensure that its statements in its brief are accurate. Henderson requested as a sanction that the Hearing Officer strike the

---

[14] Henderson argues that the NAC may find him statutorily disqualified from his willful failures to update timely his Form U4 only if it serves a remedial purpose. Henderson misunderstands the statutory consequence of Section 3(a)(39)(F) of the Exchange Act. *See McCune*, 2016 SEC LEXIS 1026, at *37. "[S]tatutory disqualification is not a FINRA-imposed penalty or remedial sanction." *Riemer*, 2018 SEC LEXIS 3022, at *29 n.47. Rather, statutory disqualification is "automatic" when, as here, a respondent has willfully failed to disclose timely material information of a Form U4. *See McCune*, 2016 SEC LEXIS 1026, at *37.

[15] Enforcement also misstated the amount of Henderson's prior tax liens in its opening statement at the hearing. Enforcement stated, "FINRA issued a cautionary action letter against Mr. Henderson for failure to disclose eight federal tax liens totaling over $400,000, which are not the subject of the charges here." Enforcement went on to state that "the cautionary action letter specifically placed Mr. Henderson on notice that in accordance with long standing FINRA practice, his reporting failures will be taken into consideration in determining any future matters, should repeat violations occur." *Accord FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *5 (Mar. 2009) ("While Cautionary Actions are considered by the staff in any future disciplinary matter, these actions do not constitute formal discipline and are not reportable on FINRA's Central Registration Depository (CRD) system or Form BD."); *see also FINRA Sanction Guidelines* 9 (Oct. 2021), https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf [hereinafter "*Guidelines*"]. ("FINRA Regulation staff-issued Cautionary Action Letters . . . [is] informal action[] that [is] not included for purposes of the FINRA Sanction Guidelines in the term 'action.'"). Enforcement noted during its closing argument that the statements about the amount of the eight liens in its prehearing brief and opening statement were mistakes, and they are not evidence in this case.

allegation of willfulness from the second cause of action related to Henderson's failure to disclose timely the Four Liens.

FINRA Rule 9280 provides that a Hearing Officer may sanction a party who engages in contemptuous conduct during a proceeding. The sanctions available to a Hearing Officer include striking pleadings or specified parts of pleading, and the NAC has interpreted this sanction to include dismissing a proceeding. *See* FINRA Rule 9280(b)(1)(C); *Dep't of Enf't v. Wicker*, Complaint No. 2016052104101, 2021 FINRA Discip. LEXIS 31, at *27 (FINRA NAC Dec. 15, 2021), *appeal docketed*, Admin. Proc. No. 3-20705 (Jan. 13, 2022); *Dep't of Enf't v. Larson*, Complaint No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *20 n.18 (FINRA NAC Sept. 21, 2020). After reviewing Henderson's motion, Enforcement's opposition, and the entire case record, the Hearing Officer denied Henderson's motion.

We review the Hearing Officer's decision to decline to sanction a party pursuant to FINRA Rule 9280 under an abuse of discretion standard. *Wicker*, 2021 FINRA Discip. LEXIS 31, at *27; *cf. Sorenson v. Wolfson*, 683 F. App'x 33, 35 (2d Cir. 2017) (stating that the court reviews a district court's denial of a motion for sanctions under Fed. R. Civ. P. 11 for abuse of discretion); *Allen v. Exxon Corp.*, 102 F.3d 429, 432 (9th Cir. 1996) ("We review sanctions imposed by a district court [under Fed. R. Civ. P. 37] for abuse of discretion and will not reverse absent a definite and firm conviction that the district court made a clear error of judgment."). Henderson therefore bears a "heavy burden" to demonstrate that the Hearing Officer either applied the wrong legal standard or made a clear error in judgment by refusing to sanction Enforcement by striking part of its pleading. *See Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *16 (Sept. 29, 2015).

