

SYMPOSIUM: THE ENFORCEMENT ROLE OF THE NEW YORK STOCK EXCHANGE.

David P. Doherty *

Arthur S. Okun **

Steven F. Korostoff ***

and James A. Nofi ****

* Senior Vice President, New York Stock Exchange, Division of Enforcement; former General Counsel, U.S. Central Intelligence Agency; former Associate Director, U.S. Securities and Exchange Commission, Division of Enforcement; J.D. 1965, Georgetown University Law Center; A.B. 1962, St. Michael's College.

** Vice President, New York Stock Exchange, Division of Enforcement; former Assistant Attorney General, Department of Law of the State of New York, Bureau of Securities & Public Financing; J.D. 1968, Brooklyn Law School; B.A. 1965, Brooklyn College.

*** Enforcement Director, New York Stock Exchange, Division of Enforcement; former Branch Chief, U.S. Securities and Exchange Commission, Division of Enforcement; J.D. 1980, University of Pennsylvania Law School; B.A. 1977, State University of New York at Stony Brook.

**** Senior Special Counsel, New York Stock Exchange, Division of Enforcement; J.D. 1981, New York University School of Law; B.A. 1978, New York University. Mr. Nofi was formerly in private practice in New York City, specializing in civil litigation.

I. INTRODUCTION

The New York Stock Exchange, Inc. ("Exchange") is one of the world's leading marketplaces for the trading of securities, and plays a critical role in the capital formation and capital allocation processes that are central to the economy. The participants in the Exchange include more than 1700 listed companies from around the world, individual and institutional investors, and approximately 535 member firms. Public confidence in the integrity of the market, and in the integrity of the securities professionals who serve the investing public, is essential to the market's continued viability.

As a self-regulatory organization, one of the Exchange's principal functions is to enforce the provisions of the Securities Exchange Act of 1934 ("1934 Act")ⁿ¹ and the rules promulgated thereunder,ⁿ² as well as the rules of the Exchange,ⁿ³ within the Exchange member firm community ("member firm community").ⁿ⁴ Such self-regulation by the Exchange is required by the 1934 Act.ⁿ⁵

The Exchange is a not-for-profit corporation governed by a Board of Directors ("Board") consisting of twelve public representatives; twelve Exchange membersⁿ⁶ or allied members;ⁿ⁷ and a full time chairperson, executive vice chairperson, and president.ⁿ⁸ The Board is responsible for guiding the Exchange's various policies and programs, and the Exchange's staff is responsible for implementing them.

II. ENFORCEMENT AT THE EXCHANGE

The Exchange's Division of Enforcement ("Enforcement"), which is a part of the Exchange's Regulatory Group, is responsible for investigating and prosecuting violative activity within the member firm community. The Regulatory Group is responsible for the Exchange's regulatory functions with respect to the member firm community. It consists of over 450 employees, or more than one quarter of the Exchange's staff. In addition to Enforcement, the other major parts of the Regulatory Group are the Division of Member Firm Regulation ("Member Firm Regulation"), which is responsible for conducting periodic examinations of member firms and monitoring their financial condition, operations, and sales practices, and the Division of Market Surveillance ("Market Surveillance"), which is responsible for monitoring the trading activities of members, member firms, and their customers.

A. The Division of Enforcement

Enforcement is headed by a senior vice president, and is divided into three departments, each under the direction of a vice president. These departments, in turn, are divided into enforcement units. Each enforcement unit is supervised by an enforcement director and is staffed by attorneys and one or more investigators.

Although Enforcement always investigated and prosecuted violative activity, over the past several years the Exchange has significantly increased the resources committed to its enforcement program. Indeed, the number of individuals employed by Enforcement, including professionals and support personnel, has nearly tripled (to approximately 110 employees) since the beginning of 1987. Enforcement has also made a significant effort to attract and maintain a quality professional staff. In addition to a number of attorneys and investigators who have been with the Exchange for many years, Enforcement has hired persons with significant prior experience at law firms, brokerage firms, and the Securities and Exchange Commission ("SEC"), and has also hired a number of recent law school graduates.

Enforcement's increased resources have resulted in a significant increase in the number of enforcement actions instituted, ⁿ⁹ and in a number of noteworthy cases. ⁿ¹⁰ Enforcement's stepped-up efforts also have resulted in more contested litigation. ⁿ¹¹

III. EXCHANGE INVESTIGATIONS

A. Authority for Conducting Investigations

Section 6(b)(1) of the 1934 Act ⁿ¹² provides that the criteria for registration as a national securities exchange include a determination by the SEC that, among other things, an exchange has the organization and capacity to comply, and to enforce compliance by its members and persons associated therewith, with the provisions of the 1934 Act, the rules promulgated by the SEC under the 1934 Act, and the rules of the exchange. In addition, Section 19(g)(1) of the 1934 Act ⁿ¹³ requires that an exchange enforce compliance by its members and associated persons with such provisions. The Exchange carries out its enforcement responsibilities by conducting investigations and, where appropriate, initiating disciplinary actions. Under the Exchange Constitution, all powers necessary for the governance of the Exchange and the regulation of the business conduct of the member firm community is vested in the Board. ⁿ¹⁴ The Exchange Constitution further provides that the powers vested in the Board may be delegated. ⁿ¹⁵ As stated earlier, the Board has delegated authority to investigate possible violative activity to Enforcement. ⁿ¹⁶

It is important to note that Enforcement's authority to investigate and prosecute possible violations of Exchange rules, the 1934 Act, and SEC regulations promulgated under the 1934 Act is limited to Exchange members ⁿ¹⁷ and member organizations ⁿ¹⁸ and their employees, and to allied members ⁿ¹⁹ and approved persons. ⁿ²⁰

B. Sources of Cases

Enforcement receives information about possible violations from various sources, including investor complaints made directly to the Exchange and certain required filings by member firms. Member firms are required to report to the Exchange, among other things, the settlement of a claim in excess of a specified amount, and the taking of certain types of disciplinary action by the firm against an employee. ⁿ²¹ Similarly, firms are required to report, inter alia, each instance in which a registered employee whose employment has terminated is the subject of any pending customer complaints or lawsuits involving claims in excess of a specified amount. ⁿ²²

Enforcement also may commence an investigation as a result of referrals from Member Firm Regulation and Market Surveillance, as well as from the SEC. n23 Member Firm Regulation refers cases to Enforcement involving possible violations by member firms of SEC and Exchange rules concerning financial responsibilities of broker-dealers and protection of customers' securities and funds. Member Firm Regulation also refers cases involving operational problems and instances of violative activity in the sales practice area. Cases referred to Enforcement by Market Surveillance include instances of possible market manipulation, insider trading, improper trading practices occurring off the Floor of the Exchange ("Floor"), and possible misconduct on the Floor by specialists or Floor brokers. Cases referred by the SEC generally involve allegations of improper sales practices.

Enforcement also learns of possible violative activity through reports in the news media and other sources.

C. The Investigatory Process

The purpose of an investigation by Enforcement is to ascertain the relevant facts in order to determine whether violative activity has occurred and, if so, what action, if any, should be taken by Enforcement. In conducting its investigations, which are nonpublic, Enforcement, among other things, obtains relevant documents, conducts informal interviews, and takes formal testimony. Enforcement may request documents from member firms, employees of member firms, and other persons having information relevant to Enforcement's inquiry. Enforcement also typically seeks to interview any customers who may have been harmed by violative activity, and to interview or take the formal testimony of firm employees or other individuals with relevant information.

Exchange members, member organizations, and their employees, as well as allied members and approved persons, are required to cooperate with investigations conducted by Enforcement. Exchange Rule 476(a) provides that such persons and entities may be, among other things, expelled, suspended, fined, or barred from association with a member or member organization for failing to comply with a request by the Exchange for documents, testimony, or other information. n24 Exchange Rule 477 provides that the Exchange may require such cooperation from a person or entity even after the termination of such person's or entity's status as a member, member organization, or employee thereof, or as an allied member or approved person, provided that the Exchange provides appropriate notice to the person or entity within a one-year period. n25

Enforcement does not have the power to issue subpoenas in connection with its investigations, n26 and its authority to require testimony and the production of documents is limited to the persons and entities falling within the categories listed above. For example, Enforcement cannot compel customers and other persons who do not fall within one of the categories (such as attorneys or chief executive officers of public companies who might have relevant information) to provide documents or appear for testimony. Nevertheless, Enforcement generally has been successful in obtaining the voluntary cooperation of such individuals. Such cooperation is of great importance in enabling Enforcement to carry out its investigatory responsibilities.

Subjects of Exchange investigations, witnesses, and any other persons contacted by the Exchange during an investigation have the right to be represented by counsel or other representative in connection with the investigation and prosecution of any matter by the Exchange. n27

Following the completion of its investigation, Enforcement reviews the facts and determines whether any violative activity has occurred, and, if so, decides whether to recommend formal disciplinary proceedings. n28 Enforcement also decides which persons or entities should be the subject of such proceedings, and which violations should be prosecuted. Alternatively, Enforcement may decide to impose informal discipline, or to close the matter without further action.

If Enforcement determines that formal disciplinary proceedings are appropriate, it will then reach an initial recommendation on what sanction to seek. n29 Enforcement generally will then seek the advice of other senior officials in the Regulatory Group, and thereafter present the matter to the head of the Regulatory Group for final approval. This approval is necessary prior to instituting most formal disciplinary proceedings.

In certain instances, Enforcement will conclude that the nature of the violation is such that formal discipline is not warranted, and will instead impose informal discipline, i.e., issue a letter of admonition or an education letter. The letter of admonition typically advises the recipient that Enforcement has serious

concerns about the recipient's conduct, and warns that any future misconduct may result in formal disciplinary action. The education letter, used less frequently, serves to remind the recipient of an applicable rule or standard of conduct, rather than to reprimand the recipient.

The Exchange rules also provide for an alternative form of discipline. Under this form of discipline, the Exchange may impose a summary fine on persons or entities within the member firm community, in an amount not to exceed \$ 5000, for certain offenses which the Exchange officially designates as minor in nature. n30 The person or entity may either pay the fine or contest the imposition of the fine in accordance with the procedures governing formal disciplinary proceedings. n31

The Exchange also has the power, under extraordinary circumstances, to summarily suspend a person or firm prior to a hearing, e.g., a firm in such a precarious financial condition that it cannot be allowed to continue to operate with safety to, among others, the public, creditors or other member firms. n32 However, it seldom has been necessary to use this power.

Finally, in those instances where Enforcement determines that neither formal nor informal discipline is warranted, it will close the matter without further action.

IV. FORMAL DISCIPLINARY PROCEEDINGS

Once Enforcement is authorized to institute formal disciplinary proceedings, as set forth above, Enforcement either issues a Charge Memorandum and proceeds to a contested hearing against a respondent, n33 or enters into a settlement with the respondent through a Stipulation of Facts and Consent to Penalty ("Stipulation and Consent"). n34 Exchange disciplinary proceedings are nonpublic at the time they are instituted, but result in a written decision which is made public after the decision has become final.

The provisions governing Exchange disciplinary proceedings are set forth in article IX of the Exchange Constitution n35 and Exchange Rule 476. n36

A. Charge Memorandum

The issuance of a Charge Memorandum commences the litigation of a contested Exchange disciplinary proceeding. The Charge Memorandum is a written statement of the specific charges being brought against a respondent. n37 It must be served on the respondent in accordance with the provisions of the Exchange rules, n38 and the respondent must file a written Answer with Enforcement within 25 days of service. n39

Upon receipt of the Answer, Enforcement forwards both the Charge Memorandum and the Answer to the Exchange Hearing Board with a request to schedule a hearing. The filing of the request to schedule a hearing is the first notice to the Hearing Board of the disciplinary proceeding. n40

B. The Hearing Board

Exchange disciplinary proceedings are conducted at a hearing held before an Exchange Hearing Panel consisting of at least three persons: a Hearing Officer, who is the chairperson of the Panel, and at least two other members of the Hearing Board. n41

The Hearing Board is composed of "members and allied members of the Exchange who are not members of the Board [of Directors], and registered employees and non-registered employees of members and member organizations. . . ." n42 Members of the Hearing Board are appointed annually by the Chairperson of the Exchange, subject to approval by the Board of Directors, and serve at the Board's pleasure. n43 Hearing Officers are officers and employees of the Exchange who are not involved in either "the investigation or preparation of disciplinary matters." n44 Hearing Officers are appointed annually by the Chairperson of the Board, subject to the Board's approval, and serve at the pleasure of the Board. n45

The composition of a Hearing Panel for a matter is governed by certain requirements regarding the status and activities of Hearing Panel members set forth in the Exchange Constitution and Rules. n46 The requirements are designed so that the respondent may be tried by a panel which includes the respondent's "peers." n47

C. Sanctions

The Hearing Panel is empowered to impose disciplinary sanctions which include "expulsion, suspension, limitation as to activities . . . , fine, censure, suspension or bar from being associated with any member or member organization . . . [and] any other fitting sanction." n48

On January 20, 1988, the Exchange Rules were amended to eliminate all limitations on the amount of fines which may be imposed. n49

D. Pre-Hearing Procedures

During the pre-hearing phase, the Chief Hearing Officer, or any Hearing Officer he or she designates, is empowered to resolve, upon motion of either party, any and all procedural and evidentiary matters relating to the hearing. n50 No interlocutory appeal lies from any determination by a Hearing Officer on such motions. n51

Prior to the hearing, Enforcement may agree to provide to the respondent informal discovery of certain nonprivileged documents in its possession and a witness list, on a reciprocal basis. Absent such reciprocity, Enforcement usually will not provide any informal discovery. If the parties cannot reach an agreement on informal discovery, the respondent may move for inspection and copying of documents or records in the Exchange's possession which are material to the preparation of the defense or which Enforcement intends to use as evidence in chief at the hearing. n52 The respondent is not entitled to "discovery or inspection of reports, memoranda, or other internal Exchange documents prepared by the Exchange in connection with the proceeding." n53

E. Conduct of Hearings

Hearings before the Hearing Panel are conducted much like any other trial or arbitration. Enforcement and the respondent may present their cases through documentary evidence and the testimony of witnesses. n54 Witnesses testify under oath and are subject to cross-examination. Strict compliance with formal rules of evidence is not always required in hearings before a Hearing Panel. The Hearing Officer determines all questions of the admissibility into evidence of testimony and documents. n55 Following the conclusion of the evidentiary hearing, the parties, with the approval of the Hearing Panel, may submit legal memoranda or proposed findings of fact and conclusions of law to aid the Hearing Panel in its deliberations.

The Hearing Panel decides each charge by majority vote. If the Hearing Panel finds against the respondent on any charge, Enforcement and the respondent may then present arguments on the appropriate sanction. Either party may request the Hearing Panel to permit the presentation of evidence, including character witnesses, on sanction issues. The Hearing Panel then decides the sanction by majority vote, n56 and a written decision is sent to the parties. n57

F. Settlement

A respondent usually has the option of settling a formal disciplinary proceeding through a Stipulation and Consent, which generally contains an agreement to the entry of findings by the Hearing Panel of a violation(s), and the imposition of an agreed-upon sanction. n58 The executed Stipulation and Consent is submitted to the Hearing Board which schedules a hearing. After the hearing, the Hearing Panel has the authority to impose the sanction agreed to in the Stipulation and Consent, or any less severe sanction, or it may reject the Stipulation and Consent. n59 The Hearing Panel informs the parties of its determination by written decision. n60

G. Appeals

After a contested proceeding, either party may appeal the decision of the Hearing Panel to the Board. n61 In addition, any member of the Board may require a review of the Hearing Panel's decision, whether the matter was contested n62 or settled by Stipulation and Consent. n63 A review by the Board n64 is based upon written briefs and oral argument, and is limited to consideration of the record before the Hearing Panel. n65

In an appeal of a contested matter, the Board may "sustain any determination or penalty imposed, or both, may modify or reverse any such determination, and may increase, decrease or eliminate any such penalty or impose any penalty permitted . . . as it deems appropriate." n66 Under appropriate circumstances, the Board may also remand a case to the Hearing Panel. n67

In an appeal involving a Stipulation and Consent, n68 the Board, like the Panel, may impose the stipulated penalty or any penalty which is less severe than the stipulated penalty, or the Board may remand the matter for further proceedings. n69

After the Board's decision on an appeal, a respondent may seek further review by the SEC under the 1934 Act. n70 The respondent may then seek judicial review of an adverse SEC decision in a United States Court of Appeals. n71 Thereafter, either the respondent or the SEC may petition the United States Supreme Court for a writ of certiorari to review the decision of the Court of Appeals. n72

V. SUBSTANTIVE AREAS

As noted above, Enforcement's mandate is to investigate and prosecute violations, by persons and entities within the member firm community, of the 1934 Act, the SEC Rules promulgated under the 1934 Act, the Exchange Constitution, and the Exchange Rules. Within this regulatory framework, Enforcement concentrates on certain types of conduct, including sales practice violations, financial and operational violations by members and member organizations, and trading and Floor-related violations. Enforcement also typically reviews relevant supervisory issues and may institute disciplinary proceedings where supervisory deficiencies are found.

A. Sales Practices

The largest number of Enforcement's investigations and disciplinary proceedings are in the sales practice area, which encompasses all aspects of a registered representative's handling of a customer's brokerage account. Under Exchange Rule 476(a)(6), Enforcement may institute disciplinary action where a person or entity subject to the Exchange's jurisdiction has engaged in "conduct . . . inconsistent with just and equitable principles of trade." n73 A significant number of disciplinary proceedings involving improper sales practices are instituted under this rule. n74 Sales practice cases may involve, among other things, excessive trading of the securities in a customer's account, recommending securities transactions which are unsuitable for the customer involved, executing transactions in a customer's account without the customer's authorization, and misappropriating customer funds.

B. Financial and Operational

A second major area of enforcement activity concerns the financial and operational affairs of members and member organizations, and focuses particularly on those rules which relate to the financial soundness of members or member organizations.

The SEC's net capital rule n75 safeguards the investing public by requiring all broker-dealers to maintain, at all times: (1) specified minimum amounts of net capital, and (2) either (i) a specified ratio of aggregate indebtedness to net capital or (ii) net capital in an amount not less than a certain percentage of aggregate debit items as computed in accordance with the formula for determination of reserve requirements under SEC Rule 15c3-3 promulgated under the 1934 Act. n76 A shorthand way of understanding the purpose of the rule is to think of it as governing the minimum amount of "liquid" capital necessary to adequately protect the public.

Also known as the "customer protection rule," Rule 15c3-3 -- promulgated by the SEC under the 1934 Act -- requires, among other things, that a broker-dealer have possession or control of customers' fully paid and excess margin securities and that it properly segregate them. n77 The rule also requires a broker-dealer to compute its "reserve requirement," and to segregate customers' funds, and certain customer-related funds, through periodic deposits in a "Special Reserve Bank Account." n78

Enforcement also investigates and prosecutes violations occurring in a member organization's operational or "back office" areas, such as violations of Regulation T, relating to, among other things, margin credit, issued by the Board of Governors of the Federal Reserve System, n79 and violations of Exchange Rules and SEC Rules requiring the preparation and maintenance of books and records. n80

C. Trading and Floor-Related Violations

A third major area of Enforcement's investigations and prosecutions involves violations which relate to trading on the Floor of the Exchange. These violations include insider trading, market manipulation, failure

by specialists and specialist firms to maintain a fair and orderly market in the securities for which they are responsible, and on-Floor trading for their own account by Floor brokers who are not registered to do so.

D. Supervision

As stated above, Enforcement typically investigates relevant supervisory issues and may institute disciplinary proceedings in instances where there are supervisory deficiencies.

VI. RECENT CASES OF INTEREST

Enforcement has instituted an increased number of disciplinary proceedings, many of which have involved more complex and significant issues, resulting in substantial sanctions in several matters. n81

A. Recent Disciplinary Proceedings

Cases recently prosecuted by Enforcement have resulted in findings of:

- * Violative activity by a member firm and two supervisory officials relating to a breakdown in the firm's "Chinese Wall" and restricted list procedures. n82
- * Violative conduct by a member firm and two supervisory officials based on overtendering of customers' securities for the member firm's benefit. n83
- * Failure by a member organization to comply on a timely basis with investigative requests for information, which conduct imposed an administrative burden on the resources of the Exchange (this was the first case involving such findings against a member organization). n84
- * Failure by a specialist firm to maintain a fair and orderly market. n85
- * Violative activity in an increasing number of cases involving options transactions. n86
- * Violations of the SEC's net capital rule (Rule 15c3-1) and the SEC's customer protection rule (Rule 15c3-3) by member organizations. n87
- * Violative activity by a member firm relating to certain practices and transactions involving the firm's commercial bank accounts, known as "excessive draw downs" and "chaining," which practices and transactions resulted in the firm's pleading guilty to various criminal charges. n88
- * Violative activity involving the alteration of prices on certain program trades executed on behalf of certain customers. n89
- * Failure by branch office managers and other supervisory officials to fulfill supervisory responsibilities. n90

B. Sanctions

Sanctions obtained by Enforcement in recent disciplinary proceedings include the following:

- * A record fine of \$ 1,300,000 against one member firm, n91 and fines against other member firms in the amounts of \$ 375,000, n92 \$ 400,000, n93 \$ 500,000, n94 and \$ 750,000. n95
- * Reallocation of one of the stocks assigned to an Exchange specialist firm. n96
- * Obtaining undertakings by firms with greater frequency, including undertakings to:

(a) continue to employ special counsel for three years to provide certain advice to the firm's investment committee; n97

(b) report the results of an outside review of a firm's reorganization department's policies and procedures; n98

(c) report the results of an independent auditor's review of the disgorgement of profits that a firm had previously made, in a case involving overtendering; n99 and

(d) maintain an additional "cushion" in a firm's customer reserve account for a period of five years, in a case involving customer reserve account deficiencies. n100

* Bars and suspensions from supervisory responsibilities. n101

VII. CONCLUSION

An effective and aggressive enforcement program of a self-regulatory organization deters violative activity, induces compliance, and enhances investor confidence in the integrity of the market. Enforcement pursues these objectives by bringing disciplinary proceedings which send the message to the member firm community that it is serious in its enforcement efforts.

FOOTNOTES:

n1 15 U.S.C. § 78a (1988).

n2 The rules are codified at 17 C.F.R. §§ 240.0-1 to .31-1 (1990).

n3 The rules are promulgated by the Exchange's Board of Directors under the powers vested in it by article IV, section 1 of the Exchange's Constitution. NEW YORK STOCK EXCHANGE, INC. CONST. art. IV, § 1 [hereinafter EXCHANGE CONST.].

n4 See generally EXCHANGE CONST. art. I, § 3 (c)-(n) (defining types of members); EXCHANGE CONST. art. II, §§ 1-3 (delineating membership categories).

n5 1934 Act, Section 19(g), 15 U.S.C. § 78s(g) (1988).

n6 A "member" is defined by the Exchange Constitution as a "natural person who is a member of the Exchange. A member may be associated as a member with no more than one member organization." EXCHANGE CONST. art. I, § 3(h).

n7 An "allied member" of the Exchange is defined as:

(i) a general partner in a member firm, or an employee who controls a member firm, who is not a member of the Exchange and who has become an allied member as provided in the rules of the Exchange, or
(ii) an employee of a member organization who is not a member of the Exchange, who has become an allied member as provided in the rules of the Exchange, and who is either:

-a principal executive officer of such corporation, or

-a person who controls such corporation.

EXCHANGE CONST. art. I, § 3(c).

n8 See generally EXCHANGE CONST. art. IV, § 2 (discussing the composition of the Board).

n9 The number of disciplinary proceedings initiated by Enforcement increased from 85 in 1987 to 97 in 1988, 137 in 1989, and 219 in 1990.

n10 See infra notes 82-101 and accompanying text.

n11 While 22 hearings on contested matters were held in 1987 and 19 were held in 1988, 40 such hearings were held in 1989 and 63 were held in 1990.

n12 15 U.S.C. § 78f(b)(1) (1988).

n13 Id. § 78s(g)(1).

n14 EXCHANGE CONST. art. IV, § 1.

n15 Id. § 14.

n16 See Part II, supra.

n17 See supra note 6.

n18 The Exchange Constitution defines "member organization" to include "member firm" and "member corporation." EXCHANGE CONST. art. I, § 3(k).

n19 See supra note 7.

n20 An "approved person" is defined as:

a person who is not a member or an allied member of the Exchange or an employee of a member organization, who has become an approved person as provided in the rules of the Exchange and who is either:

(i) a person who controls a member or member organization, or

(ii) a person engaged in a securities or kindred business who is controlled by or under common control with a member or member organization.

EXCHANGE CONST. art. I, § 3(d). For the procedures governing the attainment of status as an approved person, see Exchange Rule 304.

n21 Such filings are required by Exchange Rule 351, and are made on Forms RE-3. See Exchange Rule 351.10.

n22 Reports of the termination of the employment of a registered employee are filed on Form U-5. See Exchange Rule 345.17. Certain misconduct by a non-registered employee is reportable on Form RE-3 prior to or after the termination of employment.

n23 See Part II, *supra*.

n24 Exchange Rule 476(a).

n25 Exchange Rule 477. The one-year period begins to run when the Exchange receives written notification that the person's or entity's status as a member, member organization, or employee of a member or member organization, or as an allied member or approved person, has terminated. *Id.*

n26 The only subpoena power the Exchange has is the limited power granted under state law to nonjudicial tribunals to issue subpoenas for their hearings. See, e.g., N.Y. CIV. PRAC. L. & R. § 2302 (McKinney Supp. 1990).

n27 Exchange Rule 476(h).

n28 See *infra* notes 33-72 and accompanying text for a discussion of disciplinary proceedings.

n29 See *infra* notes 48-49 and accompanying text for a discussion of the sanctions which may be imposed in Exchange disciplinary proceedings.

n30 Exchange Rule 476A(a).

n31 Exchange Rule 476A(c)-(d); see *infra* notes 33-72 and accompanying text for a discussion of formal disciplinary proceedings.

n32 Exchange Rule 475(b).

n33 See *infra* notes 37-57 and accompanying text.

n34 See *infra* notes 58-60 and accompanying text.

n35 EXCHANGE CONST. art. IX, § § 1-6.

n36 See generally Exchange Rule 476.

n37 Exchange Rule 476(d).

n38 Under Exchange Rule 476(d), the Charge Memorandum must be served upon the respondent by personal delivery, by leaving it at the respondent's last known office address during business hours or respondent's last place of residence as reflected in Exchange records, or by mailing it to the respondent at either the last known office address or place of residence.

n39 Exchange Rule 476(d) provides that the Answer must specifically indicate which assertions of fact and charges in the Charge Memorandum are admitted and which are denied. The Answer must also assert any affirmative defenses the respondent may have to the charges and must assert any specific facts which contradict the charges. *Id.* "A general Denial without more shall not be deemed to satisfy this requirement. Any assertions of fact not specifically denied in the Answer may be deemed admitted and failure to file an Answer may be deemed an admission of any facts asserted in the Charge Memorandum." *Id.*

n40 See *infra* notes 58-60 and accompanying text for a discussion of the procedure dealing with Stipulations and Consents.

n41 EXCHANGE CONST. art. IX, § 2; Exchange Rule 476(b).

n42 EXCHANGE CONST. art. IX, § 3; see also Exchange Rule 476(b).

n43 EXCHANGE CONST. art. IX, § 3; Exchange Rule 476(b).

n44 EXCHANGE CONST. art. IX, § 3; Exchange Rule 476(b).

n45 EXCHANGE CONST. art. IX, § 3; Exchange Rule 476(b).

n46 EXCHANGE CONST. art. IX, § 4; Exchange Rule 476(b).

n47 To the extent reasonably possible, at least one member of the Hearing Panel for a given matter should be engaged in the type of work engaged in by the respondent. In addition, in a case involving a Floor broker, at least one member of the panel shall be actively engaged in activities on the Floor. EXCHANGE CONST. art. IX, § 4; Exchange Rule 476(b). Rule 476(b).

n48 EXCHANGE CONST. art. IX, § 5; see also Exchange Rule 476(a).

n49 See Exchange Act Release No. 34-25276 (Jan. 20, 1988).

n50 Exchange Rule 476(c).

n51 *Id.*

n52 *Id.*

n53 *Id.*

n54 Exchange Rule 476(d).

n55 Exchange Rule 476(c).

n56 Exchange Rule 476(b).

n57 Exchange Rule 476(e).

n58 Exchange Rule 476(g).

n59 *Id.*

n60 If the Hearing Panel imposes a sanction less severe than the stipulated sanction, Enforcement may appeal the Hearing Panel's decision to the Exchange's Board. If the Hearing Panel rejects a Stipulation and Consent, either party may appeal. *Id.*; see *infra* notes 61-72 and accompanying text for a discussion of "Appeals."

n61 EXCHANGE CONST. art. IX, § 6; Exchange Rule 476(f).

n62 EXCHANGE CONST. art. IX, § 6; Exchange Rule 476(f).

n63 EXCHANGE CONST. art. IX, § 6; Exchange Rule 476(g).

n64 The Board refers appeals to its Committee for Review of Disciplinary and Other Matters.

n65 Exchange Rule 476(f)-(g).

n66 Exchange Rule 476(f); see also EXCHANGE CONST. art. IX, § 6.

n67 Exchange Rule 476(f).

n68 See *supra* note 60.

n69 EXCHANGE CONST. art. IX, § 6; Exchange Rule 476(g).

n70 1934 Act, Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (1988).

n71 1934 Act, Section 25(a)(1), 15 U.S.C. § 78y(a)(1) (1988).

n72 28 U.S.C. § 1254 (1988).

n73 Exchange Rule 476(a)(6).

n74 In addition, improper sales practices may constitute violations of specific Exchange Rules.

n75 17 C.F.R. § 240.15c3-1 (1990).

n76 See *infra* notes 77-78 and accompanying text.

n77 17 C.F.R. § 240.15c3-3(b) (1990).

n78 Id. § 240.15c3-3(e).

n79 12 C.F.R. § 220 (1990).

n80 See 17 C.F.R. §§ 240.17a-3, 240.17a-4 (1990); Exchange Rule 440.

n81 Unless otherwise indicated, all of the matters cited and discussed hereafter have been settled by means of Stipulation and Consent, wherein the respondent agreed to settle the matter without admitting or denying guilt.

n82 The First Boston Corp., Exchange Hearing Panel Decision ("HPD") 89-50 (June 5, 1989) (stipulation with the firm accepted by Hearing Panel); Luis Mendez, HPD 89-51 (June 5, 1989) (stipulation with Mendez accepted by Board of Directors on January 4, 1990, reversing decision of Hearing Panel rejecting that stipulation); Nicholas J. Minucci, HPD 89-52 (June 5, 1989) (stipulation with Minucci accepted by Board of Directors on January 4, 1990, reversing decision of Hearing Panel rejecting that stipulation).

n83 Charles Schwab & Co., HPD 90-53 (May 17, 1990); Barry Snowbarger, HPD 90-54 (May 18, 1990); Stephen Cass, HPD 90-55 (May 18, 1990).

n84 Shearson Lehman Hutton Inc., HPD 89-44 (Apr. 25, 1989).

n85 Morelli, Nick & Co., HPD 89-61 (July 13, 1989).

n86 See, e.g., Stuart V. Reynolds, Sr., HPD 89-41 (Apr. 17, 1989).

n87 See, e.g., Nomura Securities Int'l, Inc., HPD 90-103 (Aug. 8, 1990); SBCI Swiss Bank Corp. Inv. Banking, Inc., HPD 89-58 (June 22, 1989).

n88 E.F. Hutton & Co., HPD 88-19 (Apr. 11, 1988).

n89 Salomon Bros., HPD 90-169 (Dec. 10, 1990).

n90 E.g., Thomas McDonald, HPD 90-74 (June 8, 1990); William Wallace, HPD 90-10 (Feb. 1, 1990); Dale Bonga, HPD 90-7 (Jan. 23, 1990); Peter Hall Partridge, HPD 89-34 (Mar. 28, 1989); Jerome Markowitz, HPD 89-95 (Oct. 25, 1989); George Ball, HPD 88-20 (Apr. 11, 1988); Thomas P. Lynch, HPD 88-21 (Apr. 11, 1988).

n91 Salomon Bros., HPD 90-169 (Dec. 10, 1990).

n92 Charles Schwab & Co., HPD 90-53 (May 17, 1990).

n93 E.F. Hutton & Co., HPD 88-19 (Apr. 11, 1988).

n94 Shearson Lehman Bros., HPD 90-48 (May 7, 1990).

n95 Prudential-Bache Sec., HPD 90-121 (Sept. 6, 1990).

n96 Morelli, Nick & Co., HPD 89-61 (July 13, 1989) (reallocation ordered by Board of Directors on October 5, 1989, modifying decision by Hearing Panel). Each stock listed on the Exchange is assigned or allocated to a specialist or specialist firm responsible for maintaining a fair and orderly market in that stock. Reallocation of a stock can have a substantial economic impact on the specialist or specialist firm, depending on the nature of the stock.

n97 Shearson Lehman Bros., HPD 90-48 (May 7, 1990).

n98 Charles Schwab & Co., HPD 90-53 (May 17, 1990).

n99 Id.

n100 Branch, Cabell & Co., HPD 88-46 (Nov. 11, 1988).

n101 See Barry Snowbarger, HPD 90-54 (May 18, 1990); Stephen Cass, HPD 90-55 (May 18, 1990).