BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Richard A. Neaton Port Charlotte, FL, Respondent.	DECISION Complaint No. 2007009082902 Dated: January 7, 2011

Respondent willfully failed to disclose material information on his Form U4. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Mark P. Dauer, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Richard A. Neaton ("Neaton") appeals a Hearing Panel decision. The Hearing Panel found that Neaton failed to disclose on his Uniform Application for Securities Industry Registration or Transfer ("Form U4"), in violation of FINRA rules, that his authority to practice law in the State of Michigan was twice suspended and later revoked for, among other things, making false statements, forgery, and commingling and misappropriating client funds.[1] The Hearing Panel also concluded that Neaton is subject to a "statutory disqualification" because his actions were "willful" and involved the failure to disclose "material" information that concerned

[1] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

his disciplinary history as an attorney. The Hearing Panel fined Neaton $5,000 and suspended him, restricting his ability to associate in any capacity with any FINRA member for a one-year period.[2] After an independent review of the entire record, we affirm the Hearing Panel's findings. We, however, have determined to modify the sanctions imposed by Hearing Panel and instead bar Neaton in all capacities for his misconduct.

I. Facts

A. Neaton Enters the Securities Industry

Neaton began practicing law in Michigan in 1976. In 1993, he gave up his law practice and moved to Florida. In March 1995, Neaton entered the securities industry and registered through a FINRA member.

B. Neaton's Law License Is Suspended

On June 5, 1995, the State of Michigan's Attorney Discipline Board ("Attorney Discipline Board" or "Board") suspended Neaton's law license for a three-year period beginning, retroactively, on December 1, 1993.[3] The Attorney Discipline Board found that Neaton, among other things, neglected a client's personal injury matter, falsely informed the client that he had settled her claims, delivered money to the client from his personal account, falsely represented to the client that this money constituted her share of the mock settlement, and made numerous other false representations to the client. The Board further found that Neaton, in an unrelated matter, affixed a client's signature to a draft entrusted to him for the client's benefit, commingled these funds with funds in his personal account, misappropriated the client's funds to pay his client in

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[2] The Hearing Panel also assessed hearing costs of $1,861.30.

[3] The Attorney Discipline Board is the adjudicative arm of the Michigan Supreme Court and discharges the court's exclusive constitutional responsibility to supervise and discipline Michigan attorneys. Mich. Ct. R. 9.110(A). The Board appoints hearing panels to conduct trial-level proceedings in which the Michigan Attorney Grievance Commission has filed a formal complaint alleging that a member of the State Bar of Michigan has committed misconduct. Mich. Ct. R. 9.111. The Attorney Discipline Board also hears petitions for review of hearing panel decisions and performs other duties. Mich. Ct. R. 9.118(A). Its decisions may be appealed to the Michigan Supreme Court. Mich. Ct. R. 9.122. Before the National Adjudicatory Council ("NAC"), Neaton suggests that the Board did not possess jurisdiction to suspend or revoke Neaton's law license because, he claims, he "voluntarily" chose not to renew his license at the end of November 1993. We conclude that Neaton may not collaterally attack the Board's decisions in his appeal before the NAC. *Cf. Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (finding, during a review of a denial of a membership continuance application, that "[i]t is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made against him"). Moreover, the Attorney Discipline Board retained jurisdiction to consider and impose sanctions for misconduct committed by Neaton while licensed as an attorney. *See Grievance Adm'r v. Attorney Discipline Bd.*, 447 Mich. 411, 413 (1994).

the personal injury matter, failed to advise the client of his use of the funds, and made numerous other false statements to the client concerning the funds.[4]

C. Neaton Changes Firms and Completes a Form U4

Less than four months after the Attorney Discipline Board suspended his authority to practice law, Neaton decided to change firms and interviewed with Dennis Harrelson ("Harrelson"), the owner of an independent, general agent affiliated with FINRA member Securian Financial Services, Inc. ("Securian").[5] Harrelson testified that, during the interview, Neaton told him that he was the subject of a "client" or "customer" "complaint" related to his former law practice.[6] Neaton described the matter as a "minor," "fee" "dispute" or "disagreement," and Securian asked him to report the resolution of the client's complaint to the firm. Neaton did not disclose any information concerning the Attorney Discipline Board's action or that the "complaint" he described was the subject of an attorney grievance proceeding in Michigan. On October 31, 1995, Neaton registered through Securian as an investment company and variable contracts products – limited representative.[7] Harrelson testified that Neaton never disclosed any additional information to Securian concerning the resolution of the client dispute.

