

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: June 7, 2011)

Decided: February 14, 2012)

Docket No. 10-429-ag

SCOTT MATHIS,

Petitioner,

v.

UNITED STATES SECURITIES & EXCHANGE
COMMISSION,

Respondent.

Before: MINER, LYNCH, and LOHIER, Circuit Judges,

Petitioner Scott Mathis seeks review of an order of the Securities and Exchange Commission affirming the sanctions imposed by the Financial Industry Regulatory Authority, Inc., which subjected Mathis to statutory disqualification for, among other things, failing to disclose that certain tax liens had been filed against him by the Internal Revenue Service. We hold that there was substantial evidence supporting the Commission's factual findings that Mathis intentionally failed to disclose the liens on registration forms he was required to file with FINRA and that the information regarding the liens was material. We also hold that the SEC did not abuse its discretion in concluding that Mathis's conduct constituted a willful violation of § 3(a)(39) of the Securities Exchange Act.

Affirmed.

1 ERIC S. HUTNER, Hutner Klarish LLP, New York,
2 N.Y., *for Petitioner-Appellant*.

3
4 SUSAN S. McDONALD, Senior Litigation Counsel
5 (David M. Becker, General Counsel; Mark D. Cahn,
6 Deputy General Counsel; Jacob H. Stillman,
7 Solicitor, *on the brief*), Securities and Exchange
8 Commission, Washington, D.C., *for Respondent-*
9 *Appellant*.

10
11 LOHIER, Circuit Judge:

12 Petitioner Scott Mathis, a registered representative and principal with various brokerage
13 firms over the years, seeks review of a December 7, 2009, final order of the Securities and
14 Exchange Commission (the “SEC” or “Commission”), which concluded that Mathis willfully
15 failed to disclose the existence of certain tax liens filed against him and thereby violated
16 § 3(a)(39) and § 15(b)(4)(A) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15
17 U.S.C. §§ 78c(a)(39) and 78o(b)(4)(A). The SEC’s conclusion that Mathis acted willfully,
18 which followed Mathis’s appeal of various determinations of the Financial Industry Regulatory
19 Authority, Inc. (“FINRA”) and its predecessor, the National Association of Securities Dealers,
20 Inc. (“NASD”),¹ subjects Mathis to statutory disqualification from the securities industry.

21 In his petition to vacate the SEC’s order, Mathis argues that he was not aware that he was
22 obligated to disclose the tax liens against him on FINRA’s “Uniform Application for Securities
23 Industry Registration or Transfer,” or “Form U-4,” which Mathis completed in November 1999

¹ On July 26, 2007, after initiating the disciplinary action against Mathis, the NASD changed its corporate name to the Financial Industry Regulatory Authority, Inc. (“FINRA”). See Securities Exchange Act Rel. No. 56146, 2007 WL 5185331 (July 26, 2007); 72 Fed. Reg. 42190-01, 2007 WL 2186071 (Aug. 1, 2007). Although the NASD instituted the disciplinary action before the name change, we use the designation “FINRA,” as FINRA ultimately completed the action and sanctioned Mathis.

1 and August 2000. He also claims that he was unaware of his duty to amend a Form U-4
2 previously filed in 1995 to reflect the existence of the liens from 1996 onward. He therefore
3 challenges the SEC's conclusion that his conduct was willful and that the tax liens were material
4 information that had to be disclosed.

5 We conclude that there was substantial evidence supporting the SEC's factual finding
6 that Mathis intentionally failed to disclose the liens on his Forms U-4 and that the liens were
7 material. Moreover, the SEC did not abuse its discretion when it determined that Mathis's
8 conduct constituted a willful violation of the Exchange Act's provisions relating to applications
9 and registration. We therefore deny Mathis's petition and affirm the SEC's order.

10 **BACKGROUND**

11 The following facts are either undisputed or are supported by substantial evidence in the
12 record.

13 1. The Forms U-4

14 From 1985 through 2002, Mathis worked in the securities industry as a broker or
15 principal with various brokerage firms. At all relevant times, FINRA has required any person
16 who works in the investment banking or securities business of a FINRA member to register as a
17 securities representative (e.g., a stockbroker) or principal, among other categories. NASD Rules
18 1022(a), 1031(a), 1032(a). To register, applicants must complete a Form U-4, in which they
19 provide detailed information about their personal, employment, disciplinary, and financial
20 background.

