SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES AND EXCHANGE ACT OF 1934
Rel. No. 61120 / December 7, 2009

Admin. Proc. File No. 3-13335

In the Matter of the Application of

SCOTT MATHIS
c/o Hutner Klarish LLP
1359 Broadway, Suite 2001
New York, NY 10018

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Conduct and Membership Rules

Misstatements on Form U4

Registered representative and principal of member firm of registered securities association submitted Forms U4 that failed to disclose tax liens pending against him, as well as a customer complaint and a customer-initiated civil action. *Held*, association's findings of violation and sanction imposed are *sustained*.

APPEARANCES:

Eric S. Hutner, of Hutner Klarish LLP, for Scott Mathis.

Marc Menchel, *Alan Lawhead*, *James Wrona*, and *Vickie R. Olafson*, for Financial Industry Regulatory Authority, Inc.

Appeal filed: January 21, 2009
Last brief received: June 22, 2009

I.

Scott Mathis ("Mathis"), a registered representative and general securities principal of DPEC Capital, Inc. ("DPEC Capital"), an NASD member firm, seeks review of NASD disciplinary action.[1] NASD found that Mathis willfully failed to amend his Form U4 to disclose five tax liens and that he willfully failed to disclose three then-pending tax liens on two initial Forms U4, all in violation of NASD Conduct Rule 2110 and Membership Rule IM-1000-1.[2] For those violations, NASD fined Mathis $10,000 and suspended him for three months. NASD also found that Mathis failed to amend his Form U4 in a timely fashion to disclose a customer complaint and a customer-initiated civil action, also in violation of Rules 2110 and IM-1000-1. For this misconduct, Mathis was fined $2,500 and suspended for ten business days, with the two suspensions to run concurrently.[3] Because NASD found that his failures to disclose were willful, Mathis is also subject to a statutory disqualification.[4] We base our findings on an independent review of the record.

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[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

[2] NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." NASD Membership Rule IM-1000-1 prohibits the filing, in connection with membership or registration as a registered representative, of information so incomplete or inaccurate as to be misleading.

[3] NASD also imposed costs on Mathis of $5,907.67.

[4] Securities Exchange Act §§ 3(a)(39) and 15(b)(4)(A), 15 U.S.C. §§ 78c(a)(39) and 78*o*(b)(4)(A).

II.

The facts in this case are largely undisputed.[5] Mathis has worked in the securities industry in a registered capacity since 1985. In August 1995, he became associated with The Boston Group LP ("The Boston Group") as a general securities representative and, in November 1995, became registered as a general securities principal with that firm. Mathis was associated with The Boston Group until July 1998 when he became associated with National Securities Corporation ("National Securities") as a general securities representative and general securities principal. Mathis was associated with National Securities until September 2000, when he voluntarily ceased his association with the firm.

On June 8, 2000, Mathis became associated with InvestPrivate, Inc. ("InvestPrivate" or the "Firm") -- a broker-dealer he founded and controlled -- as a general securities representative and general securities principal.[6] From June 2000 to April 2001, Mathis also served as the chief executive officer and chairman of the board of directors of CelebrityStartUps.com, Inc. ("CelebrityStartUps"), a development-stage company that he founded. CelebrityStartUps filed a membership application with NASD in August 2000, but voluntarily withdrew the application in April 2001.

A. Tax Liens

Mathis received five written notices of tax liens totaling $634,436.28 from the U.S. Internal Revenue Service ("IRS") between August 1996 and September 2002.

1. The first notice of tax lien, dated August 9, 1996, informed Mathis that the IRS had entered "a lien in favor of the United States" against him in the amount of $274,526.68 for unpaid taxes for the 1993 and 1994 tax years.

2. On September 23, 1998, the IRS sent Mathis a second tax lien notice in the amount of $53,302.53 for unpaid taxes due in 1995.

3. On May 11, 1999, the IRS sent Mathis a third tax lien notice in the amount of $179,429.07 for unpaid taxes due in 1997.

4. On July 2, 2002, the IRS sent Mathis a fourth tax lien notice in the amount of $92,985.14 for unpaid taxes due in 1999.

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[5] In June 2007, Mathis and NASD reached an agreement under which they stipulated to most of the facts at issue in this case.

[6] In January 2008, the name of the Firm changed to its current name, DPEC Capital, Inc.

5. On September 9, 2002, the IRS sent Mathis a fifth tax lien notice in the amount of $34,192.86 for unpaid taxes due in 2000.

Each of these notices advised Mathis that the IRS had "made a demand for payment" of the unpaid tax liability and informed him that, as a consequence of his nonpayment, "there is a lien in favor of the United States on all property and rights to property belonging to [Mathis] for the amount of these taxes . . . ." In letters sent in 1999 and 2002 approving Mathis's request to pay his back taxes in installments, the IRS advised Mathis that, although it had established an installment plan for him, it "must protect the government's interest" and, therefore, "a notice of federal tax lien has already been filed." The IRS explained to Mathis in these letters that "[a] notice of federal tax lien is a public notice that the government has a claim against your property to satisfy a debt" and that it would "release (remove) the lien" only when Mathis had finished paying what he owed. Mathis testified that he did not read this statement when he received the letters.

