BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Harrison A. Hatzis Hallandale, FL, Respondent.	DECISION Complaint No. 20060051788-01 Dated: March 2, 2012

Respondent provided incomplete and inaccurate information and misled FINRA staff when his firm applied for FINRA membership. Held, findings affirmed, in part, and sanction modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Elissa Meth Kestin, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Andrew J. Goodman, Esq.

Decision

Harrison A. Hatzis ("Hatzis") appeals a FINRA Hearing Panel decision. The Hearing Panel found that Hatzis provided incomplete and inaccurate information and misled FINRA staff when his firm, Algorithmic Trading Management, LLC ("Algorithmic Trading"), applied for FINRA membership. For this misconduct, the Hearing Panel barred Hatzis from associating with any FINRA member. After an independent review of the entire record, we affirm the Hearing Panel's findings, in part. We, however, modify the sanction imposed, fine Hatzis $30,000, and suspend him in all capacities for two years.

I. Background

The Department of Enforcement ("Enforcement") filed a single-cause complaint commencing disciplinary proceedings on March 2, 2009.[1] Enforcement alleged that Hatzis provided FINRA staff with erroneous information and withheld from FINRA staff certain documents and information about Algorithmic Trading's funding and finances when the firm applied for FINRA membership. Enforcement claimed that Hatzis therefore provided incomplete and inaccurate information with respect to the firm's membership and misled FINRA staff, in violation of NASD Membership and Registration Rules Interpretive Material ("IM") 1000-1 and NASD Rules 1013 and 2110.

On March 30, 2009, Hatzis filed an answer and denied having engaged in any misconduct. The Hearing Panel issued its decision on March 22, 2010, after a four-day hearing. The Hearing Panel found that Hatzis violated FINRA rules as alleged in the complaint and barred him. This appeal followed.

II. Facts

A. Hatzis's Relevant Employment History

Hatzis began working in the securities industry in 1995, after serving as an officer in the United States Army. From April 2001 to March 2004, he registered through a series of FINRA member broker-dealers as a general securities representative and an equity trader.

In August 2004, Algorithmic Trading submitted a Uniform Application for Securities Industry Registration or Transfer ("Form U4") to register Hatzis as a general securities representative and general securities principal of the firm. FINRA did not approve these registrations.

In March 2006, Hatzis registered through FINRA member ATM USA, LLC ("ATM USA") as a general securities representative and general securities principal. ATM USA terminated Hatzis's registrations through the firm in September 2010. Hatzis is not currently associated with any FINRA member.

The parties stipulate that FINRA, at all relevant times, possessed jurisdiction to discipline Hatzis for any misconduct alleged in Enforcement's complaint.

B. Hatzis Forms Algorithmic Trading

Hatzis, who served as Algorithmic Trading's president and managed its day-to-day operations, formed the firm to develop trading-platform software that it planned to sell to other

---

[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

broker-dealers.[2] Algorithmic Trading did not intend to conduct a traditional securities business or hold customer funds or securities. Instead, Algorithmic Trading anticipated receiving, once registered as a broker-dealer, a portion of the per-share commissions charged by client broker-dealers for securities transactions executed by their customers using Algorithmic Trading's software.

C. TH Funds Algorithmic Trading

On March 11, 2004, Hatzis's friend, "TH," opened a bank account in Algorithmic Trading's name.[3] On the same day, TH deposited a $10,000 personal check, payable to Algorithmic Trading, in the firm's newly-opened bank account.

D. The FINRA Membership Application Process

A broker-dealer seeking FINRA membership is required to file an application in the manner prescribed by NASD Rule 1013. As it concerns this case, NASD Rule 1013 requires, and required at the time of the events at issue here, that a membership application contain:

- an original signed and notarized Form BD;
- a detailed business plan describing all material aspects of the applicant's business, including a trial balance sheet, computation of net capital, and a monthly projection of income and expenses for the first 12 months of operations;
- copies of any final or proposed contracts with banks, clearing entities, or service bureaus, and a general description of any other final or proposed contracts;
- a description of the nature and source of the applicant's capital with supporting documentation, including a list of the people or entities that contributed or planned to contribute financing to the applicant's business and the terms of such financing arrangements; and
- a description of any risks to net capital and any arrangements for the infusion of additional capital should a business need arise.

To determine whether a broker-dealer meets the standards for admission to membership set forth in NASD Rule 1014, FINRA staff review each membership application, may request additional information, and interview representatives of the applicant. These standards, among other things, require that an applicant be capable of maintaining a level of net capital necessary to meet minimum requirements and to support its business operations on a continuing basis.

---

[2] The firm's software provided an analytical tool designed to upgrade the existing trading platforms of client broker-dealers. It did not execute trades.

[3] TH was associated at this time with another FINRA member broker-dealer. That firm terminated TH in January 2005 for conducting outside business activities without the firm's knowledge or permission. The New York Stock Exchange, Inc. ("NYSE"), later admonished TH for violating its rule addressing outside business activities.

NASD Rule 1014(a)(7). FINRA staff therefore direct their significant attention upon an applicant's capital, source of funds, economic forecasts, and financial plans and arrangements.

E. Algorithmic Trading Applies for FINRA Membership

On May 11, 2004, Algorithmic Trading applied for FINRA membership.[4] In its application, the firm stated that it was "100% owned by Hatzis" and its "business operations [would] initially be funded by capital contributions from . . . Hatzis."[5] Documents submitted with Algorithmic Trading's membership application indicated that the firm received an initial capital contribution of $10,000 on March 11, 2004. These documents, however, did not detail or identify the source of this funding.

Algorithmic Trading further declared that it "would be compensated by receiving a portion of the commission charged by a [broker-dealer] in connection with the transactions executed by such [broker-dealer] through [Algorithmic Trading's] software on a per share basis." The firm's application nevertheless did not include or describe any final or proposed contracts or agreements between Algorithmic Trading and any client broker-dealer concerning the use of the firm's trading-platform software.

F. The Firm Enters into an Investment Agreement with a Client Broker-Dealer

On May 25, 2004, Hatzis and a principal of a second broker-dealer, "Firm Two," signed and executed an agreement titled "Investment in ATM, LLC" (the "Investment Agreement").[6] Under the Investment Agreement's terms, Algorithmic Trading agreed to provide a proprietary trading platform to Firm Two, and Firm Two agreed to pay Algorithmic Trading a share of the commissions generated by Firm Two using Algorithmic Trading's software.

Firm Two, however, also agreed to "loan" $250,000 to ATM, LLC ("ATM"), described in the Investment Agreement as "the sole equity owner" of Algorithmic Trading, "in order to

---

[4] Algorithmic Trading's outside legal counsel ("Counsel") prepared and submitted the application to FINRA on behalf of the firm. Counsel copied Hatzis on this and all other correspondence with FINRA staff concerning Algorithmic Trading's membership application.

[5] Algorithmic Trading's membership application included a Uniform Application for Broker-Dealer Registration ("Form BD"), which Hatzis, as Algorithmic Trading's executive representative, signed on April 28, 2004. Counsel, however, prepared the information included on the firm's Form BD. The Form BD also identified Hatzis as Algorithmic Trading's sole owner.

[6] Counsel drafted this agreement and all other draft and final commercial agreements to which Algorithmic Trading and Firm Two were parties based on business terms dictated by Hatzis.

supply [ATM] with working capital."[7] Algorithmic Trading agreed to repay the loan's principal "solely by offsetting commission payments due from [Firm Two]." Firm Two was not obligated to pay Algorithmic Trading for its services until the commissions that Firm Two otherwise owed Algorithmic Trading exceeded "$285,000, net of execution, clearing, ecn/floor charges, trading errors, program trading desk operating expenses, and third-party software license fees." Thus, under the Investment Agreement's provisions, Algorithmic Trading contracted to forego the first $285,000 of net commissions due from Firm Two for the use of Algorithmic Trading's software as consideration for Firm Two's $250,000 investment in ATM.[8]

On May 25, 2004, Firm Two paid ATM $250,000 in accordance with the Investment Agreement.[9]

G. FINRA Staff Request Additional Information Concerning the Firm's Funding

1. The June 10, 2004 Request and the Firm's Response

On June 10, 2004, FINRA staff sent a letter to Hatzis to acknowledge their receipt of Algorithmic Trading's membership application. FINRA staff concluded that the firm's application did not contain all of the information and documents required by NASD Rule 1013, and they therefore could not adequately assess the application against FINRA's membership standards. FINRA staff therefore requested that Algorithmic Trading provide additional information.

Among other things, FINRA staff asked that the firm document that Hatzis provided Algorithmic Trading's initial capital of $10,000 and provide evidence of any subsequent infusions of funds not discussed in the firm's membership application. FINRA staff also requested that Algorithmic Trading justify and document "the economic rationale" for the firm's revenue projections and identify its anticipated fixed and other expenses for the first 12 months of operations. Finally, FINRA staff asked that the firm "[p]rovide sample books and records relative to [its] proposed business activities," including any "software usage agreements."

