

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN A. ELAM, JR.
(CRD No. 1334930),

Respondent.

Disciplinary Proceeding
No. 2005002600501

Hearing Officer – SNB

DEFAULT DECISION

September 8, 2006

For Respondent's failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity. In light of this bar, no further sanctions are imposed for Respondent's willful failure to amend his Form U-4, in violation of Rule 2110 and IM-1000-1.

Appearances

Thomas M. Huber, Esq., Regional Counsel, NASD, New York, NY, and Rory C. Flynn, Esq., Washington, DC, of Counsel, for the Department of Enforcement.

No appearance by Respondent.

DECISION

I. Background

On May 15, 2006, the Department of Enforcement ("Enforcement") filed a two-cause Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent John A. Elam, Jr. ("Respondent") violated NASD Conduct Rule 2110 and IM-1000-1 by willfully failing to amend his Uniform Application for Securities Registration or Transfer ("Form U-4") to disclose felony charges filed against him. The Complaint also alleges that Respondent violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to

respond to NASD Staff requests for information. Respondent did not file an Answer to the Complaint. On July 20, 2006, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Thomas M. Huber, Esq. and three exhibits. Respondent did not reply to the Motion. For the reasons set forth below, the Motion is granted.¹

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on May 10, 2006, by certified mail to two last known residential addresses listed in the Central Registration Depository (the "CRD addresses"), as well as a third address obtained through the United States Postal Services ("Forwarding address").² In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to Respondent on June 12, 2006. Respondent did not file an Answer to the Complaint.

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rule 9215(f) the Hearing Officer deems the allegations in the Complaint admitted.

III. Jurisdiction

Respondent first became associated with PFS Investments Inc. ("PFS"), an NASD member firm, in November 1987. Respondent was associated with PFS until his termination in September 2005, for the conduct related to his Form U-4 violation charged in the Complaint. He has not been associated or registered with an NASD member since that time.

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement with its motion.

² The forwarding address was on the same street as the first CRD address with a different house number.

Although Respondent is not currently associated with a member firm, NASD has jurisdiction to bring this proceeding, pursuant to Art. V, §4 of NASD's By-Laws, because (1) the Complaint charges Respondent with misconduct while he was an associated person and with failing to comply with requests for information made during the two-year period following termination of his last association, and (2) the Complaint was filed within that two-year period.

IV. Violations

A. Failure to Amend Form U-4

The Complaint alleges that Respondent willfully failed to amend his Form U-4 to disclose his indictment for felony violations under Title 18: 2-250 and 18: 2-308.4 of the Virginia Code. The May 9, 2005, indictments occurred while Respondent was registered with an NASD member, and were material facts requiring disclosure on his Form U-4.

Article V, §2 of NASD's By-Laws requires that persons who apply for registration with NASD must provide "such . . . reasonable information with respect to the applicant as the NASD may require." Specifically, applicants must complete a Form U-4, disclosing, among other things, whether they have been charged with, pled guilty to or been convicted of any felony. Article V, §2 of NASD's By-Laws further requires that "[e]very application for registration filed with the NASD shall be kept current at all times by supplementary amendments [which] . . . shall be filed with the NASD not later than 30 days after learning of the facts or circumstances giving rise to the amendment." Thus, Respondent was required to amend his Form U-4 to disclose the felony indictments by no later than June 8, 2005. He did not do so.

IM-1000-1 provides: "The filing with [NASD] of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading . . . 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 appropriate disciplinary action.”

The accuracy of disclosures on a Form U-4 “is critical to the effectiveness” of a self-regulatory organization’s ability to screen and monitor the professionals within the securities industry. Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); see also Daniel Richard Howard, Exch. Act Rel. No. 46269, 2002 SEC LEXIS 1909, at *9-10 (July 26, 2002) (“The candor and forthrightness of applicants is critical to the effectiveness of this screening process.”).

Dep’t of Enforcement v. Lu, Complaint No. C9A020052, 2004 NASD Discip. LEXIS 8, at *32 (NAC May 13, 2004), aff’d, Exch. Act. Rel. No. 51047, 2005 SEC LEXIS 117 (Jan. 14, 2005), petition for review filed, No. 05-8006 (D.C. Cir. Mar. 14, 2005).

Therefore, the allegations of the Complaint, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent violated Rule 2110 and IM 1000-1 by failing to amend his Form U-4.

Enforcement further alleges that Respondent’s failure to amend his Form U-4 was willful. Willfulness is not required to establish a violation of Rule 2110, but Article III, Section 4(f) of NASD’s By-Laws provides that a person who has willfully made any false or misleading statement as to any material fact in any application to become registered with an NASD member, or who has omitted to disclose any material fact which is required to be disclosed in such an application, is subject to a “disqualification.” For this purpose, it is sufficient to establish willfulness if Respondent “knew or reasonably should have known under the particular facts and circumstances that his conduct was improper.” Christopher LaPorte, Exch. Act Rel. No. 39171, 1997 SEC LEXIS 2058, at *8 n.2 (Sept. 30, 1997). In this case, Respondent knew or reasonably should have known that he was required to update his Form U-4 to disclose his indictment for felony violations. Carter v. SEC, 726 F.2d 472, 473-74 (9th Cir. 1983) (registered representatives are presumed, as a matter of law, to be aware of their obligations under NASD rules).

