

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81779 / September 29, 2017

Admin. Proc. File No. 3-17925

In the Matter of the Application of

DAVID ADAM ELGART

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY
PROCEEDINGS

Registered representative of FINRA member firm appeals from FINRA disciplinary action finding that he willfully failed to update Form U4 and misrepresented information. *Held*, FINRA's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Alan M. Wolper and Heidi E. VonderHeide of Ulmer & Berne LLP for David Adam Elgart.

Alan Lawhead, Jennifer Brooks, and Michael Garawski for FINRA.

Appeal filed: April 11, 2017
Last brief received: July 28, 2017

David Adam Elgart seeks review of FINRA disciplinary action finding that he willfully failed to update his Form U4 in a timely manner to reflect five unpaid tax liens, and provided a false statement in bad faith to FINRA in responding to a questionnaire regarding the liens. FINRA suspended Elgart for six months and fined him \$15,000 for the Form U4 violation, and suspended him an additional thirty business days and fined him \$5,000 for the false statement. We affirm FINRA's findings of violations and the sanctions imposed.

I. Background

Elgart entered the securities industry in 1971. Since 1998, he has been president and chief compliance officer of Sequoia Investments, Inc., a small broker-dealer that primarily trades in municipal securities. Elgart acquired a majority interest in the firm in 2001.

Among Elgart's responsibilities at Sequoia was ensuring that the firm's filings, including Form U4 filings, were kept current and amended as necessary. Elgart generally delegated these responsibilities to Sequoia's financial and operations principal ("FINOP") but would direct the FINOP whenever he became aware that changes were necessary, including to Elgart's own Form U4. Form U4, the Uniform Application for Securities Industry Registration or Transfer, is used to register a broker-dealer's associated persons with FINRA and other appropriate entities.

Between 2003 and 2010, Elgart became the subject of at least six tax liens:

- June 10, 2003: federal tax lien for \$150,843.50;
- December 12, 2005: State of Georgia tax lien for \$6,962.92;
- January 11, 2007: federal tax lien for \$19,175.80;
- November 3, 2008: federal tax lien for \$130,137.74;
- April 6, 2009: State of Georgia tax lien for \$27,236.57; and
- June 2, 2010: federal tax lien for \$73,575.25.

Elgart received notice of each lien at or about the time it was issued. As of April 2016, these liens remained unsatisfied and had not been released—except for the January 2007 lien, which was released less than a month after it was recorded and is not the basis of any charges against Elgart. A seventh lien, brought by DeKalb County, is also not the basis of any charges.

A. Elgart did not disclose the liens to FINRA until December 2013.

Elgart did not report that he was subject to any unsatisfied judgments or liens on the Form U4 that he filed to become associated with Sequoia in 1998. On Form U4, question 14M asks: "Do you have any unsatisfied judgments or liens against you?" Between November 2003 and October 2013, Elgart's Form U4 was amended thirteen times but the response to question 14M remained unchanged. Each amended form bears Elgart's electronic signature, indicating his "acknowledgement and consent" to the form's contents. Elgart testified that he either entered the signature himself or authorized his FINOP to enter it.

Elgart eventually decided to retain a tax attorney to help address his tax liens and met with the attorney in early January 2013. The attorney advised Elgart of the number and amount of liens outstanding, but Elgart still did not update his Form U4 to reflect the liens.

FINRA staff conducted an examination of Sequoia in 2013, and while doing so they generated LexisNexis reports for Sequoia's registered representatives; Elgart's report listed the seven liens mentioned above. As part of the examination, FINRA staff asked Elgart to fill out a Personal Activity Questionnaire ("PAQ"). Elgart completed and signed the PAQ on November 25, 2013. Question 21 on the PAQ read: "Do you have any unsatisfied judgments or liens against you? If yes, provide detail as to each." Elgart answered: "No."

FINRA staff contacted Elgart to address the apparent discrepancies between Elgart's Form U4 and PAQ and the LexisNexis report. During a December 19, 2013 phone call, FINRA staff informed Elgart of the liens listed on the report and requested that he determine whether they should be reported on his Form U4. FINRA staff also requested that Elgart, should he decide that he needed to report the liens, update his Form U4 and PAQ and provide copies to FINRA staff. FINRA staff requested that if Elgart determined that no liens needed to be disclosed, he provide a written statement explaining how he arrived at that determination. That same day, FINRA staff emailed Elgart summarizing the telephone conversation and providing a link to "guidance regarding what and when items should be disclosed on the Form U4."