---

7 When Hatzis signed the Investment Agreement, he signed on behalf of both Algorithmic Trading and ATM.

8 Algorithmic Trading also granted Firm Two a "non-assignable warrant to purchase a 2.5% membership interest in [ATM] that is exercisable only if [ATM] consummates one or more financing rounds whereby at least 50% of its equity interests are sold to unaffiliated third parties." The exercise price of the warrant was $250,000.

9 Algorithmic Trading deposited a $250,000 check, from Firm Two and payable to ATM, in the bank account that TH opened in Algorithmic Trading's name.

On August 9, 2004, Algorithmic Trading responded to FINRA staff's request for additional information.[10] It stated, in contrast with its initial membership application, that Hatzis owned ATM and, "while . . . Hatzis, indirectly through his sole ownership of ATM, remains to be the sole beneficial owner of [Algorithmic Trading], the [firm] will be directly owned solely by ATM."[11] The firm further explained that its "bank account was funded by a capital contribution in the amount of $10,000 made by ATM and . . . Hatzis" and that it had received no other funds.[12] Algorithmic Trading, however, did not disclose TH's contribution funding Algorithmic Trading's bank account, and the documents submitted with the firm's response did not shed any additional light upon the genesis of Algorithmic Trading's receipt on March 11, 2004, of $10,000 of initial capital.[13]

As to the economic rationale supporting its revenue and expense projections for the firm's first year of operations, Algorithmic Trading stressed that its revenue projections reflected "estimated" commissions generated from use of the firm's software and were based on "indications of interest" received by Algorithmic Trading from certain broker-dealers.[14] The firm included a copy of a "draft" service agreement that the firm anticipated using to license its software to other broker-dealers. The draft service agreement indicated that client broker-dealers would compensate Algorithmic Trading from the commissions such broker-dealers generated using the firm's software.

---

[10] All of the firm's responses to FINRA staff's requests for information were through Counsel and in writing.

[11] Algorithmic Trading amended its Form BD to reflect that ATM directly owned the firm and that Hatzis's ownership interest in the firm was indirect through ATM.

[12] Algorithmic Trading submitted with its response a copy of an unsigned, capital contribution agreement which purported to show that ATM and Hatzis contributed $10,000 to Algorithmic Trading and that they both agreed to make future capital contributions, not to exceed $1,000,000, to the firm as needed.

[13] Algorithmic Trading stated that, due to an "administrative error," it re-titled the bank account that TH opened in the firm's name to reflect that ATM instead owned the account. Algorithmic Trading then opened a new bank account in its name. These account changes occurred on August 4, 2004. On August 6, 2004, the firm transferred $10,000 from the freshly-titled ATM bank account to the new account opened in Algorithmic Trading's name. The firm, however, did not substantiate the origins of the $10,000 and statements provided for Hatzis's personal bank account did not support the firm's earlier suggestion that Hatzis, at least in part, was the source of this money.

[14] The firm stated that it based its expense projections on either "actual contracted figures" or "historical figures" from other broker-dealers with similar business plans. The firm's projected expenses included marketing costs, accounting fees, legal fees, rent, salary, payroll taxes and benefits, as well as miscellaneous expenses related to equipment and other expenses.

Nothing in the pro forma financial statements and other information provided by Algorithmic Trading in its August 9, 2004 response, however, presented any glimpse of the firm's obligation, under the terms of the Investment Agreement, to forego $285,000 in net commissions due from Firm Two in exchange for Firm Two's May 25, 2004 payment of $250,000 to ATM. Other than the "draft" service agreement, Algorithmic Trading's response did not contain or depict any other final or proposed contracts or agreements between Algorithmic Trading and any client broker-dealer concerning the use of the firm's trading-platform software, including the Investment Agreement.

2. The September 1, 2004 Request and the Firm's Response

On September 1, 2004, FINRA staff sent a second letter to Hatzis. In anticipation of a scheduled membership interview, FINRA staff requested that Algorithmic Trading provide certain additional information and documentation.

Among other things, FINRA staff requested that Algorithmic Trading submit an updated capital computation. FINRA staff also asked the firm to "[p]rovide a copy of . . . Hatzis's bank statement evidencing his initial funding [of] ATM" and a copy of ATM's bank account statement "evidencing the $10,000 being debited to fund [Algorithmic Trading]." Finally, FINRA staff asked that the firm substantiate the ability of both ATM and Hatzis to infuse additional capital into Algorithmic Trading, as the capital contribution agreement provided with the firm's August 9, 2004 response stated they would do as needed.

On October 18, 2004, the eve of the firm's FINRA membership interview, Algorithmic Trading responded to FINRA staff's latest request for information.[15] A net capital computation provided by the firm indicated that Algorithmic Trading possessed $10,000 in total capital as of September 24, 2004.

With respect to the money that funded ATM, Algorithmic Trading stated that, "although . . . Hatzis initially funded ATM . . . with a $10,000 capital contribution, such contribution was not made from . . . Hatzis's personal checking account." The firm did not disclose that TH served as the source of the $10,000 deposited in the re-titled ATM (formerly Algorithmic Trading) bank account on March 11, 2004.

Instead, Algorithmic Trading explained that the "majority" of ATM's capital came from "the payment of up-front, fixed-rate service fees by certain of ATM['s] . . . customers." Algorithmic Trading thus stated that it had amended the capital contribution agreement provided with the firm's prior response, "to remove the representation that . . . Hatzis and/or ATM . . . will contribute up to $1,000,000." To be more precise, the firm declared, any money contributed by Hatzis and ATM to support Algorithmic Trading as needed under the capital contribution agreement would come from the "up-front, fixed-rate service fees" paid to ATM.

---

[15] FINRA staff testified that neither Hatzis nor Counsel disclosed any new information concerning Algorithmic Trading's membership application during the firm's membership interview on October 19, 2004.

At the hearing below, Hatzis testified that Algorithmic Trading's allusion to "up-front, fixed-rate service fees" referred to the $250,000 that Firm Two paid to ATM on May 25, 2004, under the Investment Agreement. Nevertheless, Algorithmic Trading again did not provide to FINRA staff a copy of the Investment Agreement, disclose its conditions, or reveal a copy or the terms of any other final or proposed agreements with client broker-dealers.

3. The October 21, 2004 Request and the Firm's Response

On October 21, 2004, shortly after the firm's membership interview, FINRA staff directed an additional request for information to Algorithmic Trading.[16] Because the firm represented in its prior response that Hatzis did not initially finance ATM from his personal bank account, staff asked that Algorithmic Trading describe and document the origin of the $10,000 that initially funded "the Parent," ATM. FINRA staff also requested that Algorithmic Trading provide more detail concerning the ability of ATM and Hatzis to infuse additional capital into the firm should the need arise and updated pro forma financial projections. In this respect, FINRA staff asked that the firm provide a detailed description of ATM, its sources of revenue, and "any information circulated [by ATM] to potential investors and/or clients within the last twelve months." Finally, FINRA staff asked that Algorithmic Trading "[p]rovide a detailed description of [its] customer base" and copies of any "proposed or executed agreements" between the firm and other broker-dealers "for the commissions it will receive."

Algorithmic Trading responded to this third request for information on November 30, 2004. Algorithmic Trading stated that ATM was not the firm's "parent," but rather an "affiliate" that was "under common ownership and control" because, in its view, Hatzis solely owned both entities. The firm nevertheless, for the first time since it filed its membership application, disclosed that TH contributed the $10,000 that initially financed ATM.[17]

The firm further reiterated that Hatzis and ATM were capable of contributing additional capital to Algorithmic Trading should the need arise. It stated that ATM's revenues consisted of "flat-fee service charges" paid by certain broker-dealers for consulting services and were independent of the transaction-based commissions paid to Algorithmic Trading by client broker-dealers. In this respect, the firm provided a new, "proposed" service agreement that the firm stated Algorithmic Trading and ATM would enter into with client broker-dealers and reflected

---

[16] FINRA staff sent the June 10, 2004 letter, and the letter dated September 1, 2004, directly to Hatzis. FINRA staff addressed all later correspondence concerning Algorithmic Trading's membership application to Counsel.

[17] The firm stated TH "initially planned to participate in some manner in the business of ATM as a principal, employee or in some other capacity. Shortly after making such capital contribution and due to [TH's] other business obligations, [TH] decided not to participate in the business activities of [Algorithmic Trading] or ATM and informed . . . Hatzis that ATM may retain the $10,000 he contributed as a gift with no obligations attached." Algorithmic Trading, however, did not provide with its answer documentation supporting the assertion that TH contributed $10,000 to ATM.

the services they would provide and the fees that they would receive.[18] The firm, however, did not provide FINRA staff with a copy of the Investment Agreement or any other executed or proposed agreements between Algorithmic Trading or ATM and their client broker-dealers.

Finally, Algorithmic Trading provided a current, 12-month projection of its monthly income and expenses. The firm estimated that it would have no more than $39,395 of total expenses during its first year of operations and stated that ATM would make an additional $30,000 capital contribution to Algorithmic Trading in order for the firm to continue to meet its net capital requirements. The firm's revenue and expense projections by all appearances did not account for the firm's forbearance of $285,000 in net commissions due from Firm Two pursuant to the Investment Agreement.

4. The December 8, 2004 Request and the Firm's Response

On December 8, 2004, FINRA staff requested that Algorithmic Trading document TH's $10,000 contribution to ATM and provide proof of the $30,000 capital infusion that the firm stated ATM would provide the firm in its previous response to FINRA staff.

On December 13, 2004, the firm provided a copy of the $10,000 check that TH deposited into the former Algorithmic Trading bank account on March 11, 2004. The firm further indicated ATM transferred $30,000 to Algorithmic Trading on December 10, 2004, although the firm did not provide documentation to support this claim.

5. The December 28, 2004 Request and the Firm's Response

On December 28, 2004, after ATM transferred $30,000 to Algorithmic Trading, FINRA staff requested that Algorithmic Trading provide a detailed explanation of the $250,000 deposit into ATM's (formerly Algorithmic Trading's) bank account on May 25, 2004. FINRA staff specifically requested that the firm "address the nature of this [$250,000] deposit, and where the funds originated."[19]

On January 18, 2005, Algorithmic Trading submitted its written response. The firm stated that, on May 25, 2004, Firm Two paid ATM a $250,000 "service fee pursuant to a service agreement." Indeed, the firm included with its response a copy of the purported service agreement, titled "Service Agreement with ATM, LLC" (the "Service Agreement"), that Hatzis

---

[18] Algorithmic Trading stated that the firm and ATM would derive their clients from an "existing extensive network of broker/dealer firms (the 'Prospects')." The firm declared that, other than demonstrating its software, "no other prepared information has been distributed to potential clients of [Algorithmic Trading] or ATM."

[19] After reviewing bank statements provided by the firm in response to earlier requests for information, FINRA staff concluded that the $30,000 capital contribution from ATM to Algorithmic Trading derived from the $250,000 Firm Two paid to ATM on May 25, 2004, although FINRA staff did not know under what terms or agreements that the $250,000 originated.

and a principal of Firm Two seemingly executed on May 25, 2004, the same date on which the Investment Agreement was executed. Under the Service Agreement's terms, ATM agreed to provide Firm Two certain consultation services, including the development and implementation of quantitative and analytical trading models, and Firm Two agreed to pay ATM $250,000. The Service Agreement made no mention of Algorithmic Trading or of any terms by which the firm would forego $285,000 in commissions in return for Firm Two's $250,000 payment to ATM.[20]

6. The January 19, 2005 Request and the Firm's Response

On January 19, 2005, FINRA staff wrote to request additional information from Algorithmic Trading after conducting a second membership interview.[21] FINRA staff noted that, based upon a review of the information that the firm had provided to date, it appeared that TH made his contribution to ATM in March 2004, but the initial capitalization of Algorithmic Trading occurred on August 6, 2004. FINRA staff therefore asked the firm to explain why it had not disclosed TH's $10,000 contribution earlier and to clarify whether these funds in fact were used to capitalize Algorithmic Trading.

On January 28, 2005, Algorithmic Trading responded and stated that ATM and "Hatzis, indirectly, as the sole owner of ATM," were the sources of Algorithmic Trading's initial capital. The firm, in fact, specifically denied that TH contributed the firm's initial funding. The firm instead declared that it considered TH's $10,000 contribution a "gift to . . . Hatzis as the sole of owner of ATM . . . , rather than, and indistinguishable from, a gift to ATM . . . ." The firm also explained that it had not disclosed TH's contribution to FINRA staff prior to November 30, 2004, because it "believed at the time that the [contribution] was not material to the application."

7. The February 7, 2005 Request and the Firm's Response

On February 7, 2005, FINRA staff requested certain additional information from Algorithmic Trading concerning TH's contribution and Firm Two. Among other things, FINRA staff asked whether TH's $10,000 "was contributed to . . . Hatzis directly, or ATM." FINRA staff also asked that the firm "[p]rovide copies of all correspondence/documents, emails, advertising documents, letters etc.) [sic] that were presented to or evidence correspondence with [Firm Two] in order to promote the proprietary algorithmic trading system services offered by ATM . . . (which [Firm Two] ultimately purchased)."

Algorithmic Trading responded on March 7, 2005. Contradicting its earlier assertion that TH gifted $10,000 to Hatzis, the firm now claimed that the money "was contributed directly to

---

[20] The Service Agreement stated that "the parties . . . agree that (i) [Firm Two] will pay to ATM the Service Fee; and (ii) ATM will perform the Services." The Service Agreement included no terms referencing a "loan."

[21] FINRA staff conducted a follow-up membership interview with Hatzis and Counsel on January 18, 2005. Neither Hatzis nor Counsel provided FINRA staff with any additional information concerning Firm Two's May 25, 2004, $250,000 payment to ATM during this second interview.

ATM." Moreover, documents that the firm provided with its response, including letters from TH's lawyers to NYSE staff, demonstrated that TH believed fully that his $10,000 contribution assisted Algorithmic Trading with its initial funding.

Lastly, the firm avowed "that there is no correspondence of any kind between ATM . . . and [Firm Two] promoting the proprietary algorithmic trading services offered by ATM." The firm stated that "[a]ll marketing was effected by in person demonstration and telephone conversations."

H. FINRA Staff Deny Algorithmic Trading's Membership Application

On June 20, 2005, FINRA staff denied Algorithmic Trading's membership application. FINRA staff concluded that Algorithmic Trading withheld during the application process material information and provided conflicting information about the firm's ownership and the ownership of ATM, the funding of these entities, and the involvement of TH. FINRA staff also concluded that they were unable to establish who owned and controlled Algorithmic Trading and ATM or the extent and nature of TH's involvement with each of these entities. Accordingly, FINRA staff determined that Algorithmic Trading failed to meet the standards of admission set forth in NASD Rule 1014, specifically those standards requiring that all membership applications be complete and accurate and that no information exist indicating that the applicant may circumvent or evade compliance with the federal securities laws or FINRA rules.

I. Hatzis Forms ATM USA

After FINRA staff denied Algorithmic Trading's membership application, Hatzis formed a second broker-dealer, ATM USA, to develop and market trading-platform software to client broker-dealers. In August 2005, ATM USA applied for FINRA membership. On March 16, 2006, FINRA staff approved the firm's membership application. Hatzis served as both the chief executive officer and chief compliance officer of ATM USA until December 2008.[22]

J. FINRA Staff Examine ATM USA

In September 2006, FINRA staff commenced a new member examination of ATM USA. During the examination, FINRA staff examined ATM USA's correspondence and email files. This review led to FINRA staff's discovery of the Investment Agreement and of efforts by Algorithmic Trading and Hatzis to shield the Investment Agreement from regulatory scrutiny.

1. FINRA Staff Learn of New Information About Firm Two's Advances to Algorithmic Trading

ATM USA's files included a May 10, 2006 email from Hatzis to an individual connected to a firm that owned a minority stake in ATM USA. The email contained the subject line "[Firm Two] Advances" and included the attachment "Advances from [Firm Two]." The attachment

---

22 ATM USA remains a FINRA member firm.

discussed three "advances" – a $250,000 advance, a second $250,000 advance, and a $40,000 advance from Firm Two to ATM. The attachment further stated that "[o]n paper these advances were accounted for as service fees and reported as revenue to the IRS . . . . In reality, ATM is responsible for paying back [Firm Two] in one of [two] ways: pay back the advance through trade commission revenue . . . or forego advance repayment and give [Firm Two] a 10% equity stake."

2. FINRA Staff Discover the Investment Agreement

On November 15, 2006, after reviewing the foregoing email, FINRA staff requested that Firm Two provide copies of "any and all contracts or agreements" between Firm Two, ATM USA, and any of ATM USA's "affiliates or entities during the period of January 1, 2003 through November 13, 2006." FINRA staff also called for Firm Two to provide copies of any emails and correspondence sent to or received from Hatzis during the same period.

On December 22, 2006, Firm Two provided information responsive to FINRA staff's request for information. This information included copies of three agreements: the Investment Agreement, the Service Agreement, and a second document titled "Service Agreement with ATM, LLC," but dated June 1, 2005. Prior to receiving this information, FINRA staff was unaware of the Investment Agreement or its terms. Hatzis and Algorithmic Trading did not provide a copy of the Investment Agreement or describe its terms to FINRA staff at the time that the firm applied for FINRA membership or in any subsequent correspondence or discussions with FINRA staff concerning Algorithmic Trading's membership application.

3. FINRA Staff Unearths Drafts of the Investment Agreement

Firm Two's December 22, 2006 response also included copies of numerous emails exchanged by Hatzis and Firm Two principals. These emails established that Hatzis and Firm Two officials began negotiating the terms of the Investment Agreement on March 26, 2004, well before the firm applied for FINRA membership. On that day, a principal of Firm Two suggested to Hatzis that Firm Two invest $250,000 in Algorithmic Trading, which Firm Two would "recapture . . . from net profits." The Firm Two principal stated that his firm was "ready to move forward immediately."

Hatzis emailed a counterproposal to the Firm Two principal on March 30, 2004. Hatzis asserted that an Algorithmic Trading and Firm Two "partnership" could "generate [and] increase commission profitability by maximizing the sale of . . . stock trade execution services . . . measured in share volume." In this respect, Hatzis extolled the virtues of Algorithmic Trading's services and declared that an investment in Algorithmic Trading constituted a "shrewd investment in program trading." Hatzis agreed to Firm Two's demand that Firm Two "recapture" its $250,000 investment from "net profits" and equated net profits to commissions net of execution, clearing, and trading-desk operating costs.[23]

---

[23] Hatzis also proposed that Algorithmic Trading grant Firm Two a "subscription warrant" to purchase two and one-half percent of Algorithmic Trading for $250,000.

In April and early May 2004, Hatzis and Firm Two principals exchanged several additional emails that contained drafts of the Investment Agreement. Each of these drafts called for a $250,000 "loan" from Firm Two to ATM that would be repaid by "offsetting commission payments" due from Firm Two to Algorithmic Trading and the grant of a "warrant" permitting Firm Two to purchase an interest in Algorithmic Trading under certain conditions.

On May 11, 2004, the day that Algorithmic Trading applied for FINRA membership, Counsel sent an "execution version" of the Investment Agreement to principals of Firm Two and requested that they execute and return the agreement to Hatzis. Like the earlier drafts, this version of the Investment Agreement required Firm Two to "loan" $250,000 to ATM and stated that Firm Two would not be obligated to pay Algorithmic Trading for the use of the firm's software until the net commissions receivable from Firm Two exceeded a set sum – now $285,000. Hatzis executed this document on behalf of Algorithmic Trading before Counsel sent it to Firm Two's principals, and he believed that a final agreement between Algorithmic Trading and Firm Two was imminent.

After making only minor modifications to the previous documents, Hatzis and a principal of Firm Two completed and executed the Investment Agreement on May 25, 2004. FINRA staff uncovered no other draft documents or agreements that Hatzis and Firm Two principals exchanged during April and May of 2004.

4. FINRA Staff Discern Efforts to Create the Service Agreement and Hide the Investment Agreement from View

On August 30, 2004, Hatzis emailed a Firm Two principal and stated that Counsel had informed Hatzis that the Investment Agreement was "illegal."[24] Hatzis further explained that, if

---

[24] Hatzis testified that, shortly after Algorithmic Trading submitted its August 9, 2004 response to FINRA staff's June 10, 2004 request for information, he met with Counsel. Counsel informed Hatzis that the Investment Agreement was "illegal" and had to be revised. Counsel also explained to Hatzis that because Algorithmic Trading was not yet a registered broker-dealer, it could not receive commission-based compensation. Counsel then urged Hatzis to discuss a new "service agreement" with Firm Two, which Counsel stated could be "backdated" to "replace" the Investment Agreement.

In its decision, the Hearing Panel noted that Hatzis's testimony "is uncorroborated." The Hearing Panel, however, made no findings concerning Hatzis's credibility as a witness. We therefore find no reason not to credit Hatzis's testimony. *See Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *26 (Oct. 6, 2008) ("In the absence of a credibility finding with respect to the . . . testimony, the NAC was required to conduct a de novo review and was permitted to make its findings based on a review of the entire record.").

Indeed, Counsel later acknowledged, in the course of a fee dispute, that the Investment Agreement was "problematic under [FINRA] regulations" and that Counsel informed Hatzis that the Investment Agreement "could be revised in accordance with [FINRA] regulations."

[Footnote continued on next page]

FINRA staff asked for a copy of the Investment Agreement in the course of reviewing the firm's membership application, Algorithmic Trading and Firm Two would have to revise the agreement to show that they had not entered into "any commission sharing agreements prior to [Algorithmic Trading's] registration as a [broker-dealer]." Hatzis stated that Algorithmic Trading and Firm Two would "revise [and] back-date [the] original accordingly and then we will have a side agreement that renders the revised agreement null and void after [Algorithmic Trading] is fully registered." "Once the revised agreement is null [and] void," Hatzis claimed, "the original will once again be valid."[25]

On December 9, 2004, Counsel emailed Hatzis to inform him of FINRA staff's December 8, 2004 letter requesting that Algorithmic Trading document TH's $10,000 contribution to ATM and provide proof of ATM's $30,000 infusion of capital into the firm. Counsel proclaimed that "we don't want [FINRA staff] to start asking about the other money that came into ATM."[26]

On December 28, 2004, Algorithmic Trading's Counsel emailed Hatzis a list of the information that FINRA staff requested by their letter of the same date. Counsel highlighted, among other things, the request that Algorithmic Trading provide "a description of the $250,000 capital infusion to ATM on May 25, 2004, and documentation evidencing the source."[27] "For

---

[Cont'd]

Although Counsel, who never testified at the hearing, denied that the Investment Agreement was "illegal," we do not discredit Hatzis's testimony that he was led by Counsel to believe that it was.

[25] On September 21, 2004, Counsel emailed Hatzis to inform him that "[y]our application is in good shape . . . [t]he [Firm Two] situation appears also, at this time, not to be a problem with [FINRA], and if it becomes one, we would be able to deal with it." Counsel concluded, "[l]et me worry about the application and you take care of your business." Hatzis testified that he took from this email that Counsel had discussed with FINRA staff at least the terms of the Investment Agreement.

[26] On December 15, 2004, Hatzis complained to Counsel about its fees and stated that Algorithmic Trading had spent "[s]ubstantial time and effort" responding to Counsel's "requests for documentation, clarification, and strategization [sic] of the means by which [Counsel] could effectively divert [FINRA's] attention from the source of ATM's financing (which was secured through ATM's operating agreement with [Firm Two])." Hatzis testified that he used this language because he was frustrated that Algorithmic Trading was being charged fees for Counsel's efforts to address regulatory issues that Counsel created in its drafting of the Investment Agreement.

[27] Hatzis responded to Counsel's email on December 29, 2004, adding the comment: "THIS IS WHAT I'VE FEARED ALL ALONG." Hatzis testified that he meant to express by this comment that he feared that Counsel had mismanaged Algorithmic Trading's membership application.

this," Counsel informed Hatzis, "I will provide you with an appropriate agreement . . . which then should be executed by you and [Firm Two]."[28]

On January 4, 2005, Hatzis exchanged emails with a Firm Two principal. In one email, Hatzis stated that Counsel had informed him of FINRA staff's request that Algorithmic Trading describe and document the origin of the $250,000 paid to ATM on May 25, 2004. Hatzis explained that "[m]y attorneys had been trying to avoid this issue with [FINRA] for months, but now it's unavoidable." "As discussed several months ago," Hatzis continued, "the [Investment Agreement] between ATM [and] [Firm Two] is problematic for [FINRA]." Hatzis declared that "[Algorithmic Trading's] application will certainly be DISAPPROVED due to the fact that the $250k 'loan' is to be 'repaid' with commission revenues." Hatzis thus asked, "[w]hen can we discuss executing a revised and backdated agreement that is in compliance with [FINRA] regulations?" "Perhaps we can execute a 'side' agreement," Hatzis concluded, "that restores the [Investment Agreement] immediately upon [Algorithmic Trading's] approved registration."

Hatzis later emailed principals of Firm Two a draft of the Service Agreement, which Counsel drafted.[29] Hatzis stated that the Service Agreement was "to be back-dated (May 04) and executed prior to [Algorithmic Trading's] final [FINRA] inquiry." "This agreement," Hatzis avowed, "is devoid of any references to commission sharing or equity interests" and "is 100% compliant with [FINRA] rules and regulations."

As we noted above, on January 18, 2005, Counsel provided the Service Agreement to FINRA staff and asserted that Firm Two "paid to ATM . . . a $250,000 service fee" under the terms of the Service Agreement. The record is clear, however, that the Service Agreement did not exist in written form until early January 2005, and Hatzis and a principal of Firm Two did not sign and execute the Service Agreement until this time. Hatzis and the Firm Two principal instead executed a document backdated to May 25, 2004. Firm Two never paid ATM pursuant to the Service Agreement.

Although, in Hatzis's appeal to the NAC, Hatzis suggests that Algorithmic Trading and Firm Two terminated the Investment Agreement, there is no evidence to support this claim. The Investment Agreement remained in effect at all times while Algorithmic Trading's membership

---

[28] Although he may have earlier thought that Counsel discussed the Investment Agreement with FINRA staff, the evidence is clear that, by December 28, 2004, Hatzis knew well that the existence and terms of the Investment Agreement in fact had not been disclosed to FINRA.

[29] The email also included an attachment titled "Strategic Agreement with ATM, LLC" that Hatzis stated would "be executed simultaneously with the Service Agreement." Hatzis stated "[t]his agreement addresses the commission sharing between ATM [and] [Firm Two]." The document itself stated that "[Algorithmic Trading] will receive a share of the commissions generated by [Firm Two's] trading desk." The record is unclear as to whether Firm Two and ATM ever executed this additional agreement or whether Algorithmic Trading disclosed it to FINRA staff.

application was pending. On August 18, 2005, Hatzis emailed Firm Two principals. He stated: "Nothing has changed about our original agreements including . . . the . . . **Investment** (in atm)." Hatzis further declared to Firm Two principals, "I would NEVER fail to honor our agreements (BOTH written AND verbal) and I would NEVER violate our trust, business partnership, or friendship."[30]

III. Discussion

We affirm the Hearing Panel's findings that Hatzis violated NASD IM-1000-1 and NASD Rule 2110 by providing incomplete and inaccurate information concerning Algorithmic Trading's application for membership and misleading FINRA staff. Although Hatzis, on appeal to the NAC, attacks the fairness of the proceedings below, we find his arguments are without merit and we reject them.

A. Hatzis Violated NASD IM-1000-1 and NASD Rule 2110.

NASD IM-1000-1 required broker-dealers to file complete and accurate membership information.[31] This requirement applied to information filed in connection with an application for FINRA membership and includes the condition that applicants timely update information contained within membership applications as changes occur.[32] *Dep't of Enforcement v. Harvest Capital Inv., LLC*, Complaint No. 2005001305701, 2008 FINRA Discip. LEXIS 45, at *41-42 (FINRA NAC Oct. 6, 2008). Providing misleading membership information, or failing to timely amend a membership application when required, violates IM-1000-1 and the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its member

---

[30] Hatzis also informed a representative of ATM USA's minority owner in May 2006 that ATM remained obligated to repay the $250,000 paid under the Investment Agreement through the commissions otherwise due from Firm Two. *See supra* Part II.J.1.

[31] NASD IM-1000-1 stated that any information filed in connection with FINRA membership or registration as a registered representative, "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for disciplinary action." Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 74 (Oct. 2008). FINRA transferred NASD IM-1000-1 to the Consolidated Rulebook and adopted it as FINRA Rule 1122. *See FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96 (June 2009).

[32] At the time of the conduct at issue in this matter, Art. IV, Sec. 1(c) of NASD's By-Laws provided that "[e]ach applicant and member shall ensure that its membership application . . . is kept current at all times by supplementary amendments . . . . Such amendments shall be filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment."

and their associated persons under NASD Rule 2110.[33] *Harvest Capital*, 2008 FINRA Discip. LEXIS 45, at *42.

1. Algorithmic Trading Supplied Inaccurate, Incomplete, and Misleading Membership Information to FINRA Staff

In May 2004, Algorithmic Trading applied for FINRA membership. Over the course of the next year, Algorithmic Trading provided incomplete and inaccurate membership information that misled FINRA staff.

First, we find that Algorithmic Trading failed to accurately, completely, and timely disclose the source and nature of the firm's initial funding and ownership. On March 11, 2004, TH deposited $10,000 into Algorithmic Trading's bank account. These sums comprised all of the firm's initial capital. Two months later, however, when Algorithmic Trading applied for FINRA membership, the firm incorrectly stated that Hatzis funded the firm, and it failed to disclose TH's contribution. Algorithmic Trading's membership application and Form BD also inaccurately indicated that Hatzis solely owned the firm, when in fact ATM was Algorithmic Trading's sole, direct owner.[34]

Algorithmic Trading ultimately disclosed TH's financing of the firm and clarified ATM's ownership role, but it did so only after providing a series of confusing and misleading responses to several FINRA staff requests for information. For example, on August 9, 2004, Algorithmic Trading responded to FINRA staff's request that it document Hatzis's funding of the firm. Rather than disclose TH's contribution to FINRA staff, Algorithmic Trading explained that ATM owned the firm and suggested that ATM and Hatzis provided the $10,000 that funded Algorithmic Trading's bank account. Algorithmic Trading later obfuscated the issue of the firm's funding and ownership further and coyly stated, in an October 18, 2004 response to a FINRA staff request for information, that Hatzis initially funded ATM, but he did not do so with a payment from his personal bank account.

Not until November 30, 2004, some six months after the firm applied for FINRA membership, did Algorithmic Trading acknowledge TH's $10,000 contribution to the now re-titled Algorithmic Trading bank account. Even then, however, the firm failed to provide sufficient documentation evidencing the payment, proposed that these funds were used only to

---

[33] NASD Rule 2110 states "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 2110 applies with equal force to FINRA members and their associated persons. *See* NASD Rule 0115(a).

[34] Algorithmic Trading answered "no" to question 9.B. of the Form BD, which asked whether "any person" other than Hatzis directly or indirectly, "wholly or partially finance[d] the business of the applicant." Algorithmic Trading never amended the Form BD to answer this question "yes."

fund ATM (not Algorithmic Trading), and supplied disingenuous information concerning whether TH gifted the funds to Hatzis or contributed them directly to ATM.

These events led ultimately to FINRA staff's decision to deny Algorithmic Trading's membership application and the fair conclusion that they were unable to determine the ownership and control of Algorithmic Trading and ATM or the extent and nature of TH's involvement with each of these entities. For too long, Algorithmic Trading withheld TH's identity as the source of the $10,000 deposited into the bank account he opened in Algorithmic Trading's name and misled FINRA staff by providing a series of oblique and shifting rejoinders to requests for information that plainly should have elicited clear and unambiguous responses.

Second, we conclude that Algorithmic Trading misled FINRA staff concerning the $250,000 payment under the Investment Agreement and sought to shield the Investment Agreement from regulatory review. By May 11, 2004, the date on which Algorithmic Trading applied for FINRA membership, Hatzis and representatives of Firm Two had negotiated the principal terms of the Investment Agreement and reduced them to writing. On May 25, 2004, Algorithmic Trading and Firm Two executed the Investment Agreement. Algorithmic Trading, however, never disclosed to or discussed with FINRA staff the terms of these "final or proposed contracts."[35] *See* NASD Rule 1013(a)(2)(L) (2004).

The Investment Agreement also concerned "the nature and source of [Algorithmic Trading's] capital," "the terms and conditions of . . . financing arrangements," an "arrangement for additional capital," and a "risk to net capital presented by [Algorithmic Trading's] business activities." *See* NASD Rule 1013(a)(2)(M) (2004). Firm Two paid ATM $250,000. A portion of these funds, however, were used to bolster Algorithmic Trading's capital, and ATM and Hatzis committed themselves to contribute additional capital to Algorithmic Trading from this and other payments of "up-front, fixed-rate service fees" paid by ATM clients. Algorithmic Trading's obligation to forego $285,000 in net commissions otherwise due from Firm Two alone affected a significant aspect of the firm's financing and revenues, and it raised considerable questions concerning Algorithmic Trading's ability to maintain adequate net capital. Nonetheless, Algorithmic Trading never disclosed to FINRA staff these key terms.

Finally, Algorithmic Trading possessed information concerning the Investment Agreement that was directly responsive to numerous requests for information issued by FINRA staff. Among other things, FINRA staff asked that Algorithmic Trading support the firm's income projections, identify its fixed and other expenses, supply "software usage agreements," substantiate the ability of ATM and Hatzis to provide additional funding, provide copies of commission agreements, and submit copies of any correspondence exchanged by ATM and potential investors and clients, including Firm Two. Algorithmic Trading nevertheless omitted any reference to the Investment Agreement or its terms when it provided FINRA staff

---

[35] Algorithmic Trading provided to FINRA staff several "draft" or "proposed" commercial agreements that it claimed it would enter into with prospective or potential client broker-dealers concerning the sharing of its software and commissions, but it never disclosed the Investment Agreement, a final contract with an actual customer.

information about "estimated" revenue projections, expense forecasts, "draft" and "proposed" service agreements, capital contribution agreements, and "up-front, fixed rate service fees."

Indeed, on December 28, 2004, FINRA staff specifically requested that Algorithmic Trading provide a "detailed description" of the $250,000 payment to ATM, including "the nature of the deposit . . . and where the funds originated." Rather than divulge the Investment Agreement to FINRA staff, Algorithmic Trading falsely informed them that the $250,000 represented "service fees pursuant to a service agreement" and, to support this claim, provided the recently-created, backdated Service Agreement, which deceptively omitted any reference to a "loan" and otherwise whitewashed Algorithmic Trading's obligation to repay it by foregoing commissions.

2. Hatzis Is Responsible for His Firm's Misconduct

We hold Hatzis responsible for Algorithmic Trading's filing of incomplete and inaccurate membership information and the resultant misleading of FINRA staff.

First, Hatzis was Algorithmic Trading's president and executive representative, and he controlled and managed the firm. *See Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *34 (Apr. 11, 2008) (finding that both the chief executive officer and president of a firm caused the firm's membership application to be incomplete, inaccurate, and misleading); *Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *51-52 (June 29, 2007) ("As the president of the Firm, Kresge was responsible for . . . disclosing on the Firm's Form BD Ferragamo's financial support of the Brooklyn branch office pursuant to . . . IM-1000-1."); *see also Harvest Capital*, 2008 FINRA Discip. LEXIS 45, at *45 ("Cotto controlled and managed Harvest capital during all relevant time periods, and he is accountable for the Firm's violations.").

Second, Hatzis was intimately involved with Algorithmic Trading's membership application. *See Jay Fredrick Keeton*, 50 S.E.C. 1128, 1133-34 (1992) (finding that a respondent who attempted to organize a broker-dealer and obtain its FINRA membership violated just and equitable principles of trade by providing false information on the firm's Form BD and failing to amend that information as required). Hatzis hired Counsel, provided all of the information from which Counsel constructed the firm's membership application and its responses to FINRA staff's requests for additional information, and was responsible for reviewing the information and documents that Counsel submitted to FINRA staff on the firm's behalf. Although it is unclear whether Hatzis received a copy of each of FINRA staff's requests for information, evidence introduced during the hearing below established that Counsel regularly discussed with Hatzis the nature and scope of these requests, including especially FINRA staff's specific requests concerning Algorithmic Trading's initial funding and Firm Two's $250,000 payment to ATM.

Third, Hatzis signed and executed the Form BD submitted with Algorithmic Trading's membership application, representing that the information therein was "current, true, and accurate." He thus acknowledged the firm's continuing duty to amend the Form BD when its information was no longer accurate and complete. *Cf. Dep't of Enforcement v. Howard*, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16, at *31 (NASD NAC Nov. 16, 2000)

("It is axiomatic that the person who provides information for a regulatory filing and executes that filing is responsible for ensuring that the information contained therein is accurate."), *aff'd*, Exchange Act Rel. No. 46269, 2002 SEC LEXIS 1909 (July 26, 2002), *aff'd*, 77 Fed. App'x 2 (1st Cir. 2003).

Lastly, Hatzis personally negotiated the terms of the Investment Agreement with Firm Two principals and was indispensably involved with Algorithmic Trading's dishonest efforts to "replace" the Investment Agreement with the Service Agreement. *See, e.g.*, *Gordon*, 2008 SEC LEXIS 819, at *22 ("Applicants instructed [staff members], before a routine [FINRA] examination in 2001, to avoid referring to Guss other than as the Firm's webmaster and to put documents that had Guss's name on them out of sight."). Under these circumstances, Hatzis should have, but did not, amend the firm's membership application to ensure that it was complete and contained accurate information. *See Kresge*, 2007 SEC LEXIS 1407, at *47 ("Kresge admits that he should have, but did not, amend the Firm's Form BD to disclose that Ferragamo was financing the operation of the Brooklyn branch office.").

We accordingly affirm the Hearing Panel's findings that Hatzis violated NASD IM-1000-1 and NASD Rule 2110.[36]

B. Hatzis Received a Fair Hearing

Hatzis contends that the proceedings below denied him due process and were unfair. We disagree.

1. Hatzis's Constitutional Arguments Are Inapplicable

As an initial matter, it is a well-settled proposition that FINRA is not a state actor and thus the Constitutional protections that Hatzis asserts do not pertain to FINRA proceedings. *See Richard A. Neaton*, Exchange Act Rel. No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011). Hatzis's due process argument is thus inapplicable. *See id.*

2. Hatzis's Specific Claims of Unfairness Are Meritless

Section 15A(b)(8) of the Securities Exchange Act of 1934 ("Exchange Act") requires FINRA to "provide a fair procedure for the disciplining of members and persons associated with members." Under Exchange Act Section 15A(h)(1), the necessity for fairness obligates FINRA,

---

[36] Enforcement alleged, and the Hearing Panel found, that Hatzis also violated NASD Rule 1013, which sets forth the filing and content requirements of an applicant's membership application, imposes the requirement that FINRA staff conduct a membership interview prior to serving its decision on an applicant, and incorporates FINRA's membership standards. Because we find that Hatzis violated IM-1000-1 and NASD Rule 2110, we conclude that we need not reach a determination as to whether we can also discipline him under NASD Rule 1013 and vacate this aspect of the Hearing Panel's decision.

in disciplinary proceedings, to bring specific charges, provide notice of the charges, and afford the member or associated person an opportunity to mount a defense.

Hatzis asserts two arguments that FINRA denied him a fair hearing. Both arguments concern the complaint issued by Enforcement in this case. Neither argument holds worth.

First, Hatzis claims that the Hearing Panel found that he violated FINRA rules based upon a theory of misconduct that Enforcement did not allege in the complaint. Hatzis avers that Enforcement based its "entire case" upon a theory that he misled FINRA because Algorithmic Trading failed to disclose that the $250,000 that ATM received from Firm Two under the terms of the Investment Agreement was in fact a loan. Because Enforcement did not prove that the Investment Agreement was a legally enforceable "loan," Hatzis objects, it was improper for the Hearing Panel to discipline him.

We find no merit in this contention and Hatzis's characterization of Enforcement's complaint is inaccurate. The complaint made clear that the allegations of Hatzis's misconduct centered on the fact that Algorithmic Trading provided incomplete and inaccurate information and misled FINRA staff concerning the funding and financing of the firm. As Enforcement stated in both the complaint and in prehearing filings, Algorithmic Trading should have disclosed the existence and terms of the Investment Agreement, whether described as a "loan" or some other kind of money transfer, because either NASD Rule 1013 required that the firm provide it or because it was responsive to numerous FINRA staff requests for information. The taxonomy of Firm Two's $250,000 payment to ATM is therefore irrelevant to the violation alleged. *See First Capital Funding, Inc.*, 50 S.E.C. 1026, 1028 (1992) ("We believe the theory of the charge remained essentially the same regardless of whether the violation resulted from the sending of offering memoranda or pre-qualification forms.").

Second, Hatzis argues that the complaint did not provide him fair notice of the conduct against which he would have to defend, claiming that Enforcement's theories of liability were "vague." In this respect, Hatzis objects initially that the proposition behind the charges against him was that he was required, under NASD Rule 1013, to disclose the terms of an agreement, the Investment Agreement, which remained the subject of negotiation at the time that Algorithmic Trading applied for FINRA membership.

Notice arguments, however, "'may be overcome in any specific case where reasonable persons would know that their conduct is at risk.'" *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14, at *27 (Jan. 9, 2009) (*quoting Maynard V. Cartwright*, 486 U.S. 356, 361 (1998)), *aff'd*, 586 F.3d 122 (2d Cir. 2009). Hatzis's argument disregards the plain language of NASD Rule 1013, which required, among other things, that Algorithmic Trading describe any "final or *proposed* contracts" when it applied for membership on May 11, 2004. As of that day, Hatzis and principals of Firm Two had reduced to writing a draft, "execution version" of the Investment Agreement, which contained the key terms (as it concerns the case) that would appear in the final document dated May 25, 2004. There can be no doubt that it constituted a *proposed* contract as contemplated by NASD Rule 1013.

Hatzis also complains that Enforcement charged him with wrongdoing for the "supposedly untimely disclosure of the [TH] money." He states, "[Enforcement] and the [Hearing] Panel seemed disturbed that the information was not disclosed early enough in the process," and he asks, rhetorically, "[b]ut how quickly must information be disclosed?"

We conclude that the answer to this question is clear – six months is too long. NASD IM-1000-1 required that an application for membership be complete and accurate when filed. Moreover, Art. IV, Sec. 1(c) of the NASD By-Laws demanded that each membership application be kept current at all times, and it imposed an affirmative duty upon an applicant to file timely amendments to the application within 30 days after learning of the changed facts and circumstances that require the amendment. We thus find no error in the Hearing Panel's decision to discipline Hatzis for Algorithmic Trading's failure to completely and accurately disclose the circumstances behind TH's $10,000 contribution to the firm, either at the time it applied for FINRA membership or during the six months thereafter.

Of course, the charges of misconduct in this case extend well beyond the issues of whether Algorithmic Trading should have disclosed the *proposed* Investment Agreement or TH's funding of the firm at the time it filed its membership application. Hatzis turns a blind eye to the fact that the Investment Agreement, when he personally executed it on May 25, 2004, constituted a *final* contract, the disclosure of which was further required under several provisions contained within NASD Rule 1013. Furthermore, Hatzis ignores the extent to which Algorithmic Trading repeatedly and affirmatively misrepresented and concealed the facts concerning both TH's $10,000 contribution and Firm Two's $250,000 payment to ATM, including by submitting a backdated document, the Service Agreement, which misled FINRA staff.

With the facts of this case properly viewed from this broader perspective, Hatzis cannot credibly complain that he lacked fair notice that his conduct violated NASD IM-1000-1 and NASD Rule 2110. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("[A]ny reasonable person would know that this type of intentional deception of [FINRA] would violate the [NASD] Rule 2110 requirement that the person's conduct conform to high standards of commercial honor and just and equitable principles of trade."); *see also Kevin Lee Otto*, 54 S.E.C. 847, 853 (2000) ("We have previously stated that [NASD] Rule 2110 is sufficiently specific and provides an adequate standard of compliance." (internal quotations omitted)), *aff'd*, 253 F.3d 960 (7th Cir. 2001); *cf. Harvest Capital*, 2008 FINRA Discip. LEXIS 45, at *42 ("A FINRA form that is inaccurate or incomplete so as to be misleading, or the failure to correct such a filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade."). The standard for determining whether a pleading in a FINRA proceeding is sufficient is whether the respondent understood the issues and FINRA provided the respondent with a full opportunity to justify its conduct. *Mission Secs. Corp.*, Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053, at *30-31 (Dec. 7, 2010). As long as Enforcement reasonably apprised Hatzis of the matters in controversy, and he was not misled, notice was sufficient. *John M.E. Saad*, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761, at *16 (May 26, 2010). We conclude that Enforcement's claims easily met this benchmark.

IV. Sanctions

The Hearing Panel barred Hatzis from associating with any FINRA member firm. After careful consideration of the Hearing Panel's decision and the arguments made by the parties on appeal, we have determined to modify this sanction. We instead fine Hatzis $30,000 and suspend him in all capacities for a period of two years.

A. The FINRA Sanction Guidelines

In deciding upon the sanctions to impose for Hatzis's misconduct, we first consider the FINRA Sanction Guidelines ("Guidelines").[37] The Hearing Panel applied the Guidelines for registration violations, which include violations of NASD Rules 1000 through 1120 and FINRA Rule 1122.[38] These Guidelines recommend a fine of $2,500 to $50,000 and a suspension of a responsible individual in any or all capacities for up to six months. In egregious cases, these Guidelines recommend that adjudicators consider suspending the individual for a period of up to two years or a bar.[39]

We agree with the Hearing Panel that the Guidelines for registration violations represent an appropriate starting point for the formulation of sanctions in this case. We, however, have also considered the Guidelines for misconduct involving the filing of false, misleading, or inaccurate Forms U4 and Uniform Termination Notices for Securities Industry Registration ("Forms U5"), or the failure to timely amend Forms U4 and U5, which we conclude are analogous violations to the misconduct we confront here.[40] *See, e.g.*, *Neaton*, 2011 SEC LEXIS 3719, at *19-20 ("Neaton's repeated false answers and failures to amend his Form U4 . . . are clear violations of Membership Rule IM-1000-1 and Conduct Rule 2110."). These Guidelines recommend, for the failure to file or filing false, misleading, or inaccurate forms or amendments, that a responsible individual be fined $2,500 to $25,000 and suspended in any or all capacities for five to 30 business days.[41] In egregious cases, these Guidelines recommend suspending the responsible individual in any or all capacities for a period of up to two years or a bar.[42] The Forms U4/U5 Guidelines also recommend fining a responsible principal $5,000 to $100,000 and a suspension in all supervisory capacities for 10 to 30 business days.[43] In egregious cases, these

---

37 *FINRA Sanction Guidelines* (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

38 *Id.* at 45.

39 *Guidelines*, at 45.

40 *Id.* at 69.

41 *Guidelines*, at 69.

42 *Id.* at 70.

43 *Id.*

Guidelines recommend suspending a responsible principal in any or all capacities for up to two years or a bar in all supervisory capacities.[44]

B. Hatzis's Conduct Was Egregious

The Hearing Panel found that Hatzis's misconduct was egregious. We agree and conclude that a number of aggravating factors support imposing significant sanctions in this case.

First, we reflect upon the nature of the inaccurate, incomplete, and misleading information submitted to or withheld from FINRA staff for which we hold Hatzis responsible.[45] In considering applications for membership, FINRA is charged with the responsibility of examining the ability of a broker-dealer to meet the standards of financial responsibility, operational capability, experience, and competence prescribed by FINRA rules. *See First Potomac Inv. Servs., Inc.*, 50 S.E.C. 848, 849 (1992). One vital aspect of the membership application process is to ensure that FINRA members possess an adequate level of capital when they begin operations. *Grand Secs. Co.*, 51 S.E.C. 9, 11 (1992). Broker-dealer capital requirements serve to protect customers and other market participants. *CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *32 (Jan. 30, 2009). We find it is therefore significant that the nature of the information at the center of this case concerned the source and character of Algorithmic Trading's funding.

Second, we find it troubling that the misconduct here involved a clear pattern of withholding important information concerning Algorithmic Trading's finances from FINRA staff for a period of more than one year.[46] Algorithmic Trading and Hatzis systematically failed to uphold just and equitable principles of trade. This misconduct was not the result of a momentary lapse of judgment or negligence that might establish mitigation.[47] Indeed, absent Hatzis's decision to seek FINRA membership for ATM USA, the firm's efforts to elide the Investment Agreement in favor of the Service Agreement would never have come to light and likely never have been corrected.[48] *See Neaton*, 2011 SEC LEIS 3719, at *41 ("Neaton has not demonstrated that the violations would cease in the future.").

---

[44] *Id.*

[45] In evaluating the appropriate sanctions to impose, the Forms U4/U5 Guidelines provide three "principal" considerations, only one of which – the nature and significance of the information at issue – is relevant here. *Id.* at 69. The Guidelines for registration violations include two "principal' considerations that we conclude are not relevant here. *Id.* at 45. These considerations are in addition to the "principal" considerations contained within the Guidelines that apply in every disciplinary case. *Id.* at 6-7.

[46] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[47] *See id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 13, 16).

[48] *See id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 2, 4).

Finally, it is disconcerting that the misconduct which confronts us involved deception and misinforming FINRA staff.[49] For too long, Algorithmic Trading and Hatzis withheld the source of the firm's funding from FINRA staff and instead offered a succession of shifting, inaccurate statements concerning the ownership of the firm and the persons responsible for its capital. Moreover, at no time during the membership application process did Hatzis ensure that Algorithmic Trading described to FINRA staff the terms of the Investment Agreement. Rather, when pressed by FINRA staff for specific information about the $250,000 that ATM received from Firm Two, he furthered efforts to shield it from regulatory review, allowing Algorithmic Trading to offer instead to FINRA staff a misleading, backdated document, the Service Agreement. These facts serve to magnify the alarming nature of Hatzis's misconduct for purposes of assessing sanctions. *See Gordon*, 2008 SEC LEXIS 819, at *58 ("Applicants directed LSVL staff to mention only Guss's involvement as LSVL's webmaster in their dealings with [FINRA] examiners and to put away documents that mentioned him, and Applicants additionally concealed Guss's role from [FINRA] by failing to update LSVL's Form BD to reflect Guss's involvement.").

C. Hatzis's Mitigation Arguments

In his appeal to the NAC, Hatzis argues that a number of facts should serve to mitigate the sanction in this case. We do not credit these arguments.

As an initial mater, Hatzis asserts that the Hearing Panel "disregarded" his "completely clean disciplinary history" and imposed an enhanced sanction in the absence of any "aggravating factor in this regard." We find, however, that the Hearing Panel appropriately considered Hatzis's disciplinary history. The absence of a disciplinary history is not mitigating. *Neaton*, 2011 SEC LEXIS 3719, at *44.

Next, Hatzis asserts that this matter involves the only time that regulatory authorities have ever investigated him for any potential misconduct. He thus claims that the recurrence of misconduct is unlikely, a fact that is supposedly confirmed by his "complete cooperation" with FINRA's investigation. This argument, nevertheless, is merely a reformulation of the first. The fact that Hatzis has apparently chosen not to engage in further instances of wrongdoing is not a basis for reducing sanctions. *Gordon*, 2008 SEC LEXIS 819, at *67. Moreover, the record does not show that Hatzis provided FINRA with any more than the assistance that was required of him under FINRA rules. His "cooperation" thus does not mitigate the sanction imposed. *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 & n.22 (Nov. 8, 2006).

Hatzis further claims that his misconduct resulted in no injury to the investing public. This assertion is hollow. *See Dep't of Enforcement v. Dieffenbach*, Complaint No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 (NASD NAC July 30, 2004) ("[A]djudicators . . . do not consider the lack of customer harm to be mitigating."). Because FINRA did not grant Algorithmic Trading membership, we can never know whether Hatzis's misconduct might have ever resulted in any harm or injury to investors. More importantly, Hatzis's argument ignores

---

[49] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10).

the damage inflicted by him upon the self-regulatory system. *See Keeton*, 50 S.E.C. at 1133 ("if Keeton had disclosed the existence of the partnerships in the Form BD, [FINRA] could have made a more timely inquiry concerning . . . his fitness to become an independent [FINRA] member."); *cf. CMG Inst. Trading,* 2009 SEC LEXIS 215, at *37 ("Even if no separate disciplinary action results from NASD's underlying investigation, a failure to cooperate during that investigation threatens the self-regulatory system . . . .").

Hatzis also asserts that FINRA provided him with no warning that his misconduct could result in discipline. We recognize that the Guidelines instruct adjudicators to consider whether a respondent engaged in misconduct notwithstanding warnings from FINRA that the conduct violated FINRA rules or the federal securities laws.[50] Nevertheless, while the presence of these facts can be aggravating, their absence is not mitigating. "Participants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements." *Richard J. Lanigan*, 52 S.E.C. 375, 378 (1995).

Finally, Hatzis objects that he reasonably relied upon the advice of Counsel. We need not determine whether Hatzis has provided sufficient supporting evidence to credit his advice of counsel claim. *See generally Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *40-41 (Nov. 14, 2008), *aff'd*, 347 Fed. App'x 692 (2d Cir. 2009). As the Commission has repeatedly held, reliance on advice that is based upon a strategy to avoid full compliance with FINRA rules is not mitigating. *Id.* at *49. Hatzis cannot shift responsibility for the accuracy and completeness of the firm's membership application to Counsel. *Cf. Dep't of Enforcement v. Marlowe Robert Walker, III*, Complaint No. C10970141, 2000 NASD Discip. LEXIS 2, at *22 (Apr. 20, 2000) ("Walker cannot evade responsibility for the accuracy of the Forms U-4 and MC-400 . . . by attempts to shift responsibility to his attorney.").

D. Hatzis Was Reckless, But Has Expressed Remorse

Although we agree with certain aspects of the Hearing Panel's formulation of sanctions, we disagree with it in two important respects.

First, the Hearing Panel held that Hatzis acted intentionally, and he deliberately withheld from FINRA staff certain information in order to gain Algorithmic Trading's FINRA membership. These facts, the Hearing Panel held, in part warranted the sanction it imposed and were considered aggravating. We do not, however, discern from the evidence that Hatzis was fully in control of the application process or entirely responsible for the inaccuracies and incompleteness surrounding the firm's membership application.

FINRA has stated that applying for membership is an intensive process that requires "considerable attention to detail" and a "substantial time commitment." *Immediate Effectiveness of Proposed Amendments to Rule 1013 to Adopt a Standardized New Member Application Form*, SR-NASD-2006-038, 2006 SEC LEXIS 743, at *4 (Mar. 29, 2006). Hatzis therefore hired

---

[50] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 15).

experienced Counsel to assist him with navigating this process. As Hatzis testified, Counsel portrayed the process of applying for FINRA membership as technical and, at times, "adversarial." Counsel instructed Hatzis to "let me handle FINRA" and urged Hatzis to focus instead on his business. In this respect, Hatzis testified, Counsel cautioned that providing FINRA with too much information concerning the nature and source of the firm's funding would "complicate matters." This testimony is consistent with Counsel's cautionary email to Hatzis stating that he did not want FINRA asking additional questions about Algorithmic Trading's funding. *See supra* Part II.J.4.

Hatzis testified that he therefore permitted Counsel to manage the entirety of Algorithmic Trading's membership application. Hatzis also testified that he was entirely transparent with Counsel concerning TH's involvement in the firm's funding and the terms and conditions of the Investment Agreement, which Counsel drafted, and that it was Counsel that formulated the firm's responses to FINRA staff's request for information concerning these issues.

As the record shows, Counsel informed Hatzis in August 2004 that the Investment Agreement was "illegal" or "problematic." Hatzis testified that Counsel then urged him to discuss a new service agreement with Firm Two and suggested backdating the agreement to replace the Investment Agreement. Indeed, after FINRA specifically asked Algorithmic Trading to document the source of the $250,000 payment to ATM, Counsel told Hatzis that he would draft an appropriate agreement for the parties to execute, which he did, with a false date. Although Hatzis was aware of Counsel's strategy to divert FINRA's attention from the source of Algorithmic Trading's financing, he assumed that that Counsel was acting "in a legal fashion."

Based upon these facts, we conclude that Hatzis acted with reckless or willful indifference to his duties and responsibilities as president of Algorithmic Trading, but not fully aware of the wrongfulness of his actions.[51] *See Gordon*, 2008 SEC LEXIS 819, at *59 ("Applicants' conduct was at least reckless."); *see also Dep't of Enforcement v. Westrock Advisors, Inc.*, Complaint No. 2006005696601, 2010 FINRA Discip, LEXIS 26, at *24-25 (FINRA NAC Oct. 21, 2010) ("Westrock was willfully indifferent to its obligations to respond to MS's Discovery Request and the arbitration panel's order."). In reaching this conclusion, we do not mean to excuse Hatzis's misconduct. Hatzis testified that he never questioned Counsel about the responses to FINRA staff's request for information that Counsel drafted on the firm's behalf, and he apparently gave little thought, beyond concern about legal fees, to their handling of his

---

[51] Recklessness is defined as "'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Gregory O. Trautman*, Exchange Act Rel. No. 61167, 2009 SEC LEXIS 4173, at *61 (Dec. 15, 2009) (*quoting Makor Issues & Rights, Ltd. v. Tellabs*, Inc., 513 F.3d 702, 704 (7th Cir. 2008)); *see also Rubinstein v. Collins*, 20 F.3d 160, 168 (5th Cir. 1994) (defining "reckless indifference" in a like manner); *Kane v. SEC*, 842 F.2d 194, 200 (8th Cir. 1988) ("[W]illfulness can be found if a broker or dealer who is aware of several facts suggesting a suspicious transaction proceeds to facilitate the sale with reckless indifference to such facts, and ignores the obvious need for further inquiry and the duty to disclose all relevant information to his superiors.").

firm's membership application. As the president of Algorithmic Trading and its chief promoter, Hatzis's duties were clear; it was his responsibility to ensure that the firm's membership application was complete and accurate. *See, e.g.*, *Gordon*, 2008 SEC LEXIS 819, at *34. We conclude, nevertheless, that a finding that Hatzis was reckless warrants a modification of the sanction imposed by the Hearing Panel.

Second, the Hearing Panel found that Hatzis failed to accept responsibility for his conduct, and that he testified that deceptive tactics to accomplish the goal of FINRA membership were justified. Again, the Hearing Panel concluded, these facts were aggravating and justified the sanction imposed.

We do not read Hatzis's testimony to support these findings. As Hatzis testified, he is remorseful and regrets his conduct. If confronted with these issues again, he claims, he would act differently. He further vowed that in the future he would take a "far more direct participating role overseeing every inch of the application." Contrary to the Hearing Panel's findings, Hatzis's testimony was clear; he did not mean to suggest in any fashion that the deception in which he participated was justified. These facts too lead us to a lesser sanction than a bar in all capacities. *Cf. Dep't of Enforcement v. Nouchi*, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *11 (FINRA NAC Aug. 7, 2009) (concluding that a sanction should fall within the lower end of the relevant Guidelines where the respondent expressed "sincere remorse").

* * *

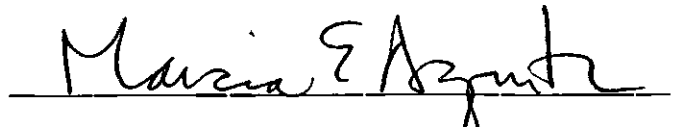
Based upon the totality of the facts before us, we consider a bar excessive and have determined to modify the sanction imposed by the Hearing Panel. We conclude that a $30,000 fine and a suspension in all capacities for a period of two years are in the public interest and will best serve to remediate Hatzis's misconduct. These sanctions will encourage Hatzis, should he continue in the securities industry upon the lifting of his suspension, as well as others in the securities industry, to provide information required under FINRA rules completely and in a timely manner. *See Scott Mathis*, Exchange Act Rel. No. 61120, 2009 SEC LEXIS 4376, at *39 (Dec. 7, 2009) ("The sanction will encourage Mathis to make complete and accurate disclosures in the future and will impress upon others the importance of the accuracy on the Form U4"); *see also McCarthy v. SEC*, 406 F.3d 179, 188-89 (2d Cir. 2005) ("Our foremost consideration must therefore be whether McCarthy's sanction protects the trading public from further harm. We also note that deterrence has sometimes been relied upon as an additional rationale for the imposition of sanctions.").

V. Conclusion

We affirm, in part, the Hearing Panel's findings, and conclude that Hatzis violated NASD IM-1000-1 and NASD Rule 2110 by providing incomplete and inaccurate information and misleading FINRA staff when his firm applied for FINRA membership. We also modify the sanction imposed by the Hearing Panel. For his misconduct, we fine Hatzis $30,000 and suspend

him from associating in any capacity with any FINRA member for a period of two years. Finally, we affirm the order that Hatzis pay costs in the amount of $6,415.43.[52]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith, Senior Vice President and
Corporate Secretary

---

[52] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.