

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MEMBER REGULATION,

Complainant,

v.

SHAREMASTER
(CRD No. 24019),

Respondent.

Expedited Proceeding
No. FPI100008

STAR No. 20100228551

Hearing Officer – RSH

Hearing Panel Decision

October 6, 2010

Respondent failed to file an annual report that had been audited by a PCAOB-registered auditor, in violation of SEC Rule 17a-5. Respondent is suspended until it files the requisite annual report. At the end of six months, the suspension will convert to an expulsion if by that date Respondent has not filed a properly audited annual report for 2009. Respondent is also ordered to pay costs.

Appearances

Ann-Marie Mason, Counsel, Washington, D.C., FINRA Department of Member Regulation.

Howard Feigenbaum, Registered Principal and Sole Proprietor of Sharemaster, *pro se*.

DECISION

I. PROCEDURAL HISTORY

The Department of Member Regulation (the “Department”) sent a letter to Respondent, Sharemaster, on May 3, 2010, notifying Sharemaster that, pursuant to FINRA Rule 9552, its FINRA membership would be suspended because it had submitted an annual audit for December 2009 that was not conducted by an accounting firm that is

registered with the Public Company Accounting Oversight Board (“PCAOB”), as required by the Securities and Exchange Commission’s (“SEC”) Exchange Act Rule 17a-5.¹ The Department stated that, pursuant to Section 4(g) of Schedule A to FINRA’s By-Laws, FINRA deems Sharemaster’s annual audit to be unfiled.

On May 17, 2010, the Respondent, through Howard Feigenbaum, its sole proprietor, filed a request for a hearing, pursuant to Rule 9552(e). The hearing was held by telephone conference call on June 24, 2010, before a FINRA Hearing Panel composed of a FINRA Hearing Officer, a member of the District 1 Committee, and a member of the District 2 Committee. Member Regulation called as witnesses Susan DeMando Scott (FINRA Director of Financial Operations), Heidi Udagawa (a FINRA regulatory coordinator), and Christopher Tapper (a FINRA regulatory coordinator). Feigenbaum testified on behalf of Sharemaster, but did not call any other witnesses. Member Regulation offered 12 exhibits and Sharemaster offered 9 exhibits. All of the exhibits were admitted into evidence.²

After a thorough review of the record, the Hearing Panel finds that Member Regulation proved by a preponderance of the evidence that Sharemaster is in violation of Exchange Act Rule 17a-5. Accordingly, Sharemaster is suspended until it files an annual report that has been audited by a PCAOB-registered auditor. If it does not file such a report within six months, it will be expelled.

¹ Exchange Act Rule 17a-5 requires every registered broker-dealer to “file annually ... a report which shall be audited by an independent public accountant.” The Sarbanes-Oxley Act of 2002 (“SOX”) amended Section 17(e) of the Exchange Act to require that broker dealer audits be performed by “a registered public accounting firm,” which is defined in Section 2(a)(12) of SOX as “a public accounting firm registered with the [PCAOB].”

² In this decision, “CX” refers to Complainant’s exhibits; “RX” to Respondent’s exhibits; and “Tr.” refers to the transcript of the hearing.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts are undisputed. The Respondent, a FINRA member since 1989,³ filed an audited annual report for 2009; however, the auditor was not registered with the PCAOB.⁴ Pursuant to Section 4(g) of Schedule A to FINRA's By-Laws, FINRA deems Sharemaster's annual audit to be unfiled.

The Respondent bears the burden of demonstrating that it qualifies for an exemption from filing an annual report.⁵ On the report, the Respondent claimed an exemption from filing audited financial statements under Exchange Act Rule 17a-5(e)(1)(i)(A) (the "Exemption") which provides in relevant part:

[T]he financial statements ... need not be audited if, since the date of the previous financial statements of the report filed pursuant to Rule 15b1-2 or this section:

A. The securities business of such broker or dealer has been limited to acting as broker (agent) for the issuer in soliciting subscriptions for securities of such issuer, said broker has promptly transmitted to such issuer all funds and promptly delivered to the subscriber all securities received in connection therewith, and said broker has not otherwise held funds or securities for or owed money or securities to customers....

Exchange Act Rule 17a-5(e)(1)(ii) provides that when a firm files an annual report that is not covered by an accountant's opinion, the firm "shall include in the oath or affirmation required by [Exchange Act Rule 17a-5(e)(2)] ... a statement of the facts and circumstances the firm relied upon as a basis for exemption from the requirement that financial statements and schedules filed pursuant to [Exchange Act Rule 17a-5(d)] be covered by the opinion of an accountant."

³ Tr. 93, 145.

⁴ The report was filed on February 17, 2010. CX-6, p. 6.

⁵ *Department of Enforcement v. FCS Securities*, 2010 FINRA Discip. LEXIS 9, at *13 (N.A.C. July 30, 2010).

In a statement supporting its claim that it was entitled to the Exemption, the Respondent stated, “the firm’s business is restricted to the sale of mutual funds and variable insurance products by application only. All funds received are payable to the issuer of the securities and the funds are promptly transmitted to the issuer. Any securities received are promptly delivered to the subscriber. Sharemaster does not hold funds or securities.”⁶ The Respondent also attached a copy of the Exemption and an e-mail from the SEC’s Office of the Chief Accountant, which indicated that if a firm is exempt from filing audited financial statements, then there is no requirement that an auditor be registered with the PCAOB.⁷

Sharemaster’s membership agreement with FINRA provides that the firm may sell mutual funds on an application basis, and may sell variable life insurance or annuities.⁸ Feigenbaum admitted that Sharemaster had sold subscriptions on behalf of multiple issuers and in 2009, had selling agreements with multiple issuers.⁹ He also stated that in 2009, Sharemaster had received trail or “12b-1” commissions from multiple issuers and received monthly automatic deposits from customers into multiple mutual funds.¹⁰

Feigenbaum argued that Sharemaster is entitled to the Exemption because his business is limited to soliciting subscriptions for mutual funds, and he meets the other requirements of the rule. In his view, Sharemaster meets the terms of the exemption even

⁶ CX-6, p. 1.

⁷ RX-4.

⁸ CX-9.

⁹ Tr. 117-121, 125; CX-10.

¹⁰ Tr. 148.

though the firm may solicit subscriptions for and receives commissions from multiple issuers.

In contrast, Member Regulation contended, and Scott testified, that the Exemption is available only to members that solicit subscriptions for securities of a single issuer.¹¹ Member Regulation's argument was supported by a letter from the SEC's Division of Trading and Markets providing the SEC's interpretation of the Exemption. The letter, addressed to Scott stated, "Under [the Exemption], broker-dealers that limit their securities business to acting solely as an agent for a single issuer in soliciting subscriptions for the issuer's securities, and that do not carry customer accounts must file an annual report, but it need not be audited."¹²

Member Regulation's argument is supported by the SEC's long-standing interpretation of its own rule,¹³ and the Hearing Panel was persuaded that it is the correct interpretation of the Exemption.

III. CONCLUSION

The Hearing Panel finds that the Respondent failed to file an annual report for 2009 that had been audited by a PCAOB-registered auditor. The Respondent did not demonstrate that it met the requirements for an exemption under Exchange Act Rule 17a-5(e)(1)(i)(A). Therefore, Sharemaster is in violation of Exchange Act Rule 17a-5.

¹¹ Tr. 52.

¹² CX-12.

¹³ *Charter Securities Corporation*, SEC No-Action Letter (Mar. 11, 1991) ("The Rule 17a-5(e)(1)(i)(A) exemption is available to a broker or dealer that...has limited its securities business to acting as a broker (agent) for a single issuer..."); *American Completion Securities*, SEC No-Action Letter (July 5, 1984) ("The [Rule 17a-5(e)(1)(i)(A)] exemption is available only to those members whose securities business has been limited to acting as a broker (agent) for a single issuer..."); *Grand Land Investments Corporation*, SEC No-Action Letter (May 23, 1983).

IV. ORDER

For the foregoing reasons, Sharemaster is suspended until it files the requisite annual report. At the end of six months, the suspension will convert to an expulsion if Respondent has at that time not filed a properly audited annual report for 2009. Respondent is also ordered to pay costs of \$1,785.00, which includes an administrative fee of \$750.00 and the cost of the hearing transcript. The costs shall be due as of a date established by FINRA.¹⁴

HEARING PANEL

Rochelle S. Hall
Hearing Officer

Copies to: Sharemaster c/o Howard Feigenbaum (via electronic and first-class mail)
 Ann-Marie Mason, Esq. (via electronic and first-class mail)
 William Jannace, Esq. (via electronic mail)
 Daniel M. Sibears, Esq. (via electronic mail)

¹⁴ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.