On December 23, 2013, Elgart filed a supplementary amendment to his Form U4 disclosing the seven liens. In response to the fields that requested the "date individual learned of the . . . lien," Elgart wrote for each lien "January 1, 2013." In a related field that asked whether the date was "exact," Elgart wrote for six of the liens that it was exact; he added that an "attorney advised me" of those six liens. For the June 2010 lien, Elgart did not identify January 1, 2013, as the exact date but instead wrote that an "attorney advised me of liens – I was not aware of." Elgart never sent an updated PAQ despite FINRA emailing him again on January 27, 2014, attaching a blank PAQ, and requesting that he complete and update the lien section and return it.

B. FINRA found that Elgart's failure to disclose the liens violated FINRA rules.

On November 10, 2015, FINRA's Department of Enforcement filed a Complaint against Elgart with two counts. First, Enforcement alleged that Elgart failed to timely amend his Form U4 to disclose the five tax liens, that his failure to amend the Form U4 was willful, and that the information omitted was material. Second, Enforcement alleged that Elgart's representation on the PAQ that he had no liens constituted providing a false statement to FINRA in bad faith.

A Hearing Panel found that Elgart failed to timely amend his Form U4 to disclose five tax liens and filed thirteen misleading Form U4 amendments, in violation of Article V, Section 2(c) of the NASD and FINRA By-Laws, NASD IM-1000-1 and FINRA Rule 1122, and NASD Rule 2110 and FINRA Rule 2010. The Hearing Panel found that this conduct was willful and the information Elgart failed to disclose was material; as a result, Elgart was subject to a statutory disqualification. The Hearing Panel also found that Elgart had provided a false and dishonest answer on his PAQ, in violation of FINRA Rule 2010. For the Form U4 violations, the

Hearing Panel suspended Elgart from associating with any member firm in any capacity for six months and fined him \$15,000. For the false statement, the Hearing Panel suspended Elgart for an additional thirty business days, to be served consecutively to the six-month suspension, and fined him an additional \$5,000. The Hearing Panel also assessed \$1,745.42 in costs.

Elgart appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council ("NAC"). The NAC affirmed the Hearing Panel's findings, sanctions, and costs, except that it vacated the Hearing Panel's finding that Elgart had filed misleading amendments to Form U4 because the Complaint did not allege that misconduct. This appeal followed.

II. Analysis

In reviewing FINRA disciplinary action, we must determine whether the respondent engaged in the conduct FINRA found, whether that conduct violates the rules specified in FINRA's determination, and whether those rules are, and were applied in a manner, consistent with the purposes of the Securities Exchange Act of 1934.¹ We base our findings on an independent review of the record and apply a preponderance of the evidence standard.²

A. The Form U4 violation

1. Elgart failed to update his Form U4 in a timely manner.

Elgart does not dispute, and the record shows, that he failed to timely update his Form U4 to disclose five unsatisfied tax liens. Elgart's conduct violated Article V, Section 2(c) of the NASD and FINRA By-Laws, which require that "[e]very application for registration filed with [FINRA] . . . be kept current at all times," and direct that amendments be filed "not later than 30 days after learning of the facts or circumstances giving rise to the amendment."³ Elgart did not keep his registration current as he neglected to file amendments disclosing his liens within the requisite thirty days. Elgart also violated NASD IM-1000-1 and FINRA Rule 1122, which prohibit associated persons from filing or failing to correct membership or registration information that is "incomplete or inaccurate so as to be misleading, or which could in any way

¹ 15 U.S.C. § 78s(e)(1).

² See *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

³ As a result of the consolidation of the regulatory functions of NASD and NYSE Regulation into FINRA and the development of a new FINRA rulebook, see Exchange Act Release No. 56146, 2007 WL 5185331 (July 26, 2007), Elgart was subject to both FINRA and NASD Rules during the period at issue, depending on which was in effect at the time of the relevant conduct. See, e.g., *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *1 nn.3-4 (June 14, 2013) (applying both NASD and FINRA rules, depending on whether conduct occurred before or after consolidation). All NASD and FINRA rules discussed jointly are equivalent for purposes of this case, and quoted language appears in both.

