SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51479 / April 6, 2005

Admin. Proc. File No. 3-11636

In the Matter of the Application of

E. MAGNUS OPPENHEIM & CO., INC.
551 Fifth Avenue
New York, NY 10176-0516

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - - REVIEW OF DISCIPLINARY PROCEEDINGS

Filing Late Focus Report

Member firm of registered securities association held liable for filing late FOCUS report. Held, association's findings and sanctions sustained.

APPEARANCES

E. Magnus Oppenheim, for E. Magnus Oppenheim & Co., Inc.

Marc Menchel, Alan Lawhead, Carla J. Carloni, and Jennifer C. Brooks, for NASD.

Appeal filed: September 7, 2004
Last brief received: December 10, 2004

I.

E. Magnus Oppenheim & Co., Inc., ("Oppenheim & Co." or the "Firm"), a member firm of NASD, appeals an August 19, 2003 decision of NASD. NASD found that Oppenheim & Co. violated Rule 17a-5(a)(2)(iii) under the Securities Exchange Act of 1934 1/ and NASD Conduct Rule 2110 2/ by filing a Financial and Operational Combined Uniform Single ("FOCUS") Report late. 3/ NASD fined Oppenheim & Co. $500 and ordered it to file a written statement of corrective action, as well as to pay costs of $1,968.74. We base our findings on an independent review of the record.

II.

Oppenheim & Co., an NASD member since December 1983, operates as a $5,000 fully-disclosed, non-clearing broker and provides investment management services. E. Magnus Oppenheim owns the Firm, serves as its President, and is a financial/operations principal ("FINOP").

Pursuant to Rule 17a-5(a)(2)(iii), the Firm is required to file a FOCUS Report within 17 business days of the end of each calendar quarter. For the calendar quarter ending December 31, 2001, the Firm should have filed its FOCUS Report by January 25, 2002, but instead filed it on February 4, 2002, at least five business days late. 4/ On January 30, 2002, NASD notified the Firm in writing that it failed to file its December 2001 FOCUS Report and requested that the Firm acknowledge receipt of the notification in writing. The Firm did not comply. 5/

In addition to the FOCUS Report at issue, the Firm had previously filed five other late FOCUS Reports for the calendar quarters ending March 1999, June 1999, December 1999,

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1/ 17 C.F.R. § 240.17a-5(a)(2)(iii).

2/ NASD Conduct Rule 2110 requires the observance of high standards of commercial honor and just and equitable principles of trade; see also NASD Manual at 4111 (2000).

3/ Rule 17a-5(a)(2)(iii) requires firms such as Oppenheim & Co., which do not carry nor clear transactions nor carry customer accounts, to file only Part IIA of the FOCUS Report. A FOCUS Report enables NASD to monitor periodically the financial and operational soundness of a company.

4/ Although the calculation appears to render the filing late by six business days, all parties consistently state that the filing was five business days late.

5/ The record indicates that the Firm's accountant called NASD on February 1, 2004 regarding the late report, although apparently not in response to the NASD late filing notice since Applicant asserts that the Firm "never ever received such a letter."

March 2000, and December 2000 (the "Five Reports"). NASD issued a warning letter to the Firm regarding the late filing for March 2000, and requested a written acknowledgment of receipt. 6/ Regarding the late filing for December 2000, NASD issued a Letter of Caution and a follow-up letter to the Firm and requested a written description of corrective action. Although the Firm had telephone conversations with NASD regarding the late filings, it provided no written response to any of these letters.

Following the Firm's five late filings as well as its failure to respond to NASD's three letters, NASD orally notified the Firm that it could avoid formal disciplinary action as to the late December 2001 FOCUS Report by accepting the terms of a Minor Rule Violation Plan ("MRVP") settlement offer that included paying a $500 fine. 7/ The parties did not reach an agreement as to an MRVP settlement. 8/ On January 6, 2003, NASD filed a formal complaint against the Firm for its sixth late filing, the December 2001 FOCUS Report.