Accordingly, the Hearing Officer finds that Respondent's failure to update the Form U-4 was willful.

B. Failure to Respond

The Complaint also alleges that on October 28, November 14, and November 30, 2005, NASD Staff sent Respondent requests for information and documents, concerning, among other things, the criminal charges referenced in Count 1. Staff sent these requests by first-class and certified mail to his two CRD addresses. Respondent did not respond. The staff again sent this request on March 9, 2006, this time by first-class and certified mail to the two CRD addresses and the Forwarding address. The Staff sent these requests to Respondent at his CRD address by first-class and certified mail, pursuant to NASD Procedural Rule 8210, and, therefore, Respondent is deemed to have received them. Respondent did not respond to any of the requests.

Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and documents related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power. See, e.g., Dep't of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); Joseph G. Chiulli, Exch. Act Rel. No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

Here, although Respondent received valid constructive notice of the Staff's requests, he failed to respond to them. Respondent thereby violated Rules 8210 and 2110. See, David I. Cassuto, Exch. Act Rel. No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

V. Sanctions

A bar is standard for failure to provide requested information. NASD Sanction Guidelines at 35 (2006 ed.). There is no evidence of any mitigating circumstances that would justify a lesser sanction. Therefore, Respondent is barred from associating with any NASD member in any capacity. In light of this bar, no further sanctions are imposed for Respondent's willful failure to amend his Form U-4.

VI. Conclusion

For Respondent's failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity. In light of the bar, no further sanctions are imposed for Respondent's willful failure to amend his Form U-4. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Dated: September 8, 2006

Copies to: John A. Elam, Jr. (*via certified and first-class mail*)
Thomas M. Huber, Esq. (*via electronic and first-class mail*)
Rory C. Flynn, Esq. (*via first class-mail*)
Mark P. Dauer, Esq. (*via first class-mail*)

EXHIBIT A

NASD OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

John A. Elam, Jr.
CRD No. 1334930

Respondent.

Disciplinary Proceeding
No. 2005002600501

Hearing Officer -

COMPLAINT

Date: May 10, 2006

Upon information and belief, Complainant alleges as follows:

1. Respondent John A. Elam, Jr. ("Elam") first became registered with NASD in November 1987. He was registered with PFS Investments Inc. ("PFS") as an Investment Company and Variable Contracts Products Representative from about November 20, 1987 to about September 19, 2005. He was registered with PFS as an Investment Company and Variable Contracts Products Principal from about December 12, 1988 to about September 19, 2005. He has not been registered with any NASD member since September 19, 2005. NASD retains jurisdiction over Elam for purposes of this Complaint pursuant to Article V, Section 4, of NASD's By-Laws in that: the misconduct alleged in Cause One occurred while Elam was associated with PFS; and, this Complaint was filed within, and the violations of Procedural Rule 8210 alleged in Cause Two occurred within, two years after PFS filed a Form U5 for Elam.

CAUSE ONE OF COMPLAINT
(Conduct Rule 2110 and IM-1000-1)

2. The allegations in Paragraph 1 above are re-alleged and incorporated herein by reference.
3. On about May 9, 2005, an Indictment was filed against Elam in the Circuit Court of Virginia Beach, Virginia, Criminal Division. The Indictment charged Elam with violations of Title 18: 2-250 and 18: 2-308.4 of the Virginia Code. Both violations charged in the Indictment constituted a felony.
4. The filing of the Indictment charging Elam with two felonies constituted a material fact that required disclosure on a Form U4 amendment. Under Article V, Section 2(c), of NASD's By-Laws, Elam was required to file a Form U4 amendment with NASD within 30 days to report the felony charges so as to keep his application for registration current.
5. Subsequent to the filing of the Indictment, Elam willfully failed to file a Form U4 amendment with NASD, or to cause one to be filed on his behalf, disclosing the felony charges filed against him.
6. Based on the foregoing, Elam violated NASD Conduct Rule 2110 and IM-1000-1.

CAUSE TWO OF COMPLAINT
(Procedural Rule 8210 and Conduct Rule 2110)

7. The allegations in Paragraph 1 above are re-alleged and incorporated herein by reference.
8. By a letter dated October 28, 2005, NASD requested, pursuant to Procedural Rule 8210, information in writing and documents from Elam concerning, among other things, criminal charges that had been filed against him. Elam's response was due by November 11, 2005. The letter was sent by first class and certified mail to two different residential addresses shown for Elam in Web CRD: [REDACTED]
[REDACTED] (hereafter [REDACTED] Sterling Road); and, [REDACTED]

█████ (hereafter █████ Mulligan Drive). The envelope sent by first class mail to █████ Sterling Road was not returned to the District Office. The District Office received a return receipt card for the envelope sent by certified mail to █████ Sterling Road signed by Richard S. Elam. The envelope sent by first class mail to █████ Mulligan Drive was returned by the Postal Service stamped to reflect that a forwarding order had expired. The envelope sent by certified mail to █████ Mulligan Drive was returned by the Postal Service with a label affixed showing that the item was "Unclaimed." Elam failed to provide NASD any information or documents by November 11 or thereafter.

9. By a letter dated November 14, 2005, NASD again requested, pursuant to Procedural Rule 8210, information in writing from Elam concerning, among other things, criminal charges that had been filed against him. His response was due by November 28, 2005. The letter warned Elam that if he failed to respond, he would be subject to disciplinary action by NASD and that the possible sanctions included a bar. The letter was sent by first class and certified mail to the two residential addresses shown for Elam in Web CRD. The envelope sent by first class mail to █████ Sterling Road was not returned to the District Office. The envelope sent by certified mail to █████ Sterling Road was returned to the District Office marked to reflect that it was "Unclaimed." In addition, the street number in the address on the envelope had been crossed out in pen and the number █████ had been written on the envelope. The envelope sent by first class mail to █████ Mulligan Drive was returned to the District Office stamped, "Authorized Forwarding Time Has Expired." In addition, the words "Return to sender Address unknown" had been handwritten on the envelope. The envelope sent by certified mail to █████ Mulligan Drive was also returned to the District Office. A Postal Service label was attached marked,

"Attempted - Not Known." Elam failed to provide NASD any information or documents by November 28, 2005 or thereafter.

10. By a letter dated November 30, 2005, NASD again requested, pursuant to Procedural Rule 8210, information in writing from Elam concerning, among other things, criminal charges that had been filed against him. His response was due by December 14, 2005. The letter warned Elam that if he failed to respond, he would be subject to disciplinary action by NASD and that the possible sanctions included a bar. The letter was sent by first class and certified mail to the two residential addresses shown for Elam in Web CRD. The envelope sent by first class mail to [REDACTED] Sterling Road was returned to the District Office. A label had been attached on which was printed, "Forward Time Exp" and the address [REDACTED] The staff received a return receipt card signed by Jonathan Elam (dated 12-3-05) for the envelope sent by certified mail to [REDACTED] Sterling Road. On the card, where the address to which the item was sent had been typed, the number [REDACTED] was crossed out and the number "08" had been written on the card. The envelope sent by first class mail to [REDACTED] Mulligan Drive was returned to the District Office marked, "Authorized Forwarding Time Has Expired." The envelope sent by certified mail to [REDACTED] Mulligan Drive was also returned to the District Office. A Postal Service label had been attached to it but no marking was on it to reflect which of the reasons printed on the label had caused the item to be returned. Elam failed to provide NASD any information or documents by December 14, 2005 or thereafter.
11. By a letter dated March 9, 2006, NASD again requested, pursuant to Procedural Rule 8210, information in writing from Elam concerning, among other things, criminal charges that had been filed against him. His response was due by March 20, 2006. The letter

warned Elam that if he failed to respond, he would be subject to disciplinary action by NASD and that the possible sanctions included a bar. The letter was sent by first class and certified mail to the two residential addresses shown for Elam in Web CRD and to [REDACTED] Sterling Road in Virginia Beach, Virginia. The envelope sent by first class mail to [REDACTED] Sterling Road was returned to the District Office. A label had been attached on which was printed, "Forward Time Exp" and the [REDACTED] Sterling Road address. The envelope sent by certified mail to [REDACTED] Sterling Road was returned marked "Unclaimed." To the date of this Complaint, neither envelope sent to [REDACTED] Mulligan Drive has been returned, nor has a return receipt card been received for the envelope sent by certified mail. The envelope sent by first class mail to [REDACTED] Sterling Road was returned to the District Office. Attached to it was a label on which was printed, "Forward Time Exp" (the label was identical to the one attached to the envelope sent to [REDACTED] Sterling Road including showing the [REDACTED] Sterling Road address). The envelope sent by certified mail to [REDACTED] Sterling Road was returned with a label attached on which was printed, "Moved Left No Address Unable To Forward." Elam failed to provide NASD any information or documents by March 20, 2006 or thereafter.

12. NASD's staff has no knowledge of a residential address for Elam that is more current than those to which the requests for information were sent and has no knowledge of a current business address for Elam.
13. To the date of this Complaint, Elam has failed to respond to NASD and he has failed to provide NASD any of the information or documents requested.
14. Based on the foregoing, Elam violated NASD Procedural Rule 8210 and Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Respondent in accordance with NASD Rule 8310;
- C. Specific findings that Respondent's conduct as alleged in Cause One of the Complaint was willful, the omitted information was material and the omission to state material facts was on a Form U4 application;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

Date: 5-10-06



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