tend to mislead.”⁴ Elgart’s failure to disclose his unsatisfied tax liens in response to a question asking if there were “any unsatisfied judgments or liens against you” was inaccurate and misleading. Finally, conduct violating NASD IM-1000-1 and FINRA Rule 1122 also violates NASD Rule 2110 and FINRA Rule 2010, which require associated persons to “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of their business.⁵

We find that these rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Exchange Act Section 15(A)(6) requires registered securities associations like FINRA to design rules to “promote just and equitable principles of trade” and “protect investors and the public interest.”⁶ “Form U4 is used to determine and monitor the fitness of securities professionals,” and so by promulgating and applying rules requiring that the form be filled out accurately and completely and kept up to date, FINRA was acting to protect investors and the public interest consistent with the purposes of the Exchange Act.⁷ FINRA’s application of NASD Rule 2110 and FINRA Rule 2010 also implemented the Exchange Act’s purpose that the rules of an association such as FINRA be designed, in part, to promote just and equitable principles of trade because Elgart’s conduct frustrated FINRA’s ability to monitor the fitness of securities professionals and was thus contrary to those principles.⁸

2. Elgart is subject to statutory disqualification because he acted willfully and the information that he omitted from the Form U4 was material.

Exchange Act Section 3(a)(39)(F) provides that a person is subject to a statutory disqualification from association with a member of an SRO if the person has willfully omitted to state in an application for membership in the SRO or association with a member any material

⁴ See NASD Rule 0115(a) and FINRA Rule 0140(a) (stating that associated persons “have the same duties and obligations as a member under the Rules”).

⁵ See, e.g., *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *3-4 (Mar. 15, 2016) (finding failure to disclose information on Form U4 constituted violation of NASD IM-1000-1 and Rule 2110 and FINRA Rules 1122 and 2010), *aff’d*, 672 F. App’x 865 (10th Cir. 2016); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *6 (Apr. 18, 2013) (same).

⁶ 15 U.S.C. § 78o-3(b)(6).

⁷ See *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *10 (Aug. 12, 2016) (finding NASD and FINRA By-Laws Article V, Section 2(c) to be consistent with purposes of Exchange Act when applied to untimely Form U4 amendments).

⁸ See 15 U.S.C. § 78o-3(b)(6); see also *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *6 n.20 (Feb. 13, 2015) (holding NASD Rule 2110 consistent with purposes of Exchange Act).

fact required to be stated therein.⁹ Elgart acted willfully in failing to timely update his Form U4, and his omissions were material. Accordingly, he is subject to a statutory disqualification.¹⁰

a. Elgart acted willfully.

To act willfully for purposes of the federal securities laws means that a respondent “intentionally commit[ted] the act which constitutes the violation.”¹¹ Such a finding does not require that the respondent “also be aware that he is violating one of the Rules or Acts”; it simply requires the voluntary commission of the acts themselves.¹² However, an “inadvertent filing of an inaccurate form” would not support a finding of willfulness.¹³

Elgart acted willfully in failing to update his Form U4 to disclose the unsatisfied liens. He admitted learning of the tax liens around the time they were issued, but did not update his Form U4 to disclose them within the requisite thirty days. His duty to disclose each lien arose as each was issued, yet he repeatedly failed to satisfy this obligation. For ten years he allowed his Form U4 to reflect that the answer to question 14M was “no”—that he did not have any outstanding tax liens—despite having liens outstanding. Moreover, Elgart had the opportunity to review and verify the contents of his Form U4 each time he amended it over this period, but again failed to disclose the liens. These voluntary actions constitute willfulness.

Elgart’s principal argument on appeal is that he misunderstood question 14M, and that this mistake means that his conduct could not have been willful because it was inadvertent. He contends that he understood the question to be referring only to liens that “could have a financial impact on Sequoia, or its customers,” not personal tax liens. This argument fails.

First, the Hearing Panel found that Elgart’s testimony regarding his understanding of question 14M was not credible. We afford great weight to the Hearing Panel’s credibility assessments unless there is substantial evidence to the contrary.¹⁴ There is no such evidence here. Elgart relies heavily on the fact that his testimony was “undisputed” in this regard, but the

⁹ 15 U.S.C. § 78c(a)(39)(F).

¹⁰ *McCune*, 2016 WL 1039460, at *4-6 (finding respondent statutorily disqualified for willfully failing to amend Form U4); *Amundsen*, 2013 WL 1683914, at *8-9 (finding respondent statutorily disqualified for willfully providing false and misleading material information on Form U4).

