SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99201 / December 18, 2023

Admin. Proc. File No. 3-19652

In the Matter of the Application of

ROBERT R. TWEED

For Review of Disciplinary Action taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDING

Former associated person of former FINRA member firm appeals from FINRA disciplinary action finding that he negligently misstated material facts and omitted material facts in connection with the offer of securities in a fund that he controlled. *Held*, the findings of violation are *sustained in part* and *set aside in part*; the sanctions imposed are *set aside*; and the proceeding is *remanded* for a redetermination of sanctions.

APPEARANCES:

Robert I. Rabinowitz and *Sarah Klein*, Baker & Poliakoff, LLP, for Robert R. Tweed.

Alan Lawhead, Jennifer Brooks, and *Michael M. Smith*, for FINRA.

Appeal filed: January 10, 2020
Last brief received: June 11, 2020

Robert R. Tweed, who during the period at issue in this appeal was associated with CapWest Securities Inc. ("CapWest"), a former FINRA member, seeks review of a FINRA disciplinary action. FINRA found that Tweed violated Sections 17(a)(2) and (a)(3) of the Securities Act of 1933, and as a result violated FINRA Rule 2010, by: (1) making material misstatements of fact and failing to disclose material facts in connection with the sale of interests in the Athenian Fund, L.P. (the "Fund"), a private investment fund he controlled; and (2) engaging in a course of conduct that operated as a fraud or deceit on the fund's investors. FINRA barred Tweed from associating with any FINRA member in any capacity.[1] Based on an independent review of the record, we have determined to sustain in part and set aside in part FINRA's findings of violation. As a result, we set aside the bar and remand to FINRA for a redetermination of sanctions.

I. Background

A. Tweed formed the Fund and made Tweed Financial Services, Inc. its investment adviser.

In 2008, Tweed organized the Fund and made Tweed Financial Services, Inc. ("Tweed Financial"), which he owned and controlled, its investment adviser. Before then, Tweed had focused mainly on real estate investments.

Tweed testified that when he formed the Fund he had been impressed by the performance of Portfolio Management International, Inc. ("PMI"), an investment adviser, which had developed a proprietary, algorithmic trading system (the "PMI System") that PMI claimed produced "superior returns" with "substantially reduced risk." Tweed was never shown how the PMI System worked or provided with any account statements or other data that reflected PMI's actual performance. Tweed testified that he nonetheless "form[ed]" the Fund with the idea that he would "try" the PMI System. In late 2009, Tweed agreed to invest the Fund's capital in a "master" fund that PMI established—the PMI Quant Pool I, LLC (the "Quant Pool").

To prepare the Fund's partnership agreement and private placement memorandum (the "PPM"), Tweed retained an attorney with experience drafting securities offering documents. The PPM, which was completed in November 2009, stated that the Fund was formed for the purpose of investing all of its assets in the Quant Pool, which was run by PMI manager Brian Hunter. According to the PPM, the Quant Pool's "competitive advantage" was "based on use of a quantitative trading platform that acts to actively manage the long and short side price cycles in

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[1] In 2020, Tweed and an investment adviser he controlled (Tweed Financial Services, Inc.) settled civil and administrative proceedings with the Commission, based on the same underlying conduct at issue here, by agreeing to be permanently enjoined from future violations of Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder and, in Tweed's case, to be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization with a right to reapply after five years. *See* Final Judgment, *SEC v. Tweed Fin. Servs., Inc.*, No. 2:17-cv-07251 (C.D. Cal. Apr. 27, 2020) ECF No. 100; *Robert Russel Tweed*, Investment Advisers Act Release No. 5542, 2020 WL 4038955 (July 16, 2020).

each of the approximately 150 highly liquid securities which collectively make up [the Quant Pool's] investment portfolio." The PPM touted Hunter's experience as an "entrepreneur . . . at the forefront of technology for the past 25 years," and described him as "uniquely qualified to operate a quantitative trading system." Although not included in the PPM, Tweed told at least one investor that, by using the PMI System that Hunter developed, the Fund would generate annual gains in excess of 80%. The PPM further stated that Tweed "has the authority to invest outside of the Master Fund, although [he] does not expect to do so," and that Tweed retained "the complete discretion to select investments for the [Fund] as investment opportunities arise."

In addressing the management fees to be charged investors, the PPM stated that such fees would be paid at an annualized rate of three-and-a-half percent of the value of their investments. Investors also would be assessed a quarterly performance allocation fee based on the profitability of their investments compared to a common stock market index. The PPM stated that Tweed Financial and PMI would share the management fee and performance allocation, with PMI receiving "[t]wo-thirds (2.5%)"[2] of the management fee and half of the performance allocation, and Tweed Financial receiving the rest. PMI's own offering materials provided that PMI was also entitled to an additional five percent management fee, but the Fund's PPM—on which Tweed relied and which the Fund's attorney had drafted after reviewing all of the documents and fees associated with an investment in the Fund—did not reference the management fee. Tweed began soliciting investors in late 2009, providing each fund investor with a PPM prior to purchase. CapWest processed all Fund sales transactions and approved the Fund's offering materials.