In its decision of August 19, 2003, the NASD Hearing Panel ("Hearing Panel") found that the Firm had filed an untimely FOCUS Report as alleged in NASD's complaint. In determining the appropriate sanction, the Hearing Panel considered several factors supporting leniency, including the number of days late the filing was made, the Firm's small size, the Firm's difficulties at the time with a transition to a new accountant and the new FOCUS reporting system, the lack of complaints from clients, the lack of any attempt to delay disclosure of deficiencies, and the absence of investor harm. The Hearing Panel, found, however, that "the most significant countervailing factor" was the Firm's history of filing the Five Reports late. Based, in part, on the previous filing deficiencies, the Hearing Panel fined the Firm $1,000, ordered it to file a statement of corrective action, and imposed $1,968.74 in costs.

6/ The warning letter stated that "[r]ecurrance of late filings of the FOCUS . . . Report could result in [the F]irm being subject to disciplinary action," but it did not mention the Firm's previous late filings.

7/ The MRVP is an alternative method of addressing certain rule violations, such as filing a late FOCUS Report. NASD Rule 9216(b); IM-9216; NASD Notice to Members 01-54 (Aug. 2001). Fines imposed under the MRVP are subject to a maximum of $2,500, and, as opposed to a formal disciplinary proceeding, the matter would not appear on the member's record or be required to be reported on certain publicly available member forms (e.g., Form BD). Members or their associated persons are not required to accept an MRVP settlement offer and may proceed to a formal disciplinary proceeding instead.

8/ On several occasions during pre-hearing conferences, Applicant was informed of the potential increased financial burden associated with foregoing an MRVP settlement and proceeding to a hearing, such as an administrative fee for the hearing itself and transcript costs.

NASD's National Adjudicatory Council (the "NAC") affirmed the Hearing Panel's decision, except that it reduced the fine to $500. In addition to the factors already considered by the Hearing Panel, the NAC also found that the Firm "apparently resolved its financial reporting deficiencies," and determined that no remedial purpose would be served by imposing a higher sanction.

III.

Section 19(e) of the Securities Exchange Act of 1934 provides the standards for our review. 9/ This section provides that, in reviewing a proceeding by a self regulatory organization ("SRO"), we shall determine whether the member or person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act. 10/

Rule 17a-5(a)(2)(iii) requires firms such as Oppenheim & Co., which neither carry nor clear transactions, nor carry customer accounts, to file FOCUS Reports with NASD within 17 business days after the end of each calendar quarter. There is no dispute that, pursuant to Rule 17a-5(a)(2)(iii), the Firm should have filed its FOCUS Report for the calendar quarter ended December 31, 2001 by January 25, 2002 but instead filed on February 4, 2002. Therefore, the Firm violated Rule 17a-5(a)(2)(iii).

NASD determined that the Firm's violation of Rule 17a-5(a)(2)(iii) also constituted a violation of Rule 2110, which requires adherence to high standards of commercial honor and just and equitable principles of trade. Oppenheim argues against this finding by accusing NASD of using "smear tactics to sully and besmirch" the Firm and branding it "for all time in [a] dishonorable fashion." However, it is well settled that a violation of a rule promulgated by this Commission or by NASD also violates Rule 2110. 11/ We accordingly sustain NASD's findings of violation.

Applicant contends that NASD's proposed MRVP settlement violated the Firm's due process and free speech rights under the United States Constitution because Applicant claims that the proposed MRVP settlement somehow prevented the Firm from defending itself. Applicant argues that, had the Firm agreed to settle through the MRVP, it would have been required to

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9/ 15 U.S.C. § 78s(e).

10/ Id.

11/ See, e.g., Chris Dinh Hartley, Securities Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244; Stephen J. Gluckman, Exchange Act Rel. No. 41628 (July 20, 1999), 70 SEC Docket 418, 428. See also Gerald James Stoiber, 53 S.E.C. 171, 180 n.22 (1997), motion for reconsideration denied, Exchange Act Rel. No. 39565 (Jan. 22, 1998), 66 SEC Docket 1058, pet. denied, 161 F.3d 745 (D.C. Cir. 1998).

"[accept] a finding of violation, [consent] to the imposition of sanctions, and [agree] to waive [its] . . . right to a hearing." 12/ Applicant argues that these conditions mean it had to "surrender [ ] and agree[ ] to charges with which the Respondent doesn't agree to." 13/

The significance of Applicant's argument is unclear. As the record in this case makes plain, the MRVP does not require anyone to "surrender" or agree to charges that are in dispute. Adopted in 1984, the MRVP was intended to "provide for a meaningful sanction for the minor or technical violation of a rule when the initiation of a disciplinary proceeding through the formal complaint process would be more costly and time-consuming than would be warranted. The MRVP provides an efficient alternative means by which to deter violations of rules while maintaining procedural rights for disciplined persons." 14/ Members or their associated persons are not required to accept an MRVP settlement offer and instead may proceed to a formal disciplinary proceeding where a defense against the charges may be presented. Here, the Firm opted to reject the settlement and proceed to a formal disciplinary hearing.