¹¹ *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

¹² *Id.*; see also *McCune*, 2016 WL 1039460, at *5-6 (analyzing willful behavior in FINRA appeal to determine if respondent “voluntarily committed the acts that constituted the violation”).

¹³ See *Mathis v. SEC*, 671 F.3d 210, 218 (2d Cir. 2012).

¹⁴ See *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *5 (Aug. 22, 2008) (citations removed).

Hearing Panel based its conclusion that Elgart's "claimed ignorance of Question 14M [wa]s not credible" on both his demeanor at the hearing and the evidence presented, including the plain wording of question 14M. We see no basis to disturb the Hearing Panel's findings.¹⁵

Second, we find that the evidence is fully consistent with the Hearing Panel's credibility determination and the NAC's finding that Elgart acted willfully. Elgart's claim that he misunderstood question 14M is inconsistent with testimony indicating that Elgart did not read Form U4 until August 2013 at the earliest. Elgart testified that from the time he entered the securities business until September 2013 he delegated the filing of Form U4 to his FINOP. According to Elgart, during that time he "had never quite frankly looked at the form that I can recall because we were paying people to do that." He later testified that until he looked at the form in August or September 2013 he "wasn't aware that that question [14M] was on there." But if Elgart never read Form U4 or question 14M during the bulk of the time that his liens were outstanding and undisclosed, his failure to timely update his form could not be based on his professed mistaken understanding of the question.

Elgart implies that his unawareness of Form U4's contents would provide an alternate basis for excluding a willfulness finding. But we have repeatedly held that "[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."¹⁶ Elgart was expected to know his disclosure obligations and abide by them and voluntarily chose not to do so.¹⁷

Nor can Elgart escape a willfulness finding by professing reliance on his FINOP. Delegation of responsibility to an employee does not relieve a respondent of "his obligation to

¹⁵ Cf. *Amundsen*, 2013 WL 1683914, at *7 (finding respondent's testimony about his interpretation of certain Form U4 questions lacked credibility in part because of their "plain language"); *Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at *7 (Dec. 7, 2009) (upholding willfulness finding and rejecting as not believable respondent's argument that he had mistaken understanding about nature of his tax liens), *aff'd*, 671 F.3d 210 (2d Cir. 2012).

¹⁶ *Mathis*, 2009 WL 4611423, at *7; see also *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *5 (Dec. 22, 2008) (same).

¹⁷ Cf. *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *12 (Oct. 20, 2011) (holding that respondent "had the obligation to review his responses before signing the [F]orm [U4], particularly when he certified that he had read and understood the items and instructions on the form and that his answers were true and complete to the best of his knowledge") (internal quotation marks and brackets removed); *Douglas J. Toth*, Exchange Act Release No. 58074, 2008 WL 2597566, at *7 (July 1, 2008) (holding that despite respondent's argument that he never saw or signed Form U4 he still had "primary responsibility for maintaining [its] accuracy").

make certain that appropriate filings were made.”¹⁸ It was Elgart’s responsibility to supply accurate information on the Form U4, and he had an obligation to review it before allowing his signature to be affixed to it acknowledging and consenting to its filing. Indeed, Elgart admitted that he never told his FINOP about the liens and had no reason to believe his FINOP otherwise knew about them. Elgart intentionally engaged in the acts that led to his false filing.¹⁹

Third, Elgart relies heavily on *Department of Enforcement v. Harris*,²⁰ a decision in which an NASD hearing panel was not persuaded that the respondent’s failure to disclose felony charges and a misdemeanor conviction on his Form U4 was willful because he did not understand he had been charged with a felony, misread the question, and did not read the question completely. Hearing panel decisions are not binding on the NAC or on the Commission.²¹ In any event, the case is distinguishable because that hearing panel credited the respondent’s testimony.²² As discussed above, the Hearing Panel did not credit Elgart’s

¹⁸ See *Haight & Co.*, Exchange Act Release No. 9082, 1971 WL 120486, at *18 (Feb. 19, 1971) (finding respondent willfully failed to amend application for broker-dealer registration despite arguments that he had delegated the task); see also *Toth*, 2008 WL 2597566, at *7 & n.23 (rejecting respondent’s argument that he could not be found responsible for inaccuracies in a Form U4 filed on his behalf); *Irving Grubman*, Exchange Act Release No. 6546, 1961 WL 61059, at *2 (May 5, 1961) (“An applicant for registration cannot shift to another his responsibilities for the truth and accuracy of the application.”).

