Statutory Disqualification and Willfulness
http://brokeandbroker.com/PDF/WillfulSD.pdf
An analysis by Bill Singer, Esq. of the BrokeAndBroker.com Blog
Bill Singer's online resume: http://www.rrbdlaw.com/bios_singer.html

Consider the saga of David Adam Elgart. who had become the President and Chief Compliance Officer of FINRA member firm Sequoia Investments, Inc. Elgart ran into some financial difficulties in the form of tax liens, which were required to be timely disclosed on his Form U4. After a contested hearing, FINRA found, in part, that Elgart had willfully failed to timely disclose the liens and hit him with thousands of dollars in fines and months of suspension. Willfully? Fuggedaboutit, the office know-it-all tells you while holding court at the water cooler. Just pay the fine, do the time, and, no big deal, who gives a crap about that willfully thing, another fancy word, when the suspension is over, you go back to work. Except you can't go back to work! As with so much legal advice dispensed by non-lawyers around the office water cooler, it turns out that after Elgart pays the dollars and sits out the months, he's statutorily disqualified from further participation in the industry.

David Elgart and Sequoia Investments, Inc.

David Elgart entered the securities industry in 1976, and by 1998, he had become the President and Chief Compliance Officer of FINRA member firm Sequoia Investments, Inc., of which he was a majority owner since 2001. Sequoia mainly sells municipal bonds to *High-Net-Worth* clients and the firm's employees consist of Elgart, a salesman, a trader, and an outside Financial and Operations Principal ("FINOP").

2003 to 2010: Six Tax Liens

Following Elgart's 2001 purchase of Sequoia, he claimed that a dispute arose concerning various tax implications of that transaction. Whatever those issues were, starting in June 2003 and extending for seven years to June 2010, the State of Georgia and the Internal Revenue Service ("IRS") filed six tax liens totaling $407,931.78 against Elgart. Sometime towards the end of 2012, Elgart asserts that he retained a lawyer to assist him in dealing with the taxing authorities and it was only during his first meeting with counsel, on January 1, 2013, that he learned how many tax liens were outstanding.

2013 U4 Amendments

In late 2013, FINRA conducted a routine examination of Sequoia and during preparation for the exam, Staff discovered various unreported tax liens. On December 19, 2013, FINRA Staff apparently raised the existence of the unreported liens with Elgart and asked him to undertake steps to confirm those liens and likely reminded him of his obligation to disclose same. Elgart first amended his *Form U4* to disclose the 2003 to 2010 tax liens on December 23, 2013. Thereafter, in response to FINRA Staff questions as to why he had not timely disclosed the liens, Elgart purportedly stated in a March 7, 2014, letter that he had delegated the filing of Sequoia's taxes to his wife and accountants and was unaware of any need to disclose the liens on his U4. Elgart characterized any non-disclosures as inadvertent.

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2015 FINRA Complaint

On November 10, 2015, FINRA's Department of Enforcement filed a two-cause *Complaint* against Elgart alleging that he had:

1. 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; and
2. misled FINRA by falsely completing and submitting to FINRA a *Personal Activity Questionnaire* ("PAQ")

The Rulebook

Section 3(a)(39) of the Securities Exchange Act provides [Ed: highlighting added]:

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person --

. . .

(F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has 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, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the 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, report, or proceeding any material fact which is required to be stated therein.

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Article III of FINRA's By-Laws: *Qualifications of Members and Associated Persons* provides:

Definition of Disqualification

Sec. 4. A person is subject to a "disqualification" with respect to membership, or association with a member, if such person is subject to any "statutory disqualification" as such term is defined in Section 3(a)(39) of the Act.

If you opt to settle a finding by FINRA that you were guilty of *willful* nondisclosure, the self-regulator's *Letter of Acceptance, Waiver and Consent* settlement typically contains the following admonition:

> I understand that this settlement includes a finding that I willfully omitted to state a material facts on a Form , and that under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 and Article III, Section 4 of FINRA's By-Laws, this these omissions make me subject to a statutory disqualification with respect to association with a member.

If you do not opt to settle and demand your day in court, a FINRA OHO Decision may state the following:

> For willfully failing to timely update his Form U4, in violation of Article V, Section 2(c) of NASD's and FINRA's By-Laws, NASD IM-1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010, Respondent is suspended from associating with any FINRA member firm in any capacity for [INSERT TIME] and fined [INSERT AMOUNT]. Because his misconduct was willful, and the information he failed to disclose was material, he is subject to statutory disqualification.

FINRA Rule 1122: *Filing of Misleading Information as to Membership or Registration*, provides:

No 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.

Finally, the ***Uniform Application For Securities Industry Registration Or Transfer*** ("Form U4") asks the following:

Financial Disclosure

14K. Within the past 10 years:

(1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?
(2) based upon events that occurred while you exercised control over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?
(3) based upon events that occurred while you exercised control over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act?

14L. Has a bonding company ever denied, paid out on, or revoked a bond for you?

14M. Do you have any unsatisfied judgments or liens against you?

2016 FINRA OHO Elgart Hearing

On April 6, 2016, a FINRA Office of Hearing Officers ("OHO") Hearing Panel conducted a one-day hearing. In the Matter of Department of Enforcement, *Complainant*, v. David Adam Elgart, *Respondent*, (*OHO Decision*, Complaint #2013035211801 / June 3, 2016) (the "Elgart OHO Decision"). The OHO Panel issued a *Decision* in which the issues are summarized as follows in the "Introduction" [Ed: Footnotes omitted]:

From June 2003 to June 2010, federal and state authorities filed a series of tax liens against Respondent David Adam Elgart. Elgart did not timely amend his Uniform Application for Securities Industry Registration or Transfer Form ("Form U4") to disclose the outstanding liens, as FINRA By-Laws and rules require.

The primary issue presented in this case is whether Elgart's decade-long failure to amend his Form U4 was willful. Elgart claims it was not. He asserts that he mistakenly believed that because the liens were personal and unrelated to his securities business,

he was not required to disclose them. Elgart claims this is also why he incorrectly stated that there were no unsatisfied liens filed against him when he responded to a FINRA staff questionnaire preceding a routine examination of his firm.

The Complaint's first cause of action alleges that Elgart learned about each of the liens close to the time they were filed, "or at least by January 2013." It charges that Elgart's Form U4 was amended 13 times between July 2003 and December 2013, without disclosure of the liens.

The NASD and FINRA By-Laws provide that a person must keep the information on his Form U4 current by filing amendments within 30 days of learning of changes of reportable circumstances. The Complaint's first cause of action charges that Elgart failed to amend his Form U4 in violation of Article V, Section 2(c) of the By-Laws. In addition, the Complaint alleges that his failure violated NASD IM-1000-1, FINRA Rule 1122, NASD Rule 2110, and FINRA Rule 2010.

The Department of Enforcement alleges that Elgart's failure to disclose was willful and the information about the tax liens was material. Finding that Elgart acted willfully and that the information omitted was material would subject him to statutory disqualification from the securities industry, "potentially a more severe sanction than a monetary penalty or temporary suspension." FINRA's By-Laws provide that a person subject to statutory disqualification cannot be associated with any FINRA member firm unless the firm obtains permission from FINRA.

The Complaint's second cause of action alleges that Elgart falsely answered a questionnaire FINRA sent in connection with a routine examination of his firm. In it, Elgart denied he had pending unsatisfied liens. Enforcement alleges that by giving this false answer, Elgart acted in bad faith, misled FINRA, and violated the high standards of commercial honor and just and equitable principles of trade required of him by FINRA Rule 2010.

Pages 1 - 3 of the Elgart OHO Decision

Ignorance

In addressing Elgart's arguments that his non-disclosure was largely inadvertent and did not rise to the level of willful, the OHO Panel concluded [Ed: Footnotes omitted]:

Elgart's assertion-that he did not act willfully because he was unaware he was required to report is unconvincing. As explained in a recent FINRA Hearing Panel decision, a respondent's "claim that he did not know that he needed to report [a] bankruptcy is not a valid defense. A registered representative is presumed to know and abide by FINRA Rules." This statement is consistent with recent and long-standing decisions issued by

the NAC and the SEC. The NAC recently held, in a decision upheld by the SEC, that a representative's claim that he did not understand the importance of FINRA's Form U4 disclosure requirements was "no defense" to a charge of willful failure to disclose. Rather, a registered representative is responsible "to ensure that his Form U4 is accurate." In reviewing a willful violation, the SEC observed that "securities industry professionals . . . have a responsibility to understand their duties to the investing public and to comply with the applicable rules and regulations which govern their behavior." A claim of not knowing that a fact has to be disclosed fails because "ignorance of the . . . rules is no excuse for their violation."

Elgart claims that although he understood he must disclose "bankruptcies, financial conflicts created by receipt of compensation, certain business affiliations and/or relationships, and almost any kind of regulatory action," he "was simply unaware" he had to report his personal liens. Citing a leading case, he argues that his omissions were the equivalent of "an inadvertent filing of an inaccurate form," and do not support a finding that he **"falsely and intentionally denied** having 'any unsatisfied judgments or liens.'"

However, in the case Elgart cites, the SEC found the respondent acted willfully in part because there was "substantial evidence to support the SEC's finding that [the respondent] received the IRS notices . . . and was aware of the tax liens when he filed his . . . Forms U4." Here, Elgart's own testimony provides substantial evidence that he received the notices of the liens and turned them over to his wife and accountant, and was therefore aware of them when they were filed. Furthermore, he testified that he made a conscious determination that he was not required to report them. Contemplating whether he had to disclose the liens, then deciding that he need not because they were filed against him personally,suffices to establish that Elgart acted willfully. Furthermore, Question 14M's plain, unambiguous wording makes unreasonable Elgart's claim that he did not understand he was required to disclose the liens. Because Elgart "knew what he was doing when he did not timely amend the forms to disclose" the liens he knew had been filed, when he answered "No" to Question 14M in the 13 amendments, Elgart acted willfully. Finally, based upon Elgart's demeanor at the hearing, and the evidence presented, the Panel finds his claimed ignorance of Question 14M is not credible; even if it were, it is not a defense.

For these reasons, the Panel concludes that Elgart willfully violated Article V, Section 2(c) of NASD's and FINRA's By-Laws, NASD IM-1000-1, and FINRA Rule 1122 by failing to timely amend his Form U4 to disclose the five unsatisfied liens, and by filing 13 misleading amendments to his Form U4 that did not disclose the liens. By doing so, Elgart engaged in conduct inconsistent with the standard of just and equitable principles of trade in violation of NASD Rule 2110 and FINRA Rule 2010.

Pages 10 - 11 of the Elgart OHO Decision

Personal Activity Questionnaire ("PAQ")

As to the issue of Elgart's allegedly untruthful responses on the *PAQ,* the OHO Panel concluded that:

The Panel finds Elgart's claims that he "intended" to be truthful in his PAQ answer, and his answer was truthful and accurate, are not credible. Almost identical to the Form U4's Question 14M, the wording of the PAQ question is simple, straightforward, and unambiguous. It does not lend itself to Elgart's claimed misinterpretation.

Elgart answered the PAQ question on November 25, 2013. By Elgart's account, this was almost a year after he met to review his liens with a tax attorney and an accountant. The liens and his argument with the IRS were not insignificant matters in his life; he testified, credibly, that he had found the number of liens and their amounts troubling.

Under these circumstances, Elgart's assertion that he honestly believed the PAQ question did not require him to disclose his unsatisfied liens is not believable. Instead, the Panel concludes that Elgart, a seasoned securities professional, fully understood the question, but chose to answer it dishonestly to mislead FINRA. By doing so he acted unethically and in bad faith, in violation of NASD Rule 2110 and FINRA Rule 2010.

Pages 11 -12 of the Elgart OHO Decision

FINRA OHO Sanctions

In accordance with its findings, the OHO Panel issued the following *Elgart OHO Order*:

For willfully failing to timely update his Form U4, in violation of Article V, Section 2(c) of NASD's and FINRA's By-Laws, NASD IM-1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010, Respondent David Adam Elgart is suspended from associating with any FINRA member firm in any capacity for six months and fined $15,000. Because his misconduct was willful, and the information he failed to disclose was material, he is subject to statutory disqualification.

For providing FINRA with a false answer to a question on a Personal Activity Questionnaire, in violation of FINRA Rule 2010, Elgart is suspended from associating with any FINRA member in any capacity for 30 business days and fined $5,000. The suspensions shall run consecutively.

Elgart is also ordered to pay the hearing costs in the amount of $1,759.42, consisting of an administrative fee of $750, and the cost of the hearing transcript . . .

2017 FINRA NAC Appeal

FINRA's National Adjudicatory Council ("NAC") affirmed the Elgart OHO *Decision* in part by affirming its finding that Elgart had willfully failed to timely update his Form U4 and had provided false statement to FINRA. The NAC vacated OHO's findings that Elgart had filed 13 misleading Form U4 amendments because the *Complaint* did not allege any such violation. Finally, the NAC affirmed the OHO sanctions. In the Matter of Department of Enforcement, *Complainant*, v. David Adam Elgart, *Respondent* (*NAC Decision;* Complaint #2013035211801 / March 16, 2017) (the "Elgart NAC Decision"). The *Elgart NAC Decision* offers a thoughtful and comprehensive rationale for a finding of willfulness [Ed: Footnotes omitted]:

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).

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.").

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. Mano#; 55 S.E.C. 1 155, 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.

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 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.

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.

Pages 9 -12 of the Elgart NAC Decision

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2017 SEC Appeal

On April 11, 2017, Elgart appealed FINRA's findings and sanctions to the Securities and Exchange Commission ("SEC"). In the Matter of David Adam Elgart (*Opinion*, SEC, '34 Act Rel. No. 81779; Admin. Proc. File No. 3-17925 / September 29, 2017). https://www.sec.gov/litigation/opinions/2017/34-81779.pdf . In *Elgart*, the SEC reiterates its long-standing definition of willfulness:

Exchange Act Section 3(a)(39)(F) provides that a person is subject to a statutory disqualification from association with a member of an SRO if the person has willfully omitted to state in an application for membership in the SRO or association with a member any material fact required to be stated therein.9 Elgart acted willfully in failing to timely update his Form U4, and his omissions were material. Accordingly, he is subject to a statutory disqualification.10

a. Elgart acted willfully.

To act willfully for purposes of the federal securities laws means that a respondent "intentionally commit[ted] the act which constitutes the violation."11 Such a finding does not require that the respondent "also be aware that he is violating one of the Rules or Acts"; it simply requires the voluntary commission of the acts themselves.12 However, an "inadvertent filing of an inaccurate form" would not support a finding of willfulness.13

Elgart acted willfully in failing to update his Form U4 to disclose the unsatisfied liens. He admitted learning of the tax liens around the time they were issued, but did not update his Form U4 to disclose them within the requisite thirty days. His duty to disclose each lien arose as each was issued, yet he repeatedly failed to satisfy this obligation. For ten years he allowed his Form U4 to reflect that the answer to question 14M was "no"—that he did not have any outstanding tax liens—despite having liens outstanding. Moreover, Elgart had the opportunity to review and verify the contents of his Form U4 each time he amended it over this period, but again failed to disclose the liens. These voluntary actions constitute willfulness.

Elgart's principal argument on appeal is that he misunderstood question 14M, and that this mistake means that his conduct could not have been willful because it was inadvertent. He contends that he understood the question to be referring only to liens that "could have a financial impact on Sequoia, or its customers," not personal tax liens. This argument fails.

First, the Hearing Panel found that Elgart's testimony regarding his understanding of question 14M was not credible. We afford great weight to the Hearing Panel's credibility

assessments unless there is substantial evidence to the contrary. There is no such evidence here. Elgart relies heavily on the fact that his testimony was "undisputed" in this regard, but the Hearing Panel based its conclusion that Elgart's "claimed ignorance of Question 14M [wa]s not credible" on both his demeanor at the hearing and the evidence presented, including the plain wording of question 14M. We see no basis to disturb the Hearing Panel's findings. 15

Second, we find that the evidence is fully consistent with the Hearing Panel's credibility determination and the NAC's finding that Elgart acted willfully. Elgart's claim that he misunderstood question 14M is inconsistent with testimony indicating that Elgart did not read Form U4 until August 2013 at the earliest. Elgart testified that from the time he entered the securities business until September 2013 he delegated the filing of Form U4 to his FINOP. According to Elgart, during that time he "had never quite frankly looked at the form that I can recall because we were paying people to do that." He later testified that until he looked at the form in August or September 2013 he "wasn't aware that that question [14M] was on there." But if Elgart never read Form U4 or question 14M during the bulk of the time that his liens were outstanding and undisclosed, his failure to timely update his form could not be based on his professed mistaken understanding of the question.

Elgart implies that his unawareness of Form U4's contents would provide an alternate basis for excluding a willfulness finding. But we have repeatedly held that "[p]articipants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements."16 Elgart was expected to know his disclosure obligations and abide by them and voluntarily chose not to do so. 17

Nor can Elgart escape a willfulness finding by professing reliance on his FINOP. Delegation of responsibility to an employee does not relieve a respondent of "his obligation to make certain that appropriate filings were made."18 It was Elgart's responsibility to supply accurate information on the Form U4, and he had an obligation to review it before allowing his signature to be affixed to it acknowledging and consenting to its filing. Indeed, Elgart admitted that he never told his FINOP about the liens and had no reason to believe his FINOP otherwise knew about them. Elgart intentionally engaged in the acts that led to his false filing.19

Third, Elgart relies heavily on Department of Enforcement v. Harris, 20 a decision in which an NASD hearing panel was not persuaded that the respondent's failure to disclose felony charges and a misdemeanor conviction on his Form U4 was willful because he did not understand he had been charged with a felony, misread the question, and did not read the question completely. Hearing panel decisions are not binding on the NAC or on the Commission.21 In any event, the case is distinguishable

because that hearing panel credited the respondent's testimony. 22 As discussed above, the Hearing Panel did not credit Elgart's testimony in this case. Elgart's alleged misunderstanding of question 14M on Form U4 does not preclude a willfulness finding. 23

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FOOTNOTES:

9 15 U.S.C. § 78c(a)(39)(F).

10 McCune, 2016 WL 1039460, at *4-6 (finding respondent statutorily disqualified for willfully failing to amend Form U4); Amundsen, 2013 WL 1683914, at *8-9 (finding respondent statutorily disqualified for willfully providing false and misleading material information on Form U4).

11 Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

12 Id.; see also McCune, 2016 WL 1039460, at *5-6 (analyzing willful behavior in FINRA appeal to determine if respondent "voluntarily committed the acts that constituted the violation").

13 See Mathis v. SEC, 671 F.3d 210, 218 (2d Cir. 2012).

14 See Geoffrey Ortiz, Exchange Act Release No. 58416, 2008 WL 3891311, at *5 (Aug. 22, 2008) (citations removed).

15 Cf. Amundsen, 2013 WL 1683914, at *7 (finding respondent's testimony about his interpretation of certain Form U4 questions lacked credibility in part because of their "plain language"); Scott Mathis, Exchange Act Release No. 61120, 2009 WL 4611423, at *7 (Dec. 7, 2009) (upholding willfulness finding and rejecting as not believable respondent's argument that he had mistaken understanding about nature of his tax liens), aff'd, 671 F.3d 210 (2d Cir. 2012).

16 Mathis, 2009 WL 4611423, at *7; see also Jason A. Craig, Exchange Act Release No. 59137, 2008 WL 5328784, at *5 (Dec. 22, 2008) (same).

17 Cf. Richard A. Neaton, Exchange Act Release No. 65598, 2011 WL 5001956, at *12 (Oct. 20, 2011) (holding that respondent "had the obligation to review his responses before signing the [F]orm [U4], particularly when he certified that he had read and understood the items and instructions on the form and that his answers were true and

complete to the best of his knowledge") (internal quotation marks and brackets removed); Douglas J. Toth, Exchange Act Release No. 58074, 2008 WL 2597566, at *7 (July 1, 2008) (holding that despite respondent's argument that he never saw or signed Form U4 he still had "primary responsibility for maintaining [its] accuracy")

18 See Haight & Co., Exchange Act Release No. 9082, 1971 WL 120486, at *18 (Feb. 19, 1971) (finding respondent willfully failed to amend application for broker-dealer registration despite arguments that he had delegated the task); see also Toth, 2008 WL 2597566, at *7 & n.23 (rejecting respondent's argument that he could not be found responsible for inaccuracies in a Form U4 filed on his behalf); Irving Grubman, Exchange Act Release No. 6546, 1961 WL 61059, at *2 (May 5, 1961) ("An applicant for registration cannot shift to another his responsibilities for the truth and accuracy of the application.").

19 Cf. Amundsen, 2013 WL 1683914, at *7 (finding respondent "bore primary responsibility for correctly answering the questions on the Forms U4" because he was "the individual directly impacted" by the matters involved and so "in the best position to provide accurate information about those subjects"); Robert D. Tucker, Exchange Act Release No. 68210, 2012 WL 5462896, at *10 (Nov. 9, 2012) (holding respondent "was in the best position to provide accurate information about the . . . liens covered by the questions in the Forms U4, demonstrating why it was appropriate that he bore primary responsibility for maintaining their accuracy") (internal quotation marks, brackets, and citations removed).

20 Disciplinary Proceeding No. C07010084, 2002 WL 31231003 (NASD May 31, 2002).

21 See Sands Bros. Asset Mgmt., LLC, Investment Advisors Act Release No. 4083, 2015 WL 2229281, at *4 (May 13, 2015) ("[A]n order issued by a law judge is not binding on the Commission or on other law judges."); Howard Brett Berger, Exchange Act Release No. 55706, 2007 WL 1306843, at *8 n.36 (May 4, 2007) (finding NYSE hearing panels decisions "have no precedential effect in a Commission review proceeding of NYSE disciplinary action").

22 Harris, 2002 WL 31231003, at *2, 4.

23 See, e.g., Neaton, 2011 WL 5001956, at *9 (finding respondent willfully failed to timely amend Form U4 despite argument that "he found questions to be ambiguous" because his interpretation was contrary to question's "plain language"); Mathis, 2009 WL 4611423, at *7 (rejecting argument that respondent's finding question on Form U4 "unclear and ambiguous" prevented willfulness finding); Craig, 2008 WL 5328784, at *5 (rejecting argument that fact that respondent "did not understand" questions on Form U4 prevented willfulness finding).

Statutory Disqualification and Willfulness
http://brokeandbroker.com/PDF/WillfulSD.pdf
An analysis by Bill Singer, Esq. of the BrokeAndBroker.com Blog
Bill Singer's online resume: http://www.rrbdlaw.com/bios_singer.html

UPDATE September 2018: 11Cir Appeal

David Elgart petitioned the United States Court of Appeals for the Eleventh Circuit ("11Cir") for a review of the SEC's final order sustaining FINRA's disciplinary action. On appeal, Elgart did **not** challenge the SEC's determination that he failed to update timely his Form U4, that the omissions on his Form U4 were material, that he submitted false information on his PAQ, or that his conduct violated FINRA Rules 1122 and 2010 and FINRA's by-laws. The only issue that Elgart raised before 11Cir was the SEC's finding that he acted willfully in failing to disclose his tax liens on his Form U4, which subjected him to statutory disqualification. David A. Elgart, Petitioner, v. Securities and Exchange Commission, Respondent (*Opinion*, Petition for Review of a Decision of the Securities and Exchange Commission; 11Cir; No. 17-15283; Agency No. 3-17925 / September 19, 2018).

In denying Elgart's petition, 11Cir distinguishes the sanctions imposed on Elgart following a contested FINRA hearing versus those imposed via settlement (the latter basked of which was largely cited by Elgart). As such, 11Cir makes an observation worth noting:

> Moreover, a finding of willfulness is dependent on the facts and circumstances of each individual case. Elgart has cited no case with materially similar facts in which the willfulness standard was applied differently than in this case. Among other things, each of the cases Elgart relies upon involved a settlement. We have said the SEC abuses no discretion in imposing lesser sanctions as a reward for settlement. . .

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In ruling against Elgart's appeal, 11Cir largely deferred to the SEC's adverse credibility determination about Elgart's testimony, and the Court found that the SEC's willfulness finding was supported by substantial evidence. In pointedly rejecting Elgart's contention that his non-compliant disclosure was inadvertent rather than willful, 11Cir underscored that he had, in fact, received IRS notice and was aware of the existence of the outstanding liens.

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