

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement

Complainant,

vs.

Marlowe Robert Walker, III
Hauppauge, New York

and

Hauppauge, New York,

Respondent.

DECISION

Complaint No. C10970141

Dated: April 20, 2000

Respondent was found, based on his default and on review of the record, to have: associated with a member firm while a person subject to a statutory disqualification; included false and misleading information about his employment history in Forms MC-400 (Membership Continuance Application) and U-4 (Uniform Application for Securities Industry Registration or Transfer) that were submitted to the NASD; and made false statements during his on-the-record interview with NASD Regulation, Inc. staff. Held, that respondent violated Conduct Rule 2110 and Procedural Rule 8210. The NAC held that the complaint did not properly charge a violation with respect to cause three (payment of a commission to a disqualified person).

Marlowe Robert Walker, III ("Walker") appealed an August 23, 1999 default decision issued by a Hearing Officer pursuant to Procedural Rule 9311. After a review of the entire record in this matter, we hold that Walker engaged in the following misconduct: he was associated with a member firm, Lexington Capital Corporation ("Lexington" or "the Firm"),¹ while subject to a statutory disqualification

¹ Lexington Capital Corporation formerly was known as Marlowe & Company. This decision

(cause one); he submitted false and misleading information to the NASD, through Lexington, on his Forms MC-400 (Membership Continuance Application) and U-4 (Uniform Application for Securities Industry Registration or Transfer) (cause two); and he made false statements during an investigatory on-the-record interview (cause five).² We order that he be barred from associating with any member of the NASD in any capacity for his misconduct with respect to each of these causes. We also hold that the complaint did not properly charge a violation with respect to cause three. Accordingly, we set aside the Hearing Officer's finding of violation and dismiss the allegation under cause three.

Background

Walker first became registered with the NASD as a general securities representative in December 1984. Walker was associated with eight different member firms between December 1984 and March 1997. In 1991, the NASD barred Walker from associating with any member firm in any capacity, based upon findings that he had failed to honor an arbitration award and had failed to respond to NASD staff requests for information and documents.³ Despite the 1991 NASD bar and without going through the mandatory statutory disqualification approval process, Walker became associated with

will refer to the Firm as Lexington, rather than Marlowe & Company.

² Walker was not named as a respondent in the following causes of the complaint: four (Conduct Rule 3070 violation); six (penny stock rules violations and supervision); seven (restriction agreement violation); eight (sales of unregistered securities and supervision); nine (fraudulently excessive mark-ups, confirmation of transactions violations, and supervision); ten (fraud/falsifying firm records); eleven (continuing education); and twelve (failure to establish written supervisory procedures).

³ The complaint in that action alleged that Walker had failed to pay an August 31, 1990 arbitration award in the amount of \$8,750 (jointly and severally with another person) to a customer of the firm that he was associated with at the time. The second cause of the complaint alleged that by letters dated April 10, 1991, April 30, 1991, and May 13, 1991, NASD staff had requested that Walker provide the NASD with a written statement addressing the circumstances concerning his failure to honor the arbitration award and that Walker had failed to respond to the staff's requests. On November 25, 1991, NASD's District Business Conduct Committee for District No. 10 ("DBCC") issued a default decision against Walker based on the fact that Walker had failed to file an answer to the complaint. In accordance with Procedural Rule 9269 (formerly Code of Procedure, Article II, Section 3(c)), the DBCC concluded that Walker's failure to file an answer constituted an admission of the complaint's allegations and that the evidence submitted supported its findings. The DBCC imposed the following sanctions on Walker: censure; bar from association with any member in any capacity; \$45,000 fine; and a requirement that Walker demonstrate that the \$8,750 arbitration award had been paid before applying to become registered with the NASD.

Lexington in July 1995.⁴ He was associated with Lexington until his termination in March 1997. Walker was not registered in any capacity during his association with Lexington.

Procedural History

On October 17, 1997, the NASD Regulation, Inc. ("NASD Regulation") Department of Enforcement ("Enforcement") filed the complaint in this matter following a District staff investigation of Lexington. The complaint asserted various charges against Lexington and four individuals associated with Lexington, including Walker. The other individuals named in the complaint were Alan Berkun ("Berkun") (Lexington's Chairman), Maurice Wise ("Wise") (Lexington's President, Compliance Officer, and Financial and Operations Principal), and Joseph Blumenthal ("Blumenthal") (associated with Lexington as an unregistered person from October to November, 1995, and as general securities representative from November 1995 to April 1996).

Walker, appearing pro se, entered an answer on December 1, 1997. The Hearing Officer scheduled the hearing for all of the respondents for July 1998. Pursuant to Enforcement's request for a continuance of the hearing date, the hearing was rescheduled for September 1998. As a result of settlement negotiations that had been entered into by some of the respondents, the Hearing Officer continued the hearing to September 15, 1998. On September 16, 1998, upon notification that NASD Regulation's National Adjudicatory Council had approved the settlements, the Hearing Officer issued an order accepting the Offers of Settlement that had been submitted by Lexington, Berkun, and Blumenthal.

Thereafter, the Hearing Officer held several more pre-hearing conferences, essentially to ascertain whether the remaining respondents (Walker and Wise) would be entering into offers of settlement. Upon determining that a settlement could not be reached, the Hearing Officer rescheduled the hearing for September 28-29, 1998.⁵ On September 25, 1998, Walker orally notified Enforcement of his intention not to appear for the September 28-29, 1998 hearing. At Enforcement's request, Walker provided Enforcement with written notice of his intention not to appear for the hearing. He gave the

⁴ A member firm is required to file with the NASD Forms U-4 (Uniform Application for Securities Industry Registration or Transfer) and MC-400 (Membership Continuance Application) as part of the application process to seek approval to employ a person subject to statutory disqualification.

⁵ The Hearing Officer decided to schedule another pre-hearing conference for September 18, 1998 after Walker abruptly ended his participation in a September 10, 1998 pre-hearing conference and Wise failed to appear at the pre-hearing conference. Walker participated in the September 18, 1998 pre-hearing conference through counsel who purported to represent Walker in a very limited capacity for purposes of the September 18 conference only. Wise did not appear at the pre-hearing conference either in person or through counsel.

following two reasons for deciding not to appear at the hearing: (1) that his attorney would not be available on the scheduled dates;⁶ and (2) that he was "no longer a member [of the NASD]."⁷ In accordance with Procedural Rule 9269, a default decision was entered against Walker and Wise. Walker was found to be in default based on his stated intent not to appear at the September 28-29, 1998 hearing. See Procedural Rule 9269(a). Wise was found to be in default for not appearing at a pre-hearing conference that was held on September 18, 1998. See Procedural Rules 9269(a) and 9241(f).

Facts

As noted above, during the relevant time, Walker was barred from association with a member firm in any capacity in a previous NASD disciplinary action. Pursuant to Article III, Section 4(a) of the NASD By-Laws (formerly, Article II, Section 4(a) of the NASD By-Laws), Walker's NASD bar constituted a statutory disqualification, and he was therefore prohibited from associating with a member firm. See Article III, Section 3(b) of the NASD By-Laws (formerly, Article II, Section 3(b) of the NASD By-Laws). Nonetheless, Walker became associated with Lexington in approximately May 1995.

Three former registered representatives of Lexington -- Michael Norton ("Norton"), James Mayer ("Mayer"), and Alfred Napolitano ("Napolitano") -- testified in on-the-record interviews as to Walker's participation in the management of Lexington's sales operations. Mayer and Napolitano testified that Berkun (Lexington's Chairman) and Walker interviewed them prior to their employment at Lexington. Mayer testified that he started working at Lexington as a registered representative in June or July 1995. Napolitano testified that he met with Walker and Berkun in December 1995 or January 1996, and that

⁶ Walker had been accompanied by an attorney for his October 30, 1996 on-the-record interview, apparently for the limited purpose of assisting Walker with that interview. Shortly after the issuance of the complaint in this matter, the attorney filed a notice with NASD Regulation, dated October 27, 1997, in which he stated that he was not representing Walker in this matter. Additionally, the record shows that Walker knew that the other attorney who represented him at the September 18, 1998 pre-hearing conference would be unavailable for hearing because the attorney had made that fact clear at the September 18, 1998 pre-hearing conference.

⁷ Article V, Section 4(a) of the NASD By-Laws provides that a person whose association with a member firm has been terminated shall continue to be subject to the filing of a complaint based on conduct which commenced prior to the termination. With respect to an unregistered person, a complaint must be filed within two years after the date upon which such person ceased to be associated with the member. See NASD By-Laws, Article V, Section 4(c). Walker was associated with Lexington until March 26, 1997. The NASD retained jurisdiction over Walker by filing a complaint on October 20, 1997, within the requisite two-year period.

he began working at Lexington in March 1996 as a sales manager. Mayer and Napolitano testified that Walker referred to himself as one of Lexington's owners during the course of their respective interviews with him.

Norton, Mayer, and Napolitano all testified that Walker held sales meetings in which he made recommendations about which stocks the brokers should push in their dealings with customers. They further testified that Walker urged the brokers to sell the following stocks: U.S. Bridge, Fun Tyme, Skoda Diesel, Crown Laboratories, Alpha Solarco, and Cyber America. Norton testified that Walker threatened brokers with dismissal if they failed to sell shares of Fun Tyme. According to Norton, Walker said: "Everyone puts away [sic] a thousand shares of Fun Tyme or don't bother coming in tomorrow, you're fired." Norton also testified about Walker's involvement in the day-to-day operations of the Firm. He said that during Walker's sales meetings, Walker would "strut up and down with a cigar in his hand [saying] 'Let's put this stock away, that stock away.' Whatever stock it was that [the brokers] were selling at that time. 'Let's put this away.'" Additionally, Napolitano testified that Walker gave motivational speeches during his sales meetings.

The record shows that Mayer and Norton went to Walker when they had problems with Wise (the Firm's president) and Berkun. Mayer testified that he asked Walker to discuss with Wise the status of his (Mayer's) registration because he thought that Wise was moving too slowly on the issue. Mayer also testified that he had complained to Walker about a fine that Berkun had imposed on him for smoking at the wrong time and that, presumably, Walker had taken care of it because he did not receive a fine. Mayer claimed that "all of the brokers would go to Walker about the fines that Berkun . . . impose[d] on them." Napolitano confirmed that brokers would go to Walker to get fines reduced or forgiven. Norton testified that on one occasion he entered Berkun's office to discuss a problem with his paycheck while Walker was present, and that Walker "physically shoved him away, out of the office," and told him that he had "made enough money [that particular] month."

Norton testified that he thought that Walker was a co-owner of Lexington based on Walker's active involvement in the Firm. Norton testified that Walker operated a different business (Woodbury Capital Assets, Inc. ("Woodbury")) out of an office that was situated directly outside of Lexington's front door.⁸ Mayer testified that Walker's Woodbury telephone lines had been adapted to allow him to listen in on the Lexington brokers' conversations. Norton testified that Walker was in the Lexington office approximately three days a week throughout 1995, and that his presence in the Lexington office

⁸ Walker and the other brokers testified that Woodbury and Lexington operated out of the same office building. Walker testified that he held the leases on the office space occupied by Woodbury and Lexington and that both companies occupied the third floor of the office building. According to Walker, although he held the leasehold on the space that Lexington occupied, Lexington paid the rent directly to the landlord.

increased to five days a week thereafter. According to Napolitano, Walker walked through Lexington's office about three or four times a day.

Mayer testified that brokers would go into Walker's Woodbury office frequently because Walker would actually stop them on their way into Lexington's office to discuss Lexington business matters. According to Mayer, Walker would discuss stocks and client problems during those impromptu meetings in his Woodbury office. Napolitano testified that Walker routinely handled Lexington's customer complaints.

The record also contains documentary evidence that Walker was involved in Lexington's operations. Walker was listed as the "operations contact" for Lexington in its clearing broker's November 1995 and January 1996 clearing directories. In addition, the record includes the following evidence that Walker had direct contact with Lexington's clearing broker: a memorandum, dated November 20, 1995, from an employee of Lexington's clearing broker to Walker that discusses margin agreements. Further, NASD examiners found checks drawn on Lexington's account that appear to have been in payment for Woodbury expenses and a personal expense of Walker.

Lexington applied to have Walker associate with Lexington approximately one year after Walker began associating with the Firm. In connection with the application process, the Firm filed with the NASD a Form U-4 dated May 24, 1996 and a Form MC-400 dated June 26, 1996.⁹ Walker's Form U-4 indicated that he had been unemployed from July 1995 through May 1996, and that he had been a part owner and manager of an establishment by the name of "Club 454" from February 1992 to July 1995.

The Form MC-400 included an addendum ("First Addendum"), in which the Firm represented, through Wise, that Walker had been unemployed since July 1995, and had been a co-owner and manager of a restaurant/bar from early 1992 until July 1995 (when the restaurant/bar filed for bankruptcy). Walker included the following statement in the First Addendum:¹⁰

⁹ Pursuant to Code of Procedure Rules 9522(b) and 9522(c), a member that wishes to sponsor the association of a person who is subject to a statutory disqualification must file a written application for relief on Form MC-400. In addition, any person seeking registration as an associated person or registered representative is required to file an application for such registration with the NASD. See Article V, Section 2 of the NASD By-Laws. Such applications are filed on a Form U-4.

¹⁰ Walker filed the above statement pursuant to a requirement contained in the Form MC-400 that the disqualified person submit a statement about his experience in the investment banking or securities business, including reasons why he should be approved in the capacity requested.

Over 4 years have passed since the statutory disqualification arose. During that time, I was employed primarily in the restaurant business, until the restaurant I managed went bankrupt in July 1995. Since that time I have been unemployed, and exploring options for reentering the securities business. I am now seeking to become associated with [Lexington] to perform back office duties. In that position, I will have no supervisory duties and I will [not be] responsible for servicing any customer accounts. I will not provide investment advice to [Lexington's] customers. In addition, I will not engage in any trading for [Lexington] or its customers, nor will I receive commissions for the purchase or sale of securities by [Lexington's] retail customers.

Walker also represented in the First Addendum that he had satisfied the arbitration award at issue in the prior disciplinary action by paying the \$8,750 arbitration award in full, despite the fact that he was jointly and severally liable for the award with another individual who did not contribute any money to the satisfaction of the award.

Walker testified in an on-the-record interview on October 30, 1996 ("Interview") that, subsequent to the filing of the MC-400, he had a meeting with the NASD attorney who was handling the MC-400 application, and that during that meeting, he advised the attorney about Woodbury in response to a question the attorney posed about whether he (Walker) operated any corporations. Walker further testified that, at some point subsequent to that meeting, the NASD attorney advised Walker's attorney that the Form U-4 contained incorrect information. As a result, Lexington filed a revised Addendum to the MC-400 ("Revised Addendum") with the NASD on October 18, 1996. The transmittal letter that was filed by Walker's attorney with the Revised Addendum stated that the addendum had been amended to "include additional information with respect to Mr. Walker's prior employment history." The letter also represented that corresponding amendments had been made to Walker's Form U-4 and that the form had been submitted to NASD's Central Registration Depository ("CRD"). (The record includes a copy of an amended Form U-4, dated September 16, 1996, that appears to have been filed with CRD.¹¹)

The Firm represented in the Revised Addendum that Walker had engaged in several business ventures through an entity known as Woodbury since his statutory disqualification in 1992; that Walker was the sole shareholder, officer, director and employee of Woodbury; and that Walker was still operating Woodbury at the time the Revised Addendum was filed. The Revised Addendum also

¹¹ The copy of the revised Form U-4 included in the record contains the following stamp: "CRD USE."

included an amended statement by Walker in which he deleted any reference to having been unemployed since 1995 and represented that he had been self-employed since the statutory disqualification arose. He represented that while self-employed, he had "conducted several business ventures through Woodbury . . ." and that, through his operation of Woodbury, he primarily had been engaged in the restaurant business, until the restaurant he managed went into bankruptcy in July 1995.

Walker also represented in the Revised Addendum that, through his operation of Woodbury, he had: managed some real estate; obtained a finder's fee from a company for a "Regulation S" transaction;¹² and obtained a referral fee from a company for the private placement of its securities. With respect to the referral fee, the record shows that while Walker was a disqualified person, he received a commission payment from Lexington. The record demonstrates that Lexington acted as a placement agent for a \$1,000,000 private offering of Stern Family Foods, Inc. ("Stern"), and that Walker expected to be compensated for arranging for an investor to purchase \$125,000 of Stern stock.

Walker admitted receiving compensation in the amount of \$11,250 in the form of a check from Lexington that was made payable to "Woodbury Capital Assets."

Walker and Berkun both testified during their on-their-record interviews that Stern had sent Walker's commission check to Lexington by mistake. Walker testified in his Interview that when he found out that Stern had paid his commission to Lexington, he told Stern's attorney that he could not take "a damn commission" because he was "not affiliated with [Lexington]." Walker nevertheless admitted taking the check from Lexington as compensation for his efforts. He also admitted that his payment was determined in accordance with the commission amount that was specified in Stern's private placement memorandum.

Walker denied throughout his Interview that he was associated with Lexington in any capacity. He acknowledged that his Woodbury office was located outside Lexington's front door and that he frequented Lexington's office to visit with his father or brothers (who all worked at Lexington), or to check on the status of the Firm's application to reinstate him in the securities industry. Walker specifically denied ever having given any sales "pep" talks to any Lexington brokers. He also denied ever having sat in on job interviews that Lexington conducted. Walker stated that the only time he would talk to a Lexington broker was "once [in] a while" when a broker would come into his Woodbury office and smoke a cigar with him.

Discussion

Like the Hearing Officer, we find that there is an evidentiary basis in the record to support the allegations contained in the complaint. See In re James M. Russen, Jr., 51 S.E.C. 675, 678 n. 12

¹² Walker testified that the Securities and Exchange Commission ("Commission") investigated Walker's involvement in the "Regulation S" transaction.

(1993); In re Nancy Martin, Complaint No. C02970027 at 8-9 (NAC, July 28, 1998). Further, Walker has failed to show good cause to set aside the default. See Procedural Rule 9269(d).

Association With a Member Firm While Subject to Statutory Disqualification (Cause One).

We affirm the Hearing Officer's finding that Walker violated NASD Conduct Rule 2110 by associating with a member firm while he was subject to statutory disqualification. As a statutorily disqualified person, Walker was prohibited from associating with Lexington until both he and the Firm had received the proper regulatory approvals. See Article III, Sections 1(b) and 4(a) of the NASD By-Laws (formerly, Article II, Sections 1(b) and 4(a)) and Procedural Rule 9522(b) (formerly, Code of Procedure, Article VII, Section 2(b)).

The evidence establishes that Walker associated with Lexington¹³ in approximately May 1995, prior to obtaining the requisite regulatory approvals, and that he remained associated with Lexington until March 26, 1997, when Lexington terminated him. In fact, the brokers' testimony demonstrated that Walker was highly involved in the management and sales operations of Lexington. We credit the testimony of the Lexington brokers over Walker's investigative testimony regarding the extent of Walker's involvement in Lexington's operations because the brokers' statements were largely consistent and were corroborated by uncontested documentary evidence that demonstrated Walker's involvement in Lexington's operations.

In light of the foregoing, we find Walker's contention that he had never been associated with Lexington not believable. Moreover, based on the record evidence that establishes that Walker was associated with Lexington during the relevant period, we reject Walker's argument on appeal that his only business connection to Lexington was that of a landlord.¹⁴

¹³ Walker was an associated person of Lexington under the definition of "associated person" contained in Article 1(ee)(2) of the NASD's By-Laws:

'person associated with a member' or 'associated person of a member' means . . . a sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the NASD under these By-Laws or the Rules of the Association

¹⁴ See discussion above in note 8 regarding the lease arrangement that Walker had with Lexington.

Submission of False Information to the NASD on Forms MC-400 and U-4 (Cause Two).

We affirm the Hearing Officer's finding that Walker knowingly submitted false, misleading, and inaccurate Forms U-4 and MC-400 to the NASD in violation of Conduct Rule 2110. The record establishes that the Forms U-4 and MC-400 that the Firm filed in May and June, 1996, respectively, contained no information about Walker's employment with Woodbury. Rather, both forms specifically indicated that Walker had been unemployed since July of 1995.

Walker argues on appeal: that the Forms MC-400 and U-4 were "filled out properly" by an attorney" recommended to [him] by an official at the NASD"; that he had told the NASD "on many occasions" that he was the owner of Woodbury; and that "if there was something incorrect, it was done in error." Walker appears to imply that counsel's purported preparation of the Form MC-400 and U-4 somehow relieves him of his responsibility to ensure that the forms contained accurate statements. In fact, Walker was responsible for the accuracy of the information included in the forms as evidenced by attestations he signed that the information contained in those forms was true and complete.¹⁵ In addition, the Commission has held that "[e]very person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate." In re Robert Kauffman, 51 S.E.C. 838, 840 (1993), aff'd mem. 40 F.3d 1240 (3d Cir. 1994).

Walker also appears to be attempting to shift his responsibility to comply with the applicable rules to the attorney who represented him in the MC-400 application process by contending that the Forms MC-400 and U-4 were filled out properly by an attorney that represented him.¹⁶ Walker cannot

¹⁵ The attestation contained in the Form U-4 is as follows:

I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.

The attestation contained in Form MC-400 is similar:

I (we) certify to the Board of Governors of the National Association of Securities Dealers, Inc., that the statements made herein are true and complete. I (we) understand that I (we) am (are) subject to the imposition of sanctions under Association rules or Section 32 of the Securities Exchange Act of 1934, as amended, in the event false information is given on this application or there are omissions of material facts

¹⁶ Although the attorney who represented Walker in the MC-400 process also assisted Walker

evade responsibility for the accuracy of the Forms U-4 and MC-400, however, by attempts to shift responsibility to his attorney. See Markowski v. SEC, 34 F.3d 99, 104-105 (2d Cir. 1994); In re William H. Gerhauser, et al., Complaint No. C07960014 (NBCC Nov. 20, 1997), aff'd, Exchange Act Rel. No. 40639 (Nov. 4, 1998).¹⁷ Moreover, Walker admitted during his Interview that he had not included any disclosure about Woodbury in the initial Forms MC-400 and U-4 because he considered himself to have been unemployed during the relevant period. He maintained during his on-the-record interview that, although he was self-employed, he did not consider himself to be employed because he was not "employed," in the traditional sense, by another person or entity. We find this argument to be unpersuasive in light of the specific requirement in the Form U-4 to list all employment, including "self-employment."

In addition, Walker appears to be attempting to shift his responsibility to comply with applicable rules to the NASD by claiming on appeal that the attorney who assisted with the Form MC-400 process was referred to him by "an official at the NASD." As Enforcement points out in its brief on appeal, this statement is unsupported by the evidence. Moreover, it is well-established that a registered representative cannot shift the responsibility for compliance with regulatory requirements to the NASD or the Commission. See In re First Colorado Financial Servs. Co., Exchange Act Rel. No. 40436 (Sept. 14, 1998); In re Sherman, Fitzpatrick & Co., Inc., 51 S.E.C. 1048, 1052 (1994).

Commission Payment to Walker While He Was a Statutorily Disqualified Person (Cause Three). The Hearing Officer found that Walker caused Lexington, a member firm, to make a payment to Woodbury, which was, "in effect," a payment to Walker, a person subject to statutory disqualification, in violation of Conduct Rules 2420, 2110, and IM 2420-2. In dismissing the Hearing Officer's finding as to this cause, we find that the complaint did not properly charge a violation. The complaint alleged the following, in pertinent part:

In October 1995, Woodbury Capital, acting through Walker, introduced and referred a public customer, [RS], to [Lexington]. [RS] subsequently purchased (through [Lexington]) 125,000 shares of the Stern private placement. As a result of the introduction and referral, the firm, acting through Berkun, and pursuant to an understanding among [Lexington], Berkun and Walker, paid Woodbury Capital the

during the Interview in connection with this disciplinary action, he did not represent Walker in the proceedings below. See the discussion in note 6 above regarding the attorney's limited participation in this proceeding.

¹⁷ It is noteworthy that Walker's testimony is very vague regarding his reasons for not having included information about Woodbury in the initial applications for reinstatement.

sum of \$11,250 on October 18, 1995. At the time of the private placement, and at the time of the aforesaid payment by [Lexington] to Woodbury Capital and Walker, Respondent Walker was not effectively registered with the Association and was subject to a statutory disqualification. . . .

By reason of the foregoing, [Lexington], Berkun and Walker acted in contravention of NASD Interpretive Memorandum 2420-2, and thereby violated NASD Conduct Rules 2420 and 2110.

Conduct Rule 2420 prohibits NASD members from dealing with non-members except at the same prices, for the same commissions or fees, and on the same terms and conditions accorded by such member to the general public. The Commission has held that such prohibition is "directed to the member firm making improper payments and to the persons associated with that member who are responsible for making those payments." See In re Lawrence W. Legel, 51 S.E.C. 589, 591 (1993). Similarly, the operative final paragraph of IM 2420-2 prohibits payment by a member to any disqualified person.¹⁸ Although the complaint properly alleged that Lexington (a member firm) made a commission payment to Woodbury (a non-member firm), through Berkun (a person associated with that member), in connection with Walker having introduced a purchaser to Stern, the complaint did not clearly allege that Walker, as an associated person of Lexington, was responsible for making that payment. Thus, we cannot find that Walker acted in contravention of either Conduct Rule 2420 or IM 2420-2. Accordingly, we cannot find that he violated Conduct Rules 2420 or 2110.¹⁹

Based on the foregoing, we set aside the Hearing Officer's finding of violation and dismiss the allegation under cause three.

Failure to Testify Truthfully During Interview (Cause Five). We affirm the Hearing Officer's finding that Walker made false statements during his Interview in violation of NASD Procedural Rule 8210 ("Rule 8210") and Rule 2110. The complaint alleged that Walker testified that he was not

¹⁸ IM 2420-2 provides, in pertinent part, that "[u]nder no circumstances shall payment of any kind be made by a member to any person who is not eligible for membership in the Association or eligible to be associated with a member because of any disqualification."

¹⁹ Although acceptance of commission payments prior to being properly registered has been found to be a violation of Conduct Rule 2110 (see In re Donald R. Gates, Exchange Act Rel. No. 41777 (Aug. 23, 1999); In re Ashvin R. Shah, 52 S.E.C. 1100, 1102-03 (1996), aff'd mem. 132 F.3d 36 (7th Cir. 1997)), we make no determination as to whether such a claim would have merit in this case because the complaint did not allege that Walker engaged in misconduct on that basis.

associated with Lexington, and that he had not: interviewed prospective brokers; recommended stocks; given motivational speeches to Lexington brokers; and distributed promotional materials or conducted due diligence meetings. The testimony by the Lexington brokers demonstrates that, except for the distribution of promotional materials, Walker engaged in all of the conduct that he denied during his on-the-record interview.²⁰ Accordingly, we find that Walker testified falsely, in violation of Rules 8210 and 2110, by denying that, while associated with Lexington, he had interviewed prospective brokers; given motivational speeches; recommended stocks; or conducted due diligence meetings.

Sanctions

The Hearing Officer determined that Walker should be censured;²¹ barred from association with any member in any capacity with respect to cause one (association with a member firm while subject to statutory disqualification) and cause two (submission of false information to the NASD on Forms MC-400 and U-4); suspended for two years with respect to cause five (failure to testify truthfully during on-the-record interview); and fined \$200,000.²² We have determined to bar Walker for the reasons set forth below.²³

²⁰ We reject Walker's argument on appeal that the brokers who testified were not believable. See discussion above on page 9 regarding our determination to credit the brokers' testimony over Walker's.

²¹ In accordance with the revised censure policy, we are eliminating the censure imposed by the Hearing Officer.

²² The \$200,000 fine was apportioned among the causes: \$50,000 for each of the four violations. The Hearing Officer also imposed a bar and ordered disgorgement of \$11,250 with respect to cause three (payment of commission to disqualified person). As discussed above, we have dismissed the allegations as to cause three.

²³ The sanction of a bar is based, in part, on Walker's disciplinary history, which we consider to be an aggravating factor. We issued a decision on December 21, 1988, in which we found that Walker had effected an unauthorized transaction in the account of a public customer. Walker was censured, fined \$3,000, and ordered to disgorge \$625. On March 9, 1992, we issued a decision in a second disciplinary action involving Walker, in which we imposed the following sanctions: censure; \$2,000 fine; and requirement that Walker requalify as a registered representative (based on findings that Walker sold shares of a new issue that traded at a premium in the immediate aftermarket to restricted accounts and failed to disclose on confirmations for transactions that his member firm was a market maker and the firm dominated the market at the time the transactions were executed). A third disciplinary action (for Walker's failure to honor an \$8,750 arbitration award) was the basis for Walker's statutory disqualification. We issued a decision in that matter on November 22, 1991, imposing the following sanctions: censure, \$45,000 fine; bar from association with any NASD member in any capacity; and a requirement that the \$8,750 arbitration award be honored before Walker applied to become registered

As to cause one, the relevant portion of the NASD Sanction Guidelines ("Guidelines") applicable to a disqualified person's associating with a firm prior to obtaining the requisite regulatory approvals recommends the imposition of a bar in egregious cases.²⁴ The Guideline does not include a recommendation for suspending or barring a person in cases that are less than egregious. We have used the principal considerations specifically applicable to this Guideline to determine whether this is an egregious case. We have considered the nature and extent of Walker's activities and responsibilities with respect to Lexington, and we conclude that Walker was extensively involved in Lexington's management and sales operations for a period of approximately two years while he was subject to statutory disqualification. That aggravating factor, alone, sustains a finding that this is an egregious case. Nevertheless, we have identified the following additional aggravating factors: Walker became associated with Lexington approximately one year before the Form MC-400 was submitted to the NASD; and Walker's disqualification resulted from securities-related misconduct. In light of our finding that the violation under cause one was egregious, we impose a bar from association with any member in any capacity.

With respect to cause two, the Guidelines recommend a suspension of 5 to 30 business days and, in egregious cases, a suspension of up to two years or a bar for filing a false, misleading, or inaccurate form or amendment.²⁵ We agree with the Hearing Officer's conclusion that Walker knowingly failed to disclose his employment with and ownership of Woodbury, and that such failure bears on his fitness to return to the industry. Further, we conclude that Walker failed to disclose his ownership of Woodbury in an attempt to conceal his association with Lexington. We consider Walker's conduct to be egregious and therefore impose a bar from association with any member in any capacity.

Turning to cause five, the Guideline for failing to respond or failure to respond truthfully, completely, or timely to NASD staff requests for information recommends a bar when an individual does not respond in any manner.²⁶ In cases where mitigation exists, or the person did not respond timely, the Guideline recommends that the individual be suspended in any or all capacities for up to two years. In this matter, we find Walker's untruthful responses to be as harmful as a complete failure to respond and, as such, that a bar is the appropriate sanction. We note that there are no mitigating factors associated with this rule violation that would support the imposition of a suspension. This is not

with an NASD member.

²⁴ Guidelines at 41 (1998 ed.) (Disqualified Person Associating With Firm Prior to Approval).

²⁵ See Guideline at 65 (1998 ed.) (Forms U-4/U-5 - Late Filing; Failing to File; Filing of False, Misleading, or Inaccurate Forms or Amendments).

²⁶ See Guideline at 31 (1998 ed.) (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210).

a situation where Walker initially failed to respond and subsequently provided the requested information. In this case, Walker gave false testimony during an on-the-record interview that he had never been involved with Lexington's operations, notwithstanding substantial proof to the contrary.

Under a policy change we recently adopted (which applies to all settled and litigated actions decided and issued on or after November 1, 1999), NASD Regulation will generally not impose a fine in cases in which an individual is barred or suspended, and where no widespread customer harm has been identified.²⁷ In accordance with that policy, we set aside the \$200,000 fine imposed by the Hearing Officer.

Accordingly, we order that Walker be barred from association with any NASD member firm in any capacity with respect to causes one, two, and five.²⁸ Pursuant to Procedural Rule 9360, the bar shall be effective upon service of this decision.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate
Secretary

²⁷ NASD Notice to Members 99-86 (Oct. 1999) (Imposition and Collection of Monetary Sanctions).

²⁸ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, 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.