¹⁹ Cf. *Amundsen*, 2013 WL 1683914, at *7 (finding respondent “bore primary responsibility for correctly answering the questions on the Forms U4” because he was “the individual directly impacted” by the matters involved and so “in the best position to provide accurate information about those subjects”); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *10 (Nov. 9, 2012) (holding respondent “was in the best position to provide accurate information about the . . . liens covered by the questions in the Forms U4, demonstrating why it was appropriate that he bore primary responsibility for maintaining their accuracy”) (internal quotation marks, brackets, and citations removed).

²⁰ Disciplinary Proceeding No. C07010084, 2002 WL 31231003 (NASD May 31, 2002).

²¹ See *Sands Bros. Asset Mgmt., LLC*, Investment Advisors Act Release No. 4083, 2015 WL 2229281, at *4 (May 13, 2015) (“[A]n order issued by a law judge is not binding on the Commission or on other law judges.”); *Howard Brett Berger*, Exchange Act Release No. 55706, 2007 WL 1306843, at *8 n.36 (May 4, 2007) (finding NYSE hearing panels decisions “have no precedential effect in a Commission review proceeding of NYSE disciplinary action”).

²² *Harris*, 2002 WL 31231003, at *2, 4.

testimony in this case. Elgart’s alleged misunderstanding of question 14M on Form U4 does not preclude a willfulness finding.²³

b. Elgart omitted material information.

Elgart’s omissions on his Form U4 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.”²⁴ Both the Commission and federal courts of appeals have found the failure to disclose tax liens on Forms U4 to be a material omission after considering the number and dollar amount of the liens and the period of time during which they were not disclosed.²⁵ Elgart’s five outstanding liens totaled hundreds of thousands of dollars and remained undisclosed for over a decade. There is a substantial likelihood that reasonable customers would have viewed the liens as significant to their assessment of Elgart’s ability to provide them with appropriate financial advice, and that a reasonable employer or regulator would have viewed the liens as significant to their assessment of Elgart’s ability to manage his financial obligations.²⁶

3. Elgart received fair process from FINRA.

Elgart argues that FINRA has acted inconsistently in prosecuting Form U4 disclosure cases and that, as a result, it has violated its statutory mandate to provide fair procedures in disciplining its members and associated persons.²⁷ He cites a number of settlements in which he believes conduct similar to his was not found to be willful. Elgart argues that the standard for willfulness is so vague that it provides no guidance and is not fair.

²³ See, e.g., *Neaton*, 2011 WL 5001956, at *9 (finding respondent willfully failed to timely amend Form U4 despite argument that “he found questions to be ambiguous” because his interpretation was contrary to question’s “plain language”); *Mathis*, 2009 WL 4611423, at *7 (rejecting argument that respondent’s finding question on Form U4 “unclear and ambiguous” prevented willfulness finding); *Craig*, 2008 WL 5328784, at *5 (rejecting argument that fact that respondent “did not understand” questions on Form U4 prevented willfulness finding).

²⁴ *McCune*, 2016 WL 1039460, at *6.

²⁵ See, e.g., *Mathis*, 671 F.3d at 219-20; *McCune*, 2016 WL 1039460, at *6; *Tucker*, 2012 WL 5462896, at *11.

²⁶ Cf. *Tucker*, 2012 WL 5462896, at *11 (“The . . . liens were significant because they cast doubt on Tucker’s ability to manage his personal financial affairs and provide investors with appropriate financial advice. The materiality of such information is particularly evident when, as in this case, their disclosure should have been triggered by specific questions on the Form U4.”).

²⁷ See 15 U.S.C. § 78o-3(b)(8) (instructing FINRA to promulgate rules that “provide a fair procedure for the disciplining of members and persons associated with members”).

We reject Elgart's claim because "FINRA has broad prosecutorial discretion in deciding against whom charges should be brought and what those charges should be."²⁸ For Elgart's vagueness claim to succeed, he must show that "he did not have fair notice of the conduct or activities proscribed or covered by the requirement."²⁹ Here, the many litigated cases in which willfulness has been defined and in which an associated person was found to have willfully misrepresented information on Form U4 fairly put Elgart on notice "that inaccuracies of the sort alleged here would reasonably have been expected . . . to violate the Rules."³⁰

B. The PAQ violation.

Elgart violated FINRA Rule 2010 when he falsely stated on a PAQ that he was not subject to any unsatisfied liens. Rule 2010 provides that a FINRA member, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The same standard applies to persons associated with members.³¹

²⁸ See *Wedbush*, 2016 WL 4258143, at *16; see also *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *16 n.44 (Jan. 30, 2009) (holding that "NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion"), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

²⁹ See *Christopher J. Benz*, Exchange Act Release No. 38440, 1997 WL 137027, at *3 (Mar. 26, 1997).

³⁰ See *Dillon Sec., Inc.*, Exchange Act Release No. 31573, 1992 WL 383783, at *5 (Dec. 8, 1992) (internal quotation marks and citations removed); cf. *V.H. Costello Sec., Inc.*, Exchange Act Release No. 29560, 1991 WL 286395, at *5 (Aug. 15, 1991) (noting in context of vagueness challenge that NASD's "case-by-case applications of broad statutory language" is a proper discharge of its congressional mandate "both to protect the public and to give sufficient guidance to member firms and NASD officials").

³¹ See FINRA Rule 0140(a).

We have frequently held that providing false information in response to a FINRA request during an investigation or examination is inconsistent with just and equitable principles of trade.³² And Elgart concedes that his PAQ answer about liens was incorrect.

Although Elgart argues that he intended to answer truthfully but misunderstood the question, the Hearing Panel found this claim not to be credible. We find no substantial evidence contradicting that finding.³³ On the contrary, Elgart had already met with his tax attorney and been advised of the outstanding liens when he filled out the PAQ. The PAQ asked unequivocally “Do you have any unsatisfied liens or judgments against you?” Elgart’s failure to answer by stating that he had liens against him was unethical and done in bad faith.³⁴

Elgart’s argument that his statement could not have misled FINRA because “FINRA already knew about the tax liens” when they sent the PAQ also fails. The issue here is not whether Elgart’s answer misled FINRA, but rather his dishonesty in answering falsely.

We also find that FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act. In particular, Rule 2010 requires that FINRA’s members “observe high standards of commercial honor and just and equitable principles of trade” and so implements Exchange Act Section 15A(b)(6).³⁵ Because Elgart’s provision of false information to FINRA is inconsistent with just and equitable principles of trade, FINRA acted within the purposes of the Exchange Act in finding him liable.

³² See, e.g., *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *13 (May 27, 2015) (finding respondent violated predecessor to Rule 2010 in providing backdated records to NASD during an examination); *Ortiz*, 2008 WL 3891311, at *7 (finding respondent violated predecessor to Rule 2010 in providing false information during NASD investigation); *Brian L. Gibbons*, Exchange Act Release No. 37170, 1996 WL 254664, at *3 (May 8, 1996) (finding respondent’s inaccurate and misleading responses to NASD staff constituted conduct “inconsistent with just and equitable principles of trade”); see also *Michael A. Rooms*, Exchange Act Release No. 51467, 2005 WL 742738, at *4 (Apr. 1, 2005) (holding that predecessor to Rule 2010 obligates members “to cooperate with [FINRA] in its effort to perform its regulatory functions”) (quoting *Stratton Oakmont, Inc.*, Exchange Act Release No. 38390, 1997 WL 112329, at *4 (Mar. 12, 1997)), *aff’d*, 444 F.3d 1208 (10th Cir. 2006).

³³ See *supra* note 14.

³⁴ Cf. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *7 (Jan. 9, 2015) (holding that disciplinary action under Rule 2010’s predecessor need be only either unethical or done in bad faith), *aff’d*, 641 F. App’x 27 (2d Cir. 2016).

³⁵ 15 U.S.C. § 78o-3(b)(6); see also *Lane*, 2015 WL 627346, at *6 n.20 (holding predecessor to Rule 2010 consistent with purposes of Exchange Act).

