

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	<u>DECISION ON REMAND</u>
District Business Conduct Committee For District No. 3	Complaint No. C3A950031
Complainant,	District No. 3
vs.	Dated: June 4, 1999
Respondent Firm 1	
and	
Respondent 2	
Respondents.	

The Securities and Exchange Commission dismissed an NBCC finding and remanded the case to redetermine sanctions for the remaining finding. The respondents are censured and jointly and severally fined \$1,000. DBCC costs and Respondent 2's suspension and requirement to requalify are eliminated.

In a decision dated September 14, 1998, the Securities and Exchange Commission ("Commission") sustained the finding of the National Business Conduct Committee ("NBCC")¹ that Respondent Firm 1, acting through Respondent 2, submitted an inaccurate FOCUS Report for the period ending April 30, 1994, but the Commission dismissed the finding that Respondent Firm 1 and Respondent 2 had engaged in a firm-commitment underwriting, thereby causing a net capital deficiency.² As a result of this dismissal, the Commission vacated the sanctions imposed by the NBCC and remanded the matter for a redetermination of sanctions. The NBCC had fined Respondent Firm 1 and Respondent 2 \$5,000, jointly and severally, suspended Respondent 2 for 10 days, and required

¹ The NBCC was the predecessor to the National Adjudicatory Council.

² This matter arose out of an NASD examination of Respondent Firm 1 in June 1994.

Respondent 2 to requalify by examination as a financial and operations principal ("FINOP"). The NBCC also assessed \$1,530.20 in costs, jointly and severally.

Background. Respondent Firm 1 became a member of the NASD in July 1988. Its membership was terminated in January 1997. Respondent 2 was Respondent Firm 1's Chief Executive Officer and Financial and Operations Principal ("FINOP"). Respondent 2 left Respondent Firm 1 in January 1997 and is not presently associated with a member firm.

Discussion

After reviewing the record and briefs submitted to us on remand, we impose a censure and joint and several fine of \$1,000 on Respondent Firm 1 and Respondent 2. As to Respondent 2, we eliminate the 10-day suspension and requirement to requalify as a FINOP. We also eliminate the assessment of costs against both respondents.

At the outset, we note that the NBCC's finding of a recordkeeping violation was sustained by the Commission and is not at issue. In its decision, the Commission noted that Respondent Firm 1 and Respondent 2 did not contest the NASD's conclusion that the report incorrectly characterized certain property and equipment as allowable assets in calculating the Respondent Firm 1's net capital. The Commission found the respondents' contentions that they did not intentionally misclassify the disallowed items and that they reasonably relied on the NASD's "approval" of earlier FOCUS Reports that also contained similar inaccuracies to be without merit. Therefore, we address solely the issue of the appropriate sanctions to be imposed for this violation.

The NBCC made it clear in its decision that the suspension and requalification requirement were being imposed based on its finding that Respondent Firm 1 had participated in firm-commitment offerings. Because the Commission has dismissed this finding, we conclude that it is appropriate also to eliminate the suspension and requalification requirement and to reduce the \$5,000 fine.

We have considered the arguments of Respondent Firm 1 and Respondent 2 on remand that Respondent 2's error was inadvertent and that the Association had approved earlier FOCUS Reports that also contained similar inaccuracies. We find these arguments to be without merit. The Commission addressed these contentions in its decision, in which it stated:

As [Respondent Firm 1's] FINOP, [Respondent 2] was responsible for the [Respondent Firm 1's] compliance with applicable financial reporting requirements and was responsible for the errors in the April 1994 FOCUS Report. As we have repeatedly stated, a 'regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation.' In any event, an NASD examiner told [Respondent 2] in 1993 that the [Respondent Firm 1's] October and November FOCUS Reports erroneously classified furniture and equipment as allowable assets, the same type of reporting violation at issue here. Thus, [Respondent 2's]

claims of inadvertence and reasonable reliance are contradicted by the record.

The NASD Sanction Guideline ("Guideline") in effect when the complaint in this matter was issued suggests a monetary sanction of \$2,500 to \$20,000. The Guideline also suggests that in a typical case of unintentional inaccuracy, neither the Respondent Firm 1 nor the financial principal should be suspended. The Guideline suggests considering the imposition of a requalification requirement on the FINOP.

Based on the facts of this matter, we have concluded that neither Respondent Firm 1 nor Respondent 2 should be suspended, and also that Respondent 2 should not be required to requalify as a FINOP. We have also concluded that a \$1,000 joint and several fine is appropriate.³ In reaching this conclusion, we have considered the factors enumerated in the Guideline, including the fact that the error involved one report and was not intentional.

Accordingly, we censure Respondent Firm 1 and Respondent 2 and fine them \$1,000, jointly and severally.

On Behalf of the National Adjudicatory Council,

Joan C. Conley
Senior Vice President and Corporate Secretary

³ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any 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 suspended or expelled from membership for non-payment. 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 non-payment.