SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48707 / October 28, 2003

Admin. Proc. File No. 3-10864

In the Matter of the Application of

RICHARD KWIATKOWSKI

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

Acts Detrimental to the Interest or Welfare of the Exchange

Trading for Account in Which Member Has an Interest

Misstatements to Exchange

Recordkeeping Violations

Member of national securities exchange effected trades for an account in which the member had an interest; traded for that account in a manner that violated exchange rules; made misstatements to the exchange; and failed to make and preserve required records. Held, exchange disciplinary action sustained.

APPEARANCES:

Jenice L. Malecki, of The Law Office of Jenice L. Malecki, for Richard Kwiatkowski.

Robert A. Marchman, Martin S. Mazur, and Virginia J. Harnisch, for the New York Stock Exchange, Inc.

Appeal filed: August 1, 2002
Last brief received: December 5, 2002

I.

Richard Kwiatkowski, a member of the New York Stock Exchange, Inc. ("NYSE" or "Exchange") and, since March 1982, an independent floor broker, appeals from the NYSE's disciplinary action against him. The NYSE determined that, between September 1996 and February 1998, Kwiatkowski engaged in conduct inconsistent with just and equitable principles of trade and engaged in acts detrimental to the interest or welfare of the Exchange. The NYSE found that Kwiatkowski violated Section 11(a) of the Securities Exchange Act of 1934, 1/ Exchange Act Rule 11a-1, 2/ and NYSE Rule 111(a) 3/ by executing orders on the floor of the Exchange for an account maintained by Oakford Corporation ("Oakford"), a non-member firm, in which he had an interest. The NYSE found that Kwiatkowski also violated NYSE Rule 95(c) 4/ when he represented orders for the same security on

---

1/ 15 U.S.C. § 78k(a). Section 11(a), subject to certain exemptions not relevant here, makes it "unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion." For a discussion of the regulatory framework governing floor brokers and their trading for accounts in which they have an interest or over which they exercise discretion, see John R. D'Alessio, Exchange Act Rel. No. 47627 (Apr. 3, 2003), 79 SEC Docket 3627, appeal pending (2d Cir.).

2/ 17 C.F.R. § 240.11a-1. Rule 11a-1, with certain exceptions not relevant here, prohibits an exchange member, while on the trading floor, from initiating any transaction in any security traded on the exchange for any account "in which such member has an interest, or for any such account with respect to which such member has discretion."

3/ NYSE Rule 111(a) provides that "[n]o member shall initiate transactions, while on the Floor, for an account in which he has an interest."

4/ NYSE Rule 95(c) states that:

> If a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established

(continued...)

both sides of the market at the minimum variation, 5/ established a position in the security by executing or partially executing one of those orders, and then liquidated or covered that position without obtaining a new order that was time-stamped upstairs and appropriately marked as a "buy cover" or "sell liquidate" order. The NYSE further determined that Kwiatkowski violated NYSE Rule 91 6/ by crossing orders without first ensuring that the order had an opportunity for an improved price on the Exchange floor and without providing notification to, and obtaining acceptance of the trade from, the member who placed the trade.

The Exchange also found that Kwiatkowski made material misstatements to the Exchange in violation of NYSE Rule 476(a)(4). 7/ Finally, the NYSE determined that Kwiatkowski violated NYSE Rule 440 and Exchange Act Rules 17a-3 and 17a-4 by failing to make and preserve required records. 8/

The Exchange censured Kwiatkowski and imposed a permanent bar from employment on the floor of the Exchange and a five-year

---

4/ (...continued)
during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor.

5/ The minimum variation, also referred to as the minimum fluctuation or minimum tick, is the smallest possible price movement of a security.

6/ NYSE Rule 91 prohibits a member from crossing trades of a customer with an account in which the member or its member organization, among others, "is directly or indirectly interested," without first ensuring that the order has an opportunity for an improved price on the Exchange floor and providing notification to, and obtaining acceptance of the trade from, the member who placed the trade.