Mathis was associated with The Boston Group in 1996 when he received the first IRS tax lien notice. He was associated with National Securities when he received the second and third IRS lien notices. Although he was associated with these firms when the IRS notified him of the first three liens, Mathis did not amend his Form U4 to report the liens.

On January 19, 1999, Mathis completed and signed an Annual Representative Certification ("Annual Certification") for National Securities, the firm with which he was then associated. When asked on the Annual Certification whether he had "filed for bankruptcy or had any liens or judgments entered against [him], which were not previously disclosed on Form U-4," Mathis responded "NO." Additionally, when asked "[i]f you are an independent contractor, have you paid all federal, state and local taxes due in full?" Mathis answered, "YES." At the time that Mathis completed the Annual Certification, he had two federal tax liens pending against him.

The parties stipulated that Mathis completed and signed two initial Forms U4 in which he failed to disclose the tax liens. On November 25, 1999, Mathis completed and signed a Form U4 to become associated with InvestPrivate. Mathis answered "NO" to question 23(M) on Form U4 asking whether he had "any unsatisfied judgments or liens against [him]." At the time, Mathis had received the notices from the IRS of the first three tax liens. Additionally, Mathis did not complete the required Form U4 Disclosure Reporting Page ("DRP") disclosing the lien type, the lien holder, and the lien amount for these liens.

On August 21, 2000, Mathis completed and signed a Form U4 seeking registration with CelebrityStartUps and, again, answered "NO" to question 23(M) on the Form U4 asking whether he had any unsatisfied judgments or liens against him. Again, Mathis did not complete the required Form U4 DRP disclosing the lien type, the lien holder, and the lien amount for each of the liens. The parties stipulated that Mathis did not disclose the liens on his Form U4 until July 2003, after the NASD Department of Enforcement ("Enforcement") staff brought the matter

to his attention during an investigation of InvestPrivate that led to the filing of the complaint against Mathis in this matter.

B. Customer Complaint and Civil Action

The parties have stipulated that Mathis failed to amend timely his Form U4 to disclose a customer complaint and a customer-initiated civil action. The stipulation states that, on December 6, 2002, Mathis received a letter of complaint from two elderly customers of InvestPrivate in which the customers alleged that Mathis and another InvestPrivate representative had recommended unsuitable investments, misrepresented the nature of the investments, and failed to disclose certain conflicts of interest. The complaint letter asked for restitution of more than $1 million. Mathis stipulated that his Form U4 was not amended to report this customer complaint until February 20, 2003, after NASD advised him that it had not been disclosed timely.

Also, in April 2002, an InvestPrivate customer brought a civil action against Mathis, InvestPrivate, and other InvestPrivate employees alleging that these defendants committed various sales practice violations, including fraud and supervisory violations, and requesting more than $2 million in damages. Mathis stipulated that he did not amend his Form U4 to report the civil action until July 7, 2003, after NASD brought the matter to his attention. The parties stipulated that the failures to amend Mathis's Form U4 to report the customer complaint and civil action were "not willful."

C. Procedural History

Enforcement sent Mathis a letter on July 3, 2003, requesting an explanation of his failure to disclose the federal tax liens on his Form U4 and reminding Mathis of his obligation to amend his Form U4 to disclose the tax liens at issue. On July 14, 2003, Mathis disclosed the tax liens in an amended Form U4 filing. On July 23, 2003, Mathis responded to Enforcement's July 3, 2003 request for information stating that, "to the best of my recollection, I was not aware of the pendency of any federal tax liens at such times and further was not aware of any obligation to report such matters on Form U-4." Mathis further responded that "the only reasons of which I am aware for why the referenced federal tax liens were filed are that there was under-withholding of federal taxes on my income and because tax returns were filed late."

In his August 2003 on-the-record interview with NASD staff (the "OTR"), Mathis did not dispute that he had received the five notices of tax liens at issue. Instead, he maintained that it was his understanding that there was a distinction between a "notice" of tax lien and being subject to a tax lien. Mathis also testified at the OTR that, at the time he received the lien notices, it had been his understanding that a lien did not exist unless and until the IRS froze one's assets. Mathis testified that, in reaching this conclusion, he did not consult with anyone else. He also stated that "a lack of concentration" caused him to answer "YES" on the Annual Certification to the question of whether he had paid all his federal, state, and local taxes, and that he did not extensively review the notices of tax liens because he had immediately forwarded

them to his accountant who was handling negotiations with the IRS on a payment plan to address his federal tax debt. Mathis paid off the liens approximately one month after disclosing them in his July 14, 2003 Form U4 filing.[7]

On February 7, 2005, Enforcement filed a complaint against Mathis and others.[8] At the subsequent hearing, Mathis testified that when he received the first tax lien notice in 1996, he sought the advice of a co-worker at The Boston Group, Kye Hellmers, a former NASD district director, about whether the tax lien notice needed to be disclosed on his Form U4. According to Mathis, Hellmers advised him that the tax lien notice was not required to be disclosed because it was not a securities-related matter.

