

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES C. GARDNER, II
(CRD No. 5468556),

Respondent.

Disciplinary Proceeding
No. 2008012392101

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

May 15, 2009

The Respondent violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to requests for information, and violated Conduct Rule 2110 by failing to report multiple felony charges and related guilty pleas on his Form U4. For these violations, the Respondent was barred from associating with any member firm in any capacity.

Appearances

James M. Stephens, Senior Regional Counsel, Kansas City, MO, for the Department of Enforcement.

No appearance by or for James C. Gardner, II.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”) for the Financial Industry Regulatory Authority (“FINRA”) filed a Complaint (attached to this Decision as Exhibit A) on January 6, 2009. The Complaint alleges that Respondent James C. Gardner, II (“Gardner”) violated Membership and Registration Rule Interpretive Material (“IM”) 1000-1 and Conduct Rule 2110 by willfully failing to disclose multiple felony charges and related guilty pleas on a Uniform Application for Securities Industry Registration or Transfer (“Form

U4”) and Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to FINRA requests for information.¹

Gardner did not answer or otherwise respond to the Complaint. Consequently, on March 26, 2009, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of James M. Stephens (“Stephens Decl.”) and two exhibits.² Gardner did not reply to the motion.³

II. Findings of Fact and Conclusions of Law

A. Respondent’s Default

The Hearing Officer finds that Enforcement properly served Gardner with the Complaint by mailing the Complaint and the First and Second Notices of Complaint to his most current residential address shown in the Central Registration Depository (the “CRD Address”) in accordance with FINRA Procedural Rule 9134(b)(1). Enforcement mailed the Complaint and First Notice of Complaint to Gardner by first-class and certified mail on January 6, 2009. The return receipt shows that the United States Postal Service delivered the certified mailing on January 8, 2009.⁴ The signature on the receipt is not legible.

Enforcement mailed the Complaint and Second Notice of Complaint to Gardner’s CRD Address by first-class and certified mail on February 5, 2009. The certified mailing was

¹ As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidate rules became effective on December 15, 2008, including certain conduct rules and procedural rules. See Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent’s alleged misconduct. The applicable rules are available at www.finra.org/rules.

² On May 12, 2009, Enforcement supplemented its submission with two additional exhibits. Exhibit CX-3 is a printout of Garner’s registration summary from CRD, and exhibit CX-4 is his Form U4 dated January 11, 2008.

³ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, as well as additional materials filed by Enforcement.

⁴ Stephens Decl. ¶ 25; CX-1, at 10.

returned marked, "Return to Sender – Refused – Unable to Forward – Return to Sender"; the mailing sent by regular first-class mail was not returned.⁵ To date, Gardner has not filed an Answer with the Office of Hearing Officers or otherwise responded to the Complaint.⁶

Gardner defaulted by failing to answer the Complaint.⁷ Accordingly, pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer deems the allegations in the attached Complaint admitted and grants Enforcement's motion for entry of a default decision.

B. Jurisdiction

Gardner became associated with FINRA member firm Ameriprise Financial Services, Inc. ("Ameriprise") on January 3, 2008, and on January 11, 2008, submitted a Form U4 to become registered as a General Securities Representative.⁸ Before he became registered, Ameriprise terminated his employment on February 1, 2008.

Gardner has not been associated with a FINRA member firm since February 1, 2008. Nonetheless, he remains subject to FINRA's jurisdiction for purposes of this proceeding pursuant to Article V, Section 4 of FINRA's Bylaws because (1) the Complaint was filed within two years following the termination of his association with Ameriprise, and (2) the Complaint charges him with misconduct committed while he was associated with Ameriprise

⁵ Stephens Decl. ¶ 27.

⁶ *Id.* ¶¶ 26, 28.

⁷ *Dep't of Enforcement v. Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (NASD Procedural Rule 9134(b)(1) allows for constructive notice by mailing a complaint to the respondent's most recent CRD address) (quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998)).

⁸ CX-3; CX-4.

and with failing to respond to FINRA's requests for information made during the two-year period following the termination of his association with Ameriprise.⁹

C. Willful Failure to Disclose Felony Charges and Guilty Pleas on Form U4

The First Cause of Action alleges that, on July 12, 1995, Gardner was charged with five felonies in Marion County, Indiana, and that, on September 1, 1995, he entered guilty pleas to two of those charges. The Complaint further alleges that, on December 7, 1995, he was charged with two additional felonies in Marion County, Indiana, and that, on July 26, 1996, he entered a guilty plea to one of those charges.

On January 3, 2008, when Gardner applied to become registered as a General Securities Representative through Ameriprise, he failed to disclose the foregoing felony charges and related guilty pleas. Form U4 Question 14A. (1)(a) asks: "Have you ever [...] been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a felony? Question 14A. (1)(b) asks: "Have you ever [...] been charged with any felony? Gardner answered "no" to both questions.¹⁰ His answers were false.

Applicants for registration with FINRA must fully and accurately disclose all material information in response to questions on Form U4. In addition, FINRA registrants are required to keep their Form U4s current at all times by filing supplementary amendments as necessary. Such amendments must be filed with FINRA not later than 30 days after learning of the facts or circumstances giving rise to the amendment.¹¹

Both the National Adjudicatory Council ("NAC") and the Securities and Exchange Commission ("SEC") have stated that the responsibility for maintaining the accuracy of

⁹ Article V, Sec. 4, FINRA By-Laws, available at www.finra.org/rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws").

¹⁰ Stephens Decl. ¶¶ 11-16.

¹¹ Article V, Section 2(c) of FINRA's By-Laws.

Form U4, by updating information as necessary, lies with the registered representative.¹² By failing to disclose the felony charges and guilty pleas, Gardner violated FINRA's By-Laws, NASD Conduct Rule 2110, and IM-1000-1.

Furthermore, Gardner's failure to disclose the criminal charges and convictions was willful and material. "Willfulness" is established by a showing that a person "knew or reasonably should have known under the particular facts and circumstances that his conduct was improper."¹³ In this case, Gardner's failure to disclose his multiple felony charges and guilty pleas appears to have been knowing and intentional.

There is no question that Gardner's felony charges and convictions were material. The NAC has determined that information on the Form U4 is material if a reasonable employer reading the Form would "view the disclosure of the omitted information as significantly altering the total mix of information available."¹⁴ In this case, Gardner had been charged with theft, conspiracy to commit theft, and credit card fraud. These charges are unassailably material to a person's employment in the securities industry. Furthermore, the NAC has made clear that "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, [it is] presumed that essentially all the information that is reportable on the Form U4 is material."¹⁵

¹² *Frank R. Rubba*, 53 S.E.C. 670, 1998 SEC LEXIS 1499, at *8 (July 21, 1998); *DOE v. Daniel Richard Howard*, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16 at *30-32 (N.A.C. November 16, 2000), *aff'd*, 2002 SEC LEXIS 1909 (July 26, 2002).

¹³ *Christopher LaPorte*, Exchange Act Release No. 39171, 1997 SEC LEXIS 2058, at n. 2 (September 30, 1997).

¹⁴ *Dep't of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, at *14 (N.A.C. April 27, 2004), (quoting *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997)).

¹⁵ *Id.*, at *13.

The Hearing Officer finds that the allegations in the First Cause of Action are sufficient to establish, for purposes of this default decision, that Gardner violated Conduct Rule 2110 and IM-1000-1.

D. Failure to Respond to Information Requests

The Second Cause of Action alleges that Gardner failed to respond to two written requests that he provide information about the facts and circumstances surrounding his termination of employment from Ameriprise. The requests were dated March 6, 2008, and April 1, 2008. FINRA Staff ("Staff") sent each request to Gardner at his CRD Addresses by regular and certified first-class mail pursuant to Procedural Rule 8210. The receipts for each certified mailing was returned signed by "Amy Garrison"; however, neither of the first-class mailings was returned to FINRA. To date, Gardner has not responded to either of the Staff's letters.¹⁶

The Hearing Officer finds that the allegations in the Second Cause of Action are sufficient to establish, for purposes of this default decision, that Gardner violated Procedural Rule 8210 and Conduct Rule 2110.

III. Sanctions

A. False Form U4

For filing a false, misleading or inaccurate Form U4 or failing to file necessary amendments to a Form U4, FINRA Sanction Guidelines ("Guidelines") recommend that an individual be fined from \$2,500 to \$50,000. In egregious cases, the Guidelines call for consideration of a suspension in any or all capacities of up to two years or a bar.¹⁷

¹⁶ Stephens Decl. ¶¶ 20-23.

¹⁷ FINRA Sanction Guidelines 73-74 (2007).

The Guidelines governing sanctions for false and misleading Forms U4 direct adjudicators to consider two relevant “principal considerations” when determining sanctions: (1) the nature and significance of the information at issue; and (2) whether [the] failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm.¹⁸ Gardner’s criminal history would have been highly significant to regulators, broker-dealers and public customers relying on the information in his Form U4. He was charged with, and entered guilty pleas to, several counts of theft. Further, the Hearing Officer finds that Gardner knowingly failed to disclose multiple serious criminal charges on his Form U4 and that his failure was willful. Therefore, Gardner is subject to statutory disqualification.¹⁹

The Hearing Officer finds that Gardner should be barred from associating with any member firm in any capacity for his willful failure to disclose his criminal record.

B. Failure to Respond to Requests for Information

The Sanction Guidelines recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.²⁰ Here, Gardner failed to respond in any manner to two written requests that he provide information in connection with the Staff’s investigation into the facts and circumstances underlying Ameriprise’s termination of his employment for cause. There are no mitigating factors that would justify a less severe sanction. Accordingly, the Hearing Officer will bar Gardner from associating with any FINRA member in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

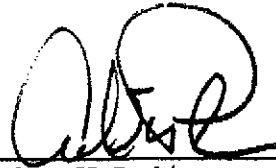
¹⁸ Guidelines 73.

¹⁹ FINRA By-Laws, Article III, Sec. 4.

²⁰ Guidelines 35.

IV. Order

Gardner is barred from association with any member firm in any capacity for his willful failure to disclose his criminal history on his Form U4, in violation of Conduct Rule 2110 and IM-1000-1, and his failure to respond to requests for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The bars will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.



Andrew H. Perkins
Hearing Officer

Copies to:

James C. Gardner, II (by FedEx, next-day delivery, and first-class mail)
James M. Stephens, Esq. (by first-class and electronic mail)
David Jaffe, Esq. (by first-class and electronic mail)
David Sonnenberg, Esq. (by electronic mail)
Mark P. Dauer, Esq. (by electronic mail)