To register through Securian, Neaton executed a Form U4 on October 15, 1995. Question 22E(1) on the form asked, "[h]as . . . any state regulatory agency . . . ever . . . found you to have made a false statement or omission or been dishonest, unfair or unethical?"[8] Neaton answered "no." Question 22E(6) further asked, "[h]as . . . any state regulatory agency . . . ever . . . revoked or suspended your license as an attorney?" Neaton once more answered "no."

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4 The Board ordered that Neaton pay restitution of the misappropriated funds.

5 Securian was formerly MIMLIC Sales Corporation and Ascend Financial Services, Inc.

6 The Hearing Panel found Harrelson credible. Neaton argues in his appeal before the NAC that the Hearing Panel's credibility determination was "unjustified" and "unreasonable." Absent substantial evidence to the contrary, however, we must defer to the Hearing Panel's credibility decision. *See Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, at *11 n.6 (Oct. 23, 2002). Neaton has presented *no* evidence, let alone substantial evidence, that would permit us to revisit the Hearing Panel's conclusion that Harrelson testified credibly.

7 In August 1998, Neaton also registered through Securian as a corporate securities – limited representative.

8 The Attorney Discipline Board, which acts on behalf of the Michigan Supreme Court, is a "state regulatory agency" for purposes of questions appearing on the Form U4. *See Thomas R. Alton*, 52 S.E.C. 380, 385 (1995) (finding that the Supreme Court of Arizona acts as a "state regulatory agency" when it disciplines attorneys).

D. Neaton's Authority to Practice Law Is Suspended a Second Time

On August 26, 1996, the Attorney Discipline Board again suspended Neaton's Michigan law license, this time for a four-year period beginning on June 1, 1995. The Board found that Neaton, while retained in a matter involving a capital murder charge, among other things, neglected a habeas corpus matter, made false representations to his client, affixed or caused to be affixed on two affidavits the signatures of two proposed expert witnesses without their knowledge, improperly affixed his signature as a notary on one affidavit, affixed or caused to be affixed a fictitious notary's name on another, and misappropriated client funds.[9]

Neaton did not amend his Form U4 following the Board's second suspension of his Michigan law license. Neaton therefore made no change to the answers he provided to Questions 22E(1) and 22E(6) on his Form U4 and continued to answer these questions "no."[10]

E. Neaton's Law License Is Revoked

Neaton's legal troubles continued. On February 2, 2001, the Attorney Discipline Board ordered the immediate revocation of Neaton's Michigan law license. The Board found that Neaton failed to return trust funds to their rightful beneficiaries, made misrepresentations concerning his investment of the trust funds, commingled trust funds with his own, and misappropriated funds held in trust as a fiduciary.[11]

Neaton did not amend his Form U4 following the revocation of his Michigan law license.[12] The Form U4 in use at the time, like the form in use in 1995 and 1996, required the disclosure of any action taken suspending or revoking the applicant's authorization to act as an attorney and any findings of any state regulatory agency that the applicant had made false statements or omissions or been dishonest, unfair, or unethical.[13] Neaton therefore continued to provide responses that did not disclose the requested information.

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9 The Board again ordered that Neaton pay restitution of the misappropriated funds.

10 The Forms U4 in use in 1995 and 1996 were the same.

11 The Board ordered that Neaton pay restitution of the misappropriated funds in this matter as well.

12 Neaton admitted that he never disclosed to Securian the Board's 2001 action revoking his law license.

13 The Form U4 in use in 2001, although revised, was not different, for purposes of the issues present in this case, in any material fashion from the form in use in 1995 and 1996. Question 22E(1) on the earlier form was renumbered as Question 23D(1) on the revised form, but was not reworded, except for the addition of one word. Question 22E(6) on the earlier form was renumbered as Question 23F on the revised form and reworded to ask, "[h]as your authorization to act as an attorney . . . ever been revoked or suspended?"

F. Neaton Again Changes Firms and Completes a New Form U4

Securian terminated Neaton's registrations through the firm on April 28, 2006. On the same day, Neaton registered as an investment company and variable contracts products – limited representative and as a corporate securities – limited representative through FINRA member Mutual Service Corporation ("Mutual").

