When Does "No" Mean "Yes"?

With Expungements, of Course

By David A. Weintraub

Putative financial advisors seeking to enter the securities industry are required to register with the Financial Industry Regulatory Authority, otherwise known as FINRA. The required registration application is called the Form U4. Question 14A(1)(b) asks whether the applicant has "*ever* been charged with a felony."[1] Question 14I asks a series of questions about whether the applicant has "*ever*" been the subject of certain customer complaints or arbitrations. While these questions are unambiguous, the answers may not be when the applicant has previously had a felony charge or a customer complaint "expunged" from his or her past. If an applicant has been charged with a felony, or has been the subject of a customer complaint, can the applicant lawfully deny either occurrence when completing the U4?

Prior Felony Charges

Being charged with a felony is problematic enough when it occurs. It can remain problematic for years to come, whether in the context of loan, housing or employment applications. In the context of the financial services or securities industry it is especially serious at multiple levels. First, Form U4 is essentially a job application. In many cases, Form U4 represents the first step in the application process, with several more steps before an employment offer is extended. If in step one, an applicant discloses a felony charge from earlier in life, will that applicant ever see step two in the employment application process? Will the second interview even occur? Will a hiring manager accept an explanation such as, "It was mistaken identity. Once the prosecutor realized that I was the wrong guy, the larceny charges were dropped."

The answer is – not likely. In the securities industry, unlike any other industry or profession, the disclosure of a prior felony charge, regardless of whether it led to a conviction or was voluntarily dismissed by a prosecutor, will be part of one's permanent public record. That public record appears on the "BrokerCheck®" portion of FINRA's website and is available to anyone with an Internet connection. In this illustration, the applicant's CRD report will permanently reflect that he was charged with larceny.[2] The CRD report will also reflect that the charges were dropped. Indeed, FINRA aggressively promotes to the general public that investors should investigate their broker. In one advertisement, FINRA writes, "You Check Everything. So Why Not Check Your Broker? Start Searching."

So, from the perspective of a hiring manager, under what circumstances would it be reasonable to hire a person who will forever be forced to wear the "felony badge," especially when compared with hiring the similarly situated person without it? The answer is that the otherwise innocent (but perhaps higher risk) applicant will rarely receive the job offer. That applicant's "felony badge," or label, will essentially be a target on his or her back, even if wrongfully charged or acquitted.[3]

A dilemma faced by any job applicant is whether to disclose the earlier felony charge. In the securities industry, the applicant completing a U4 application is required to answer whether he or she has ever been charged with a felony. It is easy to rationalize that the employer will never discover the 10-year-old felony charge that was dropped two days after being brought. In most industries, including the securities industry, that would be a mistake. Every U4 applicant is fingerprinted. The fingerprint cards are then sent to law enforcement agencies. The felony charges will thus be discovered by either state or federal authorities. The intentional misrepresentation of a fact on a U4 will lead to a statutory disqualification from

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the securities industry. In other words, don't let the door hit you on the way out.

The more difficult dilemma is faced by the "innocent felon" – the one whose criminal record has been expunged by a court of law. Does a judicially granted expungement, or expunction, in the context of an employment application give one the right to dishonestly answer "no" when the truthful answer is "yes"? The answer is not always apparent. Rather, it is a function of (1) the specific language used in the application question, (2) state law, (3) FINRA policy, or (4) a combination of these factors.

In general, if a Walmart job application asks whether an applicant has ever been charged with a felony, under what circumstances could an applicant respond in the negative, when in fact the applicant had been charged with a felony? The only circumstance in which the applicant could deny the prior felony charge is if the applicant received a judicial expungement, or the charge was set aside by some other operation of law. In order to understand the specific rights conferred by an expungement, one must look at state law.

State Laws

An example of a licensing application that provides for no wiggle room is the Nebraska State Bar application. Questions 21 and 22 of the application, like question 14 of the U4, ask whether an applicant has ever been charged with violations of any law in a criminal context. Unlike the U4, however, the Nebraska State Bar application contains the following language: "NOTE: Your responses . . . must include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside." Accordingly, given the very specific language on the Bar application, an applicant would presumably be required to disclose a prior felony charge.[4]

The U4, unlike the Nebraska Bar application, does not contain any similar note or instruction. It is silent. One must therefore look to applicable law to determine what rights an applicant acquired upon obtaining a lawful, court-ordered expungement. Nebraska's expungement statute, R.R.S. Neb. § 29-3523, provides a mechanism for obtaining an expungement of a criminal history. The statute does not, however, describe the rights one acquires upon receiving a criminal history record expungement, or expunction. Those rights are not always clear. Accordingly, a Nebraska resident completing a Form U4 may be left with nothing more than FINRA's guidance on the issue.[5] Residents of other states must look to their home states' statutes in order to understand their expungement rights and limitations.

In New York, when an expungement is judicially granted, "the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution."[6] In other words, if a person is entitled to the statutory sealing of a criminal history in New York, or expungement, it would be reasonable to deny the existence of a prior felony charge when completing a U4.

Florida's expunction statute, § 943.0585, provides that an expungement recipient "may lawfully deny or fail to acknowledge the arrests covered by the expunged record," except under certain explicitly defined circumstances. Those circumstances include candidates for admission to the Florida Bar, those seeking employment with the Florida Department of Children and Families, and certain other categories. The Florida legislature did not create an exception for applications for securities licenses (the U4) that are filed with FINRA and the Florida Office of Financial Services. Accordingly, a Florida resident who obtains a lawful, court-ordered expungement may reasonably believe her or she has the right to "lawfully deny" ever having been charged with a felony. In responding to the question of whether the Florida applicant has ever been charged with a felony, it would not be surprising that Florida applicants would check the "no" box. Moreover, it would be reasonable for the Florida applicant to believe that he or she does not need to ask for FINRA's permission, through its Registration and Disclosure Department, to answer "no." After all, the entire point of conferring the expungement is to provide individuals with a fresh start, or clean slate. Being forced to ask FINRA for permission to lawfully answer "no" is tantamount to letting the cat out of the bag – both FINRA and the prospective employer will have information to which they are not entitled. That is manifestly unfair to the individual who obtained a lawful expungement. Furthermore, there exists the risk that FINRA will not uniformly apply its unpublished criteria for determining whether one can deny the existence of a felony charge.

In Connecticut, an individual who receives a judicially granted erasure of criminal records "shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath."[7] The Connecticut Supreme Court noted that one entitled to an erasure shall be "placed in the same position he would have occupied had he not been arrested."[8]

Galligan v. Edward D. Jones & Co.[9] involved a financial advisor who was terminated by Edward D. Jones & Company, a Missouri-based broker-dealer. Galligan claimed that he was terminated after denying on his U4 that he had previously been convicted or pled guilty or no contest to certain drug-related charges. Pursuant to Connecticut General Statutes § 54-142a, Galligan claimed that his criminal record had been erased, and that as a

matter of law he was entitled to deny that the arrest ever occurred. In the context of denying Edward D. Jones's motion for summary judgment on the claim for wrongful termination, the court applied Missouri law in holding that two exceptions to Missouri's employment-at-will policy existed under these facts. First, the court held that a jury could find that Galligan was terminated for his refusal to perform an illegal act. Under these facts, the "illegal act" was the employer's effort to compel Galligan to check the "yes" box when he believed he was entitled to check the "no" box on the U4. Second, the court held that a jury could reasonably find that the "discharge [was] because the employee participated in acts that public policy would encourage."[10] This case clearly illustrates how quickly one can lose his or her career by what is perceived to be an inaccurate or misleading answer to a U4 question. These scenarios will only continue, given the lack of uniformity among the various state statutes, and the difficulty of interpreting those statutes in the context of U4 applications that can conceivably be submitted to more than 50 states and territories.[11]

As another example of the disparity, West Virginia's expungement statute provides that upon expungement, "the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit or other type of application."[12]

Maryland Criminal Procedure Code Ann. § 10-109 defines one's post-expungement rights in connection with employment applications, stating a "person need not refer to or give information concerning an expunged charge when answering a question concerning: (i) a criminal charge that did not result in a conviction." Maryland's statute, like Nebraska's, is not as clear as the statutes in Florida, New York, Connecticut, and West Virginia. The expungement statutes in those states transform criminal records into nullities, thereby giving one the right to deny that the event ever occurred. Notwithstanding the Maryland statute's ambiguity, a Maryland expungement recipient would be reasonable in concluding that he or she may deny the existence of a prior felony charge on a U4 application. However, simply because this position might be reasonable, adopting it may be akin to "cutting off your nose to spite your face." In the financial services industry, the employer is likely to learn of the expunged charge through the fingerprint search process. The U4 applicant therefore has a dilemma – whether to stand on principle and deny the existence of an expunged event, or simply disclose the event, knowing that it will ultimately be revealed in the fingerprint search.[13]

It should be noted that some states do not have statutory mechanisms for the expungement of non-conviction records.[14] Other states have expungement mechanisms that confer limited rights. As previously noted, Florida's expungement statute carves out specific circumstances under which one may not deny the existence of an expunged record. Missouri's expungement statute, § 610.140 R.S.Mo., precludes one from denying the existence of an expunged offense "when the disclosure of such information is necessary to complete any application for: (1) A license, certificate, or permit issued by this state to practice such individual's profession." Because the U4 serves as an application for a securities license within the state of Missouri, one could not deny the existence of a prior criminal record. Each state's statute is unique.

The Uniform Collateral Consequences of Conviction Act

At present, those state statutes providing mechanisms for the expungement of non-conviction records are a hodgepodge. The same is true for mechanisms for the expungement of conviction records. With respect to the expungement of conviction records, which is also relevant for purposes of the U4 application, the state of the law may be changing. In 2010, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Collateral Consequences of Conviction Act.[15] Because of the growth of the convicted population in the United States, millions of people are released from incarceration, probation, and parole supervision every year. A Department of Justice study estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 will serve prison time during their lives.[16] An even greater percentage of Americans will be convicted of crimes but not imprisoned. And an even greater percentage will be *charged* with felonies. This entire population, a high percentage of which is comprised of minorities, is subject to question 14A(1)(b) of the Form U4. An April 2013 report by the U.S. Government Accountability Office noted that from 2007 to 2011, there have been no substantial changes in the number of minorities and women in management in the financial services industry. The representation of minorities in senior management level positions is only 11% at financial firms.[17] According to U.S. Rep. Maxine Waters, of California, author of Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), although the lack of inclusion of women and minorities is not limited to the financial services industry, that sector is the worst offender. One must wonder whether one cause of this is the inclusion of question 14A(1)(b) on Form U4. How many minorities never seek employment in the financial services industry because they will be compelled to disclose felony charges, even though they may have been dropped or expunged?

The reality for any U4 applicant is that a state and/or federal fingerprint search is likely to uncover any prior criminal charges. The day of reckoning will come when the applicant will be required to explain why the "no"

box was checked when the perceived correct response was "yes." Before checking the "no" box in reliance upon a court-ordered expungement, any applicant should consult with legal counsel in order to understand what rights were acquired from the expungement, and the practical consequences of exercising those rights.

Prior Customer Complaints

Question 14I of the U4 contains a series of queries regarding prior customer complaints and how they were resolved. FINRA Rule 2080 provides a mechanism for the expungement of customer complaints. Rule 2080's predecessor, Rule 2130, is discussed in NASD[18] Notice to Members 04-16. Unfortunately, neither Rule 2080 nor NASD Notice 04-16 contains a definition of "expungement." The recipient of an expungement, therefore, will simply have information removed, or expunged, from the CRD system. The individual is without guidance as to any additional rights that may have been acquired from the expungement. For instance, if the individual changes jobs within the securities industry and is required to complete a new U4, may the individual deny the existence of the expunged customer complaint? What if the individual applies for employment outside the securities industry? Can the individual deny having been the subject of the expunged matter? Again, availing oneself of the apparent right to say "no" when the answer is actually "yes" carries risk.

Conclusion

Question 14A(1)(b) on Form U4 is antiquated. It serves no legitimate business purpose, especially in view of the fact that an affirmative answer, regardless of the underlying circumstances, will forever appear on an applicant's public CRD (assuming the applicant ever gets through the hiring process), or BrokerCheck® record. The public disclosure of a felony charge that was dropped serves only to embarrass. If indeed such public disclosure served any legitimate business purpose, it would be adopted by the legal, public accounting, and medical communities. Finally, because expungements are neither universally available nor uniformly defined, there will always be confusion in trying to answer questions 14A(1)(b) and 14I of the U4. Although it makes sense for question 14A(1)(b) to be removed in its entirety, a reasonable compromise would be for the otherwise useless responsive information to be removed from one's BrokerCheck® report, and be relegated to the non-public section of Web CRD®. ■

1. Questions 14A(2)(b), 14B(1)(b), and 14B(2)(b) also ask about prior charges, but in other contexts.

2. All of the information contained within a U4 application is submitted to the Central Registration Depository system, operated by FINRA. According to FINRA, Web CRD® "contains the registration records of more than 3,955 registered broker-dealers, and the qualification, employment and disclosure histories of more than 643,320 active registered individuals." The publicly available BrokerCheck® report is essentially a watered down, or redacted version of the Web CRD® report. The Web CRD® report is a publicly available document, but is only available from state regulators, such as the Florida Division of Securities.

3. Lawyers, certified public accountants and physicians do not wear this very public target. As an example, the Florida Bar's website only discloses an attorney's 10-year disciplinary record. There are numerous attorneys admitted to the Florida Bar with felony records. They have been admitted (or allowed re-admission) because their backgrounds have been thoroughly vetted by the Florida Bar. That aspect of their background, unlike in the securities industry, is not placed on public display on the Bar's website, or anywhere else. The Florida Bar does not have a BrokerCheck® equivalent.

4. Query whether a Nebraska Bar applicant, who has obtained a lawful expungement in a state whose statutes explicitly provide that the receipt of an expungement is absolute, can argue that disclosure to the Nebraska Bar is not required? Can the Nebraska Bar applicant rightfully treat the expunged charge as a nullity? Or has the applicant just added a year or two to the licensing process?

5. On March 5, 2015, FINRA released *Form U4 and U5 Interpretive Questions and Answers*. FINRA was asked whether one is required to report a conviction which was ultimately pardoned. From FINRA's perspective, FINRA is the sole arbiter of whether an item is reportable. Any court order granting a pardon is required to be sent to FINRA's Registration and Disclosure Department for review. FINRA employees within that department then determine whether the item must be disclosed on Form U4. Because this interpretation requires one to disclose a prior felony conviction or charge to both FINRA and a prospective employer, it is inconsistent with the legislative intent of those states that have enacted laws recognizing the right to both privacy, and a fresh start, where a judge has explicitly ruled that the prior charge or conviction may forever be considered a nullity – as if it had never occurred. *See, e.g.*, N.Y. Criminal Procedure Law § 160.60 (CPL) and Fla. Stat. § 943.0585.

6. CPL § 160.60.

7. Conn. Gen. Stat. § 54-142a.

8. *City of New Haven v. AFSCME, Council 15, Local 530*, 208 Conn. 411, 544 A.2d 186 (Conn. 1988).

9. 2000 WL 1785041 (Conn. Super. Ct. Nov. 13, 2000).

10. It should separately be noted that regardless of the statutory "erasure," Galligan answered U4 question 22 correctly. He was only charged with a misdemeanor, and the charge did not involve the investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion.

11. Typically, an individual would sign a single U4 application. That application is then sent to each state in which the applicant wishes to be registered.

12. W. Va. Code § 61-11-25.

13. In the event the employee is later terminated after refusing to disclose information about the criminal charges, the employer may be subjected to criminal charges. Md. Criminal Procedure Code Ann. § 10-109(b)(1).

14. Idaho, Montana, North Dakota and Wisconsin do not have statutory provisions for expungements of non-convictions.

15. The Uniform Collateral Consequences of Conviction Act was first put into law in Vermont and signed into law on June 10, 2014. Uniform Collateral Consequences of Conviction Act (Added 2013, No. 181 (Adj. Sess.), § 1, eff. Jan. 1, 2016). With respect to expungements of non-convictions, §§ 7603 and 7606 apply. Section 7606, signed into law in 2012, provides, "In any application for employment, license, or civil right or privilege or in an appearance as a witness in any proceeding or hearing, a person may be required to answer questions about a previous criminal history record only with respect to arrests or convictions that have not been expunged."

16. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974 – 2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976), as cited in Prefatory Note to Uniform Collateral Consequences of Conviction Act.

17. Doreen Lilienfeld and Amy Gitilitz Bennett, *Will Dodd-Frank's Diversity Mandates Go Far Enough?*, Law 360, cited in U.S. Magistrate Karen Wells Roby, *Diversity and Inclusion: The Financial Services Sector and Dodd-Frank*, ABA Section of Litigation, 2015, http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/financial-services-sector-dodd-frank-diversity.html.

18. National Association of Securities Dealers, now known as FINRA, or Financial Industry Regulatory Authority.