

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:            )  
  ) File No. OIG-509  
OIG-509                            )

WITNESS: Number 65

PAGES: 1 through 47

PLACE: Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C.

DATE: Friday, June 19, 2009

**ORIGINAL**

The above-entitled matter came on for hearing, pursuant to notice, at 3:20 p.m.

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1 APPEARANCES:

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3 On behalf of the Securities and Exchange Commission:

4 DAVID KOTZ, ESQ., Inspector General

5 HEIDI STEIBER, ESQ.

6 CHRISTOPHER WILSON, ESQ.

7 DAVID WITHERSPOON, ESQ.

8 DAVID FIELDER, ESQ.

9 Office of the Inspector General

10 Securities and Exchange Commission

11 100 F Street, NE

12 Washington, DC 20549

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14 On behalf of the Witness:

15 TERRI REICHER, ESQ., Associate General Counsel

16 SUZANNE DUDDY, ESQ.

17 Office of General Counsel

18 Financial Industry Regulatory Authority, Inc.

19 1735 K Street, NW

20 Washington, DC 20006

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P R O C E E D I N G S

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MR. WITHERSPOON: We are on the record at 3:20 on Friday, June 19th, 2009, at the United States Securities and Exchange Commission, Office of the Inspector General. We're conducting this interview by phone, and I'm going to swear you in at this time.

Could you please raise your right hand?

Whereupon,

SUSAN TIBBS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

MR. WITHERSPOON: Thank you. Please state and spell your full name for the record.

THE WITNESS: Susan Tibbs, S-u-s-a-n T-i-b-b-s.

MR. WITHERSPOON: Thank you, Ms. Tibbs. My name is David Witherspoon. I'm an attorney in the Office of the Inspector General, United States Securities and Exchange Commission. With me today is David Fielder, Heidi Steiber, Chris Wilson, Kristina Katz and April Elliott here at the Office of the Inspector General.

This is an investigation by the Office of the Inspector General, case number OIG-509, regarding Madoff Securities and Bernard L. Madoff. We're going to ask you certain questions today, and you're going to provide answers under oath. The court reporter will record and later

1 have been options in companies or securities on the S&P 100,  
2 but they claimed the counterparties were in Europe. For an  
3 NASD member, what if any records would you have had available  
4 to confirm whether or not those positions existed?

5 A In -- I'm not sure if you said this or not -- were  
6 these conventional or standardized options?

7 Q They were American -- they were purportedly  
8 American style options.

9 A Conventional or OTC?

10 Q OTC.

11 A Were they listed options or over-the-counter  
12 options?

13 Q Over the counter, with European counterparties,  
14 small European banks.

15 A It's not a simple question, which is why I hesitate  
16 for a second. NASD or FINRA has a member reporting rule,  
17 it's Rule 2860, which requires members to report contracts  
18 over 200 -- sorry, positions of 200 contracts or more to  
19 FINRA for OTC options, and then for what we call an access  
20 member, they're required to report both their -- a member is  
21 required to report their listed and their OTC options also to  
22 FINRA.

23 So to answer your question, it would depend -- if  
24 FINRA had a record of a large option position report, it  
25 would be by virtue of the report from the member.

1 Q Okay. This rule you referred to, was it in place  
2 in 2005 and 2006?

3 A That is correct.

4 Q Has the rule changed any since that time period?

5 A Yes, it has. And I have to say that I no longer  
6 work specifically with this rule, but it is basically the  
7 same, but there have been some changes to it.

8 Q The general requirements that you've already  
9 described to us, were they in existence in 2005 and 2006?

10 A The member reporting obligations were.

11 Q Okay. For the rest of today's conversation, if  
12 there is a distinction between what the rule requires now or  
13 what is available now, you can point that out to us, but  
14 we're primarily interested in what the rule required and what  
15 was available or might have been available back in 2005 and  
16 2006, okay?

17 A Okay, I'll do my best.

18 Q Okay. You mentioned different requirements for  
19 members and for access members. I'm not familiar with that  
20 terminology. What is an access member?

21 A An access member is a member of -- is a FINRA  
22 member who is not a member of one of the listed options  
23 exchange.

24 Q Okay. So if -- it's no secret we're specifically  
25 interested in Madoff Securities and the investigation of

1 Madoff Securities back in 2005 and 2006. He was a  
2 member -- he had an account at CBOE, so he would not have  
3 been an access member, is that correct?

4 A If he was a member of the CBOE, he would not  
5 be -- and he was a member of FINRA, or NASD at the time --

6 Q Right.

7 A Then he would not be considered an access member,  
8 that is correct.

9 Q So for that type of member, I think I'm repeating  
10 what you said -- I apologize -- but he would have been  
11 required to file a report for any options positions that he  
12 held with over-the-counter parties in excess of 200 contracts?

13 A If he was not an access member, member of FINRA, he  
14 would be required to report any positions over 200 contracts  
15 to FINRA.

16 Q How frequently did he have to file -- did a member  
17 have to file those reports?

18 A Reports were filed on a T-plus-1 basis. I'll wait  
19 for the question.

20 Q No, that was the question. So it wasn't a  
21 quarterly or annual reporting requirement, it was when  
22 activity occurred?

23 A It was when the positions were established at or  
24 above the 200 contracts.

25 Q And I'm guessing, then that the report would

1 not -- he would not have to summarize all of his options  
2 positions at that specific point in time in excess of 200  
3 contracts, he would be reporting the transaction or the  
4 positions that had just put him over 200 contracts in a  
5 particular issuer, is that correct?

6 A It's a position reporting requirement, so he would  
7 be required to report the position.

8 Q Let me give you a different -- I mean, a  
9 hypothetical. If he, say, had a thousand contracts and five  
10 companies on the S&P 100, and then entered into an  
11 over-the-counter transaction with a counterparty for a sixth  
12 issuer a thousand contracts, when he files the report for  
13 that sixth position, does he just file the report saying that  
14 he has now acquired a position in that issuer, or does he  
15 file a report summarizing his positions in the other five?

16 A Well, the question is -- so that we're talking  
17 about the same thing, are you talking about an index position  
18 or are you talking about individual stock positions?

19 Q An index position.

20 A It would be the same -- the OEX position, for  
21 example --

22 Q Right.

23 A -- it was a report of the position.

24 Q I see your point, yes. What about for individual  
25 companies?

1           A     On a -- it would be on a stock-by-stock basis, when  
2     the position itself exceeds 200 contracts.

3           Q     So it if was on a stock-by-stock basis, would NASD  
4     back then have been able to, at any point in time, compile a  
5     list of the -- all of the options positions an entity had  
6     over 200 contracts, based on their previous filings?

7           A     If they were filed we would retain them, yes.

8           Q     Would you be able to, based on those filings at any  
9     point in time, sort of run a report showing all of their  
10    cumulative contract positions up to that point in time in  
11    options series of individual issuers?

12          A     It may not necessarily be running a report. I  
13    believe that it was in July 2005 the reporting requirement  
14    was changed. We previously had required members to report on  
15    paper their positions. In -- I believe it was July 2005 we  
16    changed to an electronic reporting, and there was a period of  
17    time where some firms reported electronically before they  
18    were required to, but we were still able to receive them, and  
19    there was a period of time when we stopped accepting the  
20    paper reporting and went entirely to electronic.

21          Q     The paper or the report that the member actually  
22    files, that's what's referred to as the LOPR report, the  
23    large options positions report, or is that a report that NASD  
24    generated based on those filings?

25          A     Well, the members are required to report their

1 positions, and to split hairs and technicalities, we called  
2 it the LOPR report. The member reported their position; I  
3 guess you could say that then when we received it it was  
4 called a LOPR.

5 Q Mm-hmm.

6 A I don't know that we really distinguished. They  
7 were faxed in on paper or we received electronically.

8 Q I'm just -- I mean, just a little confused from my  
9 enforcement days. I remember requesting LOPR reports from  
10 you guys as an enforcement attorney and receiving a  
11 NASD-generated document, not just a copy of a member's  
12 submission. So is there another report that NASD generates  
13 that's also referred to as a LOPR report?

14 A No, I think that -- two separate things. When it  
15 was on paper, I think that the name -- I'm not a hundred  
16 percent on this, but I believe that the name of it was NASD  
17 LOPR report, with a form. I can't a hundred percent remember  
18 the name of it, but when it was just on paper, we received  
19 them on paper and we stored them on paper and we didn't  
20 compile anything with them. When they were electronic, the  
21 submission was done through SIAC and sent to us, and it would  
22 have been -- we -- what's the word -- prepared it -- we'd  
23 electronically read the data and it's displayed in our system  
24 internally.

25 Q And then you -- if you printed that out that was

1 also referred to as a LOPR report?

2 A Yes.

3 Q Okay. What were the sanctions or penalties for not  
4 filing a required report under this rule?

5 A It would depend on the circumstances. We have -- I  
6 believe that the sanction guidelines specifically cover LOPR  
7 reporting. I don't recall specifically.

8 Q Did the SEC have jurisdiction to enforce the LOPR  
9 rule?

10 A I don't know.

11 Q Okay. Do you know if they do today?

12 A I don't know. I currently don't do this work.

13 Q Okay. Do any of you guys have any general  
14 questions before we move on to anything else? Okay. I think  
15 we're going to move on to sort of the second main topic now,  
16 which is any communications you had back in the 2006 time  
17 frame with members of the SEC's New York Enforcement staff.  
18 Do you recall having any communications with members of the  
19 Enforcement staff about Bernard Madoff?

20 A I do not.

21 Q Okay. Have you searched any records since we first  
22 contacted you to refresh your recollection if you had such  
23 contact?

24 A Yes, I did.

25 Q Okay. What did you find?

1 Q Okay. Anything else you have educated speculation  
2 about what the conversation about LOPRs was about? It seems  
3 like it was about a filing requirement. Would you agree with  
4 that?

5 A Well, I mean, that's what the e-mail says. I'm not  
6 sure what you're asking me.

7 Q Okay, I don't think this is being very productive.  
8 Do you have any educated guess or recollection as to why you  
9 may have told Ms. Tibbs to talk to Gene DeMaio?

10 A You mean told -- that I would have told her to talk  
11 to Gene?

12 Q Okay, if you look at the next paragraph, it begins,  
13 "Susan suggested that before talking to Barney on Friday we  
14 talk to Gene DeMaio in an NASD, who runs the Amex  
15 surveillance." Assuming that that is an accurate and  
16 truthful reflection of something that you suggested, do you  
17 have any idea why you would have suggested she call Gene  
18 DeMaio?

19 A Gene is -- as it says, and at the time, I think he  
20 was a vice president -- very experienced in options.

21 Q Okay. I'm going to go back and take another crack  
22 at what we were talking about before with the text of the  
23 e-mail. I'm going to try it this way: I will tell you that  
24 I infer from this e-mail that your conversation with  
25 Simona Suh was about the LOPR filing requirement; that you

1 told her that you had done a search for a particular date and  
2 found no LOPR reports from Bernard Madoff regarding S&P 100  
3 index option positions.

4 I am going to infer or I do infer that you told her  
5 if he held those positions but had not filed the LOPR report  
6 it might not necessarily be a reporting violation if the  
7 London affiliate was writing the contracts and holding the  
8 positions.

9 Now is there anything that you know or that you see  
10 in this e-mail that you would like to point out makes my  
11 inference unreasonable?

12 A No.

13 Q Let me ask you -- you mentioned something about  
14 access members having to file positions of over 100,000  
15 contracts.

16 A No, I didn't.

17 Q Okay, I'm sorry. What did you say earlier about  
18 access members?

19 A Access members are required to submit their listed  
20 options positions in addition to their OTC option positions.

21 (SEC Exhibit No. 3 was marked for  
22 identification.)

23 BY MR. FIELDER:

24 Q Let me turn your attention to a document that we're  
25 going to mark as Exhibit 3. And this document is