21 In September 1995, Mathis started as a broker with The Boston Group LP, a FINRA
22 member, and signed and filed a Form U-4 (the "Original Form U-4"). After The Boston Group

1 dissolved in July 1998, Mathis became associated with the National Securities Corporation
2 (“National Securities”) as a broker and principal until September 2000, when he voluntarily
3 stopped working there. For reasons not relevant here, Mathis was permitted to transfer his
4 registration from The Boston Group to National Securities without submitting a new Form U-4.

5 In June 2000, Mathis became associated with InvestPrivate, Inc., a broker-dealer he
6 founded and controlled. He signed and filed a second Form U-4 to register as a representative
7 and principal with InvestPrivate on November 25, 1999. Starting in June 2000, Mathis also
8 served as the chief executive officer and chairman of the board of directors of
9 CelebrityStartUps.com, Inc. (“CelebrityStartUps”), a development-stage company he founded.
10 On August 21, 2000, Mathis signed and filed a third Form U-4 to register as a representative and
11 principal with CelebrityStartUps.²

12 In completing a Form U-4, applicants are required to “swear or affirm that [they] have
13 read and understand the Items and Instructions on this form and that [their] answers (including
14 attachments) are true and complete to the best of [their] knowledge.” In addition to requiring
15 Mathis to affirm the accuracy of his answers, all three Forms U-4 at issue in this appeal – the
16 Original Form U-4 and the two later forms filed in 1999 and 2000 – required Mathis to update
17 the information he provided on the forms “by causing an amendment to be filed on a timely basis
18 whenever changes occur to answers previously reported.” He further represented that “to the
19 extent any information previously submitted is not amended, the information provided in this

² Although Mathis voluntarily withdrew the FINRA membership application for CelebrityStartUps in April 2001, he remained registered with FINRA as a general securities representative and principal of InvestPrivate from 2000 until he was statutorily disqualified in 2008.

1 form is currently accurate and complete.” Similarly, the general instructions for each form
2 warned Mathis that he was “under a continuing obligation to update information required by
3 Form U-4 as changes occur.” NASD Notice to Members No. 92-19 (April 1992), 1992 NASD
4 Lexis 50, at *6 n.3; see Form U-4 Instructions, FINRA, 1 (May 18, 2009),
5 <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015>
6 111.pdf.

7 In addition to the Forms U-4 themselves, Article V, § 2(c) of the FINRA By-Laws
8 requires that associated persons keep their Forms U-4 “current at all times,” and that
9 amendments to the Form U-4 be filed “not later than 30 days after learning of the facts or
10 circumstances giving rise to the amendment.” Failing to file prompt amendments to a Form U-4
11 violates NASD Conduct Rule 2110. See also FINRA Membership, Registration and
12 Qualification Requirements (“FINRA Membership Rule”), IM-1000-1 (applicable rule prior to
13 2009, providing that an incomplete or inaccurate filing of information with FINRA by a
14 registered representative “may be deemed to be . . . sufficient cause for appropriate disciplinary
15 action”). A person who willfully makes a false or misleading statement or a material omission in
16 a Form U-4 is subject to the penalty of statutory disqualification. Exchange Act § 3(a)(39)(F),
17 15 U.S.C. § 78c(a)(39)(F).

18 2. The Tax Liens

19 In separate written notices between August 1996 and September 2002, the Internal
20 Revenue Service (“IRS”) informed Mathis that it had entered five unsatisfied tax liens against
21 him, totaling \$634,436.28, due to Mathis’s failure to pay a substantial portion of his personal
22 income taxes owed for tax years 1993, 1994, 1995, 1997, 1999 and 2000. The five liens were as