7/ NYSE Rule 476(a)(4) provides that the Exchange may discipline members who make a "material misstatement to the Exchange."

8/ NYSE Rule 440 requires brokers and dealers to make and preserve books and records prescribed by the NYSE and by Exchange Act Rules 17a-3 and 17a-4.

Exchange Act Rules 17a-3 and 17a-4 require brokers and dealers to keep and preserve current books and records regarding executed securities transactions and customer accounts. 17 C.F.R. §§ 240.17a-3 and 240.17a-4.

plenary bar. We base our findings upon an independent review of the record.

II.

Richard Kwiatkowski has been employed on the floor of the Exchange since 1972. Since 1982, he has been a lessee member of the Exchange and employed as a broker on the floor of the Exchange. Kwiatkowski has worked for a number of member firms over the course of his career as a floor broker. In or about September 1994, Kwiatkowski joined Sharpe Securities ("Sharpe" or the "Firm"), a member organization. At Sharpe, Kwiatkowski executed orders for the Firm and also conducted an independent floor broker business. Kwiatkowski's arrangement with Sharpe provided that he was to receive 80 percent of the independent commission business he generated, after expenses were deducted, and the Firm was to receive the remaining 20 percent.

Kwiatkowski met with William Kileen, a principal of Oakford, in August 1996. Kileen told Kwiatkowski that Kileen was looking for people to trade for Oakford. According to Kwiatkowski, he and Kileen reached a verbal agreement whereby Kwiatkowski would receive 70 percent of the profits generated by his trades for the Oakford account and Oakford would receive 30 percent. Kwiatkowski testified that Kileen "told me to bill him at $5 [per 100 shares] and he would pay me approximately 70 percent of the profits." Kwiatkowski testified that his arrangement with Oakford was highly unusual and it was the only time in his eighteen years as a floor broker that he shared in the profits of an account for which he traded. Kwiatkowski further acknowledged in testimony that he did not speak with anyone at the Exchange regarding whether his compensation arrangement with Oakford was proper. 9/

9/ In his reply brief, Kwiatkowski asserts that he consulted with a floor official about his relationship with Oakford. According to Kwiatkowski's testimony, however, he met with this official because the official was looking to hire a trader. Kwiatkowski told the floor official "the amount of business I thought I could bring to the firm. I also told him I was trading for an account." When asked whether the floor official gave him any advice or counsel about his relationship with Oakford, Kwiatkowski testified, "No. He said nothing. He said nothing to it at all." Nothing about this conversation about business prospects indicates that Kwiatkowski disclosed to this official the nature of his arrangement with Oakford or sought or received advice from this official as to whether Kwiatkowski's relationship with Oakford was appropriate under the federal securities laws or NYSE rules.

The record establishes that Kwiatkowski began executing orders for the Oakford account in September 1996 and continued trading for the account until Oakford ceased operations in February 1998. Kwiatkowski testified that he was able to monitor the profitability of the account by reviewing weekly and monthly profit and loss statements provided to him by Oakford. After reviewing these statements, Kwiatkowski discarded them.

Kwiatkowski understood that, in determining his compensation for the Oakford account, losses from unprofitable trades would be deducted from the amounts generated by profitable trades. For example, in September 1997, Kwiatkowski's trading for the Oakford account resulted in a loss of $1,230. Oakford made no payment for that month even though Kwiatkowski billed Oakford -- consistent with the $5 per 100 share formula -- $28,900 for the 578,000 shares that he traded for the account. Kwiatkowski's trades for the Oakford account for October generated a profit of $10,451. Oakford subtracted the $1,230 loss suffered in September from the profit generated in October and paid Kwiatkowski's firm approximately 69.4 percent of that amount.

The total profit generated by Kwiatkowski's trades for the Oakford account over the course of the approximately year and one-half that he traded for the account was $250,989. Oakford paid Kwiatkowski's firm a total of $175,989, which constituted approximately 70 percent of the account's net profits.