B. Tweed replaced the master fund but failed to update the PPM or notify Fund investors.

On January 29, 2010, Hunter informed Tweed that PMI was dissolving the Quant Pool. Tweed believed the reason was "some issue" with PMI's registration in Utah. By this point, Tweed had raised $968,500 from investors, including himself and his stepson.

PMI informed Tweed that a replacement master fund was being established—the Quantitative Analytics Master Fund, LLC ("QAMF"). Although PMI would not manage QAMF's assets directly, PMI would, Tweed was told, be given "third party trading authorization to trade the fund" using the PMI System. Instead of Hunter and PMI, QAMF's manager was an investment adviser controlled by Eric Richardson. Tweed had concerns about Richardson because Richardson had an associate, Chris Hales, whom Tweed testified he "didn't really like."

Tweed explored alternative means of having PMI manage the Fund's assets directly, but those efforts were unsuccessful. Instead, in February 2010, Tweed overcame his concerns about Richardson, and agreed to place the Fund's assets with QAMF, with PMI having third-party trading authorization to trade the fund using the PMI System. As part of Tweed's arrangement with Richardson, Tweed executed a "Consulting, Side and Advisory Agreement." The

[22] Two-thirds of the 3.5% management fee equals roughly 2.3% rather than the "2.5%" specified in the PPM. The PPM does not explain the discrepancy and it is not clear whether PMI was entitled to a fee equal to 2.5% or 2.3% of the Fund's assets, nor does it matter for this case.

agreement provided that, in exchange for investing the Fund's assets in QAMF, Tweed Financial would receive, in addition to its other fees, compensation equal to 45% of the net proceeds that Richardson's advisory firm received as a result of the Fund's investment in QAMF. Neither the Fund's switch of master funds nor Tweed's consulting agreement with Richardson (and its supplemental compensation arrangement) were disclosed to investors. Aside from $100,000 of Richardson's own money, the only funds invested in QAMF were those that the Fund invested. When asked during testimony about what, if anything, he had done to address his earlier concerns about Richardson and Hales, Tweed said that he could not remember.

QAMF's offering documents, which were provided to Tweed in February 2010, stated that it was "highly likely and anticipated that most of [QAMF's] capital will be dedicated to the [PMI System] operated by [PMI]." As for fees, QAMF's investors would be charged a monthly management fee at an annualized rate of three-and-a-half percent of the value of their investments in QAMF and a quarterly performance allocation based on the profitability of their investments compared with a common stock market index. The quarterly allocation was 20 percent if QAMF's rate of return was nine percent or below, and 30 percent if QAMF's rate of return exceeded nine percent. Like the five percent management fee contained in PMI's offering materials, QAMF also charged management and performance fees on top of those described in the offering documents. Tweed did not send existing or new investors the QAMF offering documents.

Despite the shift from the Quant Pool to QAMF, and the differences between the two master funds' offering materials, Tweed continued to offer new investors interests in the Fund based on the unrevised and now inaccurate PPM. Tweed testified that both the attorney who drafted the Fund's offering documents and CapWest's compliance officer knew that the Fund shifted master funds and that Tweed signed a side agreement with QAMF. Despite such knowledge, Tweed testified that neither the attorney nor the compliance officer advised Tweed that he should revise the PPM or otherwise make additional disclosures to Fund investors. But Tweed acknowledged that he never explicitly sought or received legal advice on the subject.

Ten additional investors invested a total of $732,000 in the Fund following the dissolution of the Quant Pool. By March 2010, investors had invested a total of $1,750,000 in the Fund, all of which was placed with QAMF. Between March and June 2010, Tweed Financial Services charged Fund investors approximately $11,891 in management fees, as evidenced by the Fund's records and a check cut from the Fund in October 2010.

C. Richardson lied to Tweed about the Fund's investment in QAMF.

In early May 2010, Tweed learned that PMI had stopped trading with the funds invested in QAMF because the PMI system "needed to be recalibrated to trade a more volatile and unpredictable market." As a result, all of the securities QAMF had held were liquidated. Within a few weeks, Richardson told Tweed that he had placed some of QAMF's cash in a Wells Fargo "credit facility" so it could earn interest while Richardson and Tweed waited for PMI to resume trading in QAMF's account. Although Tweed testified that he assumed the credit facility was a liquid investment vehicle offered through a bank, Tweed did nothing to verify that assumption. Instead, in July 2010, Tweed redeemed in full his $65,000 investment in the Fund, and those of two other investors.

In September 2010, PMI still had not resumed trading with the funds invested in QAMF. Tweed decided it would be in his investors' best interest to withdraw the Fund's investment in QAMF and distribute it to the investors. But, according to Tweed, when he asked Richardson to return the Fund's money, Richardson told him he had placed $650,000 of the Fund's cash in the purported credit facility, and that this money would be "locked up" until June 2011. Tweed testified that he was surprised and angry when Richardson told him this because it violated the terms of QAMF's offering documents, which assured investors that they could redeem their investments within five days. Richardson agreed to return the Fund's "current liquid assets," and the remainder of the Fund's investment in QAMF when the credit facility expired in June 2011.

