

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

CARLOS APONTE, JR.
(CRD No. 4211338),
Brooklyn, NY 11209

Respondent.

Disciplinary Proceeding
No. C07050006

Hearing Officer – SNB

DEFAULT DECISION

May 25, 2005

For Respondent's failure to update his Form U-4, in violation of Rule 2110 and IM 1000-1, and for his failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Joel R. Beck, Regional Counsel, NASD, Atlanta, GA, and Rory C. Flynn, Esq.,
Washington, DC, of Counsel, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Background

On January 24, 2005, 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 Carlos Aponte, Jr. ("Respondent") violated NASD Rules 2110 and IM-1000-1 by willfully failing to update his a Uniform Application for Securities Registration or Transfer ("Form U-4"). The Complaint also alleges that

Respondent violated NASD Rules 8210 and 2110 by failing to respond to NASD Staff requests for information. Respondent did not file an Answer to the Complaint. On April 6, 2005, Enforcement filed a Motion for Entry of Default Decision and Request for Sanctions, supported by the declaration of Joel R. Beck, Esq. and two 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 January 20, 2005, by first class and certified mail to his last known residential address listed in the Central Registration Depository (the "CRD address"). In the same manner, Enforcement sent the Complaint and Second Notice of Complaint to these same addresses on February 18, 2005. 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 Rules 9215(f) the Hearing Officer will deem the allegations in the Complaint admitted.

III. Jurisdiction

Respondent first became registered with the NASD in June 2000. Between May 2001 and November 2003, Respondent was registered with J.P. Turner & Company, LLC, an NASD member firm. Respondent was subsequently registered with another NASD member from November 2003 to May 2004. He is not currently registered with an NASD member.

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.

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 registered 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 a criminal indictment for insurance fraud and grand larceny on or about August 20, 2001, as well as a guilty plea to insurance fraud in the 5th degree, a misdemeanor, resulting in his conviction for that crime. The indictment, guilty plea, and conviction, all occurred while Respondent was registered with an NASD member, and were all material facts requiring disclosure on his Form U-4.

Article V, Section 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 misdemeanor or felony involving, among other things, fraud.

Article V, Section 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."

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 U4 "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, Exchange 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.").

Department 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 disclose his criminal record on his Form U-4.

Enforcement further alleges that Respondent's failure to disclose his criminal record on 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 guilty plea and conviction. 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 July 27 and August 16, 2004, NASD Staff sent Respondent requests for information concerning his failure to disclose his criminal history on his Form U-4. 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.

Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information 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.² Here, although Respondent received valid constructive notice of the Staff's requests,³ he failed to respond to them. Respondent thereby violated Rules 8210 and 2110.

² 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, Exchange Act Release 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).

³ See David I. Cassuto, Exchange Act Release No. 48,087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

V. Sanctions

For failure to update a Form U-4, the Guidelines recommend a fine of \$2,500 to \$50,000 and, in egregious cases, a suspension of up to two years or a bar. In this case, the failure to amend the Form U-4 was egregious, as it involved a failure to disclose a statutory disqualification event and the failure also likely delayed a regulatory investigation or termination for cause. A bar is also standard for failure to provide requested information. NASD Sanction Guidelines at 35, 73, 74 (2005 ed.). There is no evidence of any mitigating circumstances that would justify a lesser sanction in this case for either violation, so Respondent is barred from associating with any NASD member in any capacity.

VI. Conclusion

For Respondent's failure to update his Form U-4, in violation of Rule 2110 and IM 1000-1, and for his failure to provide requested information, in violation of Rules 8210 and 2110, Respondent is barred from associating with any NASD member in any capacity. These bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Sara Nelson Bloom
Hearing Officer

Dated: May 25, 2005

Copies to: Carlos Aponte, Jr. (via overnight and first class mail)
Joel R. Beck, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

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COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent Carlos Aponte, Jr. entered the securities industry in June 2000. He was registered as a general securities representative with NASD member J.P. Turner & Co., LLC from May 23, 2001, to November 20, 2003. Aponte remains subject to NASD's jurisdiction pursuant to Article V, § 4 of the NASD Bylaws.

**FOR A FIRST CAUSE OF COMPLAINT
Willful Failure to Amend Form U-4
NASD IM-1000-1 and Conduct Rule 2110**

2. The allegations contained in paragraph one are realleged and incorporated herein by reference.
3. On or about June 25, 2001, Aponte was arrested by the Suffolk County (NY) Police Department. He was subsequently indicted for insurance fraud and grand larceny on or about August 20, 2001.
4. On or about June 3, 2002, Aponte pled guilty to insurance fraud in the 5th degree, a misdemeanor, and was convicted of that crime.

5. The criminal indictment, Aponte's guilty plea, and the conviction all occurred while Aponte was registered with NASD member J.P. Turner & Co., LLC.
6. The indictment, guilty plea, and conviction were all material facts requiring disclosure on Aponte's Form U-4.
7. Article V, § 2(c) of the NASD Bylaws requires each application for registration (Form U-4) 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.
8. Aponte did not amend his Form U-4 to disclose the indictment, his guilty plea and conviction within 30 days of each event. In fact, as of November 2003, when his registrations with J.P. Turner & Co., LLC were terminated, Aponte had not amended his Form U-4 to disclose any of the reportable events.
9. Aponte's failure to disclose the criminal indictment, his guilty plea, and criminal conviction on his Form U-4 were willful violations of NASD Rules IM-1000-1 and 2110.

**FOR A SECOND CAUSE OF COMPLAINT
Failure to Respond To Information Requests
NASD Procedural Rule 8210 and Conduct Rule 2110**

10. The allegations contained in paragraphs one through nine are realleged and incorporated herein by reference.
11. After learning of the criminal action against Aponte discussed above, NASD staff initiated an examination that reviewed, among other things, Aponte's failure to disclose the matter on his Form U-4.
12. During the course of that examination, NASD staff sought to obtain information from Aponte. On July 27, 2004, an NASD examiner sent a letter to Aponte seeking a written response to specific questions, pursuant to Procedural Rule 8210, by August 10, 2004. The

letter was sent by certified mail to Aponte's residential address as reflected in CRD of [REDACTED]

- [REDACTED]
13. The postal service returned the July 27th letter with the notation that it was "Unclaimed."
 14. Aponte did not respond to the July 27th letter.
 15. On August 16, 2004, the NASD examiner sent a second letter to Aponte requesting a written response to specific questions, pursuant to Procedural Rule 8210, by August 30, 2004. The letter was sent by both certified and first class mail to Aponte's residential CRD address described above.
 16. The postal service returned both letters bearing the notation of "Attempted not known."
 17. Aponte did not respond to the August 16th letter.
 18. By failing to respond to the July 27 and August 16, 2004, Rule 8210 letters, Aponte violated NASD Procedural Rule 8210 and Conduct Rule 2110.

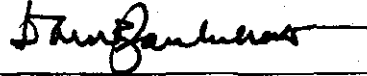
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

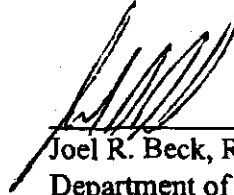
- A. Findings of fact and conclusions of law that Respondent Aponte committed the violations charged and alleged herein, including specific findings that Respondent's conduct regarding the failure to disclose his criminal history on the Form U-4 was willful; the omitted information was material; and the omission to state material facts was on a Form U-4 application.
- B. An order imposing sanctions upon Respondent Aponte in accordance with NASD Rule 8310.
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and

D. An order imposing any other fitting sanction.

January 20, 2005.



David Paulukaitis, Associate Director
NASD, Atlanta District Office



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