BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. David Adam Elgart Roswell, GA, Respondent.	DECISION Complaint No. 2013035211801 Dated: March 16, 2017

Respondent willfully failed to timely update his Form U4 with material information and provided a false answer on a FINRA questionnaire. Held, findings affirmed in part and vacated in part; sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Samir K. Ranade, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Alan M. Wolper, Esq., Heidi Vonderheide, Esq.

Decision

Between 2003 and 2010, David Adam Elgart received notice of five tax liens. FINRA rules required that he update his Uniform Application for Securities Industry Registration or Transfer ("Form U4") with information about these liens within 30 days of learning of the liens. Elgart did not do so, however, until December 2013, after FINRA staff asked Elgart whether he had any tax liens that needed to be disclosed. Approximately one month before he amended his Form U4, Elgart falsely responded to a FINRA questionnaire that he did not have any unsatisfied liens against him and provided that questionnaire to FINRA.

In the proceedings below, a Hearing Panel found that Elgart failed to timely update his Form U4 with information about his tax liens, filed misleading amendments to his Form U4, and made a false statement on a FINRA questionnaire, in violation of FINRA rules. The Hearing Panel also found that Elgart's misconduct concerning his Form U4 was willful, that the information he failed to disclose was material, and that he, therefore, was subject to statutory disqualification. For Elgart's Form U4 violations, the Hearing Panel suspended Elgart from associating with any FINRA member firm in any capacity for six months and fined him $15,000.

For providing a false answer on a FINRA questionnaire, the Hearing Panel suspended Elgart from associating with any FINRA member firm in any capacity for an additional 30 business days and fined him an additional $5,000.

Elgart appealed the Hearing Panel's decision. As explained below, we affirm the Hearing Panel's findings in part, vacate the findings in part, and affirm the sanctions.

I. Elgart

Elgart has been in the securities industry for 45 years. He first associated with a FINRA member firm in 1971, and he first registered with FINRA in 1976. Since 1998, Elgart has been the president and chief compliance officer of Sequoia Investments, Inc. ("Sequoia Investments"), a small broker-dealer, and has been registered as a general securities representative, general securities principal, municipal securities principal, and (since 2011) operations professional. In 2001, Elgart acquired a majority interest in Sequoia Investments.[1]

II. Factual Background

A. The Tax Liens

Between June 2003 and June 2010, Elgart became the subject of at least six tax liens, totaling $407,931.78. These liens, and the dates they were recorded or filed, were as follows:

1. June 10, 2003: federal tax lien for $150,843.50;

2. December 12, 2005: State of Georgia tax lien for $6,962.92;

3. January 11, 2007: federal tax lien for $19,175.80;

4. November 3, 2008: federal tax lien for $130,137.74;

5. April 6, 2009: State of Georgia tax lien for $27,236.57; and

6. June 2, 2010: federal tax lien for $73,575.25.

The January 11, 2007 federal tax lien was released on February 7, 2007, and the complaint in this proceeding does not charge Elgart with any violations concerning this lien. The parties stipulated that the five other tax liens remain unsatisfied and have not been released.[2]

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[1] Sequoia Investments' primary business is sales of municipal securities to high net worth individuals.

[2] In addition to the six tax liens discussed above, Elgart also was the subject of a January 13, 2002 lien in the amount of $4,152 held by DeKalb County. Enforcement did not have a copy of this lien and did not charge Elgart with any violations concerning it.

Elgart testified that some of the tax liens related to his purchase of Sequoia Investments and involved a "question of return of capital as opposed to taxing it as ordinary income." Elgart testified that he received the tax liens at or about the time they were issued to him. He also testified that he gave the notice of the June 2003 tax lien to his wife and his accountant to "handle."

At the end of 2012, Elgart "was getting letters from the IRS" and decided to retain a tax attorney for help in dealing with the tax liens. Elgart testified that on January 1, 2013, he met for the first time with the attorney to discuss the liens. Elgart and Enforcement stipulated that during his conversation with his attorney, Elgart was "further advised of the liens."[3] Elgart testified that his attorney informed him on January 1, 2013, about "how many actual liens there were."

B. Elgart's Form U4 Filings Prior to December 23, 2013

Elgart was responsible for ensuring that Sequoia Investments' filings, including Form U4 filings, were kept current and amended as necessary. Elgart testified that he delegated the responsibility of "handl[ing] all the paperwork for the firm from a compliance perspective, registration perspective," including Forms U4, to the firm's financial and operations principal ("FINOP"). If Elgart needed to make a change to his own Form U4, he would "[c]all the FINOP and tell them to do that."

On or about July 17, 1998, Elgart completed a Form U4 to become associated with Sequoia Investments. That initial Form U4 reported that Elgart was not subject to any liens.

Between November 2003 and October 2013, Elgart amended his Form U4 13 times.[4] Each of those Forms U4 contained Question 14M, which asks, plainly and straightforwardly, "Do you have any unsatisfied judgments or liens against you?" On those 13 amended Forms U4, Elgart did not change his "No" response to Question 14M or disclose any of his tax liens. On 12 of the amended Forms U4, Elgart's electronic signature appears as the "amendment individual/applicant" giving his "acknowledgement and consent" and as the "firm/appropriate signatory." On the other amended Form U4 (dated January 13, 2010), Elgart's electronic signature appears only as the "firm/appropriate signatory." Asked how his electronic signature was placed on these amendments, Elgart testified that he assumed that the FINOP either had Elgart log in and type his name or instead typed Elgart's signature pursuant to Elgart's authorization.

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[3] The parties stipulated that Elgart's conversation with his attorney was "on or about January 2, 2013." All other evidence in the record reflects, however, that Elgart met with his attorney on January 1, 2013.

[4] Four of these Form U4 amendments were filed between January 3, 2013—two days after Elgart discussed the liens with his attorney—and October 10, 2013.

C. FINRA Examination

In 2013, FINRA staff conducted a cycle examination of Sequoia Investments. In preparation for that examination, FINRA staff generated LexisNexis reports for all of the firm's registered representatives, including an October 16, 2013 report for Elgart. The LexisNexis report reflected that the seven tax liens discussed above (including the two liens that are not the basis of any charges in this proceeding) had been filed against Elgart.

Prior to commencing field work on the cycle examination, FINRA staff asked Elgart to complete a Personal Activity Questionnaire ("PAQ"). The PAQ instructed Elgart to "complete all pages, sign, date and return to your manager immediately." The PAQ did not refer to FINRA Rule 8210.

On November 25, 2013, Elgart completed and signed the PAQ. Question 21 on the PAQ asked, plainly and straightforwardly, "[d]o you have any unsatisfied judgments or liens against you? If yes, provide detail as to each." In response to that question, Elgart answered "No." Directly below Elgart's signature on the PAQ was the statement, "By signing this document, I am attesting that the information provided is accurate and truthful." Elgart and Enforcement stipulated that, at the time Elgart completed the PAQ, he "was on notice of and the subject of five unsatisfied liens, namely the June 2003, December 2005, November 2008, April 2009, and June 2010 liens." Elgart provided the PAQ to FINRA staff.

FINRA staff noticed that there were discrepancies between Elgart's response to the PAQ, the LexisNexis report on Elgart, and Elgart's Form U4 concerning whether Elgart had any outstanding liens. FINRA staff sought to determine whether the seven tax liens on the LexisNexis report were actually against Elgart. On a December 19, 2013 telephone call, FINRA staff informed Elgart about the seven tax liens on the LexisNexis report and asked Elgart to determine if the liens should be reported on his Form U4. FINRA staff also asked Elgart, if he decided that the liens should be reported, to update his Form U4, provide a copy of the amended Form U4 to FINRA staff, and update the PAQ. FINRA likewise asked Elgart, if he determined that he did not have liens that needed to be disclosed, to provide a written statement explaining how he made that determination.

Later on December 19, 2013, a FINRA staff member followed up with an e-mail to Elgart summarizing the earlier telephone conversation. The e-mail included a list of the seven tax liens and a link to a page on FINRA's website that provides guidance regarding what and when items should be disclosed on Form U4. In a Friday, December 20, 2013 e-mail response, Elgart wrote to FINRA staff, "Attempting to contact my accountants to obtain the status of these." In another e-mail sent later that same day, Elgart wrote to FINRA staff, "Just called the accountants and (sorry it took so long) and will have the answer by early Monday a.m. and then will update as necessary."

On Monday, December 23, 2013, Elgart amended his Form U4 to change his answer to Question 14M from "No" to "Yes" and to disclose the seven tax liens against him. In response to the fields that requested the "date individual learned of the . . . lien," Elgart responded "January 1, 2013." In a related field that asked whether that date was "exact," Elgart responded, with respect to six of the liens, that January 1, 2013 was the "exact" date that he learned of the

liens, and further responded that his "attorney advised me" of those six liens. As for the seventh tax lien (the $73,575 June 2010 tax lien held by the Internal Revenue Service), Elgart did not identify January 1, 2013 as the "exact" date he learned of the lien, but explained that his "attorney advised me of liens – I was not aware of."

On January 27, 2014, FINRA staff sent an e-mail to Elgart attaching a blank PAQ. FINRA requested that Elgart complete and update the section about liens and return the completed PAQ to FINRA staff. Elgart did not do so.

During the examination by FINRA staff into Elgart's conduct and the subsequent disciplinary proceeding, Elgart gave numerous inconsistent explanations of when he became aware of the tax liens. These explanations included Elgart's admission that he was aware of the tax liens around the time they were filed.

III. Procedural History

On November 10, 2015, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint against Elgart. Cause one alleged that Elgart failed to amend his Form U4 to disclose five tax liens totaling almost $390,000, dated between June 2003 and June 2010, until December 23, 2013, in violation of Article V, Section 2(c) of the NASD and FINRA By-Laws, NASD IM-1000-1 and FINRA Rule 1122, and NASD Rule 2110 and FINRA Rule 2010.[5] The complaint further requested that the Hearing Panel make specific findings that Elgart's failure to timely amend his Form U4 was willful, that the omitted information was material, and that the omission to state material facts was on a Form U4 application. Cause two alleged that on November 23, 2013, Elgart misled FINRA by falsely completing and submitting to FINRA the PAQ, thus acting in bad faith and failing to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. On December 8, 2015, Elgart filed an answer in which he denied the allegations.

On April 6, 2016, a Hearing Panel held a one-day hearing.[6] On June 3, 2016, the Hearing Panel issued its decision. The Hearing Panel found that Elgart failed to timely amend his Form U4 to disclose five tax liens, filed 13 misleading Form U4 amendments, and provided a false and

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[5] The conduct rules and interpretive materials that apply in this case are those that existed at the time of the conduct at issue. NASD IM-1000-1 applies to Elgart's conduct prior to August 17, 2009; FINRA Rule 1122, which superseded NASD IM-1000-1, applies to Elgart's conduct from August 17, 2009, forward. *FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96, at *2 (June 2009). NASD Rule 2110 applies to Elgart's conduct prior to December 15, 2008; FINRA Rule 2010, which superseded NASD Rule 2110, applies to Elgart's conduct from December 15, 2008, forward. *FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *32 (Oct. 2008).

[6] Enforcement called two witnesses, a FINRA cycle examination manager and Elgart. The parties submitted four joint exhibits. Enforcement introduced 13 exhibits into evidence. Elgart testified in his own defense and introduced six exhibits into evidence.

dishonest answer on the PAQ, in violation of FINRA rules. The Hearing Panel found that because Elgart's conduct concerning his Form U4 was willful and the information he failed to disclose was material, he was subject to statutory disqualification. For the Form U4 violations, the Hearing Panel suspended Elgart from associating with any member firm in any capacity for six months and fined him $15,000. For providing to FINRA a false and dishonest answer to a question on the PAQ, the Hearing Panel suspended Elgart in all capacities for an additional 30 business days, to be served consecutively with the six-month suspension, and fined him an additional $5,000. The Hearing Panel also assessed Elgart $1,759.42 in costs. This appeal followed.

IV. Discussion

A. Failure to Update Form U4 in a Timely Manner

The Hearing Panel found that Elgart failed to update his Form U4 in a timely manner and filed 13 misleading Form U4 amendments. It also found that Elgart's conduct was willful and that the information he failed to disclose on his Form U4 was material. We affirm these findings in part and vacate in part.

1. Violation of NASD and FINRA Rules

Article V, Section 2(c) of the NASD By-Laws and the FINRA By-Laws provided and provides, in pertinent part, that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments" and that "[s]uch amendment . . . shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." NASD IM-1000-1 provided that "[t]he filing with the Association of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade." Similarly, FINRA Rule 1122 provides that "[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."[7]

These rules "apply to a Form U4, which FINRA uses to screen applicants and monitor their fitness for registration within the securities industry." *McCune*, 2016 SEC LEXIS 1026, at

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[7] Rules that are applicable to members are applicable to associated persons. *See* NASD Rule 0115(a), FINRA Rule 0140(a). Conduct that violates NASD IM-1000-1 and FINRA Rule 1122 also violates the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its members and their associated persons under NASD Rule 2110 and FINRA Rule 2010. *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *12 (Mar. 15, 2016), *aff'd*, No. 16-9527, 2016 U.S. App. LEXIS 21690 (10th Cir. 2016).

*10-12; *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012) (stating that Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry"); *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *16 (Dec. 7, 2009) (NASD IM-1000-1 applies to Form U4, which is used by FINRA to determine fitness of applicants), *aff'd*, 671 F.3d 210 (2d Cir. 2012). The information on Form U4 is not only important for regulators but also for employers and members of the public. "The duty to provide accurate information on a Form U4 and to amend Form U4 to provide current information assures regulatory organizations, employers, and members of the public that they have all of the material, current information about the registered representative with whom they are dealing." *McCune*, 2016 SEC LEXIS 1026, at *12.

"Because [r]egistration of broker-dealers is a means of protecting the public, every person submitting a Form U4 has the obligation to ensure that the information provided on the form is true and accurate." *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011) (footnote omitted); *see also Mathis*, 2009 SEC LEXIS 4376, at *16 ("[T]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of the screening process."); *Tucker*, 2012 SEC LEXIS 3496, at *30 (stating that "FINRA 'cannot investigate the veracity of every detail in each document filed with it, [and] must depend on its members to report to it accurately and clearly in a manner that is not misleading"). Likewise, "[a] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur." *McCune*, 2016 SEC LEXIS 1026, at *10-12.

Elgart failed to comply with his obligation to timely amend his Form U4 with accurate current information. As noted above, Question 14M on Form U4 asks filers, "Do you have any unsatisfied judgments or liens against you?" When the answer is "yes," Form U4 further requires a filer to disclose specific information about the judgments or liens, including, in relevant part, the date the individual learned of the judgment or lien and whether that date is "exact." Prior to June 2003, Elgart's response to Question 14M was "No." In June 2003, December 2005, November 2008, April 2009, and June 2010, five separate tax liens were recorded against Elgart, and those tax liens remained unsatisfied throughout the relevant period. Thus, as early as June 2003 and continuing until Elgart finally amended his Form U4 in December 2013 to disclose these five tax liens, Elgart's "No" response to Question 14M was inaccurate and misleading.

Elgart was required to disclose each lien on his Form U4 within 30 days after learning of the circumstances that required him to disclose the liens. Elgart admits that he learned of the tax liens around the time they were issued to him. Elgart, however, did not update his Form U4 until December 23, 2013, three to ten years after he was required to do so. Elgart previously conceded that he did not dispute or deny the obligation to disclose the tax liens. And at the hearing and in stipulations, Elgart admitted that he did not amend his Form U4 to disclose the liens within 30 days of his knowledge of the liens. Accordingly, we find that Elgart failed to timely disclose five tax liens on his Form U4, in violation of Article V, Section 2(c) of the NASD By-Laws and

FINRA By-Laws, NASD IM-1000-1, NASD Rule 2010, and FINRA Rules 1122 and 2010.[8] We vacate, however, the Hearing Panel's findings that Elgart filed 13 misleading Form U4 amendments in violation of FINRA rules. The complaint did not allege any such violation.

2. Statutory Disqualification

FINRA's By-Laws provide that a person subject to a "statutory disqualification," as defined in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"), cannot be associated with a FINRA member firm unless the firm obtains permission from FINRA. *See* FINRA By-Laws, Art. III, Secs. 3(b), 3(d), and 4. A person is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act if such person has, among other things,

> *willfully* made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any *material* fact which is required to be stated therein.

15 U.S.C. § 78c(a)(39)(F) (emphasis added). This statutory provision applies to representatives who have willfully provided on a Form U4 false statements with respect to a material fact or who willfully failed to amend Form U4 with material information that is required to be stated on the Form U4. *See, e.g.*, *McCune*, 2016 SEC LEXIS 1026, at *13-23 (finding that applicant was statutorily disqualified for willfully failing to amend Form U4); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *37-41 (Apr. 18, 2013) (finding that applicant was statutorily disqualified for willfully providing material false information on, and excluding material information from, a Form U4), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014). As explained below, we find that, in failing to amend his Form U4 to disclose the tax liens, Elgart acted willfully and omitted material facts that were required to be disclosed on the Form U4.

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[8] On appeal, Elgart argues that "simply because one receives a notice of a tax lien, he or she does not necessarily know that lien to be accurate—in existence or amount." Elgart does not elaborate on this argument except to say, "[t]hus, the engagement of the accountant and attorney to review and respond." Even if Elgart's retention of an attorney and accountant was for the purpose of challenging the various liens, the liens were recorded, filed, and in existence. Elgart could have chosen to explain in the comment section on Form U4's Disclosure Reporting Pages any disputes he may have had regarding his tax liens, but any such disputes did not excuse his basic obligation to disclose the liens on Form U4. *Cf. Tucker*, 2012 SEC LEXIS 3496, at *38 n.44 (holding that respondent was not entitled to withhold disclosure of liens if he contested them).

a. Willfully

If Elgart "voluntarily committed the acts that constituted the violation, then he acted willfully." *McCune*, 2016 SEC LEXIS 1026, at *15; *see also Amundsen*, 2013 SEC LEXIS 1148, at *38 ("A failure to disclose is willful . . . if the respondent of his own volition provides false answers on his Form U4."); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *13 (Dec. 22, 2008) (same). A finding of willfulness "do[es] not require that the actor 'also be aware that he is violating one of the Rules or Acts'" or that he acted with a culpable state of mind or scienter. *McCune*, 2016 SEC LEXIS 1026, at *15, 19 (citing, *inter alia*, *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)). On the other hand, as Elgart emphasizes, a federal court of appeals has stated that an "inadvertent filing of an inaccurate form" would not support a finding of willfulness. *Mathis v. SEC*, 671 F.3d 210, 218 (2d Cir. 2012); *cf. Amundsen*, 2013 SEC LEXIS 1148, at *38 (noting, in making findings of willfulness, that respondent's conduct was neither "involuntary nor inadvertent"); *Tucker*, 2012 SEC LEXIS 3496, at *42 (same).[9]

Elgart acted willfully. Elgart concedes that he was aware of the numerous tax liens around the time that the liens were issued. *See McCune*, 2016 SEC LEXIS 1026, at *15-19 (finding that respondent willfully failed to amend Form U4 where, among other things, he knew about the bankruptcies and liens that were required to be disclosed). The record also demonstrates that Elgart was aware of his obligation to amend his Form U4 to disclose liens. *See id.* at *15-19 (finding that respondent willfully failed to amend Form U4 where respondent "was clearly aware of the requirement to amend his Form U4 to disclose bankruptcies and liens"). The requirement to amend the Form U4 is based in FINRA rules, and a registered representative is "presumed to know and abide by FINRA Rules." *Dep't of Enforcement v. Zayed*, Complaint No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *23 (FINRA NAC Aug. 19, 2010) (citing *Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983)). The Forms U4 and accompanying instructions warned and reminded Elgart of his obligation to amend his Form U4 with accurate information. *See Mathis*, 671 F.3d at 218-219 (finding that appellant willfully failed to amend his Form U4 to disclose tax liens where, among other things, Forms U4 that he had filed warned and reminded him that he was under a continuing obligation to disclose changes to previously reported answers). And Elgart admits on appeal that he was aware that Form U4 contained a question about liens. The liens question is unambiguous, straightforward, and clear. Elgart's failure to amend his Form U4 with accurate information about his tax liens was a voluntary act and, therefore, willful. This finding of willfulness is only bolstered by Elgart's repeated actions to conceal several liens, not just by repeatedly failing to amend Form U4 but also by falsely answering the liens question on the PAQ. *See Tucker*, 2012 SEC LEXIS 3496, at *44 n.56 ("Although scienter is not necessary to establish willfulness, . . . efforts to conceal violative conduct demonstrate scienter.").

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[9] *But see Hammon Capital Mgmt. Corp.*, 48 S.E.C. 264, 265 (1985)) (expressly stating that "[a] failure to make a required report, even if inadvertent, constitutes a willful violation") (citing *Jesse Rosenblum*, 47 S.E.C. 1065, 1067 & n.9 (1984), *aff'd*, 760 F.2d 260 (3d Cir. 1985)), *aff'd*, 817 F.2d 106 (9th Cir. 1987).

Elgart's primary challenge to a willfulness finding is that prior to December 2013—when he finally updated his Form U4 with information about the liens—he misread Question 14M as asking only for information about liens "that could endanger or impact [Sequoia Investments] and its clients" and believed that his tax liens could have had no such effect. Elgart asserts that his understanding of Question 14M changed only in December 2013, when he had a conversation with FINRA staff about whether he needed to disclose the liens on his Form U4. He claims that his failure to disclose the liens was inadvertent and not intentional, that he was not attempting to "obfuscate this information," and that he "truly believed" that his "No" response to Question 14M was accurate. The Commission, however, has rejected defenses to allegations of willfulness that, like Elgart's, were based on interpretations of Form U4 disclosure questions that were contrary to their plain language, limitations that did not exist in the text of the questions, or a respondent's alleged confusion or lack of understanding about the meaning of a Form U4 disclosure question. *Neaton*, 2011 SEC LEXIS 3719, at *29-30 (finding, in a discussion about respondent's willfulness, that a respondent's interpretation of one Form U4 disclosure question was "contrary to its plain language" and that his interpretation of another Form U4 question as "limited to findings arising from investment activity" was not suggested by the question itself); *Mathis*, 2009 SEC LEXIS 4376, at *21-22 (holding, in a discussion about respondent's willfulness, that respondent "ha[d] a duty to comply with all applicable NASD requirements," that "if he found [the Form U4 question about liens] to be ambiguous, it was his duty to determine whether disclosure was required," and that "[i]gnorance of the [NASD]'s rules is no excuse for their violation"); *Craig*, 2008 SEC LEXIS 2844, at *15-16 (rejecting respondent's arguments, in a discussion about his willfulness, that "he did not understand the questions on the Form U4" and "that he did not know that he needed to disclose misdemeanors," and holding that "ignorance of the NASD's rules is no excuse for their violation").

Regardless, the Hearing Panel considered Elgart's claim that he did not understand he was required to disclose the liens, and it found that Elgart's "claimed ignorance of Question 14M is not credible" based both on his "demeanor at the hearing" and "the evidence presented." We defer to this credibility determination. As explained below, the record supports it and contains no substantial contrary evidence. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 & n.6 (2002) (explaining that a Hearing Panel's credibility determination is entitled to deference absent substantial evidence to the contrary).

First and foremost, Elgart's claimed misunderstanding of Question 14M has no basis in the text of the question itself, which is "unambiguous" and "contains no limitations on the kinds of liens required to be disclosed." *Tucker*, 2012 SEC LEXIS 3496, at *36-37, 38 n.44; *see also Mathis*, 2009 SEC LEXIS 4376, at *21-22, 28 (holding that the question about unsatisfied judgments or liens "contains no limitations on the kinds of liens required to be disclosed," that "the plain language of the Form U4 . . . asks for 'any' liens," and that "there is nothing ambiguous about whether an IRS tax lien constitutes a 'lien'"); *cf. Amundsen*, 2013 SEC LEXIS 1148, at *31 (finding that respondent's testimony about his interpretations of Form U4 disclosure questions lacked credibility, where the definition of a term in one disclosure question was "written in plain language" and where another disclosure question was "explicit and unambiguous"). It strains credulity for Elgart to assert that an industry veteran like himself—who had decades of industry experience, was a general securities principal, president, and chief compliance officer of his firm, and had overarching responsibility for Form U4 registration filings—misunderstood such an unambiguous question.

Moreover, the reasons that Elgart cited for his purported misunderstanding of Question 14M do not logically support any such misunderstanding. For example, Elgart contended that his misunderstanding stemmed from the facts that "I operate . . . Sequoia Investments alone with a modicum of assistance," and "leave my wife and our accountants with the responsibility of filing our taxes," but those facts have nothing to do with Elgart's understanding of, or compliance with, his obligations to disclose his tax liens on Form U4. Likewise, Elgart contended that he delegated the responsibility of filing Forms U4 to Sequoia Investments' FINOP and received no notice about his disclosure obligation from anyone at Sequoia Investments. But Elgart never informed the FINOP about his tax liens, and Elgart had an independent responsibility to understand his disclosure requirements. *Cf. Tucker*, 2012 SEC LEXIS 3496, at *37 (holding that the "[respondent] . . . was in the best position to provide accurate information about the judgments, bankruptcies, and liens covered by the questions in the Forms U4, demonstrating why it was appropriate that he bore 'primary responsibility for maintaining [their] accuracy'"); *Neaton*, 2011 SEC LEXIS 3719, at *22-23 (rejecting a respondent's defense to allegations of willfulness that his firm's "failure to advise" him of the duty to amend his Form U4 "reinforced [his] erroneous understanding of [his] duty to amend [his] Form U4" because "securities industry registrants must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements") (internal quotation marks omitted); *Mathis*, 2009 SEC LEXIS 4376, at *22 (finding that if a respondent found a disclosure question to be ambiguous, it is the respondent's responsibility to "determine whether disclosure was required").

Finally, Elgart's lack of credibility was further evidenced—as the Hearing Panel thoroughly explained—by his numerous inconsistent explanations of when he became aware of the liens. By our count, between December 23, 2013 (when he finally disclosed his liens on a Form U4 amendment) and April 6, 2016 (when he testified at the hearing), Elgart provided no less than five different accounts of when he became aware of the liens. These accounts included a statement in his answer in which he denied—contrary to his later admission—that he was put on notice of the liens at or about the time each was recorded.[10]

Elgart does not point to any evidence that would warrant not deferring to the Hearing Panel's credibility determination. Elgart asserts that the fact that he amended his Form U4 shortly after he met with FINRA staff in December 2013 supports his testimony that he previously had a mistaken understanding of Question 14M. It is entirely consistent with the

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[10] One of Elgart's five accounts was his statement in his amended Form U4 that he learned of the tax liens on January 1, 2013. Elgart attempts to reconcile that statement with his admissions at other times that he learned of the liens at or around the time they were entered. Noting that Form U4 required Elgart to provide "all of the information on each lien," including "the jurisdiction, the date entered, the amount outstanding, and its status," Elgart asserts that he learned "those facts" on January 1, 2013, when he met with a tax attorney to discuss the liens. The Form U4 Disclosure Reporting Page, however, asked Elgart to identify the date when he learned of the liens, not the date when he met with an attorney to discuss the details of liens of which he was already aware.

record, however, to determine that the reason Elgart updated his Form U4 was not because he was previously mistaken about Question 14M but only because FINRA staff directly confronted him. We also reject Elgart's argument that his credibility is demonstrated by his "consistent" assertions that he had a mistaken understanding of Question 14M. Those consistent assertions are not contrary to the Hearing Panel's credibility determination; rather, they are equally compatible with a finding that Elgart has consistently lied about his understanding of Question 14M.[11]

In conclusion, Elgart's failure to amend his Form U4 with information about his tax liens was willful. Elgart was aware of his tax liens and of the straightforward requirement to disclose tax liens on his Form U4, yet he voluntarily did not timely update his Form U4 to disclose his tax liens.

b. Materiality

Turning to the next part of the statutory disqualification analysis, the tax liens that Elgart failed to disclose constituted material omissions. "In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available." *McCune*, 2016 SEC LEXIS 1026, at *21-22. Such persons "all would have viewed [Elgart's] . . . tax liens as significantly altering the total mix of information." *Id.* Disclosure of tax liens would have "alerted his firm to the outside financial pressures he was facing," "allowed customers to assess whether the . . . liens had a bearing on his ability to provide them with appropriate financial advice," and "provided his regulators with early notice about his financial difficulties and ability to manage his financial obligations." *Id.*; *see also Mathis*, 2009 SEC LEXIS 4376, at *29 (stating that information about respondent's tax liens, if disclosed on Form U4, would have allowed potential investors to assess "whether [respondent's] tax problems and large financial obligations had a bearing on their confidence in him"). Moreover, "[t]he significance of [Elgart's] . . . tax liens is even more apparent when viewed in light of the number and total amount of the tax liens . . . and the lengthy period of time during which the information was not disclosed." *McCune*, 2016 SEC LEXIS 1026, at *21-22.

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[11] Further challenging a willfulness finding, Elgart analogizes to *Dep't of Enforcement v. Harris*, in which an NASD Hearing Panel found that a respondent's failure to disclose his felony charges and his misdemeanor conviction on his Form U4 was not willful because, among other reasons, the respondent "misread" the relevant disclosure question. *Harris*, Complaint No. C07010084, 2002 NASD Discip. LEXIS 27, at *12 (NASD Hearing Panel May 31, 2002). Unlike the respondent in *Harris*, however, Elgart did not misread the relevant disclosure question on Form U4.

Accordingly, Elgart willfully failed to update his Form U4 to disclose material information that was required to be stated on Form U4. As a result, Elgart is statutorily disqualified.[12]

B. Providing False Information to FINRA

Turning to the second cause of action, the Hearing Panel found that Elgart provided false information to FINRA, to mislead FINRA and in bad faith, in violation of FINRA Rule 2010. We affirm.

FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The rule is "designed to enable [FINRA] to regulate the ethical standards of its members." *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009). The Commission has "long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action" under FINRA's just and equitable principles of trade rule. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *20 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016); *see also Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (Table).

Providing false information in response to a FINRA request, including requests that do not specifically cite FINRA Rule 8210, is inconsistent with high standards of commercial honor and just and equitable principles of trade. *See Dep't of Enforcement v. Stonegate Partners, LLC*, Disciplinary Proceeding No. E112005002003, 2008 FINRA Discip. LEXIS 26, at *31-32 (FINRA Hearing Panel May 15, 2008) (providing false and misleading information in response to a formal FINRA request that did not cite Rule 8210 is a violation of FINRA's just and equitable principles of trade rule); *cf. Michael A. Rooms*, 58 S.E.C. 220, 228 (2005) (finding that attempted obstruction of NASD investigation violated NASD Rule 2110), *aff'd*, 444 F.3d 1208 (10th Cir. 2006); *Mkt. Regulation Comm. v. Zubkis*, Complaint No. CMS950129, 1997 NASD Discip. LEXIS 47, at *3 n.2 (NASD NBCC Aug. 12, 1997) (finding that FINRA staff are not required to cite Rule 8210 to hold a person liable for failure to cooperate with a FINRA investigation), *aff'd*, 53 S.E.C. 794 (1998). Providing false information to FINRA during an examination or investigation "subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

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[12] Elgart argues that the statutory disqualification that results from his Form U4 violation has a "punitive effect." FINRA, however, "does not subject a person to statutory disqualification as a penalty or remedial sanction. . . . Instead, a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39)(F) whenever there has been, among other things, a determination that a person willfully failed to disclose material information on a Form U4." *McCune*, 2016 SEC LEXIS 1026, at *37 (citing *Anthony A. Grey*, Exchange Act Release No. 75839, 2015 SEC LEXIS 3630, at *47 n.60 (Sept. 3, 2015)).

Here, Elgart's provision of a false answer on the PAQ was unethical, in bad faith, and a violation of FINRA Rule 2010. The PAQ that FINRA staff provided to Elgart asked a simple and straightforward question about liens: "Do you have any unsatisfied liens or judgments against you?" This question was not subject to misinterpretation. Elgart admitted that, at the time he completed the PAQ, he "was on notice of and the subject of five unsatisfied liens." Indeed, earlier in the same year, Elgart had discussed the liens with a tax attorney. Elgart also understood that it was FINRA staff who asked him to complete the PAQ, and that his responses to the PAQ would be provided to FINRA staff. Rather than responding truthfully to FINRA's straightforward liens question—as he attested on the PAQ that he had—Elgart chose to falsely respond "no." At the time he answered the PAQ, Elgart had failed for years to disclose the liens on his Form U4. Considering all of these circumstances, we adopt the Hearing Panel's finding that Elgart "chose to answer [the question on the PAQ] dishonestly to mislead FINRA." Accordingly, Elgart provided a false answer to FINRA on the PAQ in bad faith, in violation of FINRA Rule 2010.[13]

V. Sanctions

A. Late Filing of Form U4 Amendments

For failing to timely update his Form U4, the Hearing Panel fined Elgart $15,000 and suspended him from associating with any member firm for six months. We affirm these sanctions.

For the late filing of Form U4 or amendments, the FINRA Sanction Guidelines ("Guidelines") recommend a fine of $2,500 to $37,000.[14] In egregious cases, such as those involving repeated untimely filings, the Guidelines recommend that adjudicators consider a longer suspension in any or all capacities of up to two years or a bar.[15]

There are several aggravating factors. The nature and significance of the information at issue that Elgart failed to disclose—his numerous and sizeable tax liens—was material.[16]

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[13] Elgart argues that he provided a false response on the PAQ because he purportedly misunderstood the liens question in the same way that he misunderstood Question 14M on Form U4. We reject that contention for the same reasons we rejected his purported misunderstanding of Question 14M.

[14] *FINRA Sanction Guidelines*, 69 (2016), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

[15] *Id.* at 70. The Hearing Panel relied on the portion of this particular Guideline that concerns "filing false, misleading or inaccurate Forms or Amendments," but we do not. The complaint did not allege that Elgart filed false, misleading or inaccurate Forms U4 or amendments in violation of FINRA rules.

[16] *See id.* at 69 (Principal Considerations in Determining Sanctions, No. 1).

Elgart's violations amounted to a pattern of misconduct over ten years that reflected ongoing concealment of his liens.[17] Elgart's failure to amend his Form U4 was intentional, considering the number and size of tax liens that Elgart failed to disclose, the number of years he failed to disclose them, the straightforward nature of Question 14M, the number of Form U4 amendments that he filed without disclosing the liens, and his false response to the PAQ's liens question.[18] Elgart—who has blamed his wife, his tax lawyer, his FINOP, and his firm for his failures to amend his own Form U4, and who has consistently advanced a false explanation for his misconduct—has failed to accept responsibility.[19] Elgart also attempted to conceal his Form U4 disclosure failures when he provided FINRA with a false response to the liens question on the PAQ.[20]

Elgart makes numerous arguments for why the sanctions should be reduced, but he has not identified any mitigating factors. Several of Elgart's arguments are premised on his contention that his conduct stemmed from a "single misunderstanding" of Question 14M, including his arguments that he "honestly believed he had nothing to disclose" and that he quickly amended Form U4 when he realized his error. We have already rejected, however, Elgart's contention that he misunderstood Question 14M.

Elgart argues that he has no disciplinary history despite 45 years in the industry. It is well established, however, that the absence of a disciplinary history is not mitigating.[21]

Elgart asserts that he provided FINRA with any and all information that he had on the liens. Elgart, however, does not point to anything that amounts to the kind of substantial

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17 *See id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9); *see also id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (providing that "numerous, similar violations may warrant higher sanctions").

18 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

19 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2). Elgart argues that he "immediately accepted responsibility" because, when FINRA asked him to consider whether he had any liens to disclose, he amended his Form U4 within four days. Elgart's mere updating of his Form U4, however, was not an "acceptance of responsibility." Moreover, an acceptance of responsibility is only mitigating if it occurs before detection and intervention by a firm or a regulator, and Elgart did not update his Form U4 until FINRA staff confronted him about his Form U4 responses. *Id.*

20 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 10). Elgart argues that he did not conceal his misconduct because he "readily admitted" his "error" when FINRA brought it to his attention in December 2013. However, Elgart concealed his misconduct when he provided a false response to the liens question on the PAQ.

21 *See id.* at 6 n.1 (quoting *Rooms v. SEC*, 444 F.3d 1209, 1214-15 (10th Cir. 2006)).

assistance that could be mitigating.[22] To the contrary, Elgart consistently made false claims that he misunderstood Question 14M, and he provided FINRA staff with false information in response to the PAQ.

Elgart contends that there has been no injury to third parties and that his liens "posed zero risk to the firm . . . or its customers." Elgart, however, deprived his customers, his employer, FINRA, and investors generally, of important information regarding his liens. *See Neaton*, 2011 SEC LEXIS 3719, at *40-41 (disagreeing with respondent's assertion that no one was harmed by his failure to amend his Form U4 in a timely manner, where the omissions "occurred over a long period of time"). Regardless, our "public interest inquiry focuses on the welfare of investors generally, and the absence of customer harm is not a mitigating factor." *McCune*, 2016 SEC LEXIS 1026, at *34-35.

Elgart argues that he was not disciplined by his firm and that the absence of such discipline "mak[es] a sanction against Elgart even less warranted." The relevant Guidelines, however, contemplate the potential for mitigation when a member firm with which an individual respondent is or was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection.[23] These Guidelines do not contemplate any mitigation when the respondent's member firm did *not* discipline the respondent.

Elgart similarly argues that "there were no prior warnings or indicia of concern by FINRA or any other regulator." The absence of prior warnings from a regulator, however, is not mitigating.[24]

Elgart also claims that he "affirmed, in writing and on the record, that he made a mistake and that he regrets it severely." However, the only evidence that Elgart cites in support of that claim—his March 7, 2014 letter to FINRA staff—does not include any expressions of regret. Regardless, merely expressing regret for a mistake is not an acknowledgment of an intentional violation of FINRA rules or an expression of remorse for having done so. We are not aware of any place in the record where Elgart expressed remorse for his intentional violation of FINRA rules, let alone at a time prior to the detection of his violations when any such expressions of remorse might have provided mitigation.

As the Commission has stated, "[a] representative's truthfulness in answering the financial disclosure questions on the Form U4 is a particularly critical measure of fitness for the industry because a commitment to accurate, complete, and non-misleading financial disclosure is central to any securities professional's responsibilities." *Tucker*, 2012 SEC LEXIS 3496, at *34-35 (further stating that "[a] history involving multiple false filings and misleading financial

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22 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 12).

23 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 14).

24 *See id.* at 6 (explaining that "the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation").

disclosures is highly problematic in any person participating in an industry that 'presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence'"). Considering the nature of Elgart's violation, presence of numerous aggravating factors, and absence of any mitigation, we find that Elgart's failure to timely amend his Form U4 was egregious. A strong sanction is appropriate to remedy Elgart's violation and deter him from engaging in similar violations again. For Elgart's Form U4 violations, we suspend Elgart from associating with any member firm in any capacity for six months and fine him $15,000.[25]

B. Providing a False Statement to FINRA

In assessing the appropriate sanctions for Elgart's providing a false statement to FINRA, we consider the nature of Elgart's misconduct and the Guidelines' Principal Considerations in Determining Sanctions that apply to all misconduct.[26] Providing false information to FINRA in response to a FINRA request for information, including one that does not cite FINRA Rule 8210, is serious misconduct. "[S]upplying false information to [FINRA] during an investigation . . . mislead[s] [FINRA] and can conceal wrongdoing," and "subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest." *Ortiz*, 2008 SEC LEXIS 2401, at *32-33; *see also Rooms*, 58 S.E.C. at 229 (noting that providing false information to FINRA is more

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[25] Citing principles set forth in the Guidelines, Elgart asks that his Form U4 violations and his PAQ-related violation be "batched" for sanctions purposes because his conduct was "unintentional or, at the very least negligent," "did not involve injury to any public investor," and all "resulted from the same 'systemic problem or cause'" that "has since been corrected" ("i.e., his lack of understanding of his reporting obligation"). *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4). Batching the Form U4 violations with the PAQ violation, however, is not warranted. As explained above, we reject Elgart's arguments that his actions were unintentional or the result of a misunderstanding and that there is evidence of no injury.

Elgart also argues that the Hearing Panel should have batched the Form U4 violations for purposes of sanctions. That argument ignores, however, that the Hearing Panel *did* in fact batch Elgart's Form U4 violations by applying a unitary sanction for them, rather than applying separate sanctions for each separate Form U4 violation. *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *38 (Mar. 31, 2016) (rejecting a batching argument for similar reasons), *appeal pending sub nom. Harris v. SEC*, No. 16-1739 (2d Cir., appeal filed May 31, 2016). We also apply a unitary sanction for Elgart's Form U4 violations, not because any of the factors discussed in the Guidelines that might warrant batching are present—they are not—but because the complaint charged the Form U4 violations under a single cause of action.

[26] *Guidelines*, at 6-7. Although the Hearing Panel referred to the Guidelines for forgery or falsification of records, the kind of conduct covered by those Guidelines is not sufficiently analogous to Elgart's misconduct.

damaging than refusing to respond to a request for information because it misleads FINRA and can conceal wrongdoing).

Several factors aggravate Elgart's misconduct. Elgart intentionally and dishonestly provided a false response on the PAQ.[27] Elgart did not correct the false response even after FINRA requested that he do so. In addition, Elgart's conduct contributed to a pattern of misconduct, considering that his failure to timely amend his Form U4 and his providing of a false response on the PAQ both involved withholding information about his liens from regulators.[28] Moreover, the information that FINRA requested was important; truthful information about the liens would have informed FINRA staff that Elgart had withheld material information from customers, member firms, and regulators for years, in violation of his disclosure obligations.

In light of the aggravating factors, we suspend Elgart from associating with any member firm in any capacity for 30 business days (to be served consecutively with the six-month suspension) and fine him $5,000 for providing false information to FINRA. These sanctions are appropriate to deter Elgart and others from engaging in similar misconduct.

VI. Conclusion

Accordingly, we find that Elgart willfully failed to timely update his Form U4, in violation of Article V, Section 2(c) of the NASD and FINRA By-Laws, NASD IM-1000-1 and FINRA Rule 1122, and NASD Rule 2110 and FINRA Rule 2010, and provided a false statement to FINRA in bad faith, in violation of FINRA Rule 2010. We vacate the Hearing Panel's findings that Elgart filed misleading Form U4 amendments in violation of FINRA rules. For failing to timely update his Form U4, we suspend Elgart from associating with any member firm in any capacity for six months and fine him $15,000. For providing a false answer on a FINRA questionnaire, we suspend Elgart from associating with any member firm in any capacity for an additional 30 business days and fine him an additional $5,000. The suspensions are to be served consecutively. We affirm the imposition of $1,759.42 in hearing costs.[29]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith
Executive Vice President, Board and External Relations

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27 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

28 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 8).

29 Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.