The Hearing Officer found that Henderson's total tax liability that Enforcement misstated from the period covered by the 2015 cautionary action was not a material issue at the hearing in the current action, and Enforcement promptly acknowledged and corrected its error after learning of it during Henderson's opening statement at the hearing.[16] The Hearing Officer determined that Enforcement inflated Henderson's tax liability by adding the amounts of the eight lien notices without considering that the IRS had filed duplicate lien notices in separate jurisdictions for the same tax years. Enforcement's first witness at the hearing, an examiner in the FINRA high risk registered representative unit, addressed the error during his live testimony, and acknowledged that adding the lien amounts together would overstate Henderson's tax liability during that period because some of the liens covered overlapping obligations.[17] The Hearing

---

[16] During his opening statement, Henderson's attorney stated: ". . . FINRA itself is telling a fib. They are alleging that prior to 2014, Mr. Henderson racked up $430,908 in liens, which you are going to find out is, they get that number only by double counting liens that IRS issued for the same debts."

[17] Contrary to the characterization of Henderson's attorney that the Hearing Officer had "barred him from following up" with the examiner, the Hearing Officer had previously noted during the examiner's testimony that the parties stipulated to the correct amounts of the eight liens covered by the 2015 cautionary action. The Hearing Officer explained to Henderson's

[Footnote continued on next page]

Officer, when denying Henderson's motion for sanctions, concluded that Enforcement's making of "an immaterial, inadvertent computational error" did not prejudice Henderson and was not "contemptuous conduct." We agree.

Henderson has not met his "heavy burden" to show that the Hearing Officer abused his discretion when denying Henderson's motion to sanction Enforcement. The amount of the eight prior liens that Henderson failed to disclose is not in question in this proceeding—the parties stipulated to the amount of those eight liens covered by 2015 cautionary action letter. The parties also stipulated to the amounts of the Four Liens, which are at issue in the current matter. We agree with the Hearing Officer's finding that there is no evidence in the record that Enforcement's error was anything more than an inadvertent computation error when calculating Henderson's prior unpaid tax obligation. Moreover, Enforcement acknowledged the error promptly and repeatedly at the hearing, in its opposition to Henderson's motion, and before the NAC.

We affirm the Hearing Officer's denial of Henderson's motion for sanctions and conclude Henderson received the "fair procedure" that the Exchange Act requires here, including notice of the specific charges against him and multiple opportunities to be heard. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Guang Lu*, 58 S.E.C. 43, 58-60 (2005) (finding no error in denial of a motion to compel production of documents from firm supervisor when respondent was able to cross-examine supervisor at the hearing), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings).

V. Sanctions

For Henderson's participation in three OBAs without providing written notice to IFS, the Hearing Panel fined Henderson $10,000 and suspended him in all capacities for four months. For Henderson's willful failure to amend timely his Form U4 to disclose the Four Liens, the Hearing Panel fined Henderson $20,000 and suspended him in all capacities for nine months. The Hearing Panel ordered the suspensions to run consecutively. For the reasons set forth below, we affirm these sanctions in their entirety.

[Cont'd]

attorney during his cross examination of the examiner that "if Enforcement has made an inaccurate statement in the prehearing brief, I think you have the evidence that you would need to make such an argument in closing." The Hearing Officer added that asking the examiner, who did not write the brief, whether the examiner thought the misstatement was fair, was not "going to advance the ball."

A. Undisclosed OBAs

In assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions and any other case-specific factors. For engaging in undisclosed OBAs, the Guidelines recommend a fine of $2,500 to $77,000.[18] The Guidelines also recommend a suspension in any or all capacities for a period of 10 business days to three months, and when there are aggravating factors, a suspension of up to one year.[19] When aggravating factors predominate, the Guidelines recommend a longer suspension of up to two years or a bar.[20]

The Guidelines also instruct us to evaluate six specific principal considerations for Rule 3270 violations, including: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to other parties, including the investing public, and, if so, the nature and extent of the injury; (3) the duration of the outside activity, the number of customers and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service; (5) whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm; and (6) the importance of the role played by the respondent in the outside business activity.[21]

Henderson's misconduct involved several aggravating factors. The duration of Henderson's outside activity with these three entities was lengthy, ranging from when he began his employment with IFS in December 2010 and failed to disclose his ongoing involvement with SWH and 2001 Florida, and engaging in activities for more than four years with RHPTJ.[22]

Henderson played an important role in each of the three OBAs.[23] *See, e.g.*, *Ghosh*, 2021 FINRA Discip. LEXIS 32, at *43-44 (finding respondent played a "key role[]" in an OBA when he was, for example, its owner, president, CEO, and director). Henderson was one of three

---

[18] *See Guidelines*, at 13.

[19] *Id.*

[20] *Id.*

[21] Three of the guideline-specific considerations do not apply to the facts of this case. Henderson's OBAs did not involve customers of IFS and accordingly no IFS customers suffered injury because of Henderson's misconduct. In addition, it did not appear as though IFS had approved the products or services involved. *See id.*

[22] *Id.* at 7 (Principal Consideration No. 9), 13.

[23] *Id.* at 13.

partners in SWH, and he was the company's president, secretary, and a director. Henderson also owned 10 percent of SWH's stock. Henderson was a "member or an authorized representative of a member" of 2001 Florida. Henderson was listed as a manager of 2001 Florida with his sister-in-law, LH, in the 2007 annual report.[24] He remained listed as a manager of 2001 Florida until 2017. Henderson opened and maintained the checking account for 2001 Florida and collected rent payments from tenants. Henderson formed RHPTJ in 2014 and is its manager and sole member. Additionally, RHPTJ's 2014 income tax return identified Henderson as its chief executive officer.

Henderson also concealed his activities in the three OBAs from IFS, despite several opportunities to disclose them to the firm.[25] For example, when Henderson associated with IFS in December 2010, he disclosed three OBAs, but not his ongoing involvement with SWH since 1999 and 2001 Florida since 2003. In the March 2012 Personal Activity Questionnaire, Henderson answered "No" when asked if he was "engaged in any outside employment/activity for which [he was] compensated." In his July 2014 compliance questionnaire, Henderson did not list SWH, 2001 Florida, or RHPTJ as OBAs despite listing numerous other OBAs. Moreover, as a condition of his employment with IFS, under his representative and independent contractor's agreement, Henderson agreed to disclose "all employment, contractual or business relations or interests with any person or entity." When Henderson completed his 2015 and 2016 representative acknowledgment forms that reminded him to disclose in writing any OBAs to the firm, he made no disclosure of the three OBAs to IFS. Henderson first disclosed SWH and RHPTJ in January 2018 and 2001 Florida in October 2018 and only after FINRA requested information from him pursuant to Rule 8210 about his failure to disclose these entities as OBAs. IFS was unaware of Henderson's involvement with these entities prior to these disclosures. As a result, Henderson evaded the firm's ability to potentially monitor and supervise his activities regarding these OBAs. OBAs "are of serious concern, and the careful monitoring of such transactions and activities carries important protections for member firms and investors." *Ghosh*, 2021 FINRA Discip. LEXIS 32, at *51.

We also find that Henderson's failure to comply with FINRA Rule 3270 was intentional.[26] Henderson has a lengthy securities registration history; he has been in the securities industry since 1987. Thus, he knew or should have known of his regulatory obligation as an associated person to disclose his activities with SWH, 2001 Florida, and RHPTJ to IFS. *See Ghosh*, 2021 FINRA Discip. LEXIS 32, at *44. He also actively participated in the OBAs' activities and was involved in their formation. And Henderson was on notice of his requirement under the IFS's written policies and procedures to disclose and seek approval of his OBAs. The

---

[24] We are further troubled by Henderson's attempt to minimize his involvement in 2001 Florida when he claimed that his sister-in-law made him a "manager" without his knowledge or consent, a claim the Hearing Panel found not credible.

[25] *Guidelines*, at 13.

[26] *Id.* at 8 (Principal Consideration No. 13).

firm required that "PRIOR to engaging in any outside employment or receiving any outside compensation, [Henderson] must request, and receive permission, in writing." Despite these requirements and Henderson's prior disclosure of other OBAs during his employment with IFS, Henderson failed to disclose his business interests in SWH, 2001 Florida, and RHPTJ.[27] *See Weinstock*, 2016 FINRA Discip. LEXIS 34, at *49 (finding it an aggravating factor that respondent complied with seeking the firm's approval for a previous OBA, but "ignored the process" in the present case); *Giblen*, 2014 FINRA Discip. LEXIS 39, at *28-29 (finding that respondent's failure to disclose outside business activities was intentional given his industry experience, his awareness of his firm's policies, and his prior submission of a request to engage in other outside business activities).

Under the facts here, we affirm the Hearing Panel's imposition of a $10,000 fine and four-month suspension in all capacities for Henderson's failure to disclose three OBAs, in violation of FINRA Rules 3270 and 2010.

B. Untimely Amendments to Form U4

The Guidelines for late filings of amendments to Form U4 recommend a fine of $2,500 to $39,000.[28] In a case when aggravating factors are present, the Guidelines also recommend a suspension of 10 business days to six months.[29] When aggravating factors predominate, the Guidelines direct an adjudicator to consider a longer suspension and a higher fine or, when the respondent intended to conceal information or mislead, a bar.[30] 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; the duration of the delinquency; and whether a lien that was not timely disclosed has been satisfied.[31]

---

[27] The firm's former chief compliance officer during Henderson's employment at IFS testified unequivocally at the hearing that, in his view, IFS's policies and procedures required Henderson to disclose SWH, 2001 Florida, and RHPTJ as OBAs based on his roles and activities with each of these entities. Henderson argues that the chief compliance officer's opinion should be excluded because he was not an expert witness. We disagree that the compliance officer needed to be deemed an expert to opine on Henderson's compliance with the firm's policies and procedures, which was squarely within his responsibilities for the firm. The Hearing Officer correctly permitted this testimony.

[28] *Guidelines*, at 72.

[29] *Id.*

[30] *Id.*

[31] *Id.*

We determine that several guideline-specific considerations, along with the General Principles and Principal Considerations relevant to all sanction determinations, are applicable to Henderson's misconduct and serve both to aggravate and mitigate sanctions. We agree with the Hearing Panel, however, that aggravating factors predominate in this case. Henderson failed to disclose the Four Liens imposed by the IRS, totaling $368,221—a notable amount.[32] The Forms U4 are important documents, both for the firm and FINRA and the tax lien information that Henderson failed to disclose was significant.[33] *See Holeman*, 2019 SEC LEXIS 1903, at *45. "The liens were material to the ability of regulators, [Henderson's] employer[], and . . . customers to assess [his] capability to function as an associated person of a FINRA member firm." *See id.* Henderson's failure to disclose $368,221 in liens continued for an extended period.[34] He did not disclose the Second, Third, and Fourth Liens on his Form U4 until March 2, 2017, and he did not disclose the First Lien until October 4, 2018.[35] As of the date of the hearing, the Third ($135,631) and Fourth ($107,840) Liens remained unsatisfied.[36] Henderson disclosed the Four Liens only after FINRA discovered them and sent him multiple notices about disclosing them. Indeed, we are troubled by the amount of regulatory pressure it took for Henderson to ultimately disclose the Four Liens.[37] *See, e.g.*, *Holeman*, 2019 SEC LEXIS 1903, at 45-46 (finding an aggravating factor for sanctions that the respondent disclosed liens only after FINRA began investigating and respondent still did not disclose the liens for six months). CRED sent IFS four notices about the liens beginning in 2015, and Henderson acknowledged that he knew about the CRED notices. Nevertheless, he did not disclose the Second, Third, and Fourth Liens until March 2017. FINRA subsequently had to issue a Rule 8210 request for information in August 2017 asking about the Four Liens and including copies of the IRS notices before Henderson ultimately disclosed the First Lien in October 2018. We find that Henderson's failure to disclose the Four Liens timely was at a minimum extremely reckless.[38]

When Henderson finally disclosed the Four Liens, his representations in the Form U4 were inaccurate.[39] Henderson inaccurately represented that he first learned of the Four Liens

---

32 *See id.* (Guideline-Specific Consideration No. 2).

33 *See id.* (Guideline-Specific Consideration No. 1).

34 The IRS recorded the First Lien in October 2014, the Second Lien in November 2014, and the Third and Fourth Liens in December 2014.

35 *See id.* (Guideline-Specific Consideration No. 4).

36 *Guidelines*, at 72 (Guideline-Specific Consideration No. 6).

37 *Guidelines*, at 8 (Principal Consideration No. 14).

38 *See id.* (Guideline-Specific Consideration No. 3); *id.* at 8 (Principal Consideration No. 13).

39 *See id.* at 7 (Principal Consideration No. 10).

years after he had actual notice of them from the IRS—representations he admitted at the hearing were false. The Commission has noted that "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 and, therefore, untruthful answers call into question an associated person's ability to comply with regulatory requirements." *Holeman*, 2019 SEC LEXIS 1903, at *46-47.

We also find certain factors, including that Henderson satisfied the First Lien and Second Lien years before he disclosed them, serve to mitigate partially Henderson's misconduct.[40] However, we find that the numerous applicable aggravating factors outweigh any mitigative effect.

In support of a lesser sanction, Henderson argues that he has accepted responsibility and demonstrated remorse for his misconduct. While we give Henderson some credit for his admissions at the hearing and on appeal that he violated his disclosure obligations when he failed to timely amend his Form U4, we note that the record also reflects Henderson's attempts to blame others, including the IRS, CRED, and his accountant, for his own failures, effectively negating any mitigation. Henderson did not disclose the Four Liens until after FINRA alerted him, and even then, he chose instead not to act on FINRA's prompts to disclose the Four Liens for years notwithstanding his assurances that he would do so. Even if he was confused about the status of his tax liens, Henderson had an obligation to determine whether his disclosure was required and that it was complete and accurate. *See Craig*, 2008 SEC LEXIS 2844, at *14. He did not do that promptly despite having hired a tax resolution company for the specific purpose of assisting him with his negotiations with the IRS in connection with his tax liens.

We affirm the Hearing Panel's nine-month suspension in all capacities and $20,000 fine. We also require Henderson to serve his suspensions for the OBA and Form U4 violations consecutively. *See, e.g.*, *Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 SEC LEXIS 3773, at *21 n.18 (Sept. 30, 2016) (affirming FINRA's order that respondent serve suspensions consecutively "because the violations involve different types of misconduct and raise separate public interest concerns").

VI. Conclusion

We find that Henderson engaged in undisclosed and unapproved OBAs, in violation of FINRA Rules 3270 and 2010. For this misconduct, we suspend Henderson for four months from associating with any FINRA member in any capacity and fine him $10,000. We also find that Henderson failed to amend timely his Form U4 to disclose the Four Liens, in violation of Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010. For this misconduct, we suspend Henderson for nine months from associating with any FINRA member in any capacity and fine him $20,000. The suspensions shall run consecutively. Henderson's failure to disclose was willful, and the omitted information was material; thus, Henderson also is

---

[40] *See id.* at 72 (Guideline-Specific Consideration No. 6).

statutorily disqualified. We also affirm the Hearing Panel's order that Henderson pay hearing costs of $8,779.83. We impose appeal costs of $1,742.65.[41]

On behalf of the National Adjudicatory Council,

____

Jennifer Piorko Mitchell, Vice President and
Deputy Corporate Secretary

---

[41] After seven days' notice in writing, FINRA may summarily revoke the registration of a person associated with a member if such person fails to pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or a cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable.