

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BYRON ALAN THOMAS,
(CRD No. 1048411),

Respondent.

Disciplinary Proceeding
No. 2010023076001

Hearing Officer – RLP

DEFAULT DECISION

October 8, 2012

Respondent is barred from associating with any FINRA member in any capacity for: (i) willfully failing to timely disclose reportable criminal charges on a Form U4, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010; (ii) withdrawing funds without authority from the brokerage account of a firm customer, in violation of NASD Conduct Rule 2110; and (iii) failing to provide requested information, in violation of FINRA Rules 8210 and 2010.

Appearances

Heather Hawker, Senior Regional Counsel, Denver, CO, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Introduction

FINRA investigators began the inquiry that led to the filing of a Complaint against Byron Alan Thomas after Cadaret, Grant & Co., Inc. ("CGC"), a FINRA member, filed a Uniform Termination Notice for Securities Industry Registration (Form U5) disclosing that, on June 1, 2010, Thomas was terminated for failing to notify CGC that he had been charged with three felonies and a reportable misdemeanor.¹ Based on the evidence obtained in the course of the

¹ Declaration of Heather Hawker ("Hawker Decl."), ¶¶ 6, 16; Complainant's Exhibit ("CX")-3.

investigation, the FINRA Department of Enforcement (“Enforcement”) initiated this proceeding on May 24, 2012.

In its Complaint, Enforcement charged Thomas with three causes of action: (i) willful failure to timely disclose material facts on a Uniform Application for Securities Industry Registration or Transfer (Form U4), in contravention of Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010; (ii) unauthorized withdrawal of funds from the brokerage account of a CGC customer, in violation NASD Conduct Rule 2110; and (iii) failure to respond to requests for information, in violation of FINRA Rules 8210 and 2010.² Thomas did not answer or otherwise respond to the Complaint. Consequently, on August 28, 2012, Enforcement filed a Motion for Entry of Default Decision, together with the Declaration of Heather Hawker and eight exhibits. Thomas did not respond to the motion.³

II. Jurisdiction

Thomas entered the securities industry in 1980. From August 31, 1994, through June 1, 2010, he was employed by CGC and registered as an investment company products and variable contracts representative.⁴ As stated, CGC discharged Thomas and terminated his association on June 1, 2010. He has not been associated with or registered through a FINRA member firm since then.⁵

² In 2007, NASD consolidated with the member regulation function of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (“FINRA”). FINRA then began developing a consolidated rulebook, and in December 2008, as part of the first phase of that process, NASD Conduct Rule 2110 was adopted without material change as FINRA Conduct Rule 2010. See *FINRA Regulatory Notice* 08-57, 2008 FINRA LEXIS 50 (Oct. 2008). The conduct rules that apply are those that existed at the time of the conduct. They are available at www.finra.org/Industry/Regulation/FINRARules.

³ Given that Thomas is in default as detailed below, the factual determinations in this decision are based on allegations in the attached Complaint, which are deemed admitted, as well as the Hawker Declaration and attached exhibits.

⁴ Complaint, ¶ 2; Hawker Decl., ¶ 5; CX-1; CX-2.

⁵ Complaint, ¶ 4; Hawker Decl., ¶ 7; CX-1; CX-2.

Although Thomas is not currently registered through a FINRA member firm, FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (i) the Complaint was filed within two years following the termination of his registration with CGC; and (ii) the Complaint charges Thomas with misconduct that occurred while he was registered with CGC, and with failing to respond to information requests made pursuant to Rule 8210 during the two-year period following the termination of his last FINRA registration.⁶

III. Respondent's Default

On May 24, 2012, Enforcement served the Notice of Complaint and the Complaint by overnight courier and first-class mail directed to Thomas' residential address as recorded in FINRA's Central Registration Depository ("CRD address") and to an alternative business address Thomas had provided to the staff. According to the courier's shipment receipts, the papers were delivered the next day to both Thomas' CRD address and his alternative address, where they were signed for by a receptionist.⁷ On that same day, Thomas left a telephone message for Enforcement staff, acknowledging that he had received the Complaint.⁸ He nevertheless failed to answer by the June 21 deadline specified in the Notice of Complaint.⁹

On June 25, 2012, Enforcement sent the Second Notice of Complaint and the Complaint to Thomas' CRD and alternative addresses by first-class and certified mail.¹⁰ Although Thomas

⁶ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/Industry/Regulation/FINRARules/ (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁷ Hawker Decl., ¶ 11; CX-6, at pp. 18, 20.

⁸ Hawker Decl., ¶ 11; CX-7.

⁹ Hawker Decl., ¶¶ 10-11; CX-6, at p. 2.

¹⁰ Hawker Decl., ¶ 12; CX-8.

signed the delivery receipt for the certified mailing to the CRD address, to date, he has not filed an Answer with the Office of Hearing Officers or otherwise responded to the Complaint.¹¹

Thomas received actual notice of this proceeding and, therefore, the Hearing Officer finds that Thomas defaulted by failing to answer the Complaint.

IV. Findings of Fact and Conclusions of Law

A. Willful Failure to Disclose Material Facts on a Form U4

On January 20, 2010, an indictment was issued against Thomas in the Cuyahoga County Court of Common Pleas, Criminal Court Division, State of Ohio, charging Thomas with one misdemeanor (false statement to public official) (ORC § 2921.13(A)(3)) and three felonies: (theft by deception (ORC § 2913.02(A)(3)), tampering with records (ORC § 2913.42(A)(1)), and tampering with evidence (ORC § 2921.12(A)(2)).¹² The charges concerned Thomas' handling of assets belonging to his aunt, FH, and her estate. For example, and as described in more detail below, after FH's death, Thomas improperly used an expired power of attorney to withdraw funds from FH's brokerage account and deposit them in a checking account he had co-owned with FH, subsequently paying out some of the funds to meet his own personal expenses.

Thomas' criminal arraignment took place on February 3, 2010. Thomas entered a plea of not guilty.¹³

Article V, Section 2 of FINRA's By-Laws requires that associated persons applying for registration provide FINRA with "such . . . reasonable information with respect to the applicant as [FINRA] may require" and, further, that "[e]very application for registration . . . shall be kept

¹¹ Hawker Decl., ¶¶ 13-14; CX-8, at p. 1.

¹² Complaint, ¶ 6; Hawker Decl., ¶ 17; CX-3, at 6-7.

¹³ Complaint, ¶ 7; Hawker Decl., ¶ 17. Ultimately, Thomas entered into a plea agreement under which he pleaded guilty to the misdemeanor charge, paid restitution to FH's estate, and entered into the criminal court's diversion program. Hawker Decl., ¶ 33.

current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment.” FINRA Rule 1122, in turn, prohibits associated persons from filing registration information that “is incomplete or inaccurate so as to be misleading” These provisions give rise to a duty to provide accurate and current information so as to “assure[] regulatory organizations, employers, and members of the public that they have all material, current information about the securities professional with whom they are dealing.”¹⁴

In contravention of his obligation to keep his Form U4 current, Thomas failed to amend the form within 30 days of his arraignment (by March 5, 2010) and answer “yes” to both Question 14A(1)(b), asking whether he had “ever been charged with a felony,” and Question 14B(1)(b), asking whether he had “ever been charged with a misdemeanor” involving false statements, among other things.¹⁵ When his Form U4 was finally amended on May 28, it was thus nearly three months late.¹⁶

By failing to timely amend his Form U4, Thomas violated Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rule 1122.¹⁷ His failure to timely disclose the charges also ran afoul of the high standards of commercial honor and just and equitable principles of trade that FINRA members and their associated persons must observe under Rule 2010.¹⁸

¹⁴ *Richard A. Neaton*, Exchange Act Rel. No. 65598, 2011 SEC LEXIS 3719, at *17-18 (Oct. 20, 2011).

¹⁵ Complaint, ¶¶ 13-14; Hawker Decl., ¶ 19.

¹⁶ Complaint, ¶¶ 13-14; Hawker Decl., ¶ 20.

¹⁷ *Dep’t of Enforcement v. Tucker*, No. 2007009981201, 2011 FINRA Discip. LEXIS 66, at *12-13 (Oct. 4, 2011) (stating that failure to timely amend Form U4 violated predecessor to Rule 1122) (citing *Scott Mathis*, Exchange Act Rel. No. 61120, 2009 SEC LEXIS 4376, at *18 (Dec. 7, 2009), *aff’d*, *Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012); *Dep’t of Enforcement v. Fishman*, No. 2007008812801, 2008 FINRA Discip. LEXIS 53, at *10 (OHO Sept. 18, 2008) (stating that Article V, Section 2(c) of the FINRA By-Laws and the predecessors to FINRA Rules 1122 and 2010 “require associated persons to answer the questions of the Form U4 accurately and fully and to keep the information updated.”).

¹⁸ *Scott Mathis*, 2009 SEC LEXIS 4376, at *18.

Based on the foregoing, the Hearing Officer also concludes that, under FINRA By-Laws Article III, Section 3(b), Thomas is ineligible to be associated with a FINRA member, because he is subject to a disqualification set forth in Section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(39).¹⁹ Under Section 3(a)(39)(F), a person who “willfully” fails to disclose any “material” fact which is required to be stated in an application is subject to statutory disqualification from participating in the securities industry. Here, the information that Thomas failed to timely disclose is material. “The test of materiality is whether the omitted information would have ‘significantly altered the total mix of information made available.’”²⁰ Criminal information is material.²¹

The failure to timely disclose also was willful. It is well established that a respondent acts “willfully” when he intentionally commits the act that constitutes the violation; he need not act with a culpable state of mind or even be aware that he is violating any regulatory requirement.²² Thomas knew he had been arraigned on criminal charges. Moreover, as narratives by CGC personnel, correspondence pertaining to Thomas’ termination, and information concerning the firm’s compliance procedures demonstrate, Thomas was aware that he needed to keep his Form U4 current.²³ Accordingly, the Hearing Officer concludes that

¹⁹ Article III, Section 3(b) of FINRA’s By-Laws provides that “No person shall become associated with a member, continue to be associated with a member, or transfer association to another member, if such person . . . is or becomes subject to a disqualification under Section 4.” Article III, Section 4 provides that a person “is subject to a ‘disqualification’ with respect to membership, or association with a member, if such person is subject to any ‘statutory disqualification’ as such term is defined in Section 3(a)(39) of the [Exchange] Act.”

²⁰ *Scott Mathis*, 2009 SEC LEXIS 4376, at *29 (citation omitted).

²¹ *Dep’t of Enforcement v. Kraemer*, No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *15, n.5 (NAC Dec. 18, 2009).

²² *See, e.g., Mathis v. SEC*, 671 F.3d 210, 216-219 (2d Cir. 2012); *Dep’t of Enforcement v. Zayed*, No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *13, n.11 (NAC Aug. 19, 2010).

²³ Hawker Decl., ¶¶ 22-24.

Thomas intentionally failed to timely amend his Form U4 to reflect his criminal charges and, therefore, that he acted willfully.²⁴

B. Withdrawing Funds Without Authority

On July 22, 1995, FH executed a general power of attorney appointing Thomas as her attorney-in-fact.²⁵ Nearly 12 years later, in early January 2007, FH was hospitalized, and, later in the month, was placed in hospice care.²⁶ She died on February 15, 2007.²⁷

During FH's last illness, on January 19, 2007, Thomas, acting under authority of the 1995 power of attorney, opened an account at CGC for his aunt. The account was funded with nearly 2,000 shares of PPG Industries stock FH owned; the opening account value was in excess of \$117,000.²⁸ Just ten days later, Thomas sold the shares and the proceeds were deposited in the account's money market fund.²⁹

Then, in April 2008, some 14 months after FH died, Thomas, ostensibly acting under the 1995 power of attorney, withdrew \$22,000 from the money market fund held in FH's CGC brokerage account.³⁰ He then deposited the \$22,000 into a Republic Bank checking account that his aunt had held individually until January 9, 2007, when, during her hospitalization, she and Thomas signed new account forms that changed her individual checking and savings accounts into accounts held jointly with Thomas.³¹

²⁴ See *Mathis*, 671 F.3d at 218.

²⁵ Complaint, ¶ 17; Hawker Decl., ¶ 25.

²⁶ Complaint, ¶ 18; Hawker Decl., ¶¶ 26-27.

²⁷ Complaint, ¶ 22; Hawker Decl., ¶ 28.

²⁸ Complaint, ¶ 20; Hawker Decl., ¶ 27.

²⁹ Complaint, ¶ 21; Hawker Decl., ¶ 27.

³⁰ Complaint, ¶ 23; Hawker Decl., ¶ 31.

³¹ Complaint, ¶¶ 19, 23; Hawker Decl., ¶¶ 26, 31.

FH's February 2007 death revoked Thomas' authority to act as FH's attorney-in-fact.³² And, although FH had named Thomas executor of her estate, his nearly two-year delay in applying to probate the will led the probate court to deny his application and appoint an independent fiduciary to administer the estate.³³ Accordingly, the April 2008 withdrawal of funds from FH's brokerage account was unauthorized.

At all pertinent times, NASD Conduct Rule 2110 stated that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."³⁴ By withdrawing funds from FH's account under a power of attorney that was no longer valid, Thomas violated NASD Conduct Rule 2110.³⁵

C. Failure to Respond to Requests for Information

The Complaint's Third Cause of Action alleges that Thomas violated FINRA Rules 8210 and 2010 by failing to respond to three written requests for bank statements that might bear on whether Thomas had misused or converted funds belonging to FH or her estate, including those funds improperly withdrawn from FH's brokerage account and deposited in the joint checking account.

On January 30, 2012, FINRA staff sent a request for information to Thomas' attorney. Among the documents requested were monthly statements for all of FH's Republic Bank

³² See *McDonald v. Black's Administrator*, 20 Ohio 185 (1851); *Santa v. Ohio Dep't of Human Serv.*, 136 Ohio App.3d 190, 193, 736 N.E.2d 86 (2000); *In re Scott*, 111 Ohio App.3d 273, 275, 675 N.E.2d 1350 (1996).

³³ Complaint, ¶ 24; Hawker Decl., ¶¶ 29-30. That Thomas was one of fifteen beneficiaries of the estate likewise did not authorize the withdrawal.

³⁴ The Rule applied to Thomas through NASD Rule 0115, which provided that persons associated with a member have the same duties and obligations as the member.

³⁵ Cf., e.g., *Dep't of Enforcement v. Frondorf*, No. C05000002, 2000 NASD Discip. LEXIS 54, at *4-6, 11-12 (OHO Sept. 5, 2000) (in order to qualify for a prize in a firm-sponsored sales contest, registered representative caused checks made payable to three customers to be drawn on the accounts of those customers; these unauthorized withdrawals were held to violate NASD Conduct Rule 2110); *Matthew D. Mitchell*, Disciplinary Action No. 02-131, 2002 NYSE Disc. Action LEXIS 122, at *1 (NYSE June 19, 2002) (representative engaged in conduct inconsistent with just and equitable principles of trade when he effected discretionary trades in customer's account after power of attorney expired on customer's death).

accounts, including checking and savings accounts and any other accounts FH had held at the bank.³⁶ Thomas' counsel responded to the request on February 17, 2012, stating: that Thomas was unable to retrieve banking statements predating 2007; that although Thomas had made a formal request for statements covering the period from January 2007 through December 2008, he might not be "permitted to even get them"; and that, if the statements were accessible, Thomas would have to pay between \$250-\$400 to receive them.³⁷

Enforcement then sent another request for the bank records to Thomas' counsel on April 12, 2012, seeking a response on or before April 20.³⁸ On April 17, 2012, Thomas' counsel advised Enforcement staff, by facsimile, that his client would "make greater effort to comply" with the information request but that it was "highly unlikely" that he would be able to obtain the materials by April 20. Attached to the facsimile was a letter directed to Republic Bank's predecessor requesting copies of the Republic Bank checking account records only, together with a release signed by Thomas.³⁹

By May 1, 2012, some three months after the first request, FINRA still had not received any of the requested bank records. Accordingly, Enforcement sent another letter to Thomas' counsel requesting that the bank records, including records of checking and savings accounts, be produced by May 11, 2012. The records were not forthcoming.⁴⁰ Enforcement then sent Thomas' counsel another letter, this time seeking authorization to deal with the bank directly, but noting that even if the bank should produce the requested information, Thomas' earlier failure to produce the documents would not be excused. Enforcement also advised Thomas' counsel that a

³⁶ Complaint, ¶ 27; Hawker Decl., ¶¶ 37, 40

³⁷ Complaint, ¶ 31; Hawker Decl., ¶ 38.

³⁸ Complaint, ¶¶ 32-34; Hawker Decl., ¶ 39.

³⁹ Complaint, ¶¶ 35-36; Hawker Decl., ¶ 40.

⁴⁰ Complaint, ¶¶ 38-39; Hawker Decl., ¶¶ 40-41.

complaint was being prepared and that it would include a Rule 8210 charge in the event that all bank records were not provided by May 16.⁴¹

On May 16, 2012, Thomas' attorney sent Enforcement a release signed by Thomas. The release was limited to checking account records and, although Enforcement responded by reiterating that the release did not cover all the items requested, e.g., savings account records, Thomas failed to provide another release.⁴²

Enforcement subsequently contacted the bank to request copies of the checking account records, and on June 18, 2012, only 13 days after Enforcement's request and upon payment of \$160, the bank provided copies of statements for the period from February 2007 through August 2009 (when the account was closed).⁴³ These records confirmed that Thomas used more than \$12,000 of the \$22,000 he had withdrawn from FH's brokerage account for his own personal purposes—to pay his son's tuition and compensate his personal attorney. In addition, the records showed that Thomas made other unauthorized uses of FH's funds after her death, including loaning \$10,000 and \$13,000 to his personal friends.⁴⁴

FINRA Rule 8210(c) sets forth an unequivocal requirement that registered persons comply with FINRA information requests, providing that "[n]o member or person shall fail to provide information" requested pursuant to the Rule. Thomas repeatedly flouted this obligation. Accordingly, the Hearing Officer finds that Thomas violated Rule 8210. Thomas' Rule 8210 violation is also a violation of Rule 2010.⁴⁵

⁴¹ Hawker Decl., ¶ 43.

⁴² Hawker Decl., ¶¶ 45-47.

⁴³ Hawker Decl., ¶ 47.

⁴⁴ Hawker Decl., ¶¶ 50-52.

⁴⁵ See *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, at *13-14 & n.14 (Apr. 1, 2005) ("efforts to impede [FINRA] investigations violate . . . high standards of commercial honor and just and equitable principles of trade.")

V. Sanctions

A. Willful Failure to Disclose Material Facts on a Form U4

As the NAC has emphasized, the questions on a Form U4 are a “critical means of providing FINRA with the information needed to protect investors” because FINRA uses the form to determine the fitness of applicants to participate in the securities industry.⁴⁶ As a consequence, the Sanction Guidelines recommend a fine of \$2,500 to \$25,000 for an individual’s late filing of amendments and, in egregious cases, such as those involving repeated untimely filings, a suspension in any or all capacities (of up to two years) or a bar.⁴⁷ Among the principal considerations in determining sanctions is the nature and significance of the information at issue.

The Hearing Officer concludes that this is an egregious case. For nearly four months, Thomas failed to inform his firm, regulators, or the public that he was the subject of four criminal charges. Those charges—of repeated and serious dishonesty—bore significantly on any assessment of his continuing fitness to participate in the securities industry. Moreover, his reporting failure was willful, as stated above. For these reasons, the Hearing Officer concludes that a suspension of two years would be appropriate to remedy this violation—to impress on Thomas and others the importance of keeping registration information accurate and current. In light of the bar that will be imposed for Thomas’ Rule 8210 violation, however, the suspension is redundant and will not be imposed.

B. Withdrawing Funds Without Authority

There is no sanction guideline that addresses what is charged only as an unauthorized withdrawal of funds belonging to a brokerage firm customer. In such circumstances,

⁴⁶ *Zayed*, 2010 FINRA Discip. LEXIS 13, at *10 & n.8 (citing *Thomas R. Alton*, 52 SEC 380, 382 (1995)).

⁴⁷ *FINRA Sanction Guidelines* 69-70 (2011), available at www.finra.org/Industry/Enforcement/SanctionGuidelines.

adjudicators are encouraged to consult “guidelines for analogous violations.”⁴⁸ In other cases involving unauthorized withdrawals, adjudicators have consulted the guideline for unauthorized transactions.⁴⁹ The Hearing Officer likewise concludes that the guideline for unauthorized transactions is a reasonable guidepost for assessing the sanction in this case. The guideline calls for a 10-day to one-year suspension and a fine of \$5,000 to \$75,000, although in egregious cases a longer suspension or a bar may be warranted.⁵⁰ Principal considerations include whether the respondent misunderstood his or her authority and whether the conduct was egregious.⁵¹ Although Enforcement alleged only one instance of unauthorized withdrawal, the record shows that Thomas misused the funds—to pay his son’s tuition and personal legal expenses—and that, through other improper exercises of the expired power of attorney, he engaged in other instances of misuse of estate funds.⁵² The Hearing Officer concludes that the presence of these aggravating factors renders Thomas’ conduct egregious and warrants a two-year suspension. Again, however, given that a bar will be imposed for Thomas’ violation of Rule 8210, the suspension will not be imposed.

C. Failure to Respond to Requests for Information

A violation of Rule 8210 is serious because Rule 8210 “provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct

⁴⁸ *Sanction Guidelines* 1.

⁴⁹ *E.g., Frondorf*, 2000 NASD Discip. LEXIS 54, at *12-13.

⁵⁰ *Sanction Guidelines* 98.

⁵¹ *Id.* Unauthorized trading can be quantitatively egregious (by virtue of the number of trades) or qualitatively egregious (e.g., when a respondent acts in bad faith). It also can be considered egregious when it is accompanied by aggravating factors. *Id.* at n.2.

⁵² Although Enforcement has not alleged in its Complaint, and the Hearing Officer is not finding, that Thomas violated FINRA Rules by misusing or converting funds, the Hearing Officer considers these facts as aggravating in assessing sanctions. *See Gateway International Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *24 n.30 (May 31, 2006).

investigations.”⁵³ The rule thus “is at the heart of the self-regulatory system for the securities industry” and, when members delay their responses or neglect entirely their responsibilities under the rule, they “undermine the ability of [FINRA] to . . . protect the public interest.”⁵⁴ For these reasons, the Guidelines recommend a bar when an individual does not respond in any manner or when he provides a partial but incomplete response and cannot demonstrate that the information he provided substantially complied with all aspects of the request.⁵⁵

Although Thomas provided responses to a number of information requests, his provision of a release for the checking account statements was, as far as Rule 8210 compliance is concerned, insufficient. It was too little because, although Enforcement repeatedly requested information concerning *all* of FH’s Republic Bank accounts, Thomas refused to supply, or even sign a release relating to, among other accounts, the savings account that FH and Thomas had held jointly. Thus, Thomas cannot show that he substantially complied with the request. That the partial response also was too late is demonstrated by the fact that, armed with the release, Enforcement was able to obtain in less than two weeks the account statements that account holder Thomas had failed, without any justification, to supply for nearly four months.

Viewed from FINRA’s perspective, the information requested was vitally important to FINRA’s investigation of whether Thomas had converted funds belonging to his aunt’s estate—misconduct which, if proven, would have warranted a bar.⁵⁶ There is no evidence of any mitigating facts that would justify a sanction less than a bar.

⁵³ *Richard J. Rouse*, 51 SEC 581, 584, 1993 SEC LEXIS 1831, at *7 (1993).

⁵⁴ *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *pet. denied*, 347 Fed. Appx. 692 (2d Cir. 2009).

⁵⁵ *Sanction Guidelines* 33.

⁵⁶ *Sanction Guidelines* 36.

Accordingly, the Hearing Officer finds that Thomas should be barred from associating with any FINRA member in any capacity for violating FINRA Rules 8210 and 2010.

VI. Order

Respondent is barred from associating with any FINRA member in any capacity for failing to provide requested information, in violation of FINRA Rules 8210 and 2010. The bar shall become effective immediately if this decision becomes FINRA's final disciplinary action. In light of the bar, no further sanctions are assessed for Respondent's (i) willful failure to timely disclose reportable criminal charges on a Form U4, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 and (ii) withdrawal of funds, without authority, from the brokerage account of a firm customer, in violation of NASD Conduct Rule 2110.


Rada Lynn Polts
Hearing Officer

Copies to:

Byron Alan Thomas (*via overnight courier and first-class mail*)
Heather Hawker, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

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

DEPARTMENT OF ENFORCEMENT,	)	Disciplinary Proceeding
	)	No. 2010023076001
Complainant,	)	
	)	Hearing Officer:
v.	)	
	)	COMPLAINT
BYRON ALAN THOMAS,	)	
CRD No. 1048411,	)	
Respondent.	)	

The Department of Enforcement alleges:

SUMMARY

1. While associated with Cadaret, Grant & Co., Inc. (Firm), Respondent Byron Alan Thomas willfully failed to timely amend his Uniform Application for Securities Industry Registration or Transfer (Form U4) to disclose three felony charges and a disclosable misdemeanor. Said conduct violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. Respondent also engaged in unethical conduct by withdrawing funds totaling \$22,000 from his deceased aunt's brokerage account held at the Firm when he lacked the authority to do so, in violation of NASD Conduct Rule 2110. Finally, in violation of FINRA Rules 8210 and 2010, Thomas failed to provide FINRA staff with documentation, viz., bank records, requested pursuant to Rule 8210 that would evidence whether or not Thomas misused or converted funds from his deceased aunt's estate.

RESPONDENT AND JURISDICTION

2. Thomas was associated with the Firm from on or about August 31, 1994 through on or about June 1, 2010, where he was registered as an investment company products and variable contracts representative.

3. Per the Uniform Termination Notice for Securities Industry Registration (Form U5) filed by the Firm on June 1, 2010, Thomas was terminated for failing to notify the Firm of three felony charges and one misdemeanor charge.

4. Since his termination from the Firm, Thomas has not associated with another member firm. Although Thomas is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for the purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Thomas' registration with the Firm and (2) the Complaint charges Thomas with misconduct committed while he was registered or associated with a FINRA member and with failing to respond to FINRA requests for information during the two-year period after the date upon which he ceased to be registered or associated with a FINRA member.

FIRST CAUSE OF ACTION

(Willful Failure to Timely Disclose Material Facts on a Form U4 – Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010)

5. The Department realleges and incorporates by reference paragraph numbers 1 - 4 above.

6. On or about January 20, 2010, an indictment was issued against Thomas in the Cuyahoga County Court of Common Pleas, Criminal Court Division, State of Ohio, Case No. 09-532718-A, charging him with the following: theft (ORC §2913.02(A)(3) – first degree felony); tampering with records (ORC §2913.42(A)(1) – third degree felony); tampering with evidence (ORC §2912.12(A)(2) – third degree felony); and, falsification (ORC §2921.13(A)(3) – misdemeanor). The above charges pertained to Thomas' handling of assets belonging to his aunt, FH, and her estate.

7. Thomas' criminal arraignment on the charges identified in Complaint paragraph 6 took place on February 3, 2010. At that time, Thomas, who was represented by counsel, entered a plea of not guilty.

8. All applicants for registration with FINRA must complete and sign a Form U4. Pursuant to Article V, Section 2(c) of FINRA's By-Laws, every application filed with FINRA shall be kept current at all times by supplementary amendments. Such amendments shall be filed with FINRA not later than 30 day after learning of the facts or circumstances giving rise to the amendment.

9. Form U4 question 14A(1)(b) reads as follows: "Have you ever been charged with a felony?".

10. Similarly, Form U4 question 14B(1)(b) reads: "Have you ever been charged with a misdemeanor specified in 14B(1)(a)?".

11. The misdemeanors identified in 14B(1)(a) include those involving "investments or an investment related business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses."

12. Thomas was required by Article V, Section 2(c) of FINRA's By-Laws to amend his then-current Form U4 on or before March 5, 2010 to provide both an affirmative answer to Form U4 questions 14A(1)(b) and 14B(1)(b) and complete details of the disclosed events/proceedings on appropriate DRP(s).

13. On May 28, 2010, Thomas' Form U4 was amended to disclose the Cuyahoga County criminal proceeding. The amendment was over two and a half months delinquent.

14. Although Thomas was continuously registered with the Firm between February 2010 when he was arraigned, through May 2010, and was, at all relevant times, aware of the criminal charges, he willfully failed to timely amend his Form U4 to disclose this material information.

15. The acts, practices and conduct described above constitute separate and distinct violations of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by Thomas.

SECOND CAUSE OF ACTION
(Unethical Conduct-- NASD Conduct Rule 2110)

16. The Department realleges and incorporates by reference paragraph numbers 1-15 above.

17. On July 22, 1995, FH executed a general power of attorney appointing her nephew, Thomas, as her attorney-in-fact.

18. In or about early January 2007, FH, who had cancer, was hospitalized. Thomas advised staff that, for a period of time during her hospitalization, FH was comatose. Upon information and belief, FH was placed in hospice care in or about mid-January 2007.

19. FH maintained both a checking and a savings account at R bank. On January 9, 2007, while FH was hospitalized, she executed a special power of attorney that appointed Thomas as her attorney-in-fact and granted him the authority "to open, deposit in, operate, withdraw from and close deposit accounts ... and safe deposit boxes" with R bank. On the same date, FH and Thomas also signed new account forms changing her existing individual accounts at R bank to joint accounts with Thomas.

20. On or about January 19, 2007, Thomas, acting under authority of the 1995 power of attorney, opened an account at the Firm for his aunt. The account was funded with 1,778 shares of PPG Industries, Inc. owned by the aunt; the opening account value was \$117,863.62.

21. Thomas sold the PPG shares on January 29, 2007, and the sale proceeds remained in the account in a money market fund. No further transactions occurred in the account until April 2008.

22. FH died on February 15, 2007. Per FH's last will and testament, her goddaughter and thirteen nieces and nephews were to receive equal shares of the estate proceeds.

23. In early April 2008, Thomas, knowing that FH had died in February 2007, but ostensibly acting as her attorney-in-fact under the 1995 power of attorney, withdrew \$22,000 from FH's brokerage account at the Firm. Thomas then deposited the \$22,000 into the R bank checking account referenced in Complaint paragraph 19.

24. By operation of law, the death of the principal revokes the authority of the attorney-in-fact. Thus, at the time Thomas withdrew the \$22,000 from FH's brokerage account at the Firm, the 1995 power of attorney was no longer valid. At no point in time was Thomas ever appointed to act as the executor of FH's estate. Moreover, no authorized representative of the estate ever authorized Thomas to withdraw funds from the account. As such, Thomas lacked the legal authority to withdraw the \$22,000 from the account of Firm customer FH.

25. By withdrawing funds from FH's account under authority of a power of attorney that was no longer valid by reason of FH's death, and without authority as executor or otherwise, Thomas violated NASD Conduct Rule 2110.

THIRD CAUSE OF ACTION
(Failure to Provide Information/Documentation – FINRA Rules 8210 and 2010)

26. The Department realleges and incorporates by reference paragraph numbers 1– 25

above.

27. On January 30, 2012 FINRA staff sent a written Rule 8210 request for information and documentation to Thomas' attorney. Documentation requested therein included, but was not limited to, "a copy of each and every monthly statement (including a copy of each and every check written) for any and all [FH] bank accounts at [R bank] (and any successor bank) from January 1, 2005 through the date such account was closed."

28. FINRA staff requested the bank records because such documentation was necessary to determine whether or not Thomas misused or converted funds from his aunt's estate.

29. The requested documentation was to be provided to FINRA staff on or prior to February 13, 2012. On February 13th, Thomas' counsel requested a one week extension of time to respond to the January 30th Rule 8210 request letter, which was granted.

30. On February 17, 2012, Thomas' counsel submitted a response to the January 30th Rule 8210 request. The response, however, failed to include the above requested bank records.

31. In his February 17th response, Thomas' counsel represented, in relevant part, that "Mr. Thomas has been unable to retrieve the banking statements predating the power of attorney from [RB]; that is, Jan. 2007. As to those statements of Jan. 2007 to Dec. 2008, Mr. Thomas has made a formal request for said records with RC, Branch Manager at 3505 Lee Rd., Shakers Hill, OH 44120. Mr. Thomas learned that these statements are on microfiche and would require payment from him in the amount between \$250 - \$400, if he would be permitted to even get them, where they are the records of the preceding bank [CB]."

32. On April 12, 2012 FINRA issued another Rule 8210 request to Thomas' counsel for the FH bank records. The April 12th request was sent by certified mail, first class mail and

facsimile.

33. In relevant part, the April 12th Rule 8210 request provided,

[S]taff ... requested in the January 30, 2012 letter that your client “provide a copy of each and every monthly statement (including a copy of each and every check written) for any and all [FH] bank accounts at [RB] (and any successor bank) from January 1, 2005 through the date such account was closed.” Your response dated February 17, 2012, notes that the statements for the period of January 2007 through December 2008 are believed to be available on microfiche. Your response, however, failed to contain this requested information and instead indicated that your client was unwilling to incur the \$250 to \$400 cost to obtain the bank statements. The requested information is material to staff’s investigation. As such, staff again requests, pursuant to Rule 8210, that the responsive materials be produced.

34. The documentation requested in the April 12th Rule 8210 letter was due on or prior to April 20, 2012.

35. On April 17, 2012, Thomas’ counsel advised that his client would “make greater effort to comply” with FINRA’s requests for information. He further noted that it would be “highly unlikely” that he would be able to obtain the requested materials by April 20th.

36. Attached to the April 17th letter was correspondence directed to the bank seeking copies of the checking account statements. The request to the bank is dated April 17, 2012, seventy-eight days after the initial January Rule 8210 request for the information was originally made.

37. Thomas failed to provide FINRA with the requested bank records on or prior to April 20, 2012.

38. On May 1, 2012, FINRA still had not received the FH bank records from Thomas. Consequently, another Rule 8210 request for the FH bank records was sent to Thomas’ counsel. The Rule 8210 request was sent on May 1, 2012 by certified mail, first class mail and facsimile. The responsive documentation was due on or prior to May 11, 2012.

39. Thomas did not provide FINRA staff with the requested FH bank records by the May 11th due date.

40. After Thomas deposited the \$22,000 into the R bank checking account, he drew two checks payable to himself totaling \$11,000 to cover his sons' tuition payments and two checks payable to his attorney totaling \$1,200. Thomas's failure to provide the bank statements has prevented FINRA from determining whether these checks were drawn from funds that Thomas acquired improperly after the expiration of the 1995 power of attorney.

41. Thomas' failure to provide FINRA with copies of the FH bank records that were requested, pursuant to Rule 8210 on January 30, 2012, April 12, 2012, and May 1, 2012, constitute separate and distinct violations of FINRA Rules 8210 and 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

A. Make findings of fact and conclusions of law that Thomas committed the violations charged and alleged herein;

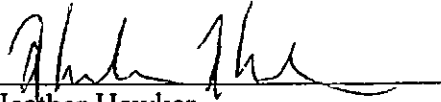
B. Order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed;

C. Order that Thomas bear such costs of proceedings as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330; and,

D. Make specific findings that Thomas' 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 U4 application.

Dated: May 24, 2012

FINRA DEPARTMENT OF
ENFORCEMENT

A handwritten signature in black ink, appearing to read 'Heather Hawker', is written over a horizontal line.

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