1 follows: (1) a \$274,526.68 lien entered August 9, 1996, in connection with his unpaid taxes for
2 1993 and 1994 (the “August 1996 Tax Lien”); (2) a \$53,302.53 lien entered September 23, 1998,
3 in connection with unpaid taxes for 1995 (the “September 1998 Tax Lien”); (3) a \$179,429.07
4 lien entered May 11, 1999, in connection with his unpaid taxes for 1997 (the “May 1999 Tax
5 Lien”); (4) a \$92,985.14 lien entered July 2, 2002, in connection with unpaid taxes for 1999 (the
6 “July 2002 Tax Lien”); and (5) a \$34,192.86 lien entered September 9, 2002, in connection with
7 unpaid taxes for 2000 (the “September 2002 Tax Lien”). Each of these notices advised Mathis
8 that the IRS had “made a demand for payment” of the unpaid tax liability and informed him that,
9 as a consequence of his nonpayment, “there is a lien in favor of the United States on all property
10 and rights to property belonging to [Mathis] for the amount of these taxes”

11 In addition, sometime in 1999, after receiving most of the IRS notices, Mathis appears to
12 have requested to pay his overdue taxes in installments. In letters to Mathis in late 1999 and
13 2002 approving his request, the IRS emphasized that to “protect the government’s interest . . . a
14 Notice of Federal Tax Lien HAS ALREADY BEEN FILED.” The letters explained, moreover,
15 that “[a] Notice of Federal Tax Lien is a public notice that the government has a claim against
16 your property to satisfy a debt” and that the government would “release (remove) the lien” only
17 when Mathis had paid what he owed.

18 Although the IRS notices alone provide substantial evidence that Mathis was aware of
19 the unsatisfied tax liens, Mathis was also aware of the liens through other sources, including a
20 work colleague. Tim Holderbaum, whom Mathis had hired to design a website for InvestPrivate,
21 informed Mathis in December 2001 about a credit check that revealed Mathis was subject to a
22 tax lien. In an email to Mathis dated December 6, 2001, Holderbaum wrote that he could not

1 obtain the necessary credit approval to establish an online store for InvestPrivate “till the tax lean
2 [sic] issue is resolved.” Holderbaum further testified that Mathis did not express any “concern or
3 reservation” about that information.

4 Having learned of their existence as early as 1996, Mathis knowingly failed to disclose
5 the liens on the two Forms U-4 filed in 1999 and 2000, failed timely to amend the Original Form
6 U-4 to reflect those liens, and failed as well to amend the 1999 or the 2000 Forms U-4 to reflect
7 the July 2002 and September 2002 Tax Liens.

8 Mathis’s efforts to conceal the liens also involved affirmative misrepresentations. On
9 both the 1999 and 2000 Forms U-4, for example, Mathis responded “no” to the question “Do you
10 have any unsatisfied judgments or liens against you?” Similarly, on an Annual Representative
11 Certification for National Securities, dated January 19, 1999, Mathis claimed that he had “paid
12 all federal, state, and local taxes due in full,” and falsely denied having “any liens . . . entered
13 against you, which were not previously disclosed on [F]orm U-4.”

14 By letter dated July 3, 2003, FINRA asked Mathis to explain his failure to disclose the
15 five federal tax liens. The letter prompted Mathis to disclose the liens for the first time on an
16 amended Form U-4, which he filed eleven days later. Mathis paid the liens approximately one
17 month after disclosing them, and the IRS released the liens a few months thereafter.

18 Mathis attempted to explain his failure to disclose the liens in a series of responses to
19 FINRA’s letter request. Initially, he claimed that “to the best of [his] recollection, [he] was not
20 aware of the pendency of any federal tax liens at such times and further was not aware of any
21 obligation to report such matters on Form U-4.” In subsequent testimony during an on-the-
22 record interview with FINRA staff in August 2003, Mathis acknowledged that he had received

1 the five IRS notices, but advanced several other explanations for his failure to disclose the liens.
2 First, Mathis claimed that he had relied on the advice of a Boston Group colleague and former
3 FINRA official, Kye Hellmers, whose understanding was “that if matters were not directly
4 related to the securities industry, they need not be reported on the Form U4.” Second, Mathis
5 testified that he thought a distinction existed between an IRS “notice” of a tax lien and the tax
6 lien itself, and that he was not obligated to report the IRS notice. Third, Mathis explained that
7 on the January 1999 National Securities Annual Representative Certification, a “lack of
8 concentration” caused him to answer “YES” to the question whether he had paid his federal,
9 state, and local taxes. Fourth, he testified that he only cursorily reviewed the IRS notices of tax
10 liens before forwarding them to his accountant, who was working directly with the IRS on a
11 payment plan to address Mathis’s federal tax debt.

12 3. Procedural History

13 In February 2005, FINRA’s Division of Enforcement filed a multi-count complaint
14 against Mathis that charged him, as relevant to this appeal, with willfully failing to amend his
15 Original Form U-4 to disclose the liens, and willfully failing to disclose the tax liens on the two
16 Forms U-4 filed in 1999 and 2000, when he started InvestPrivate and CelebrityStartUps. In May
17 2007, the parties entered into a settlement in which some of the charges were dismissed and
18 others settled, while three counts against Mathis remained, all of which concerned the tax liens at
19 issue. Mathis denied these remaining charges and requested a hearing before a FINRA Hearing
20 Panel, which was held in July 2007 and lasted for two days.

21 In December 2007, a FINRA Hearing Panel (the “Panel”) determined that Mathis became
22 aware of the disclosure requirement after January 1999 and thereafter willfully failed to disclose

1 the tax liens on his Forms U-4. The Panel found that Mathis “made a conscious effort to conceal
2 his tax liabilities from his [new] employer” by falsely representing on the National Securities
3 Annual Certification in January 1999 that he was current in his taxes. Although it concluded that
4 Mathis had not acted willfully with respect to events from 1996 to January 1999—because he
5 had reasonably relied on the advice of Hellmers, his former Boston Group colleague—the Panel
6 nevertheless imposed a \$10,000 fine and a three-month suspension for failing to disclose the tax
7 liens on his Forms U-4 after January 1999.³

8 Mathis appealed the Panel’s decision to the FINRA National Adjudicatory Council (the
9 “NAC”). In a decision issued in December 2008, the NAC largely affirmed the Panel’s decision,
10 but disagreed with its finding that Mathis had reasonably relied on Hellmers’s advice from 1996
11 to January 1999. Instead, the NAC concluded that Mathis had willfully failed to amend his Form
12 U-4 to disclose the five tax liens from the time he received the notice of the first tax lien in
13 August 1996 through mid-2003. In particular, the NAC found that Hellmers had offered only his
14 “opinion” about Mathis’s obligation to report the liens, and that he had specifically advised
15 Mathis that it was the responsibility of The Boston Group’s compliance department to determine
16 if an unsatisfied tax lien should be reported. Although the NAC found that Mathis’s violations
17 started as early as 1996, it affirmed the Panel’s sanction, describing it as “an appropriately
18 remedial sanction for Mathis’s willful failure to amend his Form U4 to disclose the five tax liens
19 at issue and his willful failure to disclose the tax liens pending against him at the time he filed
20 two initial Forms U4.”

³ Mathis also was sanctioned for intentionally failing to disclose a customer complaint and a customer-initiated court action. These sanctions are not at issue in this appeal.

1 Mathis petitioned the SEC to review the NAC decision, challenging principally the
2 NAC’s finding of willfulness and arguing that statutory disqualification was an excessive
3 sanction.⁴ Rejecting Mathis’s claim that he was unaware of the existence of the liens pending
4 against him and that he had reasonably relied on the advice of his colleague, the SEC sustained
5 the NAC’s substantive decision relating to Mathis’s Forms U-4 as well as the sanctions imposed
6 against him. It determined that Mathis had “voluntarily provided false answers on his Form U4”
7 regarding the tax liens and that the nondisclosure was material. Explaining that willfulness
8 “means that the respondent ‘intentionally committ[ed] the act which constitutes the violation’”
9 and “does not require that the person ‘also be aware that he is violating one of the Rules or
10 Acts,’” the SEC concluded that Mathis had “willfully violated Membership Rule IM-1000-1 and
11 Conduct Rule 2110.” The conclusion that Mathis acted willfully, by operation of §§ 3(a)(39)(F)
12 and 15A(g)(2) of the Exchange Act, 15 U.S.C. §§ 78c(a)(39)(F) and 78o-3(g)(2), subjected
13 Mathis to a “statutory disqualification,” or bar, from associating with any FINRA member
14 firm—potentially a more severe sanction than a monetary penalty or temporary suspension. See
15 Feins v. Am. Stock Exch., Inc., 81 F.3d 1215, 1218 n.1 (2d Cir. 1996) (“Statutory
16 disqualifications include primarily prior felony convictions, willful violations of the federal
17 securities laws, and other conduct that has, or could have, resulted in expulsion or suspension
18 from a self-regulatory organization.”); Exchange Act § 15A(g)(2), 15 U.S.C. § 78o-3(g)(2) (“A
19 registered securities association may, and in cases in which the Commission, by order, directs as
20 necessary or appropriate in the public interest or for the protection of investors shall, deny

⁴ Mathis did not challenge FINRA’s finding that he failed timely to amend his Form U-4 to disclose the five tax liens or its finding that he failed to disclose the then-pending tax liens on the two Forms U-4 filed in 1999 and 2000 relating to InvestPrivate and CelebrityStartUps.

1 membership to any registered broker or dealer, and bar from becoming associated with a member
2 any person, who is subject to a statutory disqualification.”).

3 Mathis timely filed this petition to review and vacate the SEC’s order, insofar as it
4 determined that he was subject to statutory disqualification.

5 DISCUSSION

6 1. Jurisdiction and Standard of Review

7 FINRA regulates member brokerage firms and exchange markets, subject to oversight by
8 the SEC. Exchange Act §§ 15A, 15A(b)(6), 15 U.S.C. §§ 78o-3, 78o-3(b)(6). The Exchange
9 Act requires FINRA to promulgate rules “to prevent fraudulent and manipulative acts and
10 practices” and to discipline its members when they violate those rules. Exchange Act §
11 15A(b)(6), 15 U.S.C. § 78o-3(b)(6). On the petition of a disciplined party, any disciplinary
12 action taken by FINRA is reviewed by the SEC, which conducts a de novo review of the record
13 and make its own findings as to whether the alleged conduct violated FINRA rules. See
14 Exchange Act §§ 19(d)(2), 19(e)(1), 15 U.S.C. §§ 78s(d)(2), (e)(1); PAZ Sec., Inc. v. SEC, 494
15 F.3d 1059, 1064-65 (D.C. Cir. 2007). The SEC’s order is subject to review by this Court. See,
16 e.g., Heath v. SEC, 586 F.3d 122, 131 (2d Cir. 2009).

17 “[W]e will affirm the SEC’s findings of fact if supported by substantial evidence.”
18 VanCook v. SEC, 653 F.3d 130, 137 (2d Cir. 2011); see MFS Sec. Corp. v. SEC, 380 F.3d 611,
19 617 (2d Cir. 2004); 15 U.S.C. §§ 78y(a)(4), 80a-42(a), and 80b-13(a); 15 U.S.C. § 77i (“The
20 finding of the Commission as to the facts, if supported by evidence, shall be conclusive.”).
21 Under the Administrative Procedure Act, we will set aside the SEC’s actions, findings, or
22 conclusions of law only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not

1 in accordance with law.” 5 U.S.C. § 706(2)(A); see D’Alessio v. SEC, 380 F.3d 112, 120 (2d
2 Cir. 2004). “We will not disturb the SEC’s choice of sanction unless it is ‘unwarranted in law or
3 without justification in fact.’” VanCook, 653 F.3d at 137 (quoting Butz v. Glover Livestock
4 Comm’n Co., 411 U.S. 182, 186 (1973)).

5 2. Statutory Framework

6 Pursuant to § 15A of the Exchange Act, FINRA enacted Membership Rule IM-1000-1
7 governing Forms U-4, which is used to screen applicants for registration as securities
8 professionals and to ensure that their applications and registration materials are accurate and up-
9 to-date. At the time Mathis completed his Forms U-4, Rule IM-1000-1 provided as follows:

10 The filing with the Association of information with respect to
11 membership or registration as a Registered Representative which is
12 incomplete or inaccurate so as to be misleading, or which could in
13 any way tend to mislead, or the failure to correct such filing after
14 notice thereof, may be deemed to be conduct inconsistent with just
15 and equitable principles of trade and when discovered may be
16 sufficient cause for appropriate disciplinary action.

17
18 “Appropriate disciplinary action” includes “statutory disqualification” from association with a
19 broker or dealer.⁵ Under § 3(a)(39)(F) of the Exchange Act, a person may be barred from
20 associating with a broker or dealer if that person has

21 willfully made or caused to be made in any application for
22 membership or participation in, or to become associated with a
23 member of, a self-regulatory organization . . . any statement which
24 was at the time, and in the light of the circumstances under which it
25 was made, false or misleading with respect to any material fact, or

⁵ Under the FINRA By-Laws, as a person subject to disqualification, Mathis cannot become associated with or continue to be associated with any FINRA member firm unless the member firm applies to FINRA and is granted permission for Mathis to be associated with the firm. FINRA By-Laws, Art. III, §§ 3(b) & (d).

1 has omitted to state in any such application . . . any material fact
2 which is required to be stated therein.

3
4 Exchange Act § 3(a)(39)(F), 15 U.S.C. § 78c(a)(39)(F).

5 3. Willfulness

6 Mathis argues that the SEC’s interpretation of the term “willful” is without support in the
7 context of either § 3(a)(39)(F) or § 15(b)(4)(A) of the Exchange Act. We disagree. The SEC did
8 not abuse its discretion when it concluded that Mathis willfully failed to disclose the tax liens
9 within the meaning of § 3(a)(39)(F)(4) because he “voluntarily provided false answers on his
10 Form U4.”

11 In determining the meaning of the word “willfully” in § 3(a)(39), we look to the use of
12 the same term in what Mathis acknowledges is an analogous provision, § 15(b)(4)(A) of the
13 Exchange Act. Section 15 is entitled “Registration and Regulation of Brokers and Dealers.”
14 Section 15(b)(4)(A) authorizes the SEC to sanction brokers who “willfully” make a false
15 statement on an application for registration required to be filed with the SEC. See 15 U.S.C. §
16 78o(b)(4)(A). Specifically, § 15(b)(4)(A) permits the SEC to “censure, place limitations on the
17 activities, functions, or operations of, suspend for a period not exceeding twelve months, or
18 revoke the registration of any broker or dealer if it finds” that such broker or dealer

19 has willfully made or caused to be made in any application for
20 registration . . . required to be filed with the Commission or with any
21 other appropriate regulatory agency⁶ under this chapter, . . . any

⁶ Under the Exchange Act, the term “other appropriate regulatory agency” may apply to any one of at least four federal government agencies: the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the SEC. See § 3(a)(34), 15 U.S.C. § 78c(a)(34). It does not include self-regulatory organizations like FINRA, which are separately defined in the Exchange Act. See 15 U.S.C. § 78c(a)(26).

1 statement which was at the time and in light of the circumstances
2 under which it was made false or misleading with respect to any
3 material fact, or has omitted to state in any such application . . . any
4 material fact which is required to be stated therein.

5
6 Id.

7 Section 15(b)(4)(A) finds a statutory counterpart in § 3(a)(39)(F) of the same Act, which
8 applies to applications and registrations filed with non-government self-regulatory organizations,
9 such as FINRA, rather than the SEC or defined governmental regulators. Like § 15(b)(4)(A), §
10 3(a)(39)(F) subjects brokers to disqualification from the securities industry for willfully making
11 false or misleading statements on registration forms and applications. Both provisions promote
12 accurate disclosure by securities professionals in order to maintain a high level of business ethics
13 in the securities industry.

14 In Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965), we analyzed another subsection of Section
15 15, § 15(b)(4)(D) of the Exchange Act, 15 U.S.C. § 78o(b)(4)(D),⁷ which permits the SEC to
16 sanction a broker or dealer who has “willfully violated any provisions of the Securities Act of
17 1933.” The SEC had determined that Tager willfully violated certain anti-fraud and
18 anti-manipulation provisions of the Securities Act of 1933 and the Exchange Act, as well as
19 Rules promulgated under both Acts. Tager, 344 F.2d at 7. We rejected Tager’s argument that
20 the broker must have understood that he was violating a particular rule in order to be found to
21 have willfully violated that rule. In doing so, we explained that “[i]t has been uniformly held
22 that ‘willfully’ in this context means intentionally committing the act which constitutes the

⁷ Tager analyzed § 15(b)(2)(D) of the Exchange Act, which became § 15(b)(4)(D) in 1975.

1 violation. There is no requirement that the actor also be aware that he is violating one of the
2 Rules or Acts.” Id. at 8; see also Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000)
3 (upholding the Commission's determination that, for the purpose of § 15, “willfulness” requires
4 only “that the person charged with the duty knows what he is doing. It does not mean that, in
5 addition, he must suppose that he is breaking the law.” (internal quotation marks omitted)).⁸

6 Tager’s definition of “willful” applies as much to § 15(b)(4)(A) as it does to
7 § 15(b)(4)(D); there is no good reason to differentiate the meaning of the same word in different
8 subsections. See Sorenson v. Sec’y of Treasury of United States, 475 U.S. 851, 860 (1986)
9 (“The normal rule of statutory construction assumes that identical words used in different parts
10 of the same act are intended to have the same meaning.” (internal quotation marks omitted)).
11 Given the parallel language and common purpose of the provisions located in both § 3 and § 15
12 of the Exchange Act, Tager’s formulation of “willfulness” naturally extends to willful violations
13 under § 3 involving Forms U-4.

14 We therefore reject Mathis’s argument that a finding of “willfulness” under § 3(a)(39)(F)
15 would have required a determination that Mathis was aware that he was violating a particular
16 rule or regulation. The SEC’s definition of “willful” as it applies to Mathis was neither arbitrary
17 and capricious, nor an abuse of discretion. We note, moreover, that the SEC itself has
18 consistently applied this definition to misleading answers on a Form U-4. See, e.g., Jason A.

⁸ The word “willfully” has been held in other contexts to require knowledge of a legal duty and an intentional violation of that duty. See e.g., Cheek v. United States, 498 U.S. 192, 201 (1991). But “willful” is a “word of many meanings, its construction often being influenced by its context.” Spies v. United States, 317 U.S. 492, 497 (1943). The interpretation of the term in Cheek is explicitly limited to “criminal tax cases,” 498 U.S. at 199-200, due to the complexity of the tax law and the particular severity of the criminal sanction. Neither factor applies here.

1 Craig, Exchange Act Rel. 59137, 94 SEC Docket 2962, 2008 WL 5328784, at *4 (Dec. 22,
2 2008) (“A willful violation of the securities laws means merely that the person charged with the
3 duty knows what he is doing.” (internal quotation marks omitted)).

4 Mathis is therefore subject to statutory disqualification under § 3(a) if he intentionally
5 submitted an application to register with a FINRA member knowing that the application
6 contained material false information. Mathis does not even challenge the finding that he
7 intentionally provided false answers on the forms. At oral argument on appeal, he acknowledged
8 that substantial evidence existed in the record that he knew his Forms U-4 contained errors when
9 he signed them. Tr. of Oral Arg. at 5. In any event, the SEC found that Mathis’s conduct
10 involved much more than an inadvertent filing of an inaccurate form, which would not have
11 supported a determination that his conduct was willful, and that, to the contrary, Mathis
12 “voluntarily provided false answers on his Form U4.” Our review of the record confirms that
13 there is substantial evidence to support the SEC’s finding that Mathis received the IRS notices
14 starting in 1996 and was aware of the tax liens when he filed his 1999 and 2000 Forms U-4, and
15 that on both forms he falsely and intentionally denied having “any unsatisfied judgments or liens
16 against [him].” For instance, the IRS emphasized in letters to Mathis in late 1999 and 2002 that
17 “a Notice of Federal Tax Lien HAS ALREADY BEEN FILED.” In addition, a colleague
18 informed Mathis in December 2001 about a credit check that revealed that Mathis was subject to
19 a tax lien.

20 The SEC’s finding that Mathis also intentionally failed to amend the Original Form U-4
21 to disclose the August 1996, September 1998, and May 1999 Tax Liens was similarly supported
22 by substantial evidence. Although it is true that, standing alone, Mathis’s failure to amend the

1 original form might have constituted evidence of an innocent oversight, at least three facts in the
2 record virtually compel the conclusion that Mathis's failure was intentional rather than
3 inadvertent. First, the Original Form U-4 clearly warned Mathis that he was under a continuing
4 obligation to disclose changes to previously reported answers, including those relating to any
5 unsatisfied liens in order to ensure that the information on the form remained "currently accurate
6 and complete." Second, in January 1999, Mathis signed the National Securities Annual
7 Certification, which required him to disclose "any liens . . . entered against [him], which were
8 not previously disclosed on form U-4" and specifically asked whether Mathis had paid all his
9 taxes in full. Mathis concealed the liens and represented, falsely, that he had paid his taxes.
10 That Mathis affirmatively lied about paying his taxes strongly supports the inference that he
11 intentionally concealed the liens filed against him. Similarly, Mathis's failure to disclose the
12 liens despite the Certification's specific reference to "any liens . . . entered against [him], which
13 were not previously disclosed on form U-4" serves only to corroborate the SEC's conclusion that
14 his failure to amend the Original Form U-4 was intentional. Third, Mathis's two other Forms U-
15 4 (filed in November 1999 and 2000) clearly reminded Mathis of his continuing obligation to
16 update all of his Forms U-4, including the Original Form U-4, which remained unchanged until
17 July 23, 2003.

18 Pointing to the evidence of his reliance on Hellmers, his colleague at The Boston Group,
19 Mathis argues that a broker who justifiably relies on advice from a person of suitable experience,
20 position and knowledge has not engaged in willful conduct.⁹ That proposition may be true, but

⁹ Mathis also refers to evidence that, in 1993, he was informed by a compliance officer at Gruntal & Co., Inc., where he was then employed, that he was not required to take any action after a tax lien was entered against him. That conversation, however, related to a separate tax

1 we need not address it because the SEC found that Mathis had not justifiably relied on any
2 advice. To the contrary, the SEC found that Hellmers specifically advised Mathis that it was the
3 responsibility of The Boston Group’s compliance department to determine if a tax lien was a
4 “reportable event,” “[t]here is no evidence in the record showing that The Boston Company’s
5 [sic] compliance department ever considered the tax lien issue and, further, it is undisputed that
6 the compliance department never affirmatively advised Mathis that he could answer ‘no’ to the
7 lien question on the Form U4.” The SEC’s factual finding that Mathis was not able to rely
8 reasonably on Hellmers’s advice without corroborating advice from Boston Group’s compliance
9 department was supported by substantial evidence in the record, particularly since Mathis never
10 sought the advice of the compliance department.

11 Having found that the two Forms U-4 filed in 1999 and 2000 each contained a statement
12 that Mathis knew was incorrect, and that Mathis intentionally failed to amend the Original Form
13 U-4, the SEC was justified in concluding that the nondisclosure constituted a willful violation
14 under § 3(a)(39) of the Exchange Act.

15 4. Materiality

16 Mathis also urges us to vacate the SEC’s order on the ground that the information about
17 the tax liens was not material. We do not think the SEC’s finding that the liens were material
18 lacked substantial evidence to support it. The SEC employed the proper and familiar test for
19 materiality set forth in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976):

20 “[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been

lien and took place several years before the first tax lien involved here was issued. The SEC therefore properly rejected Mathis’s argument that he justifiably relied on that compliance officer’s advice.

1 viewed by the reasonable investor as having significantly altered the ‘total mix’ of information
2 made available.” In determining that Mathis’s repeated failure to disclose the liens was material,
3 the SEC reviewed “the large dollar amount of the liens, the number of the liens, and the lengthy
4 period of time during which this information was not disclosed,” and it concluded that “Mathis’s
5 omissions significantly altered the total mix of information made available to [FINRA], other
6 regulators, employers, and investors.” As the SEC observed in its decision, Mathis himself
7 acknowledged on the record that he would want to know about an employee’s serious financial
8 problems before hiring him or her because “it could be an indication that the broker is under
9 financial pressure,” as Mathis was at the time he failed to pay his taxes.

10 Given the evidence and the inarguable importance of accurate disclosure on Forms U-4
11 regarding a registered representative’s serious financial problems, we have no difficulty in
12 affirming the SEC’s conclusion that the tax liens were material.

13 **CONCLUSION**

14 For the reasons stated, the petition for review is DENIED, and the order of the SEC is
15 AFFIRMED.