To register through Mutual, Neaton completed a new Form U4, which he signed on January 31, 2006. The Form U4 in use at the time continued to require the disclosure of any action taken suspending or revoking the applicant's authorization to act as an attorney and any findings of any state regulatory agency that the applicant had made false statements or omissions or been dishonest, unfair, or unethical.[14] Neaton answered the two questions on the Form U4 that sought this information "no."[15]

G. Neaton Amends His Form U4 and Is Terminated

After Neaton registered through Mutual, a dispute arose concerning an insurance policy that Neaton originated while registered through Securian. During a deposition taken in litigation that arose from this policy dispute, Neaton disclosed the Attorney Discipline Board's actions suspending and revoking his Michigan law license. After Neaton revealed this information, Securian filed, on May 22, 2007, an amended Uniform Termination Notice for Securities Industry Registration ("Form U5") concerning Neaton's termination from the firm. The amended Form U5 stated that Securian had initiated an internal review after learning that Neaton's license to practice law in Michigan was revoked in 2001 for misappropriating client trust funds.

FINRA staff commenced an investigation shortly after Securian filed the amended Form U5. On November 2, 2007, after FINRA staff inquired of his disciplinary history with the State Bar of Michigan and requested information from both Securian and Mutual, Neaton amended his Form U4 and changed his answer to Question 14F on the form from "no" to "yes."[16] On the Form U4's disclosure reporting pages, Neaton disclosed that the Michigan Attorney Discipline

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[14] The Form U4 in use in 2006 was materially similar to the form in use in prior years for purposes of the issues presented in this case. Question 14D(1)(a) on the 2006 Form U4 was the same as Question 23D(1) on the form in use in 2001. Question 14F asked, "[h]ave you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?"

[15] Neaton admitted that he never disclosed to Mutual any of the Attorney Discipline Board's actions suspending and revoking his Michigan law license at the time the firm hired him.

[16] There were no changes to the Form U4 between 2006 and 2007. Neaton did not alter his answer to Question 14D(1)(a) on the Form U4, which concerned the findings of any state regulatory agency that the applicant had made false statements or omissions, or been dishonest, unfair, or unethical.

Board twice suspended and later revoked his law license. Neaton, however, provided no details of the Board's findings made in support of each of those actions.

On May 21, 2008, Mutual terminated Neaton's registrations through the firm. Neaton has not since been associated with a FINRA member.

II. Procedural Background

The Department of Enforcement ("Enforcement") filed a single-cause complaint initiating disciplinary proceedings on October 8, 2008. Enforcement alleged that Neaton willfully failed, at appropriate times, to disclose on his Form U4 material information concerning his disciplinary history as an attorney. Specifically, Enforcement alleged that Neaton failed to disclose that the Attorney Discipline Board twice suspended and later revoked his Michigan law license based upon findings that he made false statements or omissions or engaged in dishonest, unfair, or unethical conduct. Enforcement asserts that Neaton's failures to divulge the Board's actions and findings, when he possessed a duty to be candid, violated NASD Rule 2110 and Membership and Registration Rules Interpretive Material ("IM") 1000-1.

Neaton filed an answer on October 16, 2008. Neaton admitted that his Michigan law license had been twice suspended and, ultimately, revoked by the Attorney Discipline Board and acknowledged the findings upon which the Board's actions were founded. Neaton, however, asserted that his failure to disclose this information on his Form U4 did not violate FINRA rules.

The Hearing Panel issued its decision on June 5, 2009, after conducting a one-day hearing. The Hearing Panel found that Neaton willfully engaged in the misconduct alleged in the complaint and imposed the aforementioned sanctions. This appeal followed under NASD Rule 9311.[17]

III. Discussion

We affirm the Hearing Panel's findings that Neaton violated NASD Rule 2110 and IM-1000-1 by failing to disclose the Board's actions suspending and revoking his law license and the findings upon which these actions were based. We also agree with the Hearing Panel's conclusion that Neaton's failures were willful and involved the misstatement and omission of

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[17] On March 4, 2010, after the NAC subcommittee empanelled to consider this matter (the "Subcommittee") heard the parties' oral arguments, Neaton filed a motion seeking leave to tender a "supplementary" brief on issues that he first raised in the opening brief that he filed pursuant to NASD Rule 9347. The Subcommittee denied Neaton's motion. We accept the ruling of the Subcommittee as our own. The FINRA procedural rules do not contemplate briefs beyond those allowed under NASD Rule 9347. The power to permit "supplementary" briefs is thus within the discretion of the NAC subcommittees appointed to consider appeals from disciplinary decisions. We find no evidence that the Subcommittee in this case abused its discretion. *Cf. Dep't of Enforcement v. Strong*, Complaint No. E8A2003091501, 2008 FINRA Discip. LEXIS 19, at *17 (FINRA NAC Aug. 13, 2008) ("[T]he NAC reviews the exclusion of evidence only for an abuse of discretion.").

material information. We therefore affirm the Hearing Panel's findings that Neaton is the subject of a statutory disqualification.

A. Neaton Violated NASD Rule 2110 and IM-1000-1

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.[18] *See Robert E. Kauffman*, 51 S.E.C. 838, 840 (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). 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 Rel. No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008). Once filed, a registered representative or associated person is under a continuing obligation to timely update information required by the Form U4 as changes occur.[19] *See Dep't of Enforcement v. Mathis*, Complaint No. C10040052, 2008 FINRA Discip. LEXIS 49, at *13-14 (FINRA NAC Dec. 12, 2008), *aff'd*, Exchange Act Rel. No. 61120, 2009 SEC LEXIS 4376 (Dec. 7, 2009). Filing a misleading Form U4, or failing to timely amend a Form U4 when required, violates IM-1000-1 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.[20] *See Craig*, 2008 SEC LEXIS 2844, at *8; *see also Mathis*, 2009 SEC LEXIS 4376, at *18 (finding that the failure to file timely Form U4 amendments is a violation of NASD Rule 2110 and IM-1000-1).

The record is clear that Neaton was well aware that the Attorney Discipline Board on two occasions suspended his Michigan law license and later revoked it, in each instance based upon findings that Neaton engaged in grave misconduct as an attorney, including misrepresentations and omissions, forgery, and commingling and misappropriating client funds. It is also without dispute that Neaton did not divulge this information, when it was appropriate for him to do so, on either the Forms U4 that he completed to register through Securian and Mutual or through timely Form U4 amendments. Over a period of nearly 12 years, Neaton instead inaccurately answered

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[18] IM-1000-1 states that membership or registration information "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for disciplinary action."

[19] At the time of the misconduct at issue in this matter, Article V, Section 2(c) of NASD's By-Laws required that "[e]very application for registration filed with [NASD] shall be kept current at all times by supplementary amendments . . . filed with [NASD] not later than 30 days after learning of the facts or circumstances giving rise to the amendment."

[20] NASD Rule 2110 states "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 2110 applies with equal force to FINRA members and their associated persons. *See* NASD Rule 0115(a).

two questions on his Form U4 "no" for which the answers "yes" were plainly the only truthful response. Neaton's license or authority to act as an attorney had clearly been suspended or revoked, and there can be no doubt that the findings upon which the Board's actions were based included findings that Neaton made false statements and omissions and engaged in dishonest, unfair, and unethical conduct as an attorney. We therefore affirm the Hearing Panel's findings that Neaton violated NASD Rule 2110 and IM-1000-1.

B. Neaton Is Statutorily Disqualified

We next consider the separate question of whether Neaton is subject to a statutory disqualification. A person is to be subject to a "statutory disqualification" under Article III, Section 4 of FINRA's By-Laws and Section 3(a)(39)(F) of the Securities Exchange Act of 1934 ("Exchange Act") if, among other things, "such person . . . has willfully made or caused to be made in any application . . . to become associated with a member of, a self-regulatory organization, . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein." We find that Neaton acted "willfully" in failing to disclose "material" information on his Form U4. We therefore agree with the Hearing Panel that Neaton is subject to a statutory disqualification.

1. Neaton Acted Willfully

A willful violation of the federal securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). Thus, in a case such as this, "[a] willfulness finding is predicated on [a respondent's] intent to commit the act that constitutes the violation – completing the Form U4 inaccurately." *Dep't of Enforcement v. Zdzieblowski*, Complaint No. C8A030062, 2005 NASD Discip. LEXIS 3, at *14 (NASD NAC May 3, 2005). We need not find that Neaton intended also to violate FINRA rules to find that he acted willfully. *See Wonsover*, 205 F.3d at 414 (finding that the law does not require that a willful actor "also be aware that he is violating one of the Rules or Acts").

At the time that Securian learned of the Attorney Discipline Board's actions against Neaton, Securian also terminated a service agreement that it granted Neaton when he left the firm for customer business that he had originated through Securian. Harrelson spoke with Neaton at the time Securian terminated this service agreement, and he asked Neaton why he had not disclosed the Attorney Discipline Board's actions. Harrelson testified that Neaton responded, "had I divulged that stuff all those years before, I would have lost my [securities] license already." Harrelson's testimony makes clear that Neaton believed that the Attorney Discipline Board's actions represented a roadblock to registration and that he intentionally failed to disclose these actions and the findings upon which they were based.[21]

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[21] Circumstantial evidence is sufficient to establish that a respondent acted "willfully" under the federal securities laws. *See Robert Thomas Clawson*, Exchange Act Rel. No. 48143, 2003 SEC LEXIS 1598, at *15 & n.19 (July 9, 2003) (stating that circumstantial evidence can be "more than sufficient" to establish that a registered representative acted willfully in violation of the antifraud provisions of the Exchange Act). The conclusion that Neaton willfully failed to

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There is no credible evidence to suggest that Neaton's inaccurate and misleading negative answers to the questions on the Form U4 were accidental or otherwise unintended.[22] As Neaton

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disclose relevant information in this case is reinforced by his having falsely answered "no" in response to a question on Securian's annual compliance questionnaires that asked whether Neaton had, while at the firm, "been involved in any type of regulatory inquiry or investigation" or been sanctioned by any "state regulatory body?" *Cf. United States v. Stierhoff*, 549 F.3d 19, 26 (1st Cir. 2008) ("Willfulness [for purposes of establishing the offense of tax evasion] may be inferred from 'any conduct, the likely effect of which would be to mislead or to conceal.'" (quoting *Spies v. United States*, 317 U.S. 492, 499 (1943)).

[22] In his appeal, Neaton argues that he did not act willfully in this case. We find that this assertion is without merit. First, Neaton claims that he "voluntarily" disclosed to Harrelson "the entire subject" of the Attorney Discipline Board's June 1995 action suspending his law license and, later, the "adverse decisions" of the Board that resulted in the second suspension of his authority to practice law in Michigan in 1996. The Hearing Panel, however, found that Neaton was not a credible witness. We defer to the Hearing Panel's credibility decision. *See Manoff*, 2002 SEC LEXIS 2684, at *11 n.6. The Hearing Panel concluded instead that, to the extent Neaton disclosed any information to Harrelson, it was "grossly inadequate," "minimized and obfuscated" the serious nature of his misconduct as an attorney, and was "misleading" and "untruthful." We agree with the Hearing Panel's characterization of the evidence and find that it is consistent with a finding that Neaton acted willfully. *See Stierhoff*, 529 F.3d at 26.

Second, Neaton claims that he was an inexperienced securities professional, that he therefore expected Securian to conduct a thorough background check and provide advice as to the answers he should provide on his Form U4, and that the firm's advice was faulty. These claims ring hollow. As a factual matter, the record is clear; Neaton was never instructed to provide the answer "no" to any of the Form U4 questions at issue in this case for which the answer "yes" was the only accurate and truthful response. Nor may Neaton use his novitiate in the securities industry as a defense. Although new to the securities industry at the time that he completed his initial Form U4, we have no doubt that Neaton, a trained and practiced attorney, should not have had any difficulty in answering the clear and unambiguous Form U4 questions at issue in this case. *Cf. Dep't of Enforcement v. Kraemer*, Complaint No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *21 (FINRA NAC Dec. 18, 2009) ("Kraemer's claims of confusion are also at odds with the evidence in the record."). Indeed, whether new or experienced, "[p]articipants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements." *Richard J. Lanigan*, 52 S.E.C. 375, 378 n.13 (1995). Neaton possessed a duty to ensure that his Form U4 was complete and accurate. *See Mathis*, 2009 SEC LEXIS 4376, at *27. Neaton alone is "responsible for his actions and cannot shift that responsibility to the firm or his supervisors." *Rafael Pinchas*, Exchange Act Rel. No. 41816, 1999 SEC LEXIS 1754, at *14 (Sept. 1, 1999). His claim that he expected Securian to uncover his attorney misconduct does not compel us to find that his failures with respect to the Form U4 were not willful. *See Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *15 (FINRA NAC

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himself admitted in his appeal brief before the NAC, by not disclosing the Attorney Discipline Board's actions, "he thought he was benefitting from a quirk in the rules and he was determined to make his new career a success from this second chance." We therefore affirm the hearing Panel's findings that Neaton's actions in this case were willful.

2. The Board's Actions and Findings Were Material

Having found that Neaton acted willfully, we turn to the materiality of the information Neaton failed to disclose. FINRA, "which cannot investigate the veracity of every detail in each document filed with it, must depend on its members to report to it accurately and clearly in a manner that is not misleading." *Kauffman*, 51 S.E.C. at 839. As we have previously stated, "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material." *Dep't of Enforcement v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *13 (NASD NAC Apr. 27, 2004).

"The test for materiality is whether the omitted information would have 'significantly altered the total mix of information made available.'" *Mathis*, 2009 SEC LEXIS 4376, at *29 (quoting *TSC Indus., Inc. v. Northway*, Inc., 426 U.S. 438, 449 (1976)). The Attorney Discipline Board's actions stemmed from findings of serious, repeated ethical lapses, misrepresentations, omissions, the misuse and misappropriation of funds to which Neaton had been entrusted, as well as professional neglect. Such information most certainly would have significantly altered the landscape of information available to FINRA, other regulators, broker-dealers, and investors.[23] "In a business that depends as heavily upon candor and fidelity to one's word as the securities business," Neaton's misconduct as an attorney and the resulting loss of his law license "cannot be viewed lightly." *See Alton*, 52 S.E.C. at 384 (citing *Roy Ray Seaton*, 47 S.E.C. 131, 134 (1979)). Indeed, as Harrelson testified, had Neaton disclosed the Board's initial suspension of his Michigan law license at the time of his interview, or the nature of the Board's findings underlying this action, Securian simply would not have hired him. We thus agree with the Hearing Panel that Neaton's failure to disclose his disciplinary history as an attorney was material.

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Dec. 27, 2007) ("Craig understood his obligation to disclose his criminal history, and . . . he took a calculated risk that the criminal background investigation might not show his complete record."), *aff'd*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008).

[23] The Form U4 also allows investors to investigate the conduct and professional background of the securities industry professionals with whom they interact. *See Order Approving a Proposed Rule Change Relating to the Amended Interpretation of IM-8310-2 Concerning the Release of Additional Disciplinary Information*, Exchange Act Rel. No. 39562, 1998 SEC LEXIS 87 (Jan. 20, 1998).

We affirm the Hearing Panel's findings that Neaton willfully violated NASD Rule 2110 and IM-1000-1 by failing to disclose material information about his disciplinary history as an attorney, and Neaton is therefore subject to a statutory disqualification.

C. Neaton Received a Fair Hearing

In his answer, Neaton asserted certain "affirmative defenses" that were based on the singular claim that FINRA staff brought the complaint in this matter in "bad faith." Specifically, he argued that staff denied him the assistance of counsel at an on-the-record interview and prevented him from settling this matter before the issuance of a complaint. During pre-hearing proceedings, Enforcement moved to strike Neaton's affirmative defenses. The Hearing Panel issued a verbal ruling striking Neaton's affirmative defenses at the commencement of the hearing below. On appeal to the NAC, Neaton argues that the Hearing Panel's ruling denied him a fair hearing. We disagree.

As an initial matter, we note that an affirmative defense is a respondent's "'assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.'" *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (quoting *Black's Law Dictionary* 430 (7th ed. 1999)); *accord Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 393 (3d Cir. 1994). The practice in disciplinary proceedings is to strike those affirmative defenses that do not constitute a valid defense to avoid wasting time litigating irrelevant facts. *Gregory L. Amico*, Admin. Proc. Rulings Rel. No. 460, 1994 SEC LEXIS 4039, at *1 (Dec. 15, 1994). Neaton may not maintain, as a matter of law, any defense that rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct. *Cf. FTC v. Image Sales and Consultants, Inc.*, No. 97-Civ.-131, 1997 U.S. Dist. LEXIS 18942, at *7-8 (N.D. Ind. Sept. 17, 1997) (finding that the doctrine of unclean hands may not be invoked as an affirmative defense against a regulatory agency that is attempting to enforce a congressional mandate in the public interest); *see also Jeffrey L. Feldman,* Admin. Proc. Rulings Rel. No. 403, 1994 SEC LEXIS 186, at *4 (Jan. 14, 1994) (striking an affirmative defense that the Commission perpetrated an abuse of discretion by bringing a disciplinary complaint because the Commission's reasons for initiating the proceeding were beyond review).

With respect to Neaton's specific arguments, Neaton asserts that FINRA staff failed to attach an addendum to a notice issued pursuant to NASD Rule 8210 that requested his appearance at an on-the-record interview. The addendum normally is sent with notices issued pursuant to Rule 8210 and advises those subject to investigative interviews that they may bring an attorney to their interview. Neaton, who appeared for an on-the-record interview without legal representation, indicated at that time that the addendum was not included with the Rule 8210 notice that he received by mail. FINRA staff, unable to corroborate Neaton's claim, therefore provided Neaton with a copy of the addendum prior to questioning Neaton at the interview. The addendum informed Neaton, among other things, that he was permitted to have legal representation at the on-the-record interview and that he could request an adjournment to allow him an opportunity to obtain legal counsel.

We find no basis upon which to conclude that Neaton was denied a fair proceeding due to staff's alleged failure to include the addendum with the mailing of the Rule 8210 notice. First, while the FINRA procedural rules permit the participation of counsel in FINRA disciplinary

proceedings, "they do not afford a right to representation." *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *41 (NASD NAC July 26, 2007). More importantly, we find that Neaton has not established that staff's purported oversight resulted in any prejudice to him. After providing a copy of the addendum at the on-the-record interview, FINRA staff asked Neaton if he had any questions. Neaton indicated that he did not. At no time during the on-the-record interview did Neaton object to proceeding without legal representation.

Neaton also claims that FINRA staff maneuvered to prevent him from settling this matter by letter of Acceptance, Waiver, and Consent ("AWC") prior to the filing of a complaint initiating disciplinary proceedings. Neaton claims that: 1) FINRA staff indicated that they would provide a proposed AWC for Neaton to review; 2) he never received the proposed AWC; and 3) he would have settled this matter if an offer had been extended.

We find that Neaton's arguments regarding the lack of an opportunity to settle this matter lack merit. Under NASD Rule 9216, the discretion to initiate settlement discussions prior to the commencement of a disciplinary proceeding lies with FINRA staff. The FINRA procedural rules unmistakably do not afford a respondent or potential respondent the right to settle disciplinary matters by AWC or otherwise.[24] *Cf. Dep't of Enforcement v. U.S. Rica Fin., Inc.*, Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *31 (NASD NAC Sept. 9, 2003) ("NASD is not required to accept an Offer of Settlement."). Moreover, settlement negotiations and materials generally are not relevant to the issues litigated in FINRA disciplinary proceedings. *See Dep't of Enforcement v. Webster*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *31 (FINRA NAC Mar. 7, 2008).

IV. Sanctions

The Hearing Panel fined Neaton $5,000 and suspended him in all capacities for one year. We find these sanctions insufficient to remediate Neaton's misconduct and to deter similar wrongdoing in the future. We therefore bar him from associating with any FINRA member in any capacity.

In deciding upon the appropriate sanctions to impose for Neaton's misconduct, we have considered the FINRA Sanction Guidelines ("Guidelines").[25] The Guidelines for misconduct involving the Form U4 recommend a fine of between $2,500 and $50,000 and a suspension of five to 30 business days.[26] In egregious cases, such as those involving repeated failures to file,

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[24] After a complaint is filed, NASD Rule 9270 allows a respondent to propose in writing an offer of settlement at any time. Indeed, the notice of complaint filed in this matter alerted Neaton to this right under NASD Rule 9270. Neaton never availed himself of the opportunity to make an offer of settlement at any time after these proceedings commenced.

[25] *FINRA Sanction Guidelines* (2010), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

[26] *Id.* at 73.

untimely filings, or false, inaccurate, or misleading filings, the Guidelines recommend considering a longer suspension of up to two years or a bar.[27] In evaluating the appropriate sanctions to impose, the Guidelines provide three "principal" considerations specific to Form U4 violations, only one of which – the nature and significance of the information at issue – is relevant here.[28] These considerations are in addition to the principal considerations contained within the Guidelines that apply in every disciplinary case.[29]

First, we have considered the nature of the actions of the Attorney Discipline Board suspending and revoking Neaton's law license. These actions were significant and concerned misconduct of a highly serious and unsavory nature. *See Alton*, 52 S.E.C. at 385, n.20 ("The question here, whether one's license to practice law has been revoked, is not an insignificant event . . . ."). Neaton's repeated ethical lapses, propensity for false statements and omissions, and flagrant misuse of funds as an attorney call into question his fitness for employment within the securities industry and his worthiness as a receptacle for customer trust. His failure to disclose this information, fully and accurately, serves to aggravate his misconduct.

Next, we have considered that Neaton's misconduct spanned a period of greater than 11 years.[30] Neaton's failures also involved numerous acts and a pattern of misconduct.[31] Neaton twice executed a false and misleading Form U4 and repeatedly failed to timely amend his Form U4 when confronted with the several intersections of fact and opportunity at which he should have done so. We find that Neaton thus systematically failed to uphold just and equitable principles of trade. His willful misconduct was not the result of a momentary lapse of judgment or negligence that might establish mitigation.[32]

Finally, Neaton's failure to acknowledge his improprieties is troubling.[33] Neaton has not accepted responsibility for his actions and continues to blame others – including Harrelson and

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27 *Id.* at 74.

28 *Id.* at 73. Neaton's failures to disclose information in this case do 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 a firm; and whether the matter involved misconduct by a respondent member firm that resulted in harm to a registered person, another member firm, or any person or entity. *Id.*

29 *See id.* at 6-7.

30 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9).

31 *Id.* (Principal Considerations in Determining Sanctions, No. 8).

32 *Cf. id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 13, 16).

33 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2). Before the NAC, Neaton argues that he "cooperated fully" with FINRA staff's investigation and calls for a reduction of the Hearing Panel's sanctions. The Guidelines provide that an associated person's

[Footnote continued on next page]

Securian – for his choice to make false statements on the Form U4. The securities industry "presents a great many opportunities for abuse and overreaching. and depends heavily upon the integrity of its participants." *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995). True and complete answers to Form U4 questions are therefore "essential to a meaningful system of self-regulation" and "vital to determining the fitness of an applicant for registration as a securities professional." *See Craig*, 2007 FINRA Discip. LEXIS 16, at *25. Neaton's failure to take responsibility for his conduct makes recurrence more likely. *See Craig*, 2008 SEC LEXIS 2844, at *22.

We find that Neaton's misconduct was egregious and that it warrants significant sanctions. The securities laws require firms and individuals to make truthful and accurate disclosures in countless situations. Neaton's repeated failures to disclose material information about his disciplinary history as an attorney proves overwhelmingly that he is unable to meet the high standards required of those employed in the securities industry. The fact that the Attorney Discipline Board, on three occasions, acted to suspend and revoke Neaton's Michigan law license for indiscretions that included, among other things, the misappropriation of client funds and forgery is further proof of his inability to meet these standards. *Id.* at 26 (citing *Brian G. Allen*, 50 S.E.C. 509, 510 (1991) ("There can hardly be more serious conduct in the securities business than forgery and theft.")). We are hard-pressed to imagine information that would be more important to potential customers and employers than the information that Neaton failed to disclose in this case. We therefore have determined to bar Neaton from associating with any FINRA member in any capacity.[34] A bar, under the facts present in this case, will best serve to

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"substantial assistance" to FINRA during an investigation is generally mitigating. *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 12). The record, however, does not show that Neaton provided FINRA with any more than the assistance that was required of him under FINRA rules. Neaton's cooperation does not mitigate the sanctions imposed. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 & n.22 (Nov. 8, 2006).

[34] On May 28, 2010, Neaton filed an additional motion for the Subcommittee's consideration, requesting the dismissal of Enforcement's complaint as "moot." Neaton argued that he is no longer registered through a FINRA member and has already amended his Form U4 to reflect the Attorney Discipline Board's actions suspending and revoking his Michigan law license. The Subcommittee has determined to deny Neaton's motion and we accept this ruling as our own. In his motion, Neaton alternatively requested that the NAC, in determining sanctions, give him credit for the time during which he has been out of the industry and, in his words, already "incurred an economic penalty." We reject this plea. Despite the termination of Neaton's registrations through Mutual, he remains subject to FINRA's jurisdiction. *See* NASD By-Laws Article V, Sec. 4(a). "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case." *Dep't of Enforcement v. Prout*, Complaint No, C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NASD NAC Dec. 18, 2000). Any economic hardships that Neaton has endured since leaving Mutual are not mitigating of the sanctions imposed herein. *See Ashton Noshir Gowadia*,

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protect the investing public and deter others from hiding obviously important negative information when seeking registration through a FINRA member. *See McCarthy v. SEC*, 406 F.3d 179, 188-89 (2d Cir. 2005) ("Our foremost consideration must be whether McCarthy's sanction protects the trading public from further harm. We also note that deterrence has sometimes been relied upon as an additional rationale for the imposition of sanctions.").

V. Conclusion

We affirm the Hearing Panel's findings that Neaton violated NASD Rule 2110 and IM-1000-1 by failing to disclose on his Form U4 his disciplinary history as an attorney. Because these failures were willful and involved material information, we also affirm the Hearing Panel's conclusion that Neaton is subject to a statutory disqualification. For his misconduct, we bar Neaton from associating in any capacity with any FINRA member. We also affirm the order that Neaton pay hearing costs of $1,861.30 and order that he pay appeal costs of $1,342.95.[35]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and
Corporate Secretary

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53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanction imposed upon [respondent] by the NASD excessive or oppressive"). To the extent that Neaton claims that he is presently unable to pay a monetary sanction, he has not carried his burden of proof. *See Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *33, n.45 (Jan. 14, 2005) ("Lu, who had the burden of demonstrating [an] inability to pay, has offered no proof. . . ."), *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006).

35 We also have considered and reject without discussion all other arguments advanced by the parties.