

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DANIEL M. PORTER
(CRD No. 2032112),

Respondent.

Disciplinary Proceeding
No. C10050041

Hearing Officer – DRP

DEFAULT DECISION

November 7, 2005

Respondent is barred for violating NASD Conduct Rule 2110 and IM-1000-1, by willfully failing to disclose felony charges and convictions on a Form U-4. In light of the bars, no further sanctions are imposed for violating Conduct Rule 2110 and IM-1000-1 by failing to disclose additional felony charges on a Form U-4.

Appearances

Christina J. Kang, Regional Attorney, New York, NY (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

No appearance by or for Daniel M. Porter.

DECISION

I. Background

On May 19, 2005, the Department of Enforcement filed a three-count Complaint in this proceeding, attached to this Decision as Exhibit A. The first count alleges that Daniel Morris Porter (Respondent or Porter) failed to disclose material facts, specifically four felony narcotics charges, on a Form U-4 Uniform Application for Securities Industry Registration (Form U-4), in violation of NASD Conduct Rule 2110 and IM-1000-1. The second and third counts allege that Porter willfully failed to disclose on a Form U-4 additional material facts: two felony charges and convictions, respectively, for aggravated unlicensed operation of a motor vehicle, in violation of NASD Conduct Rule 2110 and IM-1000-1.

Respondent did not file an Answer to the Complaint. Accordingly, on August 12, 2005, Enforcement filed a motion for entry of default decision, supported by the Declaration of Christina J. Kang (Decl.) and seventeen exhibits. Porter 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 May 17, 2005, Enforcement served the Complaint and Notice of Complaint on Porter by certified and first class mail, sent to his current residential address, as reflected in the Central Registration Depository (the CRD address).² The first class mailing to this address was not returned. The return receipt for the certified mailing was returned to Enforcement bearing the signature of "John Porter." Respondent did not file an Answer. (Decl. ¶¶ 11-15; CX-7, CX-8.)

On June 17, 2005, Enforcement served the Complaint and Second Notice of Complaint on Respondent in an identical manner. As before, the first class mailing to the CRD address was not returned, and the return receipt for the certified mailing was returned to Enforcement signed "John Porter." Respondent failed to file an Answer. (Decl. ¶¶ 16-18; CX-9, CX-10.)

Enforcement complied with NASD 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 Complaint, Porter defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

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. The exhibits are cited as CX.

² CRD records show Respondent's address as [REDACTED] (CX-1.)

III. Jurisdiction

Respondent was associated with NASD through his employment with member firm The Rockwell Financial Group, Inc. (Rockwell) from May 21, 2004 to August 25, 2004. Since that time, he has not been associated or registered with any NASD member. (Compl. ¶¶ 1-2, 4-5; Decl. ¶¶ 7-10; CX-1.)

Respondent is 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 Rockwell, alleges misconduct that occurred while he was an associated person.

IV. Findings of Fact and Conclusions of Law

The Complaint charges that Respondent failed to disclose material facts on a Form U-4 that he prepared in May 2004 for Rockwell to submit to NASD on his behalf. In completing his Form U-4, Respondent was required to disclose whether he had ever been convicted of, or charged with, a felony.³ Though he answered "yes" to each question, the Complaint alleges that Respondent's disclosures were materially inaccurate and incomplete. (Compl. ¶¶ 9-10, 13-17; Decl. ¶¶ 20-22; CX-2.)

The Form U-4 Disclosure Reporting Page (DRP) requires applicants to report all charges arising from the same event in greater detail and calls for unrelated criminal actions to be reported on separate DRPs. In connection with the Form U-4 he completed in May 2004, Respondent filed a single DRP in which he disclosed that he had been charged on January 15, 1989 with a felony, namely "sale of controlled substance," which resulted in a felony conviction on March 21, 1990. (Compl. ¶¶ 11, 14; Decl. ¶ 25; CX-2.)

³ The applicant is required to report whether he or she has ever "been convicted of or pled guilty or nolo contendere ("no contest") ... to any felony" at question 14A(1)(a) and whether he or she has ever "been charged with any felony" at question 14A(1)(b). (CX-2.)

In fact, Respondent had been charged with criminal possession of a controlled substance, a felony, in March 1989. In July 1990, he was charged with three felony counts of criminal possession of a controlled substance and three felony counts of criminal sale of a controlled substance, arising from three separate incidents. In July 1991, he was convicted of one count of attempted criminal sale of a controlled substance, which is also a felony. He also was twice charged with, and convicted of, aggravated unlicensed operation of a motor vehicle within ten years of completing his May 2004 Form U-4. (Compl. ¶¶ 7-8; Decl. ¶¶ 27, 30, 32-34; CX-11, CX-12, CX-13, CX-14, CX-15, CX-16, CX-17.)

After Rockwell received Respondent's fingerprint record and criminal history from the Department of Justice, Respondent amended his Form U-4.⁴ Thus in August 2004, Respondent belatedly disclosed that he had been charged with, and convicted of, felonies for aggravated unlicensed operation of a motor vehicle. In one DRP, Respondent reported that on February 5, 1994, he was charged with felony aggravated unlicensed operation of a motor vehicle, which resulted in a felony conviction on July 21, 1995. In a separate DRP, he reported that on January 13, 1997, he was again charged with felony aggravated unlicensed operation of a motor vehicle, which resulted in a felony conviction on June 9, 1999.⁵ (Compl. ¶ 20, 26; Decl. ¶¶ 23, 30 n.3; CX-6.)

⁴ Porter's initial Form U-4 was signed May 21, 2004, and his amended Form U-4 was signed August 4, 2004. (CX-2, CX-6.)

⁵ There is an unexplained, though minor, discrepancy between the dates in Respondent's amended Form U-4 and those in the Complaint. The second cause of the Complaint alleges that Respondent failed to disclose that he was charged with felony aggravated unlicensed operation of a motor vehicle on two occasions: in or around August 1994 and in or around May 1997. The third cause of the Complaint alleges that Respondent failed to disclose that he was convicted of felony aggravated unlicensed operation of a motor vehicle on two occasions: in or around August 1995 and in or around August 1999. Respondent's amended Form U-4 appears to report accurately the dates at issue. (Compl. ¶¶ 20, 25-26; Decl. ¶ 30; CX-16, CX-17.)

On August 24, 2004, NASD's Department of Member Regulation informed Rockwell that Respondent was subject to a statutory disqualification due to his felony convictions. Consequently, Respondent's employment was terminated on August 25, 2004. (CX-1, CX-3.)

The first cause of the Complaint charges that Respondent failed to disclose material facts, namely all felony narcotics charges. The second cause of the Complaint charges that Respondent willfully failed to disclose material facts, namely two felony charges for aggravated unlicensed operation of a motor vehicle. The third cause of the Complaint charges that Respondent willfully failed to disclose material facts, namely two felony convictions for aggravated unlicensed operation of a motor vehicle. (Compl. ¶¶ 15, 19, 25.)

In applying for registration, "applicants have an affirmative obligation to disclose fully all material facts, including an individual's criminal history, in response to the questions on the Form U-4."⁶ 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." It also violates IM-1000-1, which provides that the filing of registration information that "is incomplete or inaccurate so as to be misleading . . . may be deemed" a violation of Rule 2110.⁷

Enforcement further alleges that Respondent's conduct with respect to his failure to disclose the motor vehicles charges and convictions, charged in counts two and three, was willful.⁸ Willfulness is not required to establish a violation of Rule 2110, but Article III, Section

⁶ *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).

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

⁸ Enforcement did not allege that Respondent *willfully* failure to disclose all felony narcotics charges, because he reported one felony narcotics charge and conviction. (Decl. ¶ 28.)

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." (Compl. ¶¶ 19, 25.)

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."⁹ 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.¹⁰

Here, Respondent applied for registration with Rockwell on May 21, 2004. At that time, he failed to disclose that he had been twice charged with, and convicted of, felony aggravated unlicensed operation of a motor vehicle. Though Respondent asserted that the omissions from his Form U-4 were inadvertent, he admitted in an on-the-record interview with NASD staff that he knew he would be unable to register with NASD if he had "any felony convictions within the past ten years."¹¹ (Compl. ¶¶ 2, 19, 25; Decl. ¶¶ 7, 30, 34-35; Mot. at 6; CX-5 at 3 (p. 33 of transcript).)

The Hearing Officer thus finds that Respondent's failure to disclose felony charges and convictions was willful. The Hearing Officer further finds that the omissions were material, as an individual's criminal history is a fact that must be disclosed on a Form U-4.¹²

⁹ *Christopher LaPorte*, Exchange Act Release No. 39,171, 1997 SEC LEXIS 2058, at *8 n. 2 (Sept. 30, 1997).

¹⁰ *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); *Christopher 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).

¹¹ A person is subject to a statutory disqualification from association with a member if that person has been convicted of a felony within ten years preceding the filing of the application to become associated with a member of NASD. NASD By-Laws, Art. III, Sec. 4(g)(2).

¹² See *Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, at *13-14.

Thus, the allegations in the Complaint, which are deemed admitted, are sufficient to establish for the purposes of this default decision that Respondent violated NASD Conduct Rule 2110 and IM-1000-1.

V. Sanctions

For filing a false, misleading or inaccurate Form U-4 or Amendment, NASD Sanction Guidelines recommend a fine of \$2,500 to \$50,000, and a suspension for 5 to 30 days.¹³ In egregious cases, such as filing a false, inaccurate or misleading Form U-4, a longer suspension of up to two years or a bar is recommended.¹⁴

There are three principal considerations in determining the appropriate sanctions: the nature and significance of the information at issue; whether respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and whether the respondent's misconduct resulted in harm. 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, a statutorily disqualified individual, such as Respondent, may become associated with a member firm, as occurred here. Given the "utmost importance of complete and truthful disclosures on the Form U4,"¹⁵ Respondent's willful failure to disclose disqualifying felony convictions, as charged in the third cause of Complaint, as well as his failure to disclose the underlying felony charges, as charged in

¹³ *NASD Sanction Guidelines* (2005 ed.) at 73.

¹⁴ *Id.* at 74. Egregious cases include those involving false, inaccurate or misleading filings; those involving a failure to disclose or untimely disclosure of a statutory disqualification event or customer complaint; and those where the failure to disclose or untimely disclosure delayed regulatory investigation of terminations for cause.

¹⁵ *Dep't of Enforcement v. Zdzieblowski*, No. C8A030062, 2005 NASD Discip. LEXIS 3, at *19 (NAC May 3, 2005).

the second cause of the Complaint, was egregious. Accordingly, a bar is imposed for each violation.

In light of the bars, additional sanctions for failure to disclose material facts on his Form U-4, as charged in the first cause of Complaint, would be redundant.¹⁶ Therefore, no separate sanctions will be imposed for that violation.

VI. Conclusion

Respondent Daniel M. Porter is barred from association with any member firm in any capacity for filing a false, inaccurate or misleading Form U-4 by willfully omitting material facts, disqualifying felony convictions, in violation of NASD Conduct Rule 2110 and IM-1000-1. Respondent is also barred for filing a false, inaccurate or misleading Form U-4 by willfully omitting material facts, felony charges underlying the disqualifying felony convictions, in violation of NASD Conduct Rule 2110 and IM-1000-1. In light of the bars, no separate sanctions are imposed for filing a false, inaccurate or misleading Form U-4 by omitting material facts, additional felony charges, in violation of NASD Conduct Rule 2110 and IM-1000-1.

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

SO ORDERED.


Dana R. Pisanelli
Hearing Officer

Dated: November 7, 2005
Washington, DC

Copies to: Daniel M. Porter (*via overnight and first class mail*)
Christina J. Kang, Esq. (*via facsimile and first class mail*)
Rory C. Flynn, Esq. (*via first class mail*)

¹⁶ See *Dep't of Enforcement v. Hodde*, 2002 NASD Discip. LEXIS 4, at *17 (NAC Mar. 27, 2002).

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DANIEL MORRIS PORTER
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COMPLAINT

Upon information and belief, the Department of Enforcement ("Complainant") alleges as follows:

JURISDICTION

1. On or about May 21, 2004, Respondent Daniel Morris Porter (CRD No. 2032112) ("Respondent") became employed by member firm Rockwell Financial Group, Inc. (BD No. 26153) ("Rockwell").
2. In connection with his employment at Rockwell, Respondent became an "associated person of a member" as that term is defined in Article I, paragraph (dd) of the NASD By-Laws, by virtue of the fact that he signed a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") on or about May 21, 2004. Rockwell submitted this Form U-4 to NASD on or about May 26, 2004.
3. On or about August 24, 2004, NASD filed an administrative Uniform Termination Notice for Securities Industry Registration ("Form U-5") concerning Respondent. The Form U-5 withdrew NASD's earlier approval of Respondent's registration, based

on the identification of the Respondent as an individual subject to statutory disqualification pursuant to Article III, Section 4(g)(2) of NASD's By-Laws.

4. On or about October 27, 2004, Rockwell filed a Form U-5 terminating Respondent for his "failure to disclose felony convictions" and indicating that Respondent's last date of employment was August 25, 2004.
5. Upon information and belief, Respondent is not currently registered with NASD, nor is he otherwise employed in the securities industry. However, Respondent remains subject to the jurisdiction of NASD pursuant to Article V, Section 4 of its By-Laws.

BACKGROUND

6. Paragraphs one through five of this Complaint are realleged and incorporated herein by reference.
7. Respondent was charged with the following felony crimes:
 - a. In or around March 1989, Respondent was charged with Criminal Possession of a Controlled Substance ("CPCS") in the Third Degree, a felony under New York State law, in Suffolk County, New York.
 - b. In or around July 1990, Respondent was charged, in a Superior Court Information, with three counts of CPCS in the Third Degree, and three counts of Criminal Sale of a Controlled Substance ("CSCS") in the Third Degree, felonies under New York State law, in Suffolk County, New York. Specifically, Respondent was charged with one count of CPCS in the Third Degree and one count of CSCS in the Third Degree in connection with an arrest that took place on October 11, 1989; Respondent was charged with one count of CPCS in the Third Degree and one count of CSCS in the Third Degree in connection with an arrest

that took place on October 17, 1989; and Respondent was charged with one count of CPCS in the Third Degree and one count of CSCS in the Third Degree in connection with an arrest that took place on January 2, 1990.

- c. In or around August 1994, Respondent was charged with Aggravated Unlicensed Operation of a Motor Vehicle ("AUOMV") in the First Degree, a felony under New York State law, in Nassau County, New York.
- d. In or around May 1997, Respondent was charged with AUOMV in the First Degree, a felony under New York State law, in Suffolk County, New York.

8. Respondent was convicted of the following crimes:

- a. In or around July 1991, Respondent was convicted of Attempted CSCS in the Third Degree, a felony under New York State law, in Suffolk County, New York.
- b. In or around April 1995, Respondent was convicted of AUOMV in the First Degree, a felony under New York State law, in Nassau County, New York.
- c. In or around August 1999, Respondent was convicted of AUOMV in the First Degree, a felony under New York State law, in Suffolk County, New York.

9. On or about May 26, 2004, Rockwell submitted to NASD the Form U-4 Respondent completed and signed on or about May 21, 2004 (the "May 2004 Form U-4").

10. The May 2004 Form U-4 required an applicant to disclose information regarding his or her criminal history, including whether the applicant has ever been charged with any felony (question 14A(1)(b)), and whether the applicant has ever been convicted of any felony (question 14A(1)(a)).

11. The Form U-4 Disclosure Reporting Page ("DRP"), requires that an applicant "report all charges arising out of the same event. . . [and that] [u]nrelated criminal actions. . . must be reported on separate DRP's."

FIRST CAUSE OF COMPLAINT
(Failure to Disclose Material Facts on a Form U-4 – Felony Charges)
Violation of NASD Conduct Rule 2110 and NASD IM-1000-1

12. Paragraphs one through eleven of this Complaint are realleged and incorporated herein by reference.
13. Respondent answered "yes" to Question 14A(1)(b) on the May 2004 Form U-4, which asked whether he had ever "*been charged with any felony*" (emphasis in original). Respondent also answered "yes" to Question 14A(1)(a) on the May 2004 Form U-4, which asked whether he had ever "*been convicted of . . . any felony*" (emphasis in original).
14. On the DRP, with respect to Question 14A(1)(b), Respondent disclosed one felony charge. The disclosed felony charge was listed as "sale of Controlled Substance" on January 15, 1989.
15. Respondent was never apparently charged with "sale of Controlled Substance" in 1989. Although Respondent disclosed one narcotics-related charge, he was actually charged with narcotics-related felonies on four occasions, with a total of seven counts of felonies. Respondent's disclosure, then, was inaccurate and incomplete.
16. On the May 2004 Form U-4, Respondent failed to disclose the following material facts:
- a. that he was charged with CPCS in the Third Degree, a felony charge, in or around March 1989;

b. that he was charged with three counts of CPCS in the Third Degree, felony charges, in or around July 1990;

17. On August 4, 2004, Respondent amended his Form U-4. On this amendment, he belatedly disclosed some additional felony charges but still failed to disclose the following material facts:

- a. that he was charged with CPCS in the Third Degree, a felony charge, in or around March 1989; and
- b. that he was charged with three counts of CPCS in the Third Degree, felony charges, in or around July 1990.

By reason of the foregoing, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and thus violated NASD IM-1000-1 and NASD Conduct Rule 2110.

SECOND CAUSE OF COMPLAINT

**(Willful Failure to Disclose Material Facts on a Form U-4 – Felony Charges)
Violation of NASD Conduct Rule 2110 and NASD IM-1000-1**

18. Paragraphs one through seventeen of this Complaint are realleged and incorporated herein by reference.

19. On the May 2004 Form U-4, Respondent willfully failed to disclose the following material facts:

- c. that he was charged with AUOMV in the First Degree, a felony charge, in or around August 1994; and
- d. that he was charged with AUOMV in the First Degree, a felony charge, in or around May 1997.

20. On August 4, 2004, Respondent amended his Form U-4. On this amendment, he belatedly disclosed the August 1994 and May 1997 felony AUOMV felony charges. By reason of the foregoing, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and thus violated NASD IM-1000-1 and NASD Conduct Rule 2110.

THIRD CAUSE OF COMPLAINT

**(Willful Failure to Disclose Material Facts on a Form U-4 – Felony Convictions)
Violation of NASD Conduct Rule 2110 and NASD IM-1000-1**

21. Paragraphs one through twenty of this Complaint are realleged and incorporated herein by reference.
22. Respondent answered "yes" to question 14A(1)(a) on the May 2004 Form U-4, which asked whether he had ever "been convicted of . . . any *felony*" (emphasis in original).
23. On the DRP, with respect to Question 14A(1)(a), Respondent disclosed one felony conviction. The disclosed felony conviction was listed as a New York State conviction for "Sale of Control Substance [sic]" on March 21, 1990.
24. Respondent was never apparently convicted of "sale of Controlled Substance" in 1990.
25. On the May 2004 Form U-4, Respondent willfully failed to disclose the following material facts:
- a. that he was convicted of AUOMV in the First degree, a felony, in or around April 1995; and
 - b. that he was convicted of AUOMV in the First degree, a felony, in or around August 1999.
26. On or about August 4, 2004, Respondent amended his Form U-4 and belatedly disclosed the above felony convictions.

By reason of the foregoing, Respondent acted in contravention of Article V, Section 2 of NASD's By-Laws and thus violated NASD IM-1000-1 and NASD Conduct Rule 2110.

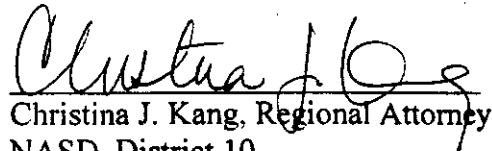
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. Specific findings that Respondent's conduct, as set forth in the Second and Third Causes of Complaint, was willful; the omitted information was material; and the omission to state material facts was on a Form U-4 application;
- C. An order imposing sanctions upon Respondent in accordance with NASD Procedural Rule 8310;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances and in accordance with NASD Rule 8330; and
- E. An order, pursuant to NASD Procedural Rule 8310, imposing any other fitting sanction.

Dated: May 17, 2005

DEPARTMENT OF ENFORCEMENT


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