In September and October 2010, QAMF returned about $760,000 to the Fund, which Tweed then held in cash. He used a portion of the cash to redeem certain investors in the Fund, including a partial redemption for his stepson. But Tweed also used $200,000 of the Fund's cash to buy a six-month promissory note issued by Teamwork Retail, LLC, an early-stage software company in which Tweed had invested and for which he had engaged in "capital-raising" efforts. Teamwork Retail defaulted on its promissory note without making any payments and eventually declared bankruptcy. As of the hearing, the Fund had recovered just $2,000 of the loan amount.

In June 2011, despite his earlier agreement, Richardson refused to return the remaining funds that he owed the Fund, claiming that the borrower had exercised its option to extend the credit facility for an additional year.[3] By November 2011, Tweed learned that Richardson had lied to him about the credit facility, that Richardson actually had used the Fund assets that he had not returned to finance a purported gold dust mining operation in Ghana, and that Richardson was having trouble getting the money back. Richardson and Tweed ultimately were unsuccessful in getting any amounts back from the claimed gold mining venture.

Despite the uncertainty over recovering the Fund's remaining capital, Tweed continued making redemptions for investors who requested them. In December 2011 alone, Tweed returned approximately $105,000 to investors. By January 2012, the Fund's cash had dwindled to the point that Tweed could no longer redeem every investor who asked. As a result, Tweed became selective, redeeming some investors, such as his stepson (who eventually got back from Tweed all he had invested), but refusing to redeem others, including an investor who had invested $100,000 but got nothing back despite requesting a redemption before the Fund's assets had been fully depleted. In July 2012, Richardson abruptly resigned as manager of QAMF and informed Tweed that he had been convicted of unrelated federal bank fraud charges.[4]

D. Tweed hid the Fund's declining finances from its investors.

From 2010 to 2013, Tweed misled investors. Tweed provided investors with unaudited financial statements that purported to show the value of their Fund investments but that actually

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[3] Richardson told Tweed that the remaining funds the Fund had invested in QAMF totaled $650,000. Tweed did not question this $650,000 figure even though it failed to account for an additional $126,040 that the Fund had invested with QAMF. When asked about it at the hearing, Tweed responded that he had not previously been aware of the discrepancy.

[4] *See United States v. Richardson*, No. 2:12-cr-00354 (D. Utah).

represented the value of each investor's capital account as equal to amounts originally invested. Tweed also failed to disclose that some Fund investors, including him and his stepson, had earlier redeemed their investments. Tweed later admitted that, because most Fund investors had other investments with him, he feared he would lose their business if they learned the truth.

In April 2014, after Tweed left CapWest and became associated with Concorde Investment Services, LLC ("Concorde"), our staff conducted an examination of Concorde. As a result of the examination, Concorde learned that the Fund had lost assets, that Tweed had been providing redemptions to certain (but not all) Fund investors that had requested them, and that he was withholding from investors information about the Fund's financial difficulties. As noted above, the Commission subsequently sued, and later settled civil and administrative proceedings against Tweed and Tweed Financial, based on the same underlying conduct at issue in this proceeding.[5]

As of the hearing in this matter, the Fund had losses totaling more than $1 million, but these losses were not shared by all of its investors. Six investors, including Tweed and his stepson, received full redemptions totaling $328,254. Six investors received partial redemptions totaling $346,675 (resulting in losses for them of $136,825), while the remaining twelve investors received nothing, resulting in losses of $889,000.

E. FINRA found that Tweed committed antifraud violations and barred him.

On April 27, 2017, FINRA's Department of Enforcement ("Enforcement") filed a complaint alleging that Tweed negligently misrepresented or omitted material facts related to the sale of the Fund's securities and engaged in a course of conduct that operated as a fraud or deceit on Fund investors, in violation of Securities Act Sections 17(a)(2) and (a)(3), and as a result violated FINRA Rule 2010. Following a hearing, the hearing panel found that Tweed violated those provisions by negligently making material misrepresentations or omitting material facts because the fund's PPM did not disclose or misrepresented the fees the Quant Pool and QAMF charged the Fund; did not disclose Tweed's switch from the Quant Pool to QAMF as the master fund; and did not disclose the fact that Tweed was to receive a portion of QAMF's management compensation. The panel concluded that Tweed's conduct violated the Securities Act as alleged, and that as a result Tweed violated Rule 2010. The panel further concluded that Tweed's conduct, which it found to be negligent, constituted "an independent violation" of Rule 2010.[6]

The hearing panel rejected Tweed's argument that the proceeding was time barred, holding that the federal statute of limitations contained in 28 U.S.C. § 2462 did not apply to FINRA proceedings and that any delay in bringing the proceeding was not unfair to Tweed because he had not demonstrated any resulting prejudice. A majority of the panel concluded that Tweed should be fined $50,000 and barred from associating with any FINRA member firm.[7]

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[5] See *supra* note 1.

[6] The hearing panel dismissed a charge alleging that Tweed failed to disclose that a broker-dealer denied his application for a trading account. Enforcement did not appeal the dismissal.

[7] One panelist would have imposed only a two-year suspension.

Tweed appealed the hearing panel's decision to FINRA's National Adjudicatory Council ("NAC"), challenging only the sanctions and the panel's finding that the disciplinary action was timely and not unfair. The NAC agreed with the hearing panel's findings of violation,[8] that Tweed's statute of limitations argument was without merit, and that Tweed failed to establish prejudice from any delay. Although FINRA's Sanctions Guidelines recommended a suspension of up to two years, the NAC, finding that Tweed posed a significant risk of future misconduct, imposed a bar.[9] Tweed timely appealed to the Commission.

II. Analysis

We review a FINRA disciplinary action to determine (1) whether the applicant engaged in the conduct FINRA found; (2) whether such conduct violated the provisions FINRA found it to have violated; and (3) whether those provisions are and were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934.[10]

A. We sustain in part, and set aside in part, FINRA's findings of violation.

1. We sustain in part, and set aside in part, FINRA's finding that Tweed violated Securities Act Section 17(a)(2).

FINRA found that Tweed violated Securities Act Section 17(a)(2) by negligently failing to disclose: (i) all fees and expenses associated with the Fund; (ii) the change in master funds from the Quant Pool to QAMF; and (iii) the consulting agreement between Tweed and Richardson's firm. Section 17(a)(2) prohibits, through means of interstate commerce and in the offer or sale of securities, obtaining money or property by means of an untrue statement of material fact or omission of material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.[11] An omitted fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made

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8 The NAC described the violations as violations of Securities Act Section 17(a) and FINRA Rule 2010. We believe it is more accurate to say, as did the complaint and the hearing panel decision, that Tweed violated Securities Act Section 17(a) and as a result violated FINRA Rule 2010 (and also independently violated FINRA Rule 2010). As discussed below, *see infra* note 34, FINRA may enforce violations of the Securities Act through FINRA Rule 2010.

9 In light of the bar, the NAC did not impose a fine.

10 15 U.S.C. § 78s(e)(1).

11 15 U.S.C. § 77q(a)(2).

available."[12] A violation of Section 17(a)(2) "can be predicated on a finding of negligence,"[13] and negligence is established when there was a failure to exercise reasonable care.[14]

The record establishes that Tweed failed to disclose the information FINRA identified. Tweed has stipulated that interests in the Fund were securities and were sold using the means of interstate commerce. And Tweed obtained money by means of the omissions described above because after using the PPM to obtain investments in the Fund he received fees for managing it and used Fund assets to cover his expenses.[15] Thus, we must determine whether the facts Tweed failed to disclose in the PPM were material and whether he acted negligently. Although the record does not support the finding that Tweed's failure to disclose fees associated with the Fund's investment in the Quant Pool was negligent, we agree with FINRA that the failure to disclose fees associated with the Fund's investment in QAMF, the failure to disclose the change in master funds (and continued use of the outdated PPM), and the failure to disclose the consulting agreement with Richardson constituted negligent violations of Section 17(a)(2).

a. Tweed did not violate Securities Act Section 17(a)(2) when he failed to disclose fees incurred though the Fund's investment in the Quant Pool, but Tweed violated Securities Act Section 17(a)(2) when he failed to disclose fees associated with an investment in QAMF.

FINRA found that Tweed's failure to disclose the five percent management fee PMI received with respect to the Fund's investment in the Quant Pool was negligent, but the record cannot support this finding. Due care may be established through reliance on the advice of counsel.[16] To show due care through reasonable reliance on the advice of counsel, a respondent must show that he made complete disclosure to counsel, sought advice as to the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice.[17] Here, FINRA found that Tweed reasonably relied on counsel to conclude that the PPM adequately disclosed the fees investors would be charged based on the Fund's original arrangement with the Quant Pool. As FINRA found, and undisputed evidence establishes, Tweed provided the Fund's attorney with the Quant Pool's offering documents, he

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[12] *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also Dolphin & Bradbury, Inc.*, Investment Advisers Act Release No. 8712, 2006 WL 1976000, at *7 (July 13, 2006) (applying "total mix" test to determine whether omission was material for purposes of Sections 17(a)(2) and (3)).

[13] *SEC v. Steadman*, 967 F.2d 636, 643 & n.8 (D.C. Cir. 1992).

[14] *The Robare Grp. v. SEC*, 922 F.3d 468, 477 (D.C. Cir. 2019).

[15] *See Timothy S. Dembski*, Investment Advisers Act Release No. 4761, 2017 WL 1103685, at *9 (March 24, 2017) (finding respondent satisfied "obtained money" prong of Section 17(a)(2) because the false statements "led his clients to purchase the Partnership interests and resulted in Dembski receiving substantial fees"), *petition denied*, 726 F. App'x 841 (2d Cir. 2018).

[16] *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

[17] *Byron G. Borgardt*, Exchange Act Release No. 26169, 2003 WL 22016313, at *11 (Aug. 25, 2003) (discussing a claim that reliance on counsel negated a finding of negligence).

specifically sought counsel's advice on whether to include the Quant Pool's fees in the Fund PPM, and counsel concluded that doing so was not required. Given FINRA's finding that Tweed acted reasonably, and the evidence supporting its finding, we must set aside this violation.[18]

Unlike the disclosures made with respect to the fees related to the Quant Pool, Tweed did not expressly seek and his attorney did not expressly provide legal advice regarding the QAMF fees. The Fund's attorney may have been aware that QAMF was charging fees that were not disclosed to investors, but the record does not show that Tweed asked whether those fees needed to be disclosed or that counsel told Tweed they did not. Indeed, Tweed did not consult counsel before using the PPM that listed the Quant Pool as the master fund to solicit investments in the Fund after he switched to QAMF as the master fund.[19] As a result, we consider whether the failure to disclose the QAMF fees rendered the PPM materially misleading and was negligent.

We agree with FINRA that the omission of information about the fees associated with an investment in QAMF rendered statements in the PPM materially misleading. The PPM disclosed certain fees but not all of the fees. A reasonable investor would have wanted to know the fees associated with the Fund's investment in QAMF because those fees would affect the investor's rate of return on an investment in the fund.[20] Indeed, we have repeatedly emphasized "the importance of fees and expenses in a typical investor's decision to invest in a fund."[21] We also agree with FINRA that Tweed acted negligently in omitting this information. Tweed testified that, in retrospect, there was "confusion" over "how [the] fees [were] supposed to be divvied up" between the master fund and feeder fund. Tweed acted unreasonably in failing to disclose the

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[18] Although FINRA made this finding as part of its discussion of sanctions, it did not explain how Tweed could have acted negligently for purposes of liability if he reasonably relied on the advice of counsel in not disclosing the Quant Pool fees.

[19] *See Borgardt*, 2003 WL 22016313, at *11 (rejecting claim that reliance on counsel negated finding of negligence because respondents could not "simply wait" for counsel "to alert them to material omissions from the Fund's registration statement" or "simply . . . discuss[] information in counsel's presence and rely[] on counsel to see that required disclosures are made and updated as circumstances require" where record did not show that respondents "sought and received legal advice" as to the adequacy of the disclosures in the registration statements); *see also SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007) ("It isn't possible to make out an advice-of-counsel defense without producing the actual advice from an actual lawyer.").

[20] *See IFG Network Secs., Inc.*, Investment Advisers Act Release No. 2533, 2006 WL 1976001, at *11 (July 11, 2006) (finding that an investment adviser's failure to disclose funds' higher expense ratio constituted a material misleading omission because the higher fees would affect potential investors' rate of return on their investments in the funds).

[21] *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 94 (2d Cir. 2010) (noting the Commission's "'strongly held belief'" in the importance of these fees and expenses) (quoting *Registration Form Used by Open-End Management Investment Companies*, 63 Fed. Reg. 13,916, 13,924 (Mar. 23, 1998)); *see also Tailored Shareholder Reports*, Exchange Act Release No. 89478, 2020 WL 4596100, at *115 (Aug. 5, 2020) ("When considering investing in a fund, fees and expenses are an important factor investors should consider").

fees associated with investing in QAMF. For these reasons, we find that Tweed's omission of fee information related to the Fund's use of QAMF as a master fund constituted a violation of Securities Act Section 17(a)(2).

b Tweed violated Securities Act Section 17(a)(2) when he failed to disclose the change in master funds from Quant Pool to QAMF.

We further agree with FINRA that Tweed violated Section 17(a)(2) when he failed to disclose the change in master funds from the Quant Pool to QAMF. The PPM disclosed that the purpose of the Funds was to invest all of its assets in the Quant Pool, and touted Brian Hunter's experience and superior performance as an investment adviser. Yet after Tweed learned, on January 29, 2010, that the Quant Pool was dissolving, and that Richardson would be replacing Hunter as the master fund manager, he continued distributing the outdated PPM to potential investors. Because the PPM tied the Fund's success to the Quant Pool and Hunter, Tweed's use of the PPM to solicit Fund investors after January 29, 2010 was materially misleading.

Tweed argues that the omission was not material because "the two master funds did the exact same thing" and the only true difference was the replacement of Hunter with Richardson. According to Tweed, the PPM's grant of discretion to select investments contemplated the type of change in management that occurred. And Tweed asserts that "[f]rom a due diligence perspective, Richardson appeared to Tweed at the time to be a better choice than Hunter."

The record does not support this assertion or that the omission was immaterial. The PPM touted Hunter as having "unique" experience. And Tweed testified that he had misgivings about Richardson largely due to Richardson's past affiliation with Chris Hales, about whom Tweed harbored concerns. Tweed even tried unsuccessfully to retain PMI as a Fund manager in early 2010 before ultimately turning to Richardson. Indeed, Tweed testified that Richardson was a "risk that wasn't accounted for" in his disclosures to investors. Tweed also conceded that, in light of the significant changes to the Fund's management, failing to provide potential investors with "a current factually accurate PPM" violated the securities laws.

In light of Tweed's concession that partnering with Richardson carried certain additional risks, his failure to disclose the management change was materially misleading, particularly given that the PPM, which he continued to provide to prospective investors, highlighted the fact that the Fund was to be managed by Hunter and PMI, whose expertise was so highly touted.[22] And while Tweed had broad authority to make the change, his actually doing so without disclosing it to potential investors clearly altered the "total mix" of information available to such investors and made the PPM's disclosures about PMI and Hunter materially misleading.[23]

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[22] *See Kevin D. Kunz*, Exchange Act Release No. 45290, 2002 WL 54819, at *6 n.32 (Jan. 16, 2002) (noting that the Commission has found the "nondisclosure of information concerning a person responsible for the success or failure of the enterprise [to be] clearly material"), *aff'd*, 64 F. App'x 659 (10th Cir. 2003).

[23] *See SEC v. Aequitas Mgmt. LLC*, 3:16-cv-438-PK, 2017 WL 1206691, at *11 (D. Or. Jan. 9, 2017) (stating that each time the defendants provided a PPM to investors in connection

We find that Tweed's continued dissemination of an inaccurate PPM and omission of information regarding the switch in funds was also negligent. Tweed should have known that disseminating a PPM containing what had become false information about who would be managing the Fund's assets was highly misleading regarding the merits of the proposed investment.[24] And Tweed did not reasonably rely on counsel's advice because, as discussed above, counsel did not advise Tweed that he did not need to disclose the switch in master funds.

c. Tweed violated Securities Act Section 17(a)(2) when he failed to disclose the existence of the consulting agreement with Richardson.

We also agree with FINRA that Tweed violated Section 17(a)(2) when he failed to disclose the existence of the consulting agreement between him and Richardson, under which Tweed Financial was entitled to receive 45 percent of the fee that Richardson's firm received from the Fund's investment in QAMF. The PPM disclosed that the Fund would invest with a master fund but did not disclose that after Tweed switched the master fund to QAMF he would receive more compensation. "When a broker-dealer has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed."[25] The consulting agreement between Tweed and Richardson's firm could have influenced Tweed's investment decisions and would therefore "have been material to any prospective investor."[26] Therefore, the failure to disclose the consulting agreement rendered the statements in the PPM materially misleading.

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with new investments "the question whether it contained misleading statements necessarily arose anew" such that defendants had to disclose new information to prospective investors that would render the statements made in the PPM materially misleading if not disclosed), *report and recommendation adopted*, No. 3:16-cv-438-PK, 2017 WL 1429190 (D. Or. Apr. 20, 2017).

[24] *See, e.g., Borgardt*, 2003 WL 22016313, at *10-11 (finding respondents negligent for failing to disclose relationship between fund and entity that "was providing and servicing the loan participations that constituted the Fund's entire investment portfolio" because due care obligated respondents "to cause the Fund to disclose material facts" yet they did not do so).

[25] *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *5 (March 31, 2016) (quoting *Kunz*, 2002 WL 54819, at 6 & n.30), *aff'd*, 712 F. App'x 46 (2d Cir. 2017).

[26] *Kunz*, 2002 WL 54819, at *6 (finding material offering documents' omission of consulting relationship and fees); *see also SEC v. Washington County Utility Dist.*, 676 F.2d 218, 225 (6th Cir. 1982) (finding failure to disclose in offering documents kickbacks to manager of district utility by underwriter whom manager chose to underwrite bond offering was material because disclosure would have revealed "manager's apparent willingness to advance his own interests at the expense of the District's interests"); *Larry C. Grossman*, Investment Advisers Act Release No. 4543, 2016 WL 5571616, at *20 (Sept. 30, 2016) (holding that failure to disclose referral and consulting agreements and fees received under those agreements "was material as a matter of law [because it] could have raised questions for a reasonable investor about the objectivity of [the] recommendation"), *vacated in part on other grounds*, Investment Advisers Act Release No. 5281, 2019 WL 2870969 (July 3, 2019).

The record further supports the finding that Tweed acted negligently in failing to disclose the consulting agreement to potential investors. Tweed's failure to give prospective investors information about a clear economic conflict of interest that the consulting agreement created was unreasonable.[27] And, as discussed above, Tweed cannot claim that he reasonably relied on counsel because counsel did not advise him that the consulting agreement need not be disclosed.

2. We sustain FINRA's findings that Tweed violated Securities Act Section 17(a)(3).

FINRA found that Tweed's conduct violated Securities Act Section 17(a)(3) because his agreements and transactions with QAMF operated as a fraud or deceit upon his investors. Section 17(a)(3) prohibits engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[28] Although Section 17(a)(3) does not apply to "a single act, . . . *repeated* acts, such as repeatedly making or drafting materially misleading statements over a period of time, may be considered a fraudulent 'practice' or 'course of business.'"[29] A showing of negligence is sufficient to find a Section 17(a)(3) violation.[30] Defendants thus violate Section 17(a)(3) where, as a result of repeated negligent conduct, "investors receive misleading information about the nature of an investment."[31]

Here, Tweed engaged in a course of business which, through his repeated failure to disclose material information to prospective investors, operated as a fraud or deceit upon those investors by misleading them about the nature of an investment in the Fund. As discussed above, Tweed failed to disclose to potential investors fees associated with the Fund's use of QAMF as a master fund, failed to disclose to potential investors that he had switched from the master fund run by Hunter to one run by a person unidentified in the PPM and about whom he had concerns, and failed to disclose that he had entered into a consulting agreement that created a conflict of interest for himself. We agree with FINRA that Tweed's repeated negligent failures to disclose material information in the course of his operation of the Fund violated Section 17(a)(3).[32]

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[27] *See, e.g., Scholander*, 2016 WL 1255596, at *5 ("Investors 'must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest.'") (quoting *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1171-72 (2d Cir. 1970); *see also e.g., SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) ("Misrepresenting or omitting to disclose a broker's financial or economic incentive in connection with a stock recommendation constitutes a violation of the antifraud provisions.").

[28] 15 U.S.C. § 77q(a)(3).

[29] *Dennis J. Malouf*, Exchange Act Release No. 4463, 2016 WL 4035575, at *12 (July 27, 2016).

[30] *SEC v. Johnston*, 986 F.3d 63, 74 (1st Cir. 2021).

[31] *Malouf*, 2016 WL 4035575, at *12.

[32] *Id.*, at *17 (finding that respondent violated Section 17(a)(3) by repeatedly failing to correct disclosures stating that he had no conflicts of interest); *see also Johnny Clifton*, Securities Act Release No. 9417, 2013 WL 3487076, at *10 (July 12, 2013) (affirming finding of Section

3. Tweed violated FINRA Rule 2010 as a result of his violations of Securities Act Sections 17(a)(2) and 17(a)(3), and FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

The Exchange Act authorizes FINRA to enact its own rules and enforce compliance with them,[33] and FINRA Rule 2010 prohibits conduct inconsistent with just and equitable principles of trade. We have found repeatedly that a violation of a provision of the Securities Act violates FINRA Rule 2010.[34] Our findings that Tweed violated Securities Act Sections 17(a)(2) and 17(a)(3) therefore supports a finding that Tweed violated Rule 2010. Although FINRA also concluded that Tweed's negligent misconduct constituted an independent violation of Rule 2010, even apart from the Section 17(a) violations, we decline to decide whether negligent conduct by itself is sufficient to establish liability under FINRA Rule 2010, and set aside that additional finding of violation.[35]

We find that FINRA Rule 2010 is consistent with Exchange Act Section 15A(b)(6)'s mandate that FINRA promulgate rules to "'promote just and equitable principles of trade.'"[36] And in finding that Tweed violated Rule 2010 as a result of his violations of Securities Act Section 17(a)(2) and (3), FINRA applied Rule 2010 consistent with this purpose. FINRA acts consistently with the purposes of the Exchange Act when it finds antifraud violations.[37]

17(a)(3) violation where, among other things, respondent "conceal[ed] material adverse information" from "sales representatives"); *Borgardt*, 2003 WL 22016313, at *10-11 (finding violation of Section 17(a)(3) where respondent caused fund he managed to issue registration statements that omitted material facts).

[33] Exchange Act Section 15A(b)(2), 15 U.S.C. § 78o-3(b)(2).

[34] *Id.* (finding that a violation of Securities Act Section 5 constitutes a violation of FINRA Rule 2010); *KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 WL 1163328, at * (Mar. 29, 2017) (same); *see also Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 422 (4th Cir. 2016) (finding plausible FINRA's view that "grounding violations of the Securities Act in its Rule 2010 is an exercise of its statutory authority to 'promote just and equitable principles of trade'") (citing 15 U.S.C. § 78o-3(b)(6)), *cert. denied*, 137 S. Ct. 1838 (Apr. 24, 2017).

[35] *Cf. Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 WL 1336324, at *14 (Apr. 9, 2021) (setting aside and remanding finding that respondents violated FINRA Rule 2010 because FINRA did not explain why negligence would establish a violation of Rule 2010 where the violation was not predicated on a violation of another provision of the securities laws).

[36] *Scottsdale Cap. Advisors Corp.*, 844 F.3d at 422 (quoting 15 U.S.C. § 78o-3(b)(6)).

[37] *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *17-18 (Sept. 28, 2017) (finding that applying antifraud provisions to applicant who used material misstatements and omissions to sell notes was consistent with the purposes of the Exchange Act).

B. FINRA's disciplinary action against Tweed was not untimely.

Tweed challenges the timeliness of the disciplinary proceeding against him on two grounds. He asserts that FINRA violated a statute of limitations and that, alternatively, FINRA's delay in commencing proceedings against him was prejudicial. We reject both arguments.

1. FINRA disciplinary proceedings are not subject to 28 U.S.C. § 2462.

Tweed first argues that we should vacate FINRA's decision because 28 U.S.C. § 2462 establishes a five-year statute of limitations and FINRA commenced the action against him more than seven years after his alleged misconduct occurred. Section 2462 provides that "[e]xcept as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained within five years from the date the claim first accrued . . . ." But Section 2462 "applies only to actions on behalf of the United States and *qui tam* actions."[38] Because FINRA disciplinary proceedings fit neither of these categories, Section 2462 "does not apply to FINRA disciplinary proceedings."[39] Tweed offers no persuasive reason to conclude otherwise here. We thus hold that Section 2462 did not bar this proceeding.

2. Any delay in bringing this disciplinary proceeding did not prejudice Tweed.

Tweed next argues that, even if FINRA is not subject to Section 2462, we should nevertheless vacate FINRA's findings of violation and sanctions because seven-and-a-half years passed between Tweed's alleged misconduct and FINRA's commencement of the disciplinary proceeding against him. This delay, Tweed argues, was unfair and prejudicial. We disagree.

The Exchange Act requires that FINRA provide a "fair procedure" for the discipline of individuals associated with member firms.[40] We have held that there are no "bright line rules" or "mechanical tests" to determine whether a delay in bringing a proceeding is unfair; rather, fairness "is determined by examining the entire record."[41] Generally, an applicant who is unable to show that he suffered prejudice because a delay deprived him of the ability to "mount an adequate defense" is unable to show that any delay rendered the proceeding unfair.[42]

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[38] *Bertha Building Corp. v. National Theatres Corp.*, 269 F.2d 785, 788-89 (2d Cir. 1959); *accord Erin Basin Metal Products, Inc., v. United States*, 138 Ct. Cl. 67, 74 (1957) ("The limitation of section 2462 applies only to actions instituted by the Government").