III. Sanctions

Exchange Act Section 19(e)(2) mandates that we sustain the sanctions FINRA imposed unless we find that they are “excessive or oppressive” or impose an unnecessary or inappropriate burden on competition.³⁶ In making this assessment, we must consider any aggravating or mitigating factors, and whether the sanctions are remedial and not punitive.³⁷ While we are not bound by FINRA’s Sanction Guidelines, they serve as a benchmark in conducting our review.³⁸

We find the NAC’s \$15,000 fine and six-month suspension for Elgart’s Form U4 violation to be neither excessive nor oppressive, and appropriately remedial to ensure timely updates to Elgart’s Form U4 in the future. For late filings of Forms U4, failure to file forms or amendments, and false, misleading, or inaccurate filings, the Sanction Guidelines recommend a fine of \$2,500 to \$37,000, and “[w]here aggravating factors are present,” the Guidelines suggest suspending the responsible individual for 10 business days to six months.³⁹ Where “aggravating factors predominate” the Guidelines recommend a suspension of up to two years, or, “where the respondent intended to conceal information or mislead, a bar.”⁴⁰ Elgart has not argued for any mitigating factors on appeal beyond noting his lack of a previous disciplinary record. However, the absence of a disciplinary history is not mitigating.⁴¹

There are several aggravating factors present here. These include the number and dollar value of the tax liens Elgart failed to disclose, the prolonged nature of this failure, and the nature and significance of the information at issue.⁴² Elgart failed to disclose numerous liens totaling hundreds of thousands of dollars, he failed to do so (or satisfy the liens) for over a decade, and the liens were material to both customers’ and regulators’ ability to assess Elgart’s fitness to act as an associated person of a FINRA member firm.

The NAC identified additional aggravating factors, but we do not rely on them because we are not convinced they have been established by the record. Specifically, the NAC found that Elgart’s failure to amend his Form U4 was intentional.⁴³ While we agree that the record supports the finding that Elgart’s conduct was willful—that he voluntarily committed the acts constituting

³⁶ 15 U.S.C. § 78s(e)(2). Our review of the record does not suggest, and Elgart does not argue, that the sanctions imposed an unnecessary or inappropriate burden on competition.

³⁷ See *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007).

³⁸ See *Plunkett*, 2013 WL 2898033, at *11.

³⁹ Sanction Guidelines at 71 (April 2017 ed.).

⁴⁰ *Id.*

⁴¹ See *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006).

⁴² See Guidelines at 71.

⁴³ See *id.* at 8.

the violation—whether Elgart committed the violation intentionally is less clear. Similarly less clear is whether, as the NAC found, Elgart’s false response on the PAQ was an attempt to conceal his Form U4 misconduct.⁴⁴ In any event, even setting aside these aggravating factors, we find that Elgart’s conduct and the remaining aggravating factors FINRA identified establish that a six-month suspension and \$15,000 fine is neither excessive nor oppressive and is necessary to protect the investing public.

We also find the NAC’s fine and suspension for Elgart’s false statement to FINRA to be neither excessive nor oppressive, and appropriately remedial to impress upon him the need to take his responsibilities in this regard more seriously in the future. The Sanction Guidelines do not specifically address providing false statements to FINRA, and so for this charge the NAC considered the nature of Elgart’s misconduct and the Guidelines’ Principal Considerations in Determining Sanctions that apply to all misconduct.⁴⁵ We do the same and agree that Elgart’s provision of false information to FINRA in response to a request for information is serious,⁴⁶ that a number of aggravating factors are present, and that there are no mitigating factors. The aggravating factors include that Elgart’s misrepresentation on the PAQ was intentional since he admittedly read and filled out that form, that the false statement on the PAQ functioned to conceal Elgart’s failure to update his Form U4, and that Elgart never updated his response to the PAQ despite FINRA’s repeated requests that he do so. These aggravating factors convince us that a suspension of thirty business days and a fine of \$5,000 are neither excessive nor oppressive.⁴⁷

An appropriate order will issue.⁴⁸

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

⁴⁴ See *id.* at 7.

⁴⁵ See *id.* at 7-8.

⁴⁶ See *Ortiz*, 2008 WL 3891311, at *9 (“[S]upplying false information to [FINRA] during an investigation . . . misleads [FINRA] and can conceal wrongdoing and thereby subverts [FINRA’s] ability to perform its regulatory functions and protect the public interest.”) (internal quotation marks, brackets, and citation removed).

⁴⁷ We also sustain FINRA’s imposition of costs, which Elgart has not challenged.

⁴⁸ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 81779 / September 29, 2017

Admin. Proc. File No. 3-17925

In the Matter of the Application of

DAVID ADAM ELGART

For Review of Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against David Adam Elgart be,
and it hereby is, sustained.

By the Commission.

Brent J. Fields
Secretary