

calculations by NASD, 4/ and the propriety of the sanction imposed if, in fact, no net capital violation occurred; the motion explicitly left our other findings undisturbed. In granting the Commission's motion, the Court of Appeals remanded the action "to the [Commission] for reconsideration of the net capital calculation and the propriety of the sanction imposed, as discussed by the SEC in [its Motion to Remand filed May 28, 2003]." 5/

We have determined to remand the portion of this proceeding addressing the calculation of the broker dealer's net capital position on June 28, 1996, to NASD to give NASD an opportunity to explain its views on whether Avello violated the net capital rule. We direct NASD's particular attention to the following questions:

(1) How was the \$44,103 net capital deficiency for June 28, 1996, from which NASD began its consideration of Avello's responsibility, calculated?

(2) How did NASD account for the exoneration of Avello regarding responsibility for the non-reporting of the \$47,000 loan balance in its calculation of the net capital deficiency?

(3) How was the office equipment lease accounted for in NASD's calculation of the net capital deficiency?

(4) In light of NASD's findings with respect to the questions in items (1) through (3) above, does NASD still find that there was a net capital violation for which Avello can be held responsible?

(5) If NASD finds that there was not a net capital violation for which Avello can be held responsible on the date in question, does NASD find that the sanctions originally imposed on Avello by NASD remain appropriate, and, if not, what, if any, sanction does NASD impose instead?

We invite NASD to address any other issue involving the calculation of, and Avello's responsibility for, the broker

4/ The NASD hearing panel found that the firm had a net capital deficiency of \$44,103. On appeal of that determination, the National Adjudicatory Council ("NAC") found that Avello should not have been held responsible for a liability of \$47,000 in the form of an unbooked bank loan. Giving Avello an additional \$47,000 credit would appear to eliminate his responsibility for the violation, yet the NAC still found him responsible.

5/ Avello v. SEC, No. 02-4139 (7th Cir.) (Order of Aug. 20, 2003).

dealer's net capital position on June 28, 1996, that NASD believes is necessary for the resolution of this issue. We reemphasize that only the portion of the November 7 Opinion addressing the calculation of the broker dealer's net capital position for June 28, 1986, and related sanctions, is subject to this remand to NASD. All other findings of November 7 Opinion remain undisturbed.

At the conclusion of NASD's proceedings on remand, Avello will have the right to file an application for review of NASD's decision with the Commission pursuant to Section 19(d)(1) of the Exchange Act 6/ and Rule 420 of the Commission's Rules of Practice. 7/ Alternatively, the Commission may, on its own initiative, review NASD's decision pursuant to Section 19(d)(1) of the Exchange Act 8/ and Rule 421 of the Commission's Rules of Practice. 9/

We do not intend to suggest any view on the outcome of the NASD's consideration of these questions.

By the Commission.

Jonathan G. Katz
Secretary

6/ 15 U.S.C. § 78s(d)(1).

7/ 17 C.F.R. § 201.420.

8/ 15 U.S.C. § 78s(d)(1).

9/ 17 C.F.R. § 201.421.