

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Respondent Firm.

DECISION

Complaint No. C10030003

Dated: August 20, 2004

**Respondent Firm failed to file timely a FOCUS Report. Held, findings affirmed and sanctions modified.**

**APPEARANCES**

For the Complainant Department of Enforcement: NASD Regional Counsel.

For the Respondent: Owner of Respondent Firm, Pro se.

**DECISION**

Respondent Firm (or "the Firm") appeals a 2003 decision of an NASD Hearing Panel pursuant to NASD Procedural Rule 9311(a). The Hearing Panel held that Respondent Firm filed a Financial and Operational Combined Uniform Single ("FOCUS") Report untimely in violation of Securities and Exchange Commission Rule 17a-5 and NASD Conduct Rule 2110. The Hearing Panel fined the Firm \$1,000 and assessed \$1,968.74 in costs. The Hearing Panel also ordered the Firm to file a certificate of corrective action, detailing the Firm's actions taken to prevent a recurrence of the filing deficiency.

For the reasons discussed herein, we affirm the Hearing Panel's findings of violation, but modify the sanctions imposed.

I. Background

The Firm became a registered member with NASD in 1983. The Firm operates as a \$5,000 fully-disclosed, nonclearing broker, providing investment advice and money management services. The owner of the Firm, serves as the Firm's president.

## II. Facts

The Firm is required to file a FOCUS Part IIA Report on a quarterly basis. The Firm's FOCUS Report for December 2001 was to be filed with NASD by January 25, 2002. The Firm filed this report on February 4, 2002—five business days late.<sup>1</sup>

The Owner did not dispute the late filing, but he made several arguments in favor of leniency. The Owner argued that the Firm is small and was dependent on a part-time accountant to prepare the Firm's financial reporting documents. The Owner stated that he was unaware at the time that the filing was late and that the accountant never gave him "any hint" that the FOCUS filing would be untimely. The Owner testified that the Firm was caught in a time of transition involving a new accountant but that he now has remedied the situation. The Owner also asserted that computer-based FOCUS filing is not "tamper proof" and that Internet traffic or server outages may cause inaccuracies in the computerized receipt dates.

The Firm has a history of filing untimely FOCUS Reports. In addition to the December 2001 FOCUS Report at issue here, the Firm filed untimely reports for the following FOCUS periods: March 1999, June 1999, December 1999, March 2000, and December 2000. The Firm received a warning letter from NASD as a result of the March 2000 late filing and a Letter of Caution as a result of the December 2000 late filing. The Firm did not provide NASD with a written response to the Letter of Caution as requested. Given the Firm's pattern of filing untimely FOCUS Reports and the Firm's failure to respond to a Letter of Caution, the Department of Enforcement ("Enforcement") elected to file a formal complaint against the Firm for the December 2001 untimely filing.

The Hearing Panel issued its decision on August 19, 2003, finding that the Firm had filed an untimely FOCUS Report as alleged in the complaint. The Hearing Panel fined the Firm \$1,000, ordered it to file a statement of corrective action, and imposed \$1,968.74 in costs. This appeal followed.<sup>2</sup>

## III. Discussion

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<sup>1</sup> SEC Rule 17a-5 uses business days, rather than calendar days, in its discussion of FOCUS filing requirements. NASD published the due dates for each 2001 quarterly FOCUS filing in the "For Your Information" section of the December 2000 Notice to Members.

<sup>2</sup> During oral argument, the Owner presented the NAC Subcommittee with a written copy of his argument. The Owner had attached five documents to his argument. Two of these documents were letters from NASD to the Owner, which were already admitted into evidence at the hearing before the Hearing Panel. The other three documents, which were not part of the record, consisted of two newspaper articles and a December 2003 letter from NASD to the Owner. The Subcommittee found these three attachments not relevant and did not admit them into evidence. We agree and adopt the Subcommittee's ruling as our own.

It is undisputed that the Respondent Firm's December 2001 FOCUS Report was untimely. SEC Rule 17a-5(a)(2)(iii) obligates the Firm to file FOCUS reports with NASD within 17 business days following the conclusion of each calendar quarter. In this case, Respondent Firm filed its December 2001 FOCUS Report on February 4, 2002, which was five business days late. Moreover, the Owner admitted at the hearing below and during oral argument that the December 2001 FOCUS Report was late.<sup>3</sup>

We affirm the Hearing Panel's finding that the Firm violated SEC Rule 17a-5 and NASD Rule 2110.<sup>4</sup>

#### IV. Procedural Issues

The Respondent Firm raises several procedural arguments on appeal. Prior to the filing of a formal complaint against the Firm, Enforcement attempted to resolve this matter with the Firm through the Minor Rule Violation Plan ("MRVP").<sup>5</sup> Enforcement offered to resolve the rule violation through the MRVP if the Firm agreed to pay a \$500 fine. Respondent Firm rejected Enforcement's offer, and Enforcement filed a formal disciplinary action.

Respondent Firm argues that Enforcement's offer of an MRVP settlement prohibited the Firm from defending itself and therefore violated the United States Constitution. We disagree. At the outset, we note that NASD is not a governmental actor, but a private corporation. See, e.g., Ditek Sec. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because NASD is not a governmental actor). As such, constitutional and common law due process requirements do not apply to NASD proceedings. See D.L. Cromwell Invs. Inc. v. NASD Regulation, Inc., 279 F.3d

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<sup>3</sup> We find that the Firm, as represented by the Owner, fails to accept responsibility for the untimely December 2001 FOCUS Report. The Owner admitted at the hearing before the Hearing Panel that the "buck stop[s] with [him] . . . because [he is] the person in charge." The Owner, however, repeatedly attempts to shift the blame for the untimely filing to the Firm's former accountant. The Firm, not its accountant, is ultimately responsible for the Firm's compliance with SEC and NASD Rules. In our view, the Firm fails to fully appreciate its responsibility for timely FOCUS filings as evidenced by the Owner's attempts to blame others. See Michael G. Keselica, 52 S.E.C. 33, 37 (1994) (rejecting blame shifting arguments).

<sup>4</sup> Failing to comply with the financial reporting requirements set forth by the SEC is a failure to observe the high standards of commercial honor and just and equitable principles of trade and thereby a violation of NASD Rule 2110. See Aristo Invs. of Am., Inc., 51 S.E.C. 90, 91 (1992).

<sup>5</sup> The MRVP provides an alternative means for NASD to address a rule violation. NASD Rule 9216(b); NASD Notice to Members 01-54 (Aug. 2001). A failure to file timely a FOCUS Report in violation of SEC Rule 17a-5 is included in the MRVP. IM-9216; NASD Notice to Members 01-54. Under the MRVP, NASD may impose a fine "not to exceed \$2,500." NASD Rule 9216(b).

155, 162 (2d Cir.), cert. denied, 537 U.S. 1028 (2002); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 698-99 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980). Moreover, the MRVP is a negotiated settlement approved by the SEC in which a respondent "accept[s] a finding of violation, consent[s] to the imposition of sanctions, and agree[s] to waive [the respondent's] right to a hearing before a Hearing Panel." NASD Rule 9216(b); see SEC Rule 19d-1(c)(2). The MRVP does not preclude a respondent from defending itself. Rather, it provides an opportunity for negotiation with NASD staff and the possibility of settlement without a full disciplinary hearing. The Firm had the option of settling this case through the MRVP or proceeding to a disciplinary hearing. The Firm chose the latter, and the Firm has not demonstrated that the offer of an MRVP settlement was prejudicial. We reject Respondent Firm's argument as meritless.

Second, Respondent Firm argues that because NASD had filed a disciplinary complaint against the Firm, NASD should have alerted Respondent Firm to the services available through NASD's Office of the Ombudsman.<sup>6</sup> Respondent Firm appears to misunderstand the role of the Ombudsman. NASD's website, as well as NASD Notice to Members 99-97 (Dec. 1999), thoroughly describes the role of the NASD Ombudsman. The purpose of the Ombudsman's Office is not to provide legal advice or dispute resolution services when an established complaint or appellate process exists—as it does here. When "an established complaint or appellate process exists, the Ombudsman staff will identify the process, explain it in general terms, and direct the caller to the appropriate office." Id. Furthermore, information regarding the Office of the Ombudsman is readily available to the public. Respondent Firm's charge is without merit.

Third, Respondent Firm argues that the Hearing Panel's decision in this case improperly fails to mention the names of each of the panelists with the exception of the Hearing Officer, correspondingly fails to reveal whether the panel rendered its decision unanimously, and fails to include the signature of all three panelists. NASD Procedural Rule 9268 requires only that the Hearing Panel render its decision by a majority vote among the three panelists and does not mandate that the decision reveal the "vote" of each panelist or that each panelist sign the decision. In addition, the Hearing Officer provided Respondent Firm with notice of the names of each panelist—through two letters from the Chief Hearing Officer dated April 4, 2003, and April 8, 2003, and by introducing each panelist to the parties at the onset of the hearing itself. We find that the Hearing Officer operated within his designated authority under NASD Procedural Rule 9235<sup>7</sup> and that the decision complies with NASD Rule 9268. Accordingly, we find no procedural irregularities with respect to the Hearing Panel's decision.

## V. Sanctions

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<sup>6</sup> A detailed description of the services provided by NASD's Office of the Ombudsman as well as contact information is available at [http://www.nasd.com/corp\\_info/ombudsman.asp](http://www.nasd.com/corp_info/ombudsman.asp).

<sup>7</sup> NASD Procedural Rule 9235 provides, in pertinent part, that the Hearing Officer shall have the authority to "draft[ ] a decision that represents the views of the majority of the Hearing Panel."

For Respondent Firm's violation of SEC Rule 17a-5 and NASD Conduct Rule 2110, the Hearing Panel imposed a \$1,000 fine and ordered the Firm to file a statement of corrective action. After a de novo review of the record, we find it appropriate to reduce the fine from \$1,000 to \$500. Respondent Firm asserts that it has implemented procedures to correct untimely FOCUS filings. In fact, the Firm has had no late filings over the last two years. To ensure, however, that the Firm appreciates the significance of timely FOCUS filings, we affirm the requirement that the Firm file a statement of corrective action.

1. Fine

The Sanction Guideline for FOCUS Reports provides for fines ranging from \$1,000 to \$20,000 for a report filed untimely.<sup>8</sup> The Overview to the Sanction Guidelines states that the recommended ranges are not absolute and that, based on facts and circumstances in each case, adjudicators may impose fines that are above or below the recommended ranges.<sup>9</sup> In determining the proper remedial sanction, the Sanction Guideline for FOCUS Reports also recommends that adjudicators consider the number of days late the firm filed the report and if the firm filed late to delay an operational, financial, or recordkeeping deficiency. Here, Respondent Firm filed its December 2001 FOCUS Report five business days late. There is no evidence in the record showing that Respondent Firm attempted to delay reporting any deficiency at the Firm.

In determining the appropriate sanctions, we have also considered the "General Principles Applicable to All Sanction Determinations" contained in the Sanction Guidelines.<sup>10</sup> The first general principle advises that adjudicators should consider firm size to ensure that disciplinary sanctions imposed are remedial and not punitive. Respondent Firm is a very small firm, employing fewer than five, full-time staff persons. The third general principle advises that adjudicators should tailor sanctions to respond to the misconduct at issue. The NAC has repeatedly accepted the tenet that the determination of appropriate sanctions depends on the facts and circumstances of each case. Roger A. Hanson, Complaint No. C8A000059, 2002 NASD Discip. LEXIS 5, at \*12 (NAC Mar. 28, 2002). We find it relevant that no client has ever complained about the Firm, no investor harm resulted from the Firm's violation, and the Firm appears to have resolved its financial reporting deficiencies. Accordingly, we find no remedial purpose is served by imposing a sanction within the recommended Sanction Guideline range (*i.e.*, \$1,000-\$20,000) and, instead, we impose a fine of \$500.<sup>11</sup> By reducing the sanctions in this

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<sup>8</sup> Sanction Guidelines (2001 ed.) at 76 (FOCUS Reports—Late Filing; Failing to File; Filing False or Misleading Reports).

<sup>9</sup> Sanction Guidelines (2001 ed.) at 1 (Overview).

<sup>10</sup> Sanction Guidelines (2001 ed.) at 3-8 (General Principles Applicable to All Sanction Determinations).

<sup>11</sup> See Sanction Guidelines at 5 (providing that a sanction below the recommended range may be appropriately remedial depending upon the facts of a particular case).

case, however, we do not intend to discount the importance of filing timely FOCUS Reports. Compliance with the requirements of SEC Rule 17a-5 is fundamental to the oversight of broker-dealers. Clinger & Co., 51 S.E.C. 924, 926 (1993).

In favor of leniency, Respondent Firm makes several arguments, which we address in turn. Respondent Firm argues that the Hearing Panel inappropriately found, without supporting evidence, that the Firm had a pattern of filing untimely FOCUS Reports prior to the December 2001 Report at issue here. We disagree. Contrary to Respondent Firm's assertion, there is evidence in the record to show that the Firm, on five prior occasions, had filed untimely FOCUS Reports. Enforcement introduced for each late filing a computerized report titled "Centralized FOCUS Review Filing Event" showing, among other things, the Firm's identification number, the Firm's name, the quarterly FOCUS period, and the date NASD received the filing from the Firm. Enforcement also introduced the testimony of an NASD examiner responsible for reviewing the Respondent Firm FOCUS filings and who testified that the Firm's filings were untimely. Additionally, Enforcement introduced a warning letter that NASD sent to the Firm following the March 2000 late filing and a Letter of Caution as a result of the December 2000 late filing.

Respondent Firm argues that the computer filings were not tamper proof and were therefore insufficient evidence of untimely filing. In support of its argument, the Firm presented a letter from its computer technicians stating that a transaction using "Web Based Internet Message Filing" may fail to "go through" due to slowdowns or bottlenecks in Internet traffic or because of a server outage. Respondent Firm, however, failed to present any evidence illustrating that these technical problems occurred with its FOCUS filings or any evidence showing the filings were timely. Respondent Firm could have called as a witness the accountant who filed the FOCUS Reports on behalf of the Firm to testify to the Firm's timely filings, but Respondent Firm did not. Moreover, the Owner admitted at the hearing before the Hearing Panel that he had no documentary evidence of timely filing. After fully reviewing the record, we find that there is no evidence to support Respondent Firm's argument that it filed timely the five prior FOCUS Reports.

Respondent Firm also argues that a chart introduced into evidence by Enforcement misrepresents the number of days late that the Firm allegedly filed the six FOCUS Reports because the chart uses calendar days rather than business days in its count. The chart does not misrepresent the facts. The chart accurately represents the number of calendar days late Respondent Firm filed each of the FOCUS Reports. Moreover, when taking into account only business days, each of the FOCUS Reports was untimely filed. The Sanction Guideline for FOCUS Reports does not distinguish between business days and calendar days.<sup>12</sup> Enforcement's chart is not misrepresentative.

Respondent Firm argues that the Hearing Panel erroneously refused to credit the Firm's absence of prior disciplinary history when it imposed sanctions. While the existence

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<sup>12</sup> See Sanction Guidelines at 76.

of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating. See, e.g., Dep't of Enforcement v. Fergus, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at \*59 (NAC May 17, 2001) (holding the absence of disciplinary history is not considered part of "relevant disciplinary history" under the Sanction Guidelines for purposes of reducing sanctions); Dep't of Enforcement v. Balbirer, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29, at \*10-11 (NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because [it] has acted in the manner in which [it] agreed (and was required) to act when entering this industry . . ."). In any event, we have given proper consideration to Respondent Firm's overall regulatory history.

Respondent Firm also argues that the Hearing Panel improperly sanctioned the Firm more severely than the sanctions proposed by Enforcement under the MRVP. Here, the offer of settlement is not relevant. See NASD Rules 9216(a)(4), 9270(j). As a general matter, however, in settled cases, the parties forgo the cost of litigation and agree to lesser sanctions; this is well recognized as a "settlement discount." See Dep't of Enforcement v. Belden, Complaint No. C05010012, 2002 NASD Discip. LEXIS 12, at \*27 (NAC Aug. 13, 2002); see also Howard R. Perles, Exchange Act Rel. No. 45691, 2002 SEC LEXIS 847, at \*34 (Apr. 4, 2002) (noting that "pragmatic considerations justify lesser sanctions in negotiated settlements"). The Overview to the Sanction Guidelines also recognizes the principle "that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle."<sup>13</sup> Thus, the Hearing Panel acted properly in imposing a fine in excess of \$500. Upon review, however, we find that an increased fine serves no remedial purpose. We therefore have chosen to reduce the fine.

## 2. Statement of Corrective Action

The Hearing Panel ordered the Firm to file a statement of corrective action setting forth, in writing, the actions taken to address the prior untimely FOCUS filings and to prevent future untimely FOCUS filings. We affirm the Hearing Panel's order.

At the hearing before the NAC Subcommittee, the Owner argued that one late FOCUS filing is a minor grievance, particularly in light of the Firm's status as a \$5,000 broker-dealer. Timely filing of FOCUS Reports is important regardless of the size of a firm, however. The Owner did assure the Subcommittee that the Firm has a new accountant in place who understands the importance of FOCUS filings and who files FOCUS Reports for other broker-dealers. To make certain that the Firm comprehends the significance of timely FOCUS filings, we require the Firm to file with NASD's District office a written statement delineating the current process that the Firm has in place to ensure timely FOCUS filings going forward.

## VI. Conclusion

We affirm the Hearing Panel's finding that Respondent Firm violated SEC Rule 17a-5 and NASD Rule 2110 by filing an untimely FOCUS Report. Accordingly, we fine Respondent

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<sup>13</sup> Sanction Guidelines (2001 ed.) at 1.

Firm \$500, order it to file with NASD's District office a written statement of corrective action within 60 days of the issuance of this decision, and order the Firm to pay costs of \$1,968.74.<sup>14</sup>

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President  
and Corporate Secretary

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<sup>14</sup> We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for nonpayment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for nonpayment.