[39] *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *22 (July 3, 2013); *see also Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 WL 507864, at *6 (July 20, 1999) (stating that Section 2462 does not apply to self-regulatory organizations).

[40] 15 U.S.C. § 78o-3(b)(8)

[41] *Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2014)).

[42] *See id.*

In support of his claim that he suffered prejudice, Tweed argues that he was unable to remember events that took place at the time of the alleged misconduct. He also argues that, because the disciplinary proceeding took place after the expiration of record retention requirements, he was unable to refresh his recollection "with documents that would have been available had FINRA enforcement filed its complaint within five years" of his alleged misconduct. But Tweed did not (and does not) contest the factual basis for FINRA's complaint against him, so these claims seem beside the point.[43] In any event, we do not agree that Tweed's defense suffered due to any delay here. Tweed identifies no specific piece of evidence that would have aided his defense but was unavailable due to the passage of time. Given the absence of some explanation of "what [his] defenses might have been or how evidence not in the record would have supported those defenses," we do not find that Tweed was prejudiced here.[44]

We recognize that, despite not finding prejudice to the applicant, we set aside the disciplinary action in *Jeffrey Ainley Hayden* on the ground that the delay in bringing the proceeding was "inherently unfair."[45] But we did so where the NYSE did not open its investigation for two years after learning about the misconduct and did not file the complaint until five years after it learned of the misconduct and more than 14 years after the first violative act.[46] Here, FINRA began its investigation almost immediately upon learning about Tweed's misconduct and filed the complaint three years later and eight years after the misconduct began. Unlike the applicant in *Hayden*, moreover, Tweed contributed to the delay by concealing his misconduct from the Fund's investors and thus preventing FINRA from learning about it sooner.[47] We find that this proceeding, unlike *Hayden*, was not inherently unfair.[48]

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43 *See id.* (rejecting claim that delay rendered proceeding unfair because "NASD based its decision on facts that [applicant] did not dispute"); *Meyers Assocs. L.P.*, Exchange Act Release No. 86497, 2019 WL 3387091, at *12 (July 26, 2019) (finding no unfairness from alleged delay in bringing proceeding where applicants did not dispute the allegations in the complaint).

44 *Meyers Assocs.*, 2019 WL 3387091, at *12; *see also Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *18 (Feb. 13, 2015) (rejecting claim that proceeding was unfair due to delay because the passage of time generally makes it more difficult to prepare a defense where applicants "identif[ied] no specific instances in which [they] were prejudiced"); *Anthony A. Adonnio*, Exchange Act Release No. 48618, 2003 WL 22321935, at *8 (Oct. 9, 2003) (finding no prejudice where applicants did not identify specific witnesses who became unavailable due to the passage of time or "point to specific instances of material memory lapses"), *aff'd*, 111 F. App'x 46 (2d Cir. 2004).

45 Exchange Act Release No. 42772, 2000 WL 649146, at *2 (May 11, 2000).

46 *Id.*

47 *Cf. Lane*, 2015 WL 627346, at *18 ("Although there was an extended period between when FINRA's investigation began and when the final FINRA decision was issued . . . at least some of the fault for that delay rests with Applicants, who failed to cooperate with FINRA staff.").

48 *See Love*, 2004 WL 283437, at *4 (rejecting "a comparison of the time lags at issue in *Hayden*" in favor of a test that examined the entire record and finding no unfairness).

III. Remand

Under Exchange Act Section 19(e)(1), if we do not find the applicant's conduct violated the statutes or FINRA rules FINRA found it to have violated, we shall "set aside the sanction imposed . . . and, if appropriate, remand to [FINRA] for further proceedings."[49] Because we reverse a portion of FINRA's findings of violation, and because FINRA imposed a single sanction for all of Tweed's violations, we set aside the bar and remand to FINRA for further proceedings to determine what sanctions, if any, are appropriate for the violations we have sustained.[50] We do not suggest any view as to the outcome on remand.

An appropriate order will issue**.**

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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[49] 15 U.S.C. § 78s(e)(1).

[50] *See Mitchell H. Fillett*, Exchange Act Release No. 75054, 2015 WL 3397780, at *13 (May 27, 2015) ("Because we are setting aside a portion of the fraud violations, we remand the sanctions for these violations to FINRA for reconsideration in light of this dismissal.").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99201 / December 18, 2023

Admin. Proc. File No. 3-19652

In the Matter of the Application of

ROBERT R. TWEED

For Review of Disciplinary Action taken by

FINRA

ORDER SUSTAINING IN PART AND SETTING ASIDE IN PART ACTION TAKEN BY FINRA AND REMANDING FOR FURTHER PROCEEDINGS

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

ORDERED that FINRA's findings of violation against Robert R. Tweed are sustained, except as set forth in the Commission's opinion; and it is further

ORDERED that the sanction FINRA imposed is set aside; and it is further

ORDERED that the matter is remanded for FINRA to reconsider the appropriate sanction.

By the Commission.

Vanessa A. Countryman
Secretary