The record also shows that on 33 occasions during the course of his trading for the Oakford account, Kwiatkowski received orders for the purchase or sale of securities from customers and filled or partially filled those orders by buying or selling the securities for the Oakford account. On sixteen occasions, Kwiatkowski entered the floor with orders for the same security at the minimum variation on both sides of the market and, after executing one of those orders, liquidated or covered that position without obtaining a new order.

During 1998, the Exchange's Division of Enforcement initiated an investigation into Kwiatkowski's conduct. On November 4, 1998, as part of this investigation, Kwiatkowski testified under oath. He stated that he did not know whether payment to him from Oakford depended on the profitability of his trades for the Oakford account, that he did not share in the profits of the Oakford account, and that he never received any documents from Oakford related to his billings of, or payment from, Oakford.

In February 1999, the Exchange called Kwiatkowski to testify again. During this investigative testimony Kwiatkowski admitted that he had understood, at the time he was trading for Oakford, that Oakford would pay him 70 percent of the net profit generated by his trades for the Oakford account. He also testified that he

received weekly statements from Oakford that showed the profit and loss for the account for the prior week. At the end of each month, he also received a statement detailing the profit and loss for the account for that month. Kwiatkowski testified that he reviewed these statements and then discarded them. At the hearing, Kwiatkowski acknowledged these inconsistencies and admitted that his testimony on November 4, 1998 was false.

III.

A. Kwiatkowski Had An Interest in the Oakford Account

The record evidence establishes that Kwiatkowski's compensation from Oakford was calculated based on a percentage of the net profits generated by his trades for the Oakford account. He received approximately 70 percent of the net trading profits for the account -- that is, losses were offset against profits before Oakford paid Kwiatkowski. Because Kwiatkowski shared with Oakford in the economic risk of the trades, Kwiatkowski had an interest in the Oakford account, and the account was Kwiatkowski's "own account." His trades for the Oakford account, therefore, violated Exchange Act Section 11(a), Exchange Act Rule 11a-1, and NYSE Rule 111(a).

Further supporting the Exchange's finding that Kwiatkowski had an interest in the Oakford account is the fact that he received and reviewed weekly and monthly profit and loss statements for the Oakford account. Kwiatkowski's actions in this regard were consistent with those of a partner who shared in the economic risk of the account, and inconsistent with the action of an agent whose compensation depended on the number of shares traded. In addition, the Exchange established that Kwiatkowski was aware that he would be paid only if the account generated a profit, regardless of how many shares he traded. For example, he was not paid for the 578,000 shares he traded for Oakford in September 1997 -- for which he billed Oakford $28,900. When questioned about this at the hearing, Kwiatkowski stated, "I wasn't surprised. I knew there was a loss for the month. I didn't expect to be paid."

Despite the evidence to the contrary, Kwiatkowski maintains that he did not have an interest in the Oakford account. He alleges that a number of facts are inconsistent with, and undermine, the Exchange's finding that he had such an interest. For example, Kwiatkowski argues that the Exchange has failed to show typical indications of ownership such as evidence that Kwiatkowski "funded the account, used it as collateral, made ultimate trading decisions or withdrew funds." Kwiatkowski states that it "is undisputed that the account was not in his name." The ownership indicia cited by Kwiatkowski, however, are not dispositive for these Exchange Act and NYSE rule purposes. Rather, our inquiry focuses on whether Kwiatkowski was

compensated in such a way that he shared in the trading performance of the account. We conclude that there is ample evidence that Kwiatkowski did so by virtue of his arrangement to share in 70 percent of the profits and losses generated by his trades for the Oakford account and that, therefore, the Oakford account was Kwiatkowski's own account.

B. Kwiatkowski Committed Additional Trading Violations

The Exchange has established that, on 33 occasions, Kwiatkowski crossed trades for the Oakford account with trades for his customers without following the requirements of NYSE Rule 91. 10/ By doing so, Kwiatkowski traded as principal with his customers, abrogating his duty to act in his customers' best interests and violating the fundamental principles of agency law embodied in NYSE Rule 91.

Kwiatkowski's only defense to this allegation is to repeat his arguments that he did not have an interest in the Oakford account and, therefore, treated the Oakford account as he would have treated any customer account. As discussed supra, we have rejected Kwiatkowski's arguments regarding his interest in the Oakford account and, accordingly, they fail to support his claim that he did not violate NYSE Rule 91. We find, as did the Exchange, that Kwiatkowski violated NYSE Rule 91 by crossing orders for the Oakford account with his customer orders.

Kwiatkowski admits that he violated NYSE Rule 95(c) sixteen times during the course of his trading for the Oakford account. Rule 95(c) applies to a broker who enters the trading floor with orders for the same security on both sides of the market, at the minimum variation, and who establishes a position with one of those orders. In order to liquidate or cover this position, the broker must obtain a new order that is time-stamped upstairs and properly marked as a "buy cover" or "sell liquidate" order.

10/ Rule 91 provides that, when crossing a customer order with the member's own account, a member may take securities for its own account, provided "(1) he shall have offered the same in the open market at a price which is higher than his bid by the minimum variation permitted in such securities, and (2) the price is justified by the condition of the market, and (3) the member who gave the order shall directly, or through a broker authorized to act for him, after prompt notification, accept the trade." A member may supply securities from its own account provided that he shall have "bid for the same in the open market at a price which is lower than his offer by the minimum variation permitted in such securities," and provided that he meets the second and third conditions for taking securities for his own account.

Kwiatkowski admits that, on sixteen occasions, he represented orders from Oakford for the same security on both sides of the market, at the minimum variation, established a position with one of those orders, but then failed to obtain the requisite "buy cover" or "sell liquidate" order. He seeks to minimize the seriousness of these violations by stating that they "were simple errors of ignorance." In so doing, he ignores the important purpose of NYSE Rule 95(c). The Rule is meant to prevent floor brokers from unfairly using their time and place advantages to benefit some of their customers at the expense of others. 11/ By executing one order immediately after the other, the floor broker can garner the spread without ever leaving the trading floor. As we have stated previously, "such 'instantaneous representation' may create the perception that intra-day traders have a time and place advantage over other market participants." 12/ Requiring floor brokers to leave the trading floor and re-establish contact with the customer eliminates this continuous representation and minimizes the broker's "perceived time and place advantage, thereby enhancing investors' confidence in the fairness and orderliness of the Exchange market." 13/ Kwiatkowski's violations of this rule are especially serious, given the fact that he used his advantages of time and place, in violation of NYSE Rule 95(c), to benefit an account in which he had an interest.

C. Kwiatkowski Made Misstatements to the Exchange and Failed to Make and Preserve Required Records

Kwiatkowski admits that he made a number of false statements to the Exchange in his testimony, given under oath, on November 4, 1998. At the hearing, he admitted that his testimony on November 4 was false when he stated that he had not shared in the profits of any customer account and was never given any documents by Oakford relating to his trading for the Oakford account, his billing for that account, or what he was being paid for his trades for that account. We find, therefore, that these statements by Kwiatkowski on November 4 violated NYSE Rule 476(a)(4).

Kwiatkowski also admits that he failed to preserve the weekly and monthly profit and loss statements that he received from Oakford for his trading for the Oakford account.

11/ See Self-Regulatory Organizations: New York Stock Exchange, Inc,; Order Approving Proposed Rule Change to Amend Exchange Rule 95 to Add New Intra-Day Trading Provisions, Exchange Act Rel. No. 34363 (July 13, 1994), 57 SEC Docket 326, 328.

12/ Id.

13/ Id.

Exchange members are required to preserve for at least three years "originals of all communications received . . . by [such] member . . . relating to [his] business as such." 14/ Kwiatkowski violated this requirement when he discarded the profit and loss statements sent to him by Oakford. Kwiatkowski also admits that he prepared inaccurate commission bills that indicated he was receiving $5 for every 100 shares he traded for the Oakford account, rather than his true compensation of 70 percent of the profit generated by his trades for the account. We conclude that Kwiatkowski's failure to make and preserve these records constitutes a violation of the recordkeeping requirements of Exchange Act Rules 17a-3 and 17a-4 and NYSE Rule 440.

* * *

We conclude, as did the Exchange, that Kwiatkowski violated Exchange Act Section 11(a), Exchange Act Rule 11a-1, and NYSE Rules 111(a), 91, and 95(c) in the course of trading as a floor broker on the floor of the Exchange, violated Exchange Act Rules 17a-3 and 17a-4 and NYSE Rule 440 by failing to make and preserve required records, and violated NYSE Rule 476(a)(4) by making material misstatements to the Exchange.

IV.

Kwiatkowski makes a number of arguments that this disciplinary proceeding was deficient on procedural and due process grounds.

A. Kwiatkowski contends that he lacked notice that his arrangement with Oakford was prohibited. 15/ He argues that the Exchange failed to provide notice by (1) not articulating a standard for what "interest in an account" meant with respect to Section 11(a) and Rule 11a-1; and (2) not enforcing compliance by floor brokers with Section 11(a) and Rule 11a-1.

Kwiatkowski's first argument is refuted by the testimony from an expert witness offered by the Exchange that floor brokers were aware, at the time that Kwiatkowski was trading for the Oakford account, that it was a violation of the federal securities laws and Exchange rules to share in the profits of an account for which they traded. Another expert witness offered by the Exchange testified that the Exchange always considered trading by floor brokers for an account in which the broker shared in 70 percent of the profits and 70 percent of the losses

---

14/ Exchange Act Rule 17a-4(4). 17 C.F.R. § 240.17a-4(4).

15/ Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996).

to be a violation of Section 11(a) and Rule 11a-1. Even Kwiatkowski's own expert witness testified that, had he been asked in 1996, he would have advised Kwiatkowski not to enter into an arrangement with Oakford in which he shared 70 percent of the net profits.

Kwiatkowski's claim that he did not have notice that his conduct violated federal securities laws and Exchange rules is further undermined by the facts that he created false invoices to conceal his arrangement with Oakford and discarded the profit and loss statements he received from Oakford. His contemporaneous concealment of the evidence of his profit-sharing arrangement illustrates his understanding that the arrangement was prohibited. Given this record evidence, we do not believe that Kwiatkowski lacked notice that his conduct was prohibited.

Kwiatkowski attempts to buttress his first argument with citation to the decision in United States v. Oakford Corp. 16/ which he asserts requires the Commission to conclude that Kwiatkowski lacked notice of the requirements of Section 11(a) and related rules. In so doing, Kwiatkowski ignores the district court's conclusion in that matter that the potential for violating Section 11(a) and Rule 11a-1 by sharing in a customer's profits was not hidden from members of the Exchange. 17/ The court based its conclusion in part on a 1992 report of a study on the practice of flipping that the Exchange had commissioned. That report noted that the Exchange viewed trades by a floor broker for an account in which the broker was a partner as a violation of Section 11(a). 18/

In addition, in other NYSE appeals recently before us, we rejected a similar argument that brokers operating on the floor of the Exchange during the period at issue here did not have notice that sharing in the profits and losses of an account gives

---

16/ 79 F. Supp.2d 357 (S.D.N.Y. 1999).

17/ Oakford, 79 F. Supp.2d at 366 ("Nor was the potential for violating Section 11(a) and Rule 11a-1 by sharing in a customer's profits hidden from the members of the Exchange.").

18/ Id. citing New York Stock Exchange, Inc., 70 SEC Docket at 159 (The report of the Exchange's Committee on Trading for Eighths noted that, if an independent floor broker "is compensated for his services based on the profitability of transactions in such a way that he becomes, in effect, a partner with his customer in the trade, such a broker may then become subject to the restrictions contained in Section 11(a).").

the broker an interest in the account. 19/ In any event, Section 11(a), Exchange Act Rule 11a-1, and the related NYSE rules are sufficiently specific to have put Kwiatkowski on notice that he was prohibited from trading for the Oakford account because he was sharing in the profits and losses of that account.

Nor are we persuaded by Kwiatkowski's second argument that he was induced to commit the violations at issue here by the Exchange's failure -- documented in our 1999 settled order making findings against the Exchange under Section 19(h)(1) of the Exchange Act -- to enforce compliance by independent floor brokers with the requirements of Section 11(a) and Rule 11a-1. Kwiatkowski voluntarily agreed to abide by the rules and regulations of the Exchange and the federal securities laws when he became an Exchange member. 20/ Any failure to police such arrangements does not excuse Kwiatkowski from his failure to comply with NYSE rules and regulations, or with the federal securities laws. 21/

B. Kwiatkowski further argues that he was denied a fair hearing. Kwiatkowski takes particular exception to the Hearing Panel's denial of his request for (1) all minutes and reports of the "Intermarket Surveillance Group, Market Surveillance Committee and Trading Committee, which became the Intra-Day Trading Committee" that concern Section 11(a) and related rules and discuss meetings between 1992 and 1998; and (2) notes and memoranda discussed in a February 20, 2001, article in the Wall Street Journal.

19/ John R. D'Alessio, 79 SEC Docket at 3644 n.44 (holding that D'Alessio, who traded for an account at Oakford from June 1994 through February 1998, had fair notice of the requirements of Section 11(a) and Exchange Act Rule 11a-1); Edward John McCarthy, Exchange Act Rel. No. 48554 (Sept. 26, 2003) __ SEC Docket __ (holding that McCarthy, who traded for an account at Oakford from June 1995 through March 1996, had fair notice of the requirements of Section 11(a) and Exchange Act Rule 11a-1).

The October 7, 1998, letter sent to the Commission's Director of the Division of Enforcement by Richard Grasso, then the Chairman and Chief Executive Officer of the Exchange, on which Kwiatkowski also relies, lends no support to his claim of lack of fair notice. For a detailed discussion of this letter, see John R. D'Alessio, 79 SEC Docket at 3645.

20/ Gold v. SEC, 48 F.3d 987, 992 (7th Cir. 1995).

21/ John R. D'Alessio, 79 SEC Docket at 3644.

Rule 476(c) sets forth the standard for document requests in Exchange disciplinary hearings. It provides, in pertinent part:

> Upon application to the Chief Hearing Officer of the Exchange by either party to a proceeding, the Chief Hearing Officer, or any Hearing Officer designated by the Chief Hearing Officer . . . may require the Exchange to permit the respondent to inspect and copy documents or records in the possession of the Exchange which are material to the preparation of the defense . . . .

Kwiatkowski has failed to establish how these documents were material to preparation of his defense, as required by Rule 476(c). He asserts that "these documents, and the expected testimony thereto, call into question the candor of the NYSE's position regarding profit based compensation and show an intentional and deliberate withholding of information to floor brokers and the industry and its regulators." Kwiatkowski also admits, however, that he did not consult with anyone at the Exchange regarding whether his compensation arrangement with Oakford was permissible. He does not claim that he relied on any Exchange study or report to justify his conduct with respect to the Oakford account. Given these facts, we do not see how the documents sought by Kwiatkowski would be material to his defense.

Kwiatkowski also argues that the Exchange erred when it denied him the opportunity to call as witnesses three senior Exchange officials: Robert McSweeney, Donald Seimer, and Edward Kwalwasser. Kwiatkowski alleges that these "individuals were essential to issues of fair notice and reasonable interpretation of 11(a) and related rules and regulations." This unsupported assertion does not demonstrate that these individuals would have provided material testimony. The Exchange's two expert witnesses and Kwiatkowski's own expert witness testified with respect to the Exchange's interpretation of Section 11(a) and the understanding of Exchange members regarding the prohibitions of Section 11(a). Moreover, Kwiatkowski did not point the Hearing Panel to any statements made by the witnesses he sought to call in any context that indicated that the Exchange sanctioned conduct of the nature at issue here, in which the floor broker shares in the profit and losses generated by an account for which the floor broker trades. The Hearing Panel also permitted Kwiatkowski to refer to documents and testimony from other proceedings. 22/ Under these circumstances, it appears that the

---

22/ For example, the Hearing Officer ordered the Exchange to produce relevant portions of the Report of the Committee for Trading for Eighths and permitted Kwiatkowski to read into the record portions of the testimony given by Edward

(continued...)

testimony of the witnesses sought by Kwiatkowski in fact would have been repetitive and cumulative of the testimony adduced.

We conclude that Kwiatkowski had a full and fair opportunity to present his case and defend himself against the charges alleged by the Exchange. 23/ Kwiatkowski requested and received access to the investigative files of the Exchange's Division of Enforcement in this matter. Kwiatkowski introduced 30 exhibits, including internal minutes of the Exchange's Market Performance Committee, the Advisory Committee on Intra-Day Trading Practices, and the Committee on Trading Practices. In addition, the Hearing Officer gave Kwiatkowski wide latitude to question witnesses about the practices of floor brokers, the rules governing that business, and the Exchange's interpretation of those rules.

V.

The NYSE censured Kwiatkowski and imposed a permanent bar from employment on the floor of the Exchange and a five-year plenary bar. On appeal, the Exchange's Board of Directors affirmed the Hearing Panel's decision.

We review sanctions imposed by the NYSE to determine whether those sanctions are excessive or oppressive, or whether they impose an unnecessary or inappropriate burden on competition. 24/ We see no basis for reducing the sanctions. Kwiatkowski argues that the sanctions imposed are more severe than those imposed in similar NYSE cases. As we have consistently held, the appropriate sanction depends on the facts and circumstances of each particular case; it cannot be precisely determined by comparison with action taken in other proceedings. 25/

22/ (...continued)
Kwalwasser in U.S. v Oakford, supra, the federal criminal proceeding against Oakford and seven individual defendants.

23/ Rita H. Malm, 52 S.E.C. 64, 74 (1994) (respondents in self-regulatory organization disciplinary proceedings are entitled to a full and fair opportunity to present their case and defend themselves against charges).

24/ Section 19(e)(2) of the Exchange Act, 15 U.S.C. § 78s(e)(2). Kwiatkowski does not claim, and the record does not show, that the NYSE's action has imposed an undue burden on competition.

25/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Jonathan Feins, Exchange Act Rel. No. 41943 (Sept. 29, 1999), 70 SEC Docket 2116, 2131 n.36; Christopher J. Benz, 52 S.E.C. 1280, 1285 (1997), petition denied, 168
(continued...)

Kwiatkowski violated the principles of commercial honor and trust that are the hallmark of the exchange auction market system. His violations go to the heart of the duties a floor broker owes a customer. He used the time and place advantages available to him in his position as a floor broker to advantage the Oakford account. He placed his own interests above the interests of his customers when he traded for an account in which he had an interest and when he traded for that account in violation of NYSE Rules 91 and 95(c).

Kwiatkowski's conduct was not an isolated incident but rather involved ongoing, numerous improper trades that occurred over the course of approximately a year and a half and stopped only when Oakford ceased operations in February 1998. Kwiatkowski's actions in creating false commission bills, discarding the Oakford profit and loss statements that he received, and providing false testimony during an Exchange investigation indicate that he knew the profit-sharing agreement was improper. In light of the serious misconduct established, we find that the sanctions imposed by the NYSE are fully warranted. An appropriate order will issue. 26/

By the Commission (Commissioners GLASSMAN, GOLDSCHMID, ATKINS, and CAMPOS); Chairman DONALDSON, not participating.

Jonathan G. Katz
Secretary

25/ (...continued)
F.3d 478 (3d Cir. 1998) (Table). In any event, the sanctions imposed by the Exchange in this case are consistent with the sanctions imposed by the Exchange in other cases in which Exchange members were found to have shared in the profits and losses of an account for which the member traded.

26/ We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48707 / October 28, 2003

Admin. Proc. File No. 3-10864

In the Matter of the Application of

RICHARD KWIATKOWSKI

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN
BY NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by the New York Stock Exchange, Inc. against Richard Kwiatkowski, be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary