

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980086
v.	:	
	:	
	:	HEARING PANEL
	:	DECISION
	:	
	:	Hearing Officer - DMF
	:	
	:	March 15, 1999
	:	
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint alleging that respondent _____, Inc. violated Section 17(a) of the Exchange Act, SEC Rule 17a-5, and NASD Rule 2110 by failing to file Form BD-Y2K in a timely manner. Form BD-Y2K was promulgated by the SEC to collect information regarding the steps broker-dealers have taken, or plan to take, to address potential Year 2000 computer problems. _____, like all other NASD member firms, was required to file a Form BD-Y2K with the SEC and the NASD on or before August 31, 1998. The Complaint alleged that _____ did not file its Form BD-Y2K until September 25, 1998. _____ filed an Answer to the Complaint in which it alleged that it sent its Form BD-Y2K to the SEC and the NASD in a timely manner, and requested a hearing.

The Hearing Panel found that the evidence was sufficient to sustain the charge that _____ failed to file its Form BD-Y2K in a timely manner. As a sanction, the Hearing Panel

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

ordered that its Decision be deemed a Letter of Caution to _____. The Hearing Panel found that more severe sanctions, such as a censure and a fine, were not required to accomplish the NASD's remedial goals under the facts of this case. The Hearing Panel also ordered _____ to pay costs in the amount of \$1,107.50.

Appearances

Jonathan Golomb, Washington, DC (Rory C. Flynn, Washington, DC, Of Counsel), for the Department of Enforcement.

_____, President of _____, Inc., for Respondent.

DECISION

Introduction

The Department of Enforcement filed its Complaint against respondent _____, Inc. on October 20, 1998. The Complaint charges that _____ failed to file its Form Y2K in a timely manner, in violation of Section 17(a) of the Exchange Act, SEC Rule 17a-5, and NASD Rule 2110. Specifically, the Complaint alleged that, although the Form was due on or before August 31, 1998, _____ did not file its Form until September 25, 1998.

_____ filed an Answer in which it alleged that it "filed form BD-Y2K ... as required ... on July 30, 1998" In support, _____ attached to its Answer: (1) a copy of a completed Form BD-Y2K; (2) a copy of _____'s "Postage and Overnight Log," which, according to _____, included an entry for July 30, 1998, showing that Form BD-Y2K was mailed to the SEC and the NASD on that date; (3) the Affidavit of _____, stating that "on July 30, 1998 at or about 9:13 AM I mailed two copies of _____

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

completed form BD-Y2K part A to the [SEC] and one copy to the NASD ...”; and (4) a copy of a Postal Service receipt for \$10.75. _____ requested a hearing on the charge.

The hearing was held on January 22, 1999, before a Hearing Panel composed of an NASD Hearing Officer and two former members of the District Committee for District 9. At the hearing, Enforcement rested its case on written stipulations of fact between the parties and nine Complainant’s Exhibits (CX 1-9). _____ offered the testimony of two witnesses (_____ and _____) and three Respondent’s Exhibits (RX 1-3). _____ also relied on certain Exhibits attached to its Answer.

The Hearing Panel finds that the evidence adduced at the hearing was sufficient to sustain the charge that _____ did not file its Form BD-Y2K in a timely manner. The Hearing Panel has determined that the appropriate sanction for this violation, based on the specific circumstances of this case, is a Letter of Caution, in the form of this Decision. The Hearing Panel has determined that the more severe sanctions requested by Enforcement – a censure and a fine – are not appropriate under the facts of this case to accomplish the NASD’s remedial goals.

The Evidence

The SEC promulgated Form BD-Y2K pursuant to Section 17(a) of the Exchange Act and SEC Rule 17a-5 in order to collect data regarding the steps broker-dealers have taken, or plan to take, to address potential Year 2000 computer problems. Those problems are potentially serious for the securities industry, and therefore collection of the information is important. NASD member firms were required to submit Form BD-Y2K to both the SEC and the NASD on or before August 31, 1998.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

The NASD took a number of steps to inform member firms of their obligation to file Form BD-Y2K. On July 16, 1998, the NASD sent a letter “to alert all [NASD] member firms of the [SEC’s] recent action amending its Rule 17a-5 to require all broker/dealers to file two reports, on new Form BD-Y2K, concerning Year 2000.” The NASD advised members that additional information was available in a Federal Register Notice published by the SEC and on the SEC’s Web Site. The NASD explained that member firms were required to file the first BD-Y2K report with the SEC and the NASD on or before August 31, 1998. The NASD indicated that it would be sending BD-Y2K forms to the members within two weeks, with detailed filing instructions, and that the NASD and the SEC had scheduled free question and answer sessions in cities around the United States. (CX 1.) The NASD subsequently sent Special Notice to Members 98-63, which included Form BD-Y2K, and an NASD Year 2000 Member Information brochure. (CX 2-3.)

At the hearing, the parties stipulated that “[t]he records and files of the NASD Year 2000 Program Office do not reflect the receipt of _____ Form BD-Y2K prior to September 25, 1998.” In addition, the SEC attested that a search of its records showed it received a Form BD-Y2K for _____ on September 28, 1998, but that its records do not show that it received a Form BD-Y2K from _____ at any prior date. (Supplemental Stipulations, ¶ 6; CX 6.)

_____, however, claimed that it sent the Form to the SEC and the NASD on July 30, 1998. _____, _____ president, testified that he filled out a Form BD-Y2K and gave it to _____ to take to a copying service. _____ testified he made three copies of the Form, and returned them to _____ offices. _____ testified that he then

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

discovered that all the copies were needed to accomplish the filings, because the SEC required the original and two copies and the NASD one copy of the Form BD-Y2K. Instead of having another copy made for _____ records, he testified, _____ sent the original and all the copies of the Form to the SEC and the NASD. _____ admitted that the Form attached to _____ Answer, rather than being a copy of what _____ sent on July 30, as the Answer implied, was a “reconstruction” that he prepared after that date. Thus, _____ was unable to offer a copy of the Form it says it sent on July 30. (Tr. 21, 25-26, 28-31, 36, 42.)

As evidence that it mailed Form BD-Y2K on July 30, _____ relied on the testimony of _____, as well as the “Postage and Overnight Log” and Postal Service receipt attached to its Answer. _____ testified he mailed the Forms on that date, but he had no clear basis for recalling that event. _____ also admitted some confusion and uncertainty as to the date the Forms were sent. (Tr. 39, 42-43, 58, 66, 69, 72-73.) The “Postage and Overnight Log” contained a handwritten entry for July 30, 1998, indicating that “Form BDY2K” was sent to “SEC/NASD” that day, but the Log also seems to show a cost for that mailing of \$10.75, an amount that does not appear to correspond to the cost of sending two packages containing the forms to the SEC and the NASD. (Tr. 72-73.) The _____ were unable to offer a coherent explanation for this discrepancy, though they pointed to a small notation “stamps” in the same entry on the Log and speculated that perhaps the purchase of stamps explained the disparity between the \$10.75 amount entered on the Log and the smaller amount that would have been required to pay postage for the two packages. (Tr. 43, 73.) In addition, the Postal Service receipt (for \$10.75), on which _____ also relied, had a paper punch hole through the date, making it impossible to confirm that it was issued on July 30. (Tr.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

44.) In the end, _____ could offer no explanation for the absence of any NASD or SEC record showing receipt of the Form BD-Y2K that _____ says it sent in July, and he admitted that the Form might have been incorrectly addressed. (Tr. 62.)

At the hearing, the _____ testified that, in addition to mailing the Form BD-Y2K on July 30, they believed _____ also faxed the Form to the NASD on that date. (Tr. 22, 25, 31, 33, 39-41.) To support this, _____ offered a photocopy of a fax cover page suggesting that _____ faxed a Form BD-Y2K to the NASD's Year 2000 Program Office on July 30, 1998, as well as a photocopy of the cover page for a Form BD-Y2K, which _____ testified he found in _____ records with the fax cover sheet. (RX 2-3.) The fax filing was not mentioned in _____ Answer, and _____ testified he discovered the fax records only when he combed through _____ files while preparing for the hearing. He was unable to provide any evidence showing that the fax was actually sent to the NASD successfully, or to provide a copy of more than the cover page of the Form BD-Y2K that _____ supposedly faxed, and he admitted that _____ may not have sent the fax. (Tr. 25, 37, 49-50, 61, 62, 70.)

In addition, _____ offered a photocopy of an e-mail message from _____ to "y2k@nasd.com," which is the e-mail address for the NASD's Year 2000 Program Office, dated July 31, 1998, at 6:28 p.m. The e-mail states: "Please confirm receipt by fax of BD Y2k for broker dealer _____." (RX 1.) Like the fax records, this e-mail was not mentioned in _____ Answer. _____ testified that, as with the fax records, he discovered the e-mail while reviewing _____ records in preparation for the hearing. He also admitted,

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

however, that he found no evidence that _____ received any response from the NASD acknowledging receipt of either the e-mail or the Form. (Tr. 23-24, 62, 85.)

On September 11, 1998, the NASD sent _____ a letter notifying the firm that the NASD had not received the Form as of September 4. The letter advised _____ that its failure to submit the Form could result in formal disciplinary action, but that the firm could still avoid a disciplinary proceeding if it filed the Form by September 21. The letter also advised that, in the alternative, _____ could file a submission by September 21 explaining why an enforcement proceeding should not be instituted. (CX 4.)

_____ acknowledged that _____ received this letter by Express Mail shortly after September 11. He testified, however, that he was away at the time, and that the letter ended up on the desk of another _____ employee, who did not bring it to his attention when he returned to the office. _____ testified he first became aware of the letter on September 25, 1998, when he received a call from the NASD Year 2000 Program Office. He said he immediately filled out the form and submitted it that day. It was received by the NASD on September 25. (Tr. 53-54, CX 5.)

On September 30, 1998, _____ sent the NASD a letter, dated September 29, in which _____ stated: "Enclosed is a copy of Part I BD-Y2K that was submitted in July of this year by our firm." (CX 9.) In the letter, _____ claimed that _____ sent the Form on July 28, rather than July 30. Moreover, _____ admitted at the hearing that the copy of the Form he sent with his September 29 letter was another "reconstruction," not a copy of the Form BD-Y2K that _____ claims to have sent in July, because _____ did not retain a copy of that Form. (Tr. 76.)

Discussion

_____ was required to file its Form BD-Y2K with the NASD and the SEC on or before August 31, 1998. Enforcement had the burden of proving that _____ did not do so. Enforcement proved that the NASD and the SEC have no record of receiving a Form from _____ prior to September 25. This is strong evidence that _____ did not file its Form in a timely manner, but it is not conclusive. Counsel for Enforcement conceded that it is at least theoretically possible that the records are inaccurate, and that _____ Form was received, but “fell between the cracks.” (Tr. 88.) There is generally a presumption that materials placed in the mails are received by the addressee. Thus, if _____ records and the testimony of its witnesses offered consistent and convincing evidence that _____ sent the Forms to the NASD and the SEC on July 30, the Hearing Panel might have found that the evidence was insufficient to prove that _____ did not file its Form in a timely manner.

Based on the evidence and the demeanor of the witnesses, the Hearing Panel concluded that _____ believed it sent the Form to the NASD and the SEC in July. Unfortunately, as described above, the evidence that _____ in fact sent the Form to the NASD and the SEC on July 30 was too vague, incomplete, and inconsistent to outweigh the evidence that the NASD and the SEC have no record of receiving it. Under these circumstances, the Hearing Panel finds that it is more probable that _____ did not send the Forms, as it intended, or that it addressed them incorrectly, than that the Forms went to both the NASD and the SEC and “fell through the cracks” in both places. Therefore, the Panel has determined that the evidence is sufficient to sustain the charge that _____ failed to file its Form BD-Y2K in a timely manner.

Sanctions

As noted above, the collection of BD-Y2K data is of great importance to the securities industry, both to ensure that the industry is prepared for the Year 2000 and to maintain investor confidence. Member firms must take seriously their obligation to complete and file Form BD-Y2K in a timely manner, as well as their obligation to anticipate and address potential Year 2000 problems. In appropriate cases, fines or other sanctions may be required to signal the importance of these obligations, and to ensure that the member firms comply with them.

One of the overall “General Principles Applicable to all Sanctions Determinations,” however, is that, “[s]ince sanctions in disciplinary proceedings are intended to be remedial, Adjudicators should impose sanctions tailored to address the misconduct involved in each particular case.” NASD Sanctions Guidelines pp. 4, ¶ 3. As explained above, the Hearing Panel concluded that _____ believed it filed the Form BD-Y2K in July, well before the deadline. Unfortunately, _____ records were too unreliable to confirm that it sent the Form, much less that the NASD and the SEC received it. In addition, _____ failed to follow up when the NASD did not confirm it had received the Form in response to the e-mail that _____ believes he sent on July 31, and _____ seriously mishandled the NASD’s September 11 letter notifying _____ that the NASD had not received the Form.

The Hearing Panel is convinced, however, that this proceeding has impressed upon _____ not only the need to provide information, such as Form BD-Y2K, in a timely manner, but also the need to create and maintain records that will establish it has done so, if questions are raised, and to be alert to indications that the requesting authorities have not received the information.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF980086.

Therefore, the Hearing Panel finds that a Letter of Caution will satisfy the NASD's remedial goals under the particular circumstances of this case. Accordingly, the Hearing Panel orders that this Decision shall constitute a Letter of Caution to _____. In addition, _____ will be assessed costs in the amount of \$1,107.50, which includes an administrative fee of \$750 and the hearing transcript cost of \$357.50.¹

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Dated: Washington, DC
March 15, 1999

¹ The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.