

CX-4). The firm repeatedly conceded that the filing was late (Tr. 64, 86, 92, 99, 102, 106-107), and liability is thus not in issue here.

The parties disagree as to the appropriate sanction. During the hearing, Enforcement argued that the fine should be \$5,000 – higher than they sought in the original Notice. The firm argues for leniency.

The Panel begins with the firm’s extensive history of untimeliness. Of eleven required filings, due from April of 2003 to April of 2004, ten were late (CX-4; Tr. 44). Eight were more than ten calendar days late, six were over thirty days late, and three were approximately 100 days late. The firm’s tardiness continued even after the late filing of the FOCUS Report which triggered this proceeding. A subsequent FOCUS Report, due on April 26, 2004, did not arrive until June 2, 2004 - thirty-seven calendar days or twenty-six business days after the deadline (CX-4).¹

The deadline for the 2003 Annual FOCUS Report was clearly set out in a November 2003 Notice, where the Exchange reminded all members in bold-face type that “the next due date for FOCUS Report Part IIA Short Form for 2003 is January 27, 2004” (CX-1). That Notice appeared on the Amex web site, on a bulletin board on the Exchange floor, and on the Amex daily ticker (CX-1; Tr. 12-13). It also contained a section entitled (in bold-face underlined type) “Extensions of Time,” which explained in detail how firms could request enlargement of the time period. B & W Global chose to ignore that option and never sought an extension (Tr. 14).

The firm attempts to blame an Exchange employee, who supposedly should have alerted the officers to the deadline and/or “pointed” them to relevant parts of the web site (Tr. 56, 59-60, 63). The responsibility for timely filing rests with the firm, not Exchange employees. As noted, the deadline was posted in many places, and the firm could have and should have been aware of

¹ For this tardiness, the firm paid a fine of \$1,300 (Tr. 19-20, 41, 126).

it.² Nor can the firm shift the blame to accountants whom it chose and for whose actions it bears responsibility. That is especially so because the firm – while recognizing the importance of the hire – nevertheless selected an accountant who had never before represented a securities firm and did not inform herself about the required filings (Tr. 87, 90). Firms have a continuing duty to know and abide by the rules, and cannot shift blame to others. See Thomas C. Kocherhans, Exchange Act Release No. 36,556, 1995 SEC LEXIS 3308 at **9-10 (Dec. 6, 1995); Dep’t of Enforcement v. Eric H. Dieffenbach, No. C06020003 (NAC, July 30, 2004), slip op., p. 20 (rejecting claim that firm’s inadequate training was mitigative).

Firms file their FOCUS Reports with the Exchange through its computerized Web FOCUS system. As explained in the system instructions, “[b]efore a filing can be submitted, it must pass a series of validation checks that are initiated by clicking the Validate button on the form entry screen” (CX-12, p. 2). After a filing passes those checks, “its status becomes Validated and is ready for submittal. A filing can be submitted by clicking on the Submit button from the form entry screen, or by clicking the Submit icon...” (Id.).

On March 25, 2004, the firm’s accountant clicked the Validate button (but not the Submit button), heard nothing thereafter, and assumed that the form had been filed (Tr. 88, 102-103). She contends that the firm should be treated as though it filed on March 25, 2004 - not on May 4, 2004 when the Exchange received it - because she or her assistant made a good faith attempt to file it on the former date (Id.). The Panel disagrees. Clicking on “validate,” while failing to click on “submit” was the result of the accountant’s ignorance of the Exchange’s Web FOCUS system. There is no reason for confusion. As shown, the instructions are clear and they dispel any notion that “validate” is somehow the equivalent of “submit.” The firm chose an accountant

² In these circumstances, the firm should have known of the filing requirement even if its accountant did not receive an additional copy of the notice which the Exchange mailed to her.

who had no securities experience and either failed to read the Exchange's instructions or chose not to inform herself. In the circumstances of this case, B & W Global's choice of this particular accountant is not a basis for mitigation. Moreover, even under her theory, the report was still late by forty-two working days, a period which, taken together with the firm's record of tardiness for a year, deserves serious sanctions in any event.

The firm asserts that the Financial Regulation Department agreed on the telephone to "waive" any fine associated with the late-filed 2003 FOCUS Report (Tr. 36-37, 52). The Department Director denied any such conversation, explaining that he had agreed to waive a late-filed insider trading report, but not the FOCUS Report (Tr. 36-37, 45-46, 52). The firm had no written notation or other record of the conversation (Tr. 72). But even if an official did initially mention waiver, there is nothing to preclude the Department from reconsidering the matter and concluding that the violation warranted a serious fine after all.

In the Panel's view, the firm failed to take a sufficiently serious approach to its regulatory responsibilities. B & W Global was persistently tardy. Even after the instant violation, it was late with another FOCUS report, an event which produced a \$1,300 fine. When pressed as to the identity of this small firm's compliance officer, the managing partner did not immediately respond, stating instead "I am thinking. I think that would be me, actually" (Tr. 70). Though recognizing the importance of an accountant who could facilitate compliance with the Exchange's financial and recordkeeping requirements, the managing partner hired a person with no experience whatsoever in the securities industry (Tr. 56-57, 87, 109). He maintained no documentation of a conversation which supposedly involved the Department Director's "waiver" of a fine for the instant misconduct or of other conversations reflecting alleged imprecision in

setting deadlines for submission of trial balances. He admitted that sometimes the firm “just forgot” to send up the requested trial balances (Tr. 78).

Finally, the Exchange has already exercised lenience as to this firm. Rule 590, Parts 3(a) and (g)A.7, provides for a fine of \$50 “a day” for late-filed annual FOCUS Reports. The Financial Regulation Department nevertheless chose to construe “day” as “business day,” thereby reducing the proposed fine from \$4,900 (98 days late) to \$3,400 (68 business days late). In addition the Department waived fines for several late-filed ITSFEA reports. Further lenience would be inappropriate.

“[P]rompt receipt of accurate FOCUS and annual audit reports is critical. It provides the NASD and the Commission with an important means of timely oversight of the financial health of broker-dealers and of protecting public investors.”³ “[C]ompliance with the requirements of Rule 17a-5 [establishing deadlines for filing of FOCUS reports] ‘is a keystone of the surveillance of registered broker-dealers with which [the Commission is] charged in the interest of affording protection to investors . . .’”⁴ As the Exchange explained on this record, such reports “enable[] the financial regulation department to assess the firm’s financial health at a point in time;” without such submissions, the Exchange’s department cannot determine whether a firm is in compliance with applicable financial requirements (Tr. 10-11, 16). The other untimely filings, dealing with trial balances and with ITSFEA, are also of regulatory importance.

To send appropriate signals to this firm and to others who might choose to be lax about deadlines, the Panel imposes a significant fine and a requirement for the development and filing of a plan designed to prevent future tardiness.

³ Clinger & Co., Exch. Act Rel. No. 33375 (December 23, 1993), 1993 SEC LEXIS 3524 (1993).

⁴ Philip Greifeld, CPA, Exch. Act Rel. No. 38316 (Feb. 20, 1997), 1997 SEC LEXIS 408 (1997) (quoting W.E. Leonard & Co., Inc., Exch. Act Rel. No. 6197 (March 3, 1960), 1960 SEC LEXIS 413 (1960)).

Although Rule 590, Part 3 envisions a fine of \$50 per day, that formula is inapplicable where, as here, a Respondent contests the violations. In that event, the Panel is “free to impose any one or more of the disciplinary sanctions authorized by the Exchange’s Constitution and rules” (Rule 590, Part 3(d)). For untimely FOCUS Reports, the NASD Sanction Guidelines (2004) recommend fines of \$1,000 to \$20,000 (p. 74).⁵ Considering all of the above aggravating circumstances, the Panel concludes that the appropriate fine should be \$5,500.

To address the firm’s seemingly casual attitude toward regulatory requirements, the Panel directs that it draft and file a plan setting forth procedures designed to assure future compliance with filing deadlines. Such plan shall be filed with the Financial Regulation Department within thirty days of the issuance of this Decision, and it shall be subject to approval by that Department.

The Disciplinary Panel further finds that the results of this disciplinary proceeding should be publicly disclosed, as provided in Rule 12 of the Exchange Rules on Disciplinary Proceedings.⁶

III. Conclusion

The Disciplinary Panel, by unanimous vote, finds that Respondent B & W Global LLC violated Exchange Rule 590, Part 3(g)A.7 by failing to file its FOCUS Report Part IIA Annual Short Form and Schedule 1 for the year 2003 within the established deadline. For this misconduct, the Panel orders (1) that Respondent be fined \$5,500 and (2) that it draft and file

⁵ Though the American Stock Exchange has no sanction guidelines, the Panel may appropriately consider analogous provisions in the NASD Guidelines. David Wong, Exchange Act Rel. No. 45426, 2002 SEC LEXIS 339 at *22 (February 8, 2002).

⁶ Rule 12 exempts from publicity those cases where the Panel finds that the offense “related solely to minor administrative requirements of the Exchange and does not materially affect the public interest or the interest of investors.” Those exemptions do not apply to the facts of this case.

with the Financial Regulation Department, within thirty days of the issuance of this Decision, a plan designed to assure future compliance with filing deadlines.

FOR THE DISCIPLINARY PANEL

Jerome Nelson, Chair

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