Hellmers also testified. Hellmers explained that, when he had discussed this matter with Mathis in 1996, it was his "general impression was that if matters were not directly related to the securities industry, they need not be reported on the Form U4" and that "even some matters that were more closely related to the industry, such as being named in an arbitration as a control person, need not be reported on a Form U4." Hellmers concluded that the tax lien notice "did not arise as a consequence of actions by Mr. Mathis within the securities industry" and thus "didn't rise to the level of a reportable event." However, Hellmers also noted that he had advised Mathis that "it was only [Hellmers's] opinion," and that the issue should be referred to The Boston Group's compliance department and that Mathis should do whatever the department recommended.

Hellmers forwarded this matter to the firm's compliance department. Mathis testified that the compliance department did not get back to him with an answer and, therefore, he concluded that he did not need to disclose the lien. Hellmers testified that the compliance department also did not respond to him. Hellmers concluded that the compliance department's failure to respond indicated "pretty clear[ly] that they also didn't think it needed to be reported."

Mathis further testified that, in 1993, when he was associated with Gruntal & Company, Inc. ("Gruntal"), he had received an earlier notice of tax lien and had discussed this matter with Patty O'Brian, a compliance officer at the firm, to determine his disclosure responsibility.[9] According to Mathis, O'Brian advised him that, because he had agreed to a payment plan with the IRS to resolve the tax deficiency, "there was nothing that [Mathis] needed to do."

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[7] The IRS consequently released the liens in October 2003.

[8] In May 2007, the parties entered into a settlement in which some of the charges were dismissed and others were settled, leaving three counts against Mathis in dispute.

[9] According to Mathis's testimony, O'Brian was the director of compliance for Gruntal's Third Avenue office in New York City.

Tim Holderbaum, whom Mathis hired to design a website for InvestPrivate, testified that he advised Mathis in December 2001 that he had attempted to establish an Internet store for an affiliate of InvestPrivate but was unsuccessful because a credit check using Mathis's social security number showed that Mathis was subject to a tax lien. In an e-mail to Mathis dated December 6, 2001, Holderman wrote that he could not obtain the necessary credit approval to establish the online store "till the tax lean [sic] issue is resolved." Holderman testified that Mathis did not express surprise at the mention of his tax lien or ask questions about it.

In a decision dated December 12, 2007, an NASD Hearing Panel found that Mathis willfully failed to disclose the tax liens on his Forms U4. The Hearing Panel concluded that Mathis reasonably relied upon Hellmers's advice and that, consequently, Mathis did not act willfully with respect to events prior to January 1999. In making this finding, the Hearing Panel found the testimony of Hellmers to be credible and concluded that Mathis's reliance on the advice was reasonable given Hellmers's senior position at The Boston Group and his lengthy service as an NASD district director.

The Hearing Panel further found, however, that Mathis became aware that "there might be an issue regarding the requirement to disclose tax liens" when he falsely represented on the National Securities Annual Certification in January 1999 that he was current in his taxes and "made a conscious effort to conceal his tax liabilities from his [new] employer." The Hearing Panel stated that Mathis's awareness of a tax lien was "underscored" in December 2001 when Holderbaum told Mathis about the tax lien issue related to his credit report and Mathis "took no action." Accordingly, the Hearing Panel found that Mathis's failure to amend his Form U4 to disclose the tax liens beginning in January 1999 was willful.

Mathis appealed the Hearing Panel decision to NASD's National Adjudicatory Council ("NAC"), which affirmed the Hearing Panel's findings of violations and sanctions. Although the NAC found no reason to disturb the Hearing Panel's credibility finding with respect to the testimony of Hellmers, it disagreed with the Hearing Panel's conclusion that Mathis reasonably relied on his advice. The NAC found that Hellmers told Mathis that Hellmers's advice not to disclose the liens was only his opinion and that Mathis should follow the decision of The Boston Group compliance office. Accordingly, the NAC found that Mathis acted willfully from the time he received notice of the first tax lien in August 1996.

III.