12/ NASD Rule 9216(b).

13/ Applicant attached to its brief a letter from Applicant to NASD claiming that an NASD attorney "hung up" on Applicant. Rule 452 of our Rules of Practice permits a party to adduce new evidence on appeal only if the moving party shows "with particularity" both (a) that the evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. §201.452. We have considered the document and determined it to be immaterial because, even if the claim is true, it has no bearing on Applicant's claim.

14/ NASD Notice to Members 01-54 (Aug. 2001).

We find no other impairments to Applicant's fairness rights in this record. 15/ NASD followed all required procedural safeguards in connection with the hearing. Applicant received adequate notice of the complaint, which contained sufficient detail to apprise the Firm of the charges against it. NASD conducted a hearing on the record at which Applicant was given the opportunity to confront and cross-examine adverse witnesses and to present Applicant's own case and witnesses.

Accordingly, we conclude that neither the MRVP settlement offer, nor any other action by NASD in connection with this proceeding, violated any of Applicant's fairness rights. As a result, we find that NASD's rules were applied consistent with the purposes of the Exchange Act.

IV.

NASD imposed a $500 fine, ordered the Firm to file a written statement of corrective action, and imposed hearing costs of $1,968.74. Applicant argues that these sanctions are excessive and should be rejected. Applicant claims that NASD improperly ignored mitigating factors and unfairly accused the Firm of failing to accept responsibility for the late FOCUS Report. Applicant challenges the finding that it previously filed the Five Reports late and disputes the importance of FOCUS filings with respect to non-clearing brokers, such as the Firm. Applicant further asserts that it is being punished for not agreeing to an MRVP settlement, that it cannot afford to pay the fine or costs, and that NASD should bear the costs and eliminate the administrative fee.

15/ Multiple courts and this Commission have held that the Constitutional protections asserted by Applicant are inapplicable to NASD proceedings. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (noting that the Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violation of constitutional rights by the government, not private actors); D.L. Cromwell Invs. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) (upholding dismissal of Fifth Amendment claims because NASD is not a governmental actor), cert. denied, 537 U.S. 1028 (2002); Jones v. SEC, 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claims based on Fifth Amendments' Double Jeopardy Clause noting NASD is not a governmental actor); Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999) (finding that NASD is not a state actor, and Constitutional requirements generally do not apply to it); see also William J. Gallagher, Exchange Act Rel. No. 47501 (Mar. 14, 2003), 79 SEC Docket 3071, 3075. We note, however, that NASD is required to provide fair procedures for the disciplining of members pursuant to Exchange Act Section 15A(h)(1) and the NASD Code of Procedure. 15 U.S.C. § 780-3(b)(8); NASD Manual at 7301 (2000); Robert Fitzpatrick, Exchange Act Release No. 44956 (Oct. 19, 2001), 76 SEC Docket 252, 258, motion for reconsideration denied, Exchange Act Rel. No. 45170 (Dec. 19, 2001), 76 SEC Docket 1197, review denied, 63 Fed Appx. 20 (2d Cir. 2003) (unpublished summary order).

We review sanctions imposed by NASD to determine whether they are excessive or oppressive. 16/ Applying these standards, we do not consider that any reduction in sanctions is warranted.

We have consistently held that appropriate sanctions depend on the particular facts and circumstances of each case. 17/ With respect to filing a FOCUS Report late, NASD Sanction Guidelines recommend a fine ranging from $1,000 to $20,000 while stating that such a range is not absolute. The fine imposed here – $500 – falls below the range.

In determining sanctions for FOCUS Report violations, factors to be considered include how many days late the firm filed the report and whether the firm filed late to delay disclosure of an operational, financial, or recordkeeping deficiency. 18/ The record shows that the NAC fully considered these and several other mitigating factors, particularly because it reduced the fine imposed by the Hearing Panel. In addition to finding that the filing was made five business days late and that there was no attempt to delay disclosure of deficiencies, the NAC acknowledged the Firm's small size and found 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."

Moreover, the NAC also found mitigating the fact that, at the time of the violation, the Firm was in a period of transition involving a new accountant and a new FOCUS reporting system. Oppenheim argues that a memorandum written by the Firm's accountant, in which the accountant "took the full blame for this late filing[,] . . . exonerated our firm." 19/ However, the

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16/ Section 19(e)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(e)(2). Applicant does not assert, and the record does not show, that NASD's action imposes an undue burden on competition.

17/ Michael Batterman, Investment Advisers Act Rel. No. 2334 (Dec. 3, 2004), __ SEC Docket __ ; see also Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); John Francis D'Acquisto, 53 S.E.C. 440, 445 n.14 (1998).

18/ NASD Sanction Guidelines (2001 ed.) at 76 (FOCUS Reports – Late Filing; Failing to File; Filing False or Misleading Reports).

19/ Applicant attached to its brief a handwritten memorandum "to file" purportedly by the Firm's accountant in which the accountant claims responsibility for the late filing. As discussed supra, n.13, Rule 452 of our Rules of Practice permits a party to adduce new evidence on appeal only if the moving party shows "with particularity" both (a) that the evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. §201.452. Applicant did not file a Rule 452 motion. However, we have considered admission of this document pursuant to the Rule.

(continued...)

Firm may not shift responsibility for its timely filing of FOCUS Reports to a third-party accountant. 20/ The NAC considered this to mean that the Firm failed to accept responsibility for the late filing. We find that the NAC properly considered the pertinent mitigating factors and, given Oppenheim's statement above, that the NAC did not unfairly characterize Applicant as rejecting responsibility for the late filing.

Applicant contends that it filed the Five Reports timely and that it is therefore improper to consider these reports as a countervailing factor in determining the appropriate sanction. We disagree. The record includes, as to each late filing, a computerized report generated by the FOCUS computer system that shows, 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. An NASD examiner responsible for reviewing the Firm's FOCUS filings testified that the date shown on the computer report was automatically and contemporaneously generated when the Firm filed the report. This examiner further testified that the Five Reports were filed late. The record also contains a warning letter from NASD that the Firm received as a result of the March 2000 late filing and a Letter of Caution from NASD to the Firm as a result of the December 2000 late filing. 21/

19/ (...continued)
For the reasons discussed in the text, it is not material. Moreover, Applicant provided no reasonable grounds for the failure to adduce the memorandum previously.

20/ Cf. B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994) (rejecting blame shifting arguments); Michael G. Keselica, 52 S.E.C. 33, 37 (1994) (rejecting blame shifting arguments); Robert Tretiak, Exchange Act Rel. No. 47534 (Mar. 19, 2003), 79 SEC Docket 3166, 3186 (holding president of broker-dealer responsible for compliance with regulatory requirements).

21/ It is undisputed that the Firm provided no written response to the letters. Regarding the Letter of Caution, NASD requested a written response articulating the actions taken by the Firm to correct the late filing deficiency and to prevent a reoccurrence. Oppenheim asserts that his oral communication with NASD following the Letter of Caution was an acceptable response. In his testimony at the hearing, Oppenheim said that, in that telephone conversation, he told NASD, "I can't promise when I am going to have [the problem] solved . . . I don't know when I am going to correct this item." Oppenheim also testified as follows:

Q. Is it true you never provided a written response?

A. I didn't, because the way the letter was phrased and I didn't want to perjure myself, trying to force information out of me which I wasn't able to provide.

(continued...)

In support of its argument that the Five Reports were filed timely, Applicant alleges various shortcomings of the FOCUS filing system, such as a change in the filing process and the lack of a computerized reply or receipt following a filing. Applicant also introduced newspaper reports regarding NASDAQ trading system failures and a letter from the Firm's computer technician that suggested the possibility of processing failures resulting from Internet traffic or a server outage. This vague information, however, is insufficient to counter the concrete evidence in the record that the Five Reports were filed late.

Applicant's arguments that Rule 17a-5(a)(2)(iii) is "flawed" with respect to non-clearing broker-dealers and that FOCUS Reports have "no meaningful impact whatsoever on and influence on the integrity of the market and health of the industry," miss the point. Whatever negative opinion Oppenheim has of the rule does not obviate the need to comply with it. Further, we have repeatedly emphasized the critical role of prompt receipt of accurate FOCUS Reports in effecting timely oversight of the financial health of broker-dealers and in protecting public investors. 22/ In the face of Oppenheim's statements above, we find it appropriate to require the Firm to file a statement of corrective action in order to ensure that the Firm understands the significance of complying with the rule and has taken meaningful steps to rectify the reporting deficiencies.

Applicant asserts that the public availability of the sanctions imposed by NASD amount to an "extra penalty" meant to punish the Firm for rejecting the MRVP settlement offer. We disagree. Publicly available disclosure documents, such as Form BD, which are routinely completed and updated by NASD members, specifically require the disclosure of findings of rule violations by, among others, NASD, "other than a violation designated as a 'minor rule

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21/ (...continued)
Q. You said perjure yourself?

A. That means if I put down it will be solved by this and this date and I don't do it I will be in worse shape . . . I am not going to put something down in writing that I can't defend.

Based on the record, we do not find Oppenheim's oral communication to be an acceptable response to NASD's Letter of Caution.

22/ Clinger & Co. Inc., 51 S.E.C. 924, 926 (1993); see Aristo Invs., 51 SEC 90, 91 (1992); First Nevada Sec., Inc., 50 S.E.C. 1015, 1019 (1992); see also Touche Ross & Co. v. Redington, 442 U.S. 560, 570 (1979) (emphasizing the importance of timely financial reporting pursuant to Section 17(a) of the Exchange Act in the regulatory scheme).

violation.'" 23/ We cannot, therefore, impute a punitive element to the effect of the sanction when it merely is the result of a form requirement. We conclude that the sanctions imposed on Applicant are neither excessive nor oppressive.

Applicant asserts an inability to pay the sanction imposed by NASD. It is well settled that an Applicant bears the burden of demonstrating the inability to pay and that NASD is entitled to make a searching inquiry into any such claim. 24/ In support of its claim, Applicant makes only the assertion that the Firm must "put money away so when business is bad [it] can survive." Applicant has not submitted any financial documentation detailing the Firm's situation, and Oppenheim's own testimony demonstrates that the Firm's liquid assets substantially outweigh its liabilities. 25/ We conclude that Applicant has not satisfied its burden of demonstrating its inability to pay.

We also reject Applicant's claim that it should not bear the administrative costs of the proceedings. NASD informed Applicant of the potential increased financial burden associated with proceeding to a hearing in lieu of a disposition under the MRVP and specifically disclosed that the failure to prevail at a hearing could result in the imposition of a $750 administrative fee plus the cost of a hearing transcript. We find that NASD acted well within its discretion in assessing the costs following the decision. 26/

23/ See, e.g., Uniform Application for Broker-Dealer Registration (Form BD), Question 7E (2000).

24/ Tretiak, 79 SEC Docket at 3174; see also William J. Gallagher, Exchange Act Rel. No. 47501 (Mar. 14, 2003), 79 SEC Docket 3071, 3076. Cf. Rule of Practice 630(e), 17 C.F.R. § 201.630(e) (Respondent in Commission administrative action who fails to file required financial information will be deemed to have waived the claim of inability to pay).

25/ Oppenheim testified that the Firm had over $126,000 in liquid assets, which included over $71,000 in cash, and that the Firm had very few liabilities. The Firm's FOCUS Report for March 2003 showed $7,984 in total liabilities.

26/ See NASD Sanction Rule 8330 (disciplined member shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances); John M. W. Crute, 53 S.E.C. 1112, 1116 (1998), aff'd, 208 F.3d 1006 (5th Cir. 2000) (recognizing NASD's broad discretion to impose costs and upholding imposition of costs).

Based on this record, we find that Oppenheim & Co. filed the December 2001 FOCUS Report late, in violation of Rule 17a-5(a)(2)(iii) and Rule 2110, and that the sanctions and assessment of costs are neither excessive nor oppressive.

An appropriate order will issue. 27/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

27/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them 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. 51479 / April 6, 2005

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In the Matter of the Application of

E. MAGNUS OPPENHEIM & CO., INC.
551 Fifth Avenue
New York, NY 10176-0516

For Review of Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against E. Magnus Oppenheim & Co., Inc. be, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary