

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOE DESOTO
(CRD No. 2879888),

Respondent.

Disciplinary Proceeding
No. 2006004240501

Hearing Officer – DRP

DEFAULT DECISION

February 22, 2007

Respondent is barred from association with any member firm in any capacity for willfully failing to disclose material facts on a Form U-4, in violation of NASD Conduct Rule 2110 and IM-1000-1, and for failing to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Appearances

William Brice LaHue, Regional Attorney, Atlanta, GA (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

No appearance by or for Joe Desoto.

DECISION

I. Background

On November 1, 2006, the Department of Enforcement filed a two-count Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Joe Desoto (Respondent or Desoto) failed to disclose on his Uniform Application for Securities Industry Registration (Form U-4) that he had been charged with a felony, and pled guilty to a misdemeanor involving false statements, in

violation of NASD Conduct Rule 2110 and IM-1000-1, and failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Respondent did not file an Answer to the Complaint.

Accordingly, on January 19, 2007, Enforcement filed a motion for entry of default decision, supported by the affidavit of William Brice LaHue and four exhibits. Desoto did not file a response to the motion. For the reasons set forth below, Enforcement's motion is granted.¹

II. Respondent's Default

On or about October 24, 2006, Enforcement served the Complaint and Notice of Complaint on Respondent by first-class and certified mail sent to Respondent's last known residential address, as reflected in the Central Registration Depository (CRD address).² Respondent did not file an Answer.³

On or about November 21, 2006, Enforcement served the Complaint and Second Notice of Complaint on Respondent by first-class and certified mail sent to Respondent's CRD address. As before, Respondent did not file an Answer.⁴

Enforcement complied with Procedural Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby providing constructive notice of this proceeding. By failing to file an Answer or otherwise respond to the

¹ The factual determinations in this Decision are based on the allegations of the attached Complaint, which are deemed admitted, and the affidavit and exhibits filed by Enforcement.

² Respondent's CRD address is [REDACTED]

³ The first-class mailing was not returned. The certified mailing was returned, marked "return to sender/unclaimed/unable to forward."

⁴ Once again, the first-class mailing was not returned. The certified mailing was returned, marked "unclaimed."

Complaint, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent was associated with NASD member PFS Investments Inc. (PFS) from March 1997 until November 2001, when he voluntarily left the firm and the securities industry.⁵ On or about December 13, 2005, Respondent once again joined PFS and completed a Form U-4 Application for Securities Registration, which the firm filed with NASD on January 12, 2006. Before Respondent could sit for the examination to obtain a Series 6 license, PFS terminated his employment on January 25, 2006. Since then, Respondent has not been associated or registered with any NASD member.

Although he was never registered, Respondent was associated with PFS, because a “person associated with a member” includes “a natural person who . . . has applied for registration”⁶ Respondent is thus subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD’s By-Laws, because the Complaint, which was filed within two years of the termination of Respondent’s association with PFS in 2006, alleges misconduct that occurred while he was an associated person, and a failure to comply with requests for information made during the two-year period following the termination.

IV. Findings of Fact and Conclusions of Law

A. Failure to Disclose Material Facts on Form U-4

The first cause of the Complaint alleges that Respondent failed to disclose material facts about his criminal history on the Form U-4 he prepared in December 2005.

⁵ During this period, Respondent sat for the examination to obtain a Series 6 license as an investment company products/variable contracts representative on three occasions, but failed each time.

⁶ NASD By-Laws, Art. I (dd).

In completing the Form U-4, Respondent was required to disclose whether he had ever been charged with any felony. He responded "no." Respondent was also obligated to divulge whether he had ever been convicted of, or pled guilty to, a misdemeanor involving false statements. Again, he answered "no."⁷ In fact, Respondent had been charged with a felony, and subsequently entered a guilty plea to a misdemeanor of Offering a False Instrument for Filing. The gravamen of the crime involves filing with the government a written instrument that one knows contains a false statement or false information.⁸

In applying for registration, an applicant has "an affirmative obligation to disclose fully all material facts, including [his or her] criminal history, in response to the questions on the Form U-4."⁹ A failure to do so, as occurred here, violates NASD Conduct Rule 2110's mandate that members observe "high standards of commercial honor and just and equitable principles of trade." Rule 115 extends this obligation to persons associated with members. It also violates IM-1000-1, which provides that the filing of registration

⁷ An applicant is required to report whether he has ever "been charged with any felony" at question 14A(1)(b) and whether he has ever "been convicted of or pled guilty . . . to a misdemeanor involving . . . false statements" at question 14B(1)(a).

⁸ Respondent was charged with Offering a False Instrument for Filing as a felony, for having submitted to the New York State Department of Environmental Conservation certificates that he had attended training courses for pesticide applications, when he had not in fact attended such courses. He subsequently pled guilty to Offering a False Instrument for Filing as a misdemeanor, under Section 175.30 of the New York Penal Law. On March 31, 1998, Respondent was sentenced to probation and ordered to pay a fine of \$350.

⁹ *Dep't of Enforcement v. Day*, No. C8A010094, 2003 NASD Discip. LEXIS 9 at *3 (OHO Feb. 10, 2003), citing *Rosario R. Ruggiero*, Exchange Act Release No. 37,070, 1996 SEC LEXIS 990, at *8-9 (Apr. 5, 1996).

information that "is incomplete or inaccurate so as to be misleading . . . may be deemed" a violation of Rule 2110.¹⁰

Accordingly, the allegations in the first cause of the Complaint, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent failed to disclose material facts on a Form U-4, in violation of NASD Conduct Rule 2110 and IM-1000-1.

Enforcement further alleges that Respondent's failure to disclose the felony charge and misdemeanor conviction 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 that is required to be disclosed in such an application, is subject to "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."¹¹ A finding of willfulness does not require intent to violate the law or a specific rule, but simply intent to commit the act that constitutes the violation.¹²

In 1998, Respondent was charged with, and later convicted of, Offering a False Instrument for Filing. At the time, he was associated, and applying for registration, with

¹⁰ See also *Dep't of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, at *7-8 (NAC Apr. 27, 2004).

¹¹ *Christopher LaPorte*, Exchange Act Release No. 39,171, 1997 SEC LEXIS 2058, at *8 n.2 (Sept. 30, 1997).

¹² *Knight*, 2004 NASD Discip. LEXIS 5; *Dep't of Enforcement v. Sarris*, No. C9A020017, 2003 NASD Discip. LEXIS 12, at *11 (OHO Mar. 17, 2003); *LaPorte*, 1997 SEC LEXIS at *8; *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976), *cert. denied*, 434 U.S. 1009 (1978).

PFS. He nevertheless failed to amend (or cause his Form U-4 to be amended) to disclose these material facts, as required by Article V, Section 2(c) of NASD's By-Laws.¹³ He then failed to disclose these material facts on his Form U-4 application when he again applied for registration with PFS in December 2005.

Form U-4 clearly and unambiguously asks about an applicant's criminal history, and Respondent knew or should have known that he was required to disclose his felony charge and misdemeanor conviction. The Hearing Officer thus finds that Respondent's failure to disclose the felony charge and disqualifying misdemeanor conviction in December 2005 was willful, as he knew or should have known that his conduct was improper.

B. Failure to Respond to Requests for Information

The second cause of the Complaint charges that Respondent violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to the staff's requests for information. The Complaint alleges that on or about March 2, 2006, the staff initiated an investigation regarding Respondent's failure to disclose material information on his Form U-4. The Complaint further alleges that on March 2, 2006, the staff sent Respondent a request for information pursuant to Rule 8210 by first-class mail to Respondent's CRD address. He did not respond in any manner to the request.¹⁴

The Complaint further alleges that on March 20, 2006, the staff sent Respondent a second Rule 8210 request for information by first-class and certified mail to his CRD

¹³ Pursuant to this section, every application for registration must be kept current by supplementary amendments that must be filed within 30 days after learning of the facts or circumstances giving rise to the amendment, and within 10 days if the amendment involves a statutory disqualification. Under Article III, Section 4(g)(1)(i), a person is subject to "disqualification" if he has been convicted of "any ... misdemeanor ... which involves ... the making of a false report...."

¹⁴ The first-class mailing was not returned.

address.¹⁵ Respondent contacted NASD staff on March 22, 2006, and stated that he would provide the requested information in writing by April 3, 2006. He failed to do so. To date, Desoto has not provided a response to the staff's requests for information.

Rule 8210 imposes an absolute obligation on members and associated persons to cooperate with NASD investigations. When an associated person fails to cooperate fully and promptly with NASD staff requests for documents and information, he undermines NASD's ability to carry out its regulatory responsibilities.¹⁶

By mailing the requests to Respondent at his last known residential address as reflected in CRD, the staff complied with Rule 8210(d), and pursuant to that rule, Respondent is deemed to have received them. Furthermore, Respondent had actual notice of the staff's request for information, as evidenced by his contact with the staff on March 22, 2006. Accordingly, the allegations in the second cause of the Complaint, which are deemed admitted, are sufficient to establish for purposes of this default decision that Respondent failed to respond to the staff's requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

V. Sanctions

Under NASD Sanction Guidelines, a bar is standard for failure to respond to requests for information.¹⁷ There is no evidence of any mitigating circumstances here that would warrant a lesser sanction. Accordingly, Respondent will be barred in all capacities for this violation.

¹⁵ Neither mailing was returned. According to a U.S. Postal Service trace, the certified mailing was unclaimed.

¹⁶ *Toni Valentino*, Exchange Act Release No. 49,255, 2004 SEC LEXIS 330, at *14 (Feb. 13, 2004).

¹⁷ *NASD Sanction Guidelines* at 35 (2006 ed.).

Enforcement also seeks a bar for Respondent's willful failure to disclose material facts on his Form U-4, alleging that his misconduct was egregious. Under the Guidelines, filing a false, inaccurate or misleading form, as Respondent did, is considered egregious misconduct and warrants a suspension of up to two years or a bar.¹⁸ There are three principal considerations in determining whether to impose the recommended sanction: the nature and significance of the information at issue; whether respondent's failure to disclose the information resulted in a statutorily disqualified individual associating with a firm; and whether the respondent's misconduct resulted in harm.¹⁹ The first and second considerations apply to Respondent's misconduct.

NASD cannot determine the veracity of every Form U-4 and must depend on its members and associated persons to provide accurate information. Otherwise, an individual subject to disqualification may become associated with a member firm, as occurred here. Given the "utmost importance of complete and truthful disclosures on the Form U-4,"²⁰ Respondent's willful failure to disclose his disqualifying misdemeanor conviction was egregious. Accordingly, a bar is also imposed for this violation.

VI. Conclusion

Respondent Joe Desoto is barred from association with any member firm in any capacity for willfully failing to disclose material facts on a Form U-4, in violation of NASD Conduct Rule 2110 and IM-1000-1, and for failure to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

¹⁸ *Guidelines* at 74.

¹⁹ *Id.*

²⁰ *Dep't of Enforcement v. Zdzieblowski*, No. C8A030062, 2005 NASD Discip. LEXIS 3, at *19 (NAC May 3, 2005).

The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Dana R. Pisanello
Hearing Officer

Dated: February 22, 2007
Washington, DC

Copies to: Joe Desoto (*via overnight and first-class mail*)
William Brice LaHue, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic and first-class mail*)
Rory C. Flynn, Esq. (*via electronic and first-class mail*)

**NASD
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOE DESOTO,
(CRD No. 2879888)

Respondent.

Disciplinary Proceeding
No. 2006004240501

Hearing Officer -

COMPLAINT

The Department of Enforcement alleges:

RESPONDENT

1. Joe Desoto ("Desoto") first entered the securities industry in March 1997 when he was associated with PFS Investments, Inc. ("PFS"), where he remained until November 2001. Thereafter, Desoto was not associated with a member for a period of about five years.
2. In or about December 2005, Desoto once again associated with PFS and completed a Uniform Application for Securities Industry Registration ("Form U-4") to apply for registration with the NASD. Desoto's Form U-4 application was filed with the NASD on January 12, 2006, but he was terminated on January 25, 2006 without registration. Desoto is not currently registered with an NASD member but remains subject to NASD's jurisdiction pursuant to Article V, § 4 of the NASD By-laws.

FIRST CAUSE OF ACTION

NASD Conduct Rule 2110 and IM-1000-1

(Failure to Disclose a Reportable Event on Form U-4)

3. The Department realleges and incorporates by reference paragraphs 1 and 2 above.
4. In or about March 1998, Desoto was charged with a second degree felony for "Offering a False Instrument for Filing." These charges stemmed from Desoto's submission of

certificates to the New York Department of Environmental Conservation that falsely indicated that he had attended training courses for pesticide applications when he had not in fact attended such courses.

5. On or about March 31, 1998, Desoto pled guilty to a reduced charge of a class A misdemeanor for the same offense and was fined.
6. Question 14A(1)(b) on Form U-4 asks if the applicant has ever been charged with any felony and, if so, the applicant is required to complete a Disclosure Reporting Page ("DRP").
7. Question 14B(1)(a) on Form U-4 asks if the applicant has ever "been convicted of or pled, guilty ... to a misdemeanor involving: ... false statements"
8. Article V, § 2(c) of the NASD By-laws requires each Form U-4 application of registration to be kept current at all times by supplementary amendments to be made not later than 30 days after learning of the facts or circumstances giving rise to the amendment.
9. Desoto failed to amend or cause his Form U-4 to be amended while he was associated with PFS to disclose the felony charge and his plea to the misdemeanor charge in 1998.
10. Desoto further answered "no" to both questions 14A(1)(b) and 14B(1)(a) on a Form U-4 which he completed and signed on or about December 13, 2005 and therefore willfully failed to disclose the material fact that he had been charged with a felony and that he had pled guilty to a misdemeanor charge for Offering a False Instrument for Filing.
11. Such acts, practices and conduct described above constitute separate and distinct violations of NASD Conduct Rule 2110 and IM-1000-1 by Respondent Desoto.

SECOND CAUSE OF ACTION

NASD Conduct Rule 2110 and Procedural Rule 8210

(Failure To Respond to NASD Request for Information)

12. The Department realleges and incorporates by reference paragraphs 1 through 11, above.
13. On or about March 2, 2006, the NASD Atlanta District office initiated an investigation into the allegations on a Uniform Termination Notice for Securities Industry Registration ("Form U-5") filed by PFS regarding Desoto.
14. By letter dated March 2, 2006, sent via first class mail to Desoto at his CRD address in Kissimmee, Florida, Desoto was requested, pursuant to Procedural Rule 8210, to provide a written statement regarding the allegations disclosed on his Form U-5. The March 2, 2006, letter set a deadline of March 16, 2006, for the submission of the requested written statement. The March 2, 2006 letter was not returned but Desoto did not respond by the March 16, 2006 deadline.
15. By letter dated March 20, 2006, sent via first class and certified mail to Desoto at his CRD address, Desoto was again requested, pursuant to Procedural Rule 8210, to provide a written statement regarding the allegations disclosed on his Form U-5. The March 20, 2006, letter set a deadline of April 3, 2006, for the response. Desoto did not respond by the April 3, 2006 deadline. The March 20, 2006 letter sent by first class mail was not returned and the copy sent by certified mail was apparently unclaimed.
16. On or about March 22, 2006, Desoto contacted the NASD staff and indicated that he would submit the requested written statement by the April 3, 2006 deadline.
17. However, Desoto failed to submit the requested written statement by April 3, 2006 and, as of the date hereon, has not submitted it.

18. Such acts, practices and conduct described above constitute separate and distinct violations of NASD Procedural Rule 8210 and Conduct Rule 2110 by Respondent Desoto.

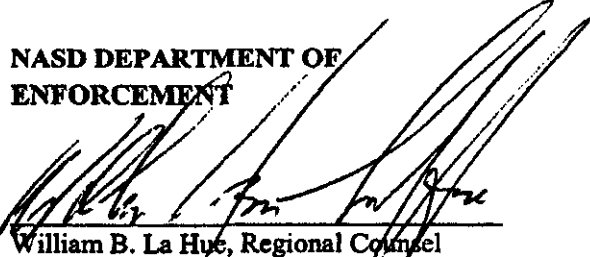
PRAYER FOR RELIEF

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations alleged within this Complaint.
- B. order that one or more of the sanctions provided under NASD Rule 8310(a), including monetary sanctions be imposed.
- C. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330.
- D. make specific findings that Respondent's conduct, as alleged in the First Cause of Action, was willful; the omitted information was material; and, the omission to state material facts was on a Form U-4 application.

Date: 10/24/06

**NASD DEPARTMENT OF
ENFORCEMENT**


William B. La Hue, Regional Counsel
Andrew A. Favret, Regional Chief Counsel
NASD Department of Enforcement
Atlanta District Office
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
(404) 239-6111
Fax No. (404) 264-1586

NASD District Director

Daniel J. Stefek, Director
NASD, Atlanta District Office
One Securities Centre, Suite 500
3490 Piedmont Road, N.E.
Atlanta, GA 30305
(404) 239-6128

Of Counsel

Rory C. Flynn, Of Counsel
NASD Department of Enforcement
1801 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 974-2974; Fax No. (202) 721-8318

Mark P. Dauer, Of Counsel
1100 Poydras Street
Energy Centre, Suite 850
New Orleans, LA 70163
(504) 412-2405; Fax No. (504) 522-4077