NASD Membership Rule IM-1000-1 prohibits the filing, in connection with membership or registration as a registered representative, of information so incomplete or inaccurate as to be misleading. This rule applies to Form U4, which is used by NASD and other self-regulatory organizations to determine the fitness of applicants for registration as securities professionals.[10] We have repeatedly stated, "[t]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of this screening process."[11] Every person submitting Form U4 has the obligation to ensure that the information provided on the form is true and accurate.[12] Filing a misleading Form U4, in addition to violating Membership Rule IM-1000-1, violates the standard of just and equitable principles of trade to which every person associated with a NASD member is held.[13]

Mathis does not challenge NASD's findings that he failed timely to amend his Form U4 to disclose five tax liens and that he failed to disclose the then-pending tax liens on two initial Forms U4. Mathis also does not dispute that he failed to amend his Form U4 in a timely fashion with respect to the customer complaints and the civil action. In doing so, he violated Membership Rule IM-1000-1 and Conduct Rule 2110.

Mathis challenges only NASD's finding that his failure to disclose the existence of federal tax liens on his Form U4 was willful. In light of NASD's findings that Mathis's failures to disclose the tax liens were willful, Mathis was also statutorily disqualified. A person is deemed to be subject to a "statutory disqualification," under Sections 3(a)(39) and 15(b)(4)(A) of the

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[10] *Timothy H. Emerson, Jr.*, Exchange Act Rel. No. 60328 (July 17, 2009), 96 SEC Docket 18882, 18885 n.8; *Jason A. Craig*, Exchange Act Rel. No. 59137 (Dec. 22, 2008), 94 SEC Docket 12694, 12698; *Douglas J. Toth*, Exchange Act 58074 (July 1, 2008), 93 SEC Docket 7380, 7387-88, *petition denied*, 319 Fed. Appx. 184 (3d Cir. 2009).

[11] *Emerson*, 96 SEC Docket at 18889; *Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (quoting *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995)) (dismissing appeal where statutorily disqualified person had failed to amend his Form U4 within ten days of statutorily disqualifying event).

[12] *Guang Lu*, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 84 SEC Docket at 2639, 2648, *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006) (citing *Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993), *aff'd*, 40 F.3d 1240 (3d Cir. 1994)).

[13] *Alton*, 52 S.E.C. at 382 (citing *Kauffman*, 51 S.E.C. at 840; *Roy Ray Seaton*, 47 S.E.C. 131, 133-34 (1979)).

Securities Exchange Act of 1934[14] if, among other things, "such person . . . has willfully made or caused to be made in any application . . . to become associated with a member of a self-regulatory organization . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein."

As the U.S. Court of Appeals for the District of Columbia stated, "willfully" under the federal securities laws means that the respondent "intentionally committ[ed] the act which constitutes the violation."[15] It does not require that the person "also be aware that he is violating one of the Rules or Acts."[16] Thus, to find that Mathis's actions were willful, we need to find that Mathis voluntarily committed the acts that constituted the violation; it is not necessary for us to determine whether Mathis was aware of the rule he violated or whether he acted with a culpable state of mind. The evidence shows that Mathis voluntarily provided false answers on his Form U4 and thus willfully violated Membership Rule 1M-1000-1 and Conduct Rule 2110.

Mathis contends that he did not believe the lien notice triggered a U4 reporting obligation because he thought the IRS had notified him of a "possible lien." He explains that "it was his (mistaken) understanding that a person was subject to a lien [only] when they are denied access to their assets, *i.e.*, an asset attachment." Mathis further contends that, having worked out a payment schedule with the IRS, it was quite reasonable for him to "think the U4 form referred to some kind of 'unsatisfied' obligation and thus [was] not applicable to Mathis."[17] However, each of the IRS notices clearly informed Mathis that, as a consequence of his tax nonpayments, "there is a lien in favor of the United States on all property and rights to property belonging to [Mathis] for the amount of these taxes . . . ." Further, in its 1999 and 2002 letters approving Mathis's request to pay his back taxes in installments, the IRS again advised Mathis that, although it had established an installment plan for him, it "must protect the government's interest" and, therefore, "a notice of federal tax lien has already been filed." The IRS explained to Mathis in these letters the concept of a tax lien and its impact on Mathis's property. In addition, Mathis had been advised by Holderbaum that a credit check using Mathis's social security number had shown that Mathis was subject to a tax lien. Under these circumstances, we find no merit in Mathis's assertion that he believed that the IRS notices related to "possible" liens, rather than actual liens.

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[14] *See supra* note 4.

[15] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (citing *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802-03 (D.C. Cir. 1965)). *See also Maria T. Giesige*, Investment Advisers Act Rel. No. 2886 (May 29, 2009), 95 SEC Docket 17154, 17161 n.10; *Brendan E. Murray*, Advisers Act Rel. No. 2809 (Nov. 21, 2008), 94 SEC Docket 11961, 11968 n.10.

[16] *Wonsover,* 205 F.3d at 414.

[17] At least three of the liens were extant before the payment plan was approved.

Mathis further asserts that he found the term "unsatisfied judgments or liens" on Form U4 to be "unclear and ambiguous."[18] Question 23(M) on Form U4 asked whether Mathis had "any unsatisfied judgments or liens against [him]." The question contains no limitations on the kind of liens required to be disclosed and there is nothing ambiguous about whether an IRS tax lien constitutes a "lien." In 1999, National Securities asked Mathis to disclose in its Annual Certification "*any* liens . . . entered against [him], which were not previously disclosed on Form U-4," as well as unpaid taxes (emphasis added).[19] As an associated person, Mathis has a duty to comply with all applicable NASD requirements and if he found Question 23(M) to be ambiguous, it was his duty to determine whether disclosure was required.[20] As we have stated, "[i]gnorance of the [NASD]'s rules is no excuse for their violation. Participants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements."[21]

Mathis contends that he justifiably relied upon the advice of senior officials at two of his former firms, Patty O'Brian, the Gruntal compliance officer, and Kye Hellmers of The Boston Group, that no Form U4 amendment was necessary and that such reliance precludes a finding of willfulness. Mathis argues that it is "well-established that willfulness in the context of U4 filings does *not* exist if the registered representative justifiably relies upon advice that no U4 amendment was necessary received from a person of suitable experience, position and knowledge."[22]

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[18] Mathis maintains that this term even confused NASD's attorneys who "repeatedly referred to 'unsatisfied liens'" in their questioning at the hearing even though, as Mathis asserted, "*there is no such thing as an 'unsatisfied lien*,'" since "[a] judgment is *satisfied*; a lien is *released*" [emphasis in original].

[19] Mathis suggests that he should not be criticized for his answers on the form because he did not join National Securities voluntarily but as the result of a mass transfer of registrations from The Boston Group. He also notes that he had earlier disclosed the liens to two employees at National Securities and had entered into a payment plan with the IRS. Mathis further claims that National Securities was not concerned about his financial status because he was acquiring stock in National Securities' parent. None of these reasons justifies his incorrect answers that he neither owed tax nor was subject to liens.

[20] *See Craig*, 94 SEC Docket at 12698 (holding that registered representative has a "duty to determine whether the information he was providing on Form U4 was complete and accurate").

[21] *Craig*, 94 SEC Docket at 12701 (citation omitted).

[22] Emphasis in original.

We find no merit in this contention. With regard to the advice that Mathis claims he received from O'Brian, we note that this advice did not relate to the tax liens at issue here and it occurred several years prior to the issuance of the first of the tax liens that are the subject of this disciplinary proceeding. Moreover, O'Brian did not testify at the hearing and we have no way to know what factors and assumptions underlay her conclusion or whether she placed any fact-specific limitations on her conclusion that may not apply to this case.

With regard to the advice Hellmers allegedly gave Mathis, Hellmers testified that he had provided Mathis with only his "general impression" and "opinion" about Mathis's obligation to report the 1996 tax lien and he specifically advised Mathis that he was forwarding the matter to The Boston Group's compliance department to determine if a tax lien was a "reportable event." Moreover, Hellmers testified that he had told Mathis that "[w]hatever decision [the compliance department] made, we would go along with." It was, therefore, not reasonable for Mathis to have relied upon Hellmer's opinion that disclosure was not required when Hellmers's ultimate advice was to "go along with" the decision of The Boston Group's compliance department.

Mathis cites to three NASD disciplinary decisions -- *Andrew C. Knight*,[23] *Stephanie Ann Dixon*,[24] and *Michael K. Kalmaer*[25] -- that he asserts support his contention that he reasonably relied upon Hellmers's advice. We find these cases to be inapposite. The NAC, in rejecting respondent's argument in *Knight* that he had reasonably relied upon the advice of the supervisor in deciding not to disclose pending criminal charges on his Form U4, noted that the supervisor "had no compliance responsibility at [the firm]" and that the respondent had "failed to inquire with anyone in the [firm's] Union compliance department" concerning the necessity of disclosing the criminal charges. Here, even though the compliance department reported to Hellmers, there is no evidence that Hellmers had any direct compliance responsibility. Moreover, Hellmers testified that, after forwarding the matter to The Boston Group's compliance department, he "did not follow up" and did not think that he "even thought about the liens in any meaningful way again" until this proceeding.

In *Dixon*, the Hearing Panel concluded that the respondent's failure to disclose on her Form U4 felony criminal charges brought against her, "partially based on her mentor's advice to answer 'no' to the question about felony charges," did not excuse the false answer. In making this finding, the Hearing Panel pointed out that "[t]he mentor, a salesperson who did not examine any of the criminal court documents . . . , was not the authoritative source" for providing guidance on how to answer the question and that she should instead "have consulted her former counsel or someone in the firm's compliance department." While the Hearing Panel determined that the respondent's failure to disclose was not willful, it based its determination on both the fact that the

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[23] 2004 WL 3141227 (N.A.S.D.R. Apr. 27, 2004).

[24] 2002 WL 31955335 (N.A.S.D.R. Nov. 6, 2002).

[25] 2002 WL 31862087 (N.A.S.D.R. Sept. 17, 2002).

respondent had informed her mentor of the charges and, in contrast to the instant case, that she had made similar disclosure to her firm on her DRP.

Finally, in *Kalmaer*, the respondent's failure to disclose his felony arrest on his Form U4 was found to not to have been willful, in part because he had "fully disclosed the details of his arrest to his supervisors -- each a seasoned securities professional." Here, in contrast, Hellmers was not Mathis's supervisor. Moreover, there is no evidence that Mathis advised his supervisors either at The Boston Group or subsequently about the lien notices at any of the firms with which he was associated during the relevant period. Indeed, Mathis provided false answers on his 1999 National Securities' Annual Certification, evidencing his effort to avoid disclosing the liens to his supervisors.

There is no evidence in the record showing that The Boston Company's compliance department ever considered the tax lien issue and, further, it is undisputed that the compliance department never affirmatively advised Mathis that he could answer "no" to the lien question on the Form U4. It was Mathis's duty to determine whether the information he was providing on Form U4 was complete and accurate, and it is undisputed that Mathis did not attempt to follow up with the compliance department to determine whether the liens needed to be disclosed. Further, Mathis cannot shift responsibility to comply with NASD's rules to another senior person at the firm.[26] Moreover, Hellmers' suggestion that only securities industry-related liens need be disclosed is not supported by the plain language of the Form U4, which asks for "any" liens and contains no such limitation.

Mathis also disputes the NAC's finding that the undisclosed tax lien information was material. As an initial matter, Mathis asserts that the NAC erred when it held that "essentially all of the information that is reportable on the Form U4 may be considered to be material." This holding, Mathis maintains, creates an irrebuttable presumption of materiality for all of the requested information on the Form U4 and is contrary to the prevailing legal standard for determining materiality.

The test of materiality is whether the omitted information would have "significantly altered the total mix of information made available."[27] Information about the tax liens was

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[26] *See Craig*, 94 SEC Docket at 12700 (holding that a registered representative cannot "shift his responsibility to comply with NASD rules to his firm"); *Rafael Pinchas*, 54 S.E.C. 331, 338 (1999) (holding that "a registered representative is responsible for his actions and cannot shift that responsibility to the firm or his supervisors").

[27] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that, in the context of determining materiality under the antifraud provisions of Exchange Act §10(b) and Rule 10b-5 thereunder, to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable

(continued...)

material to Mathis's employers because it would have alerted them to the outside financial pressures that Mathis was facing as he performed his job. This information was material to investors because it would have allowed them to assess whether Mathis's tax problems and large financial obligations had a bearing on their confidence in him. Finally, this information was material to regulators in assessing Mathis's fitness because it would have provided them with an early notice about his financial difficulties and information on his ability to manage his financial obligations. We conclude that, in light of the large dollar amount of the liens, the number of the liens, and the lengthy period of time during which this information was not disclosed, Mathis's omissions significantly altered the total mix of information made available to NASD, other regulators, employers, and investors.[28] We, therefore, find that the tax lien information was material.

Mathis argues that the tax liens were not material because no state regulator or customer ever "took action against Mathis based on the fact that he had liens filed against him." However, whether a regulator or customer pursued an action against Mathis after 2003 upon discovering the liens (which were paid off the following month) is not dispositive. Materiality does not depend upon proof of a different outcome had the disclosure been made, but on a "showing of a substantial likelihood that, under all of the circumstances, the omitted fact would have assumed

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[27] (...continued)
investor as having significantly altered the 'total mix' of information made available") (internal citation omitted). Mathis argues that the NAC incorrectly ruled that the tax lien omission was material because it "altered" the total mix of information, while the correct materiality standard, as enunciated by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988), is that the omitted information "significantly alter" the total mix of information. We find this to be a distinction without a difference. Decisions by both the circuit courts and the Commission occasionally have used "altered" in place of "significantly altered" when making a materiality determination. *See, e.g., SEC v. Ginsburg*, 362 F.3d 1292, 1302 (11th Cir. 2004) (holding that a reasonable investor would have viewed certain information "as altering the total mix of information available" and, thus, material); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 387 F.3d 468, 487 (6th Cir. 2004) (stating that materiality requires that the information, "had it been presented accurately, [would] have altered the total mix of information made available") (internal citations omitted); *Kevin D. Kunz*, 55 S.E.C. 551, 562 (2002) (holding that certain financial information was material because "[i]t altered the total mix of information for the investment decision") (internal quotations omitted). In any event, as noted, we have independently reviewed the record and base our finding of materiality on the standard enunciated in *TSC Indus., Inc.* and *Basic*, *i.e.*, that the that the omitted tax lien disclosure "significantly altered" the total mix of information available.

[28] In this regard, we note that Mathis concedes in his brief that he was unable to pay his outstanding taxes before 2003 "because he needed to help support his extended family . . . and also because much of his net worth was tied up in illiquid securities."

actual significance in the deliberations of the reasonable shareholder."[29] For the reasons discussed above, we find that the tax liens would have assumed actual significance in the deliberations of Mathis's investors, as well as employers and regulators, and, therefore, are material.

Mathis further argues that the tax liens are not material because the Commission does not require liens to be disclosed in other contexts. As an example, Mathis asserts that the Commission "does not specifically require registered investment advisers to disclose personal liens."[30] He also states that the Commission "applies a rebuttable presumption of materiality with respect to disclosures made by directors and officers pursuant to Item 401(f) of Regulation S-K and Item 401(d) of Regulation S-B." However, whether disclosure of liens is required in other contexts is not relevant to a determination of the materiality of Mathis's statement on Form U4 that he did not have any liens when, in fact, he did. We have consistently held that the candor and forthrightness of applicants in completing Form U4 is critical to the effectiveness of NASD's, and other self-regulatory organizations', ability to determine the applicants' fitness for registration as a securities professional.[31] In this context, we find that Mathis's failure to disclose the tax liens in response to a question specifically asking him to disclose such information was a material omission.

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[29] *TSC Indus., Inc.*, 426 U.S. at 449.

[30] Mathis notes, in this regard, that investment advisers are only required to disclose personal liens when other factors are present, such as reasonably likely to impair the ability of the adviser to meet contractual obligations to clients. According to Mathis, the Commission's 1987 release, *Financial and Disciplinary Information that Investment Advisers Must Disclose to Clients*, Advisers Act Rel. No. 1083 (Sept. 25, 1987), 39 SEC Docket 545, offers support for his view that "much more serious events of bankruptcy and insolvency, as opposed to a personal lien, would be rebuttably material, and even then only when certain conditions not applicable here exist [and that] the significantly less serious personal lien is not material." We do not find this persuasive as the Commission release applies to financial information that is required to be disclosed by investment advisers to their clients pursuant to Section 206 of the Advisers Act and the rules thereunder in the absence of any specific request for this information, while the information at issue here is information specifically requested by the Form U4 to be disclosed by a broker-dealer associate.

[31] *See Craig*, 94 SEC Docket at 12700 (holding that "effectiveness of [Form U4] depends on applicants' candid disclosures").

Accordingly, we find that Mathis's failure to disclose on his Form U4 his five tax liens willfully violated Membership Rule IM-1000-1 and Conduct Rule 2110. We further find that Mathis failed to amend his Form U4 in a timely fashion to disclose a customer complaint and a customer-initiated civil action, also in violation of Rules IM 1000-1 and 2110.

IV.

Pursuant to Exchange Act Section 19(e)(2), we sustain NASD sanctions unless we find, giving due regard to the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition.[32] NASD fined Mathis $10,000 and suspended him for three months.[33] We sustain the sanction imposed by NASD because, as explained below, we believe that it is neither excessive nor oppressive in light of Mathis's violative conduct and that it will adequately serve the public interest and protect investors.

We initially observe that NASD's decision to fine and suspend Mathis is consistent with NASD Sanction Guidelines.[34] For filing a false, misleading, or inaccurate Form U4, the Guidelines recommend a fine between $2,500 and $50,000 and a suspension for five to thirty business days. In egregious cases, the Guidelines recommend consideration of a longer suspension of up to two years or a bar.[35] In evaluating the appropriate sanction to impose, the Guidelines provide three "Principal Considerations," only one of which -- the "[n]ature and significance of [the] information at issue" -- is relevant here.

We conclude, as did NASD, that Mathis's failure to disclose the five tax liens was egregious. The omitted tax lien information was significant. The omissions involved tax liens for a large amount -- $634,434. They occurred over a long period of time -- approximately six

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[32] 15 U.S.C. § 78s(e)(2). Mathis does not claim, nor does the record show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

[33] NASD also fined Mathis $2,500 and suspended him for ten business days, with the two suspensions to run concurrently, for his non-willful failure to amend his Form U4 in a timely fashion to disclose a customer complaint and a customer-initiated civil action. As with the findings underlying this second sanction, Mathis is not contesting this fine and suspension. This sanction is at the minimum end of that recommended under the Sanction Guidelines and, we find, is appropriate under the circumstances.

[34] NASD promulgated the Sanction Guidelines in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. Although the Sanction Guidelines do not bind the Commission, they serve as a benchmark in reviewing sanctions under Exchange Act Section 19(e)(2). *Craig*, 94 SEC Docket at 12701 n.27.

[35] NASD Sanction Guidelines at 77-78 (Mar. 2006).

years. This information was important to investors, employers, and regulators for the same reasons we have found it to be material.[36]

In mitigation, Mathis notes that NASD withdrew the fraud allegations against him. However, we do not find this to be mitigating. The NAC imposed sanctions on Mathis for his inaccurate disclosures, not because of the withdrawn fraud allegations.

Mathis charges that the issuance of an NASD press release in this matter caused "enormous" harm to his career and reputation. Following the issuance of the original complaint against Mathis, NASD issued a press release entitled "NASD Charges InvestPrivate, Inc. and its Chairman [Scott Mathis] with Fraudulently Raising Millions." The press release also disclosed the allegations pertaining to Mathis's tax liens. Mathis asserts that, "[t]hereafter, the press release was maliciously emailed to every InvestPrivate customer by a disgruntled former InvestPrivate employee."

As noted, NASD subsequently withdrew all allegations of fraudulent misconduct. At the NASD hearing, Mathis asserted that he suffered harm as a result of the press release remaining on NASD's website without any indication that the fraud charges had been withdrawn. In response to Mathis's request that the situation be rectified, the Hearing Panel noted that, while it did not have "the authority to direct [NASD] staff to remove the press release or append it with clarifying information," it nevertheless, "encourage[d] [NASD] to consider taking action so that people reading the press release on [NASD's] website do not have the mistaken impression that [NASD] continues to allege that Mathis engaged in fraudulent conduct." After issuance of the Hearing Panel's decision, the press release on NASD's website was modified to include the following notice: "NASD withdrew the fraud charges against InvestPrivate, Inc., Mathis, [and others]."[37] The NAC dismissed Mathis's contention that he should not have been sanctioned because of the harm he sustained as a result of the press release. The NAC noted that the statements in the press release were accurate and concluded that, in any event, publication of the information in the press release was not a mitigating factor for purposes of sanctions. We concur that the press release, which was accurate when issued, and is now accurate as updated, is not a mitigating factor for purposes of determining Mathis's sanction.

Mathis contends that the fact that NASD continued with the case after the fraud charges were withdrawn suggests NASD had an agenda or bias against him. To the extent that Mathis is alleging that he has been subject to unlawful selective prosecution in NASD's initiation and pursuit of this action against him, Mathis must prove that he was singled out for enforcement action while others similarly situated were not and that his selection as a target for enforcement

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[36] *See supra* nn.27 & 29 and accompanying text.

[37] The press release on NASD's website also provides a hyperlink to the NASD/InvestPrivate/Mathis settlement agreement. *See* http://www.finra.org/Newsroom/NewsReleases/2004/P002821.

was based on an unjustifiable consideration such as his race, religion, national origin, or the exercise of constitutionally protected rights.[38] Mathis has made no showing on the record before us that he has been subject to such improper prosecutorial decisions.

We find that the fine and suspension imposed in this case are remedial and not punitive. The information Mathis failed to disclose was material in determining whether Mathis could fulfill the high standards of conduct demanded of associated persons. By not disclosing the information, Mathis demonstrated his inability to fulfill this high standard. Mathis currently is associated with a registered broker-dealer and will continue to be required to comply with the disclosure requirements of Form U4. The sanction will encourage Mathis to make complete and

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[38] *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992) (setting forth elements of selective prosecution claim). *See also Fog Cutter Capital Group Inc. v. SEC*, 474 F.3d 822, 826 (D.C. Cir. 2007) (holding that in order for respondent to make a claim of selective prosecution against NASD, he must establish that he was part of a protected class under the Equal Protection Clause, "that prosecutors acted with bad intent, [and] that similarly situated individuals outside the protected category were not prosecuted" (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996))); *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13856 n.44 (same); *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13813 n.34 (same); *Robert Radano*, Advisers Act Rel. No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7510 n.74 (same).

accurate disclosures in the future and will impress upon others the importance of the accuracy of the information in Form U4.[39] Accordingly, we sustain this sanction because it is neither excessive nor oppressive, is remedial, and will protect investors and the public interest.[40]

An appropriate order will issue.[41]

By the Commission (Commissioner WALTER, AGUILAR , PAREDES and CASEY); Chairman SCHAPIRO not participating.

Elizabeth M. Murphy
Secretary

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[39] *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("[A]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension[,] . . . it may be considered as part of the overall remedial inquiry." (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005))), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[40] Mathis notes that NASD's finding that he acted willfully results in his being statutorily disqualified and that this constitutes a disciplinary sanction. He argues that the effect on his career of a statutory disqualification is disproportionate to his offense. We disagree. NASD's finding that Mathis had acted willfully is justified given the number and amount of the liens, the lengthy period of time during which he failed to disclose this information, and the many opportunities he had over this period to correct his Form U4.

[41] We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61120 / December 7, 2009

Admin. Proc. File No. 3-13335

In the Matter of the Application of

SCOTT MATHIS
c/o Hutner Klarish LLP
1359 Broadway, Suite 2001
New York, NY 10018

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken, and costs imposed, by NASD against Scott Mathis be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary