

**Disciplinary Panel  
American Stock Exchange LLC**

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IN THE MATTER  
OF  
JOHN F. HAWKEY

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Case No. 03-96  
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Hearing Officer – DMF  
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**DISCIPLINARY PANEL DECISION**  
:  
September 7, 2004  
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*Digest*

**Respondent was censured and fined \$3,000 for violating Exchange Rule 31 by failing to respond to Exchange information requests in a timely manner.**

**DECISION**

**I. Introduction**

The American Stock Exchange, LLC filed a Statement of Charges, dated April 23, 2004, against John F. Hawkey, who was a regular member of the Exchange, alleging that Hawkey failed to provide information to the Exchange in a timely manner, in violation of Exchange Rule 31. On August 5, 2004, an Exchange Disciplinary Panel held a hearing on the charge.<sup>1</sup>

**II. Facts**

Hawkey was a regular member of the Exchange until May 28, 2004, when he terminated his Exchange membership.<sup>2</sup> Hawkey was the sole proprietor of a \$2 broker. (Tr. 56.)

In March 2003, the Exchange issued a notice to all members and member organizations advising them that:

Title III of the Patriot Act requires all registered brokers and dealers, including all Amex member organizations [and] members not associated with a member organization ... to establish and implement anti-money

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<sup>1</sup> At the hearing, the Enforcement Department offered the testimony of one witness and 21 exhibits (C001-C021); Hawkey testified on his own behalf and offered the testimony of one other witness, but no exhibits.

<sup>2</sup> On June 3, 2004, the Exchange sent Hawkey a letter, in accordance with Art. V, §6 of the Exchange Constitution, notifying him that the Exchange was retaining jurisdiction over him for purposes of this proceeding. (C013.)

laundering programs designed to achieve compliance with the Bank Secrecy Act (BSA) and applicable regulations. In addition, Amex Rule 432 prescribes the minimum standards required by Title III of the Patriot Act of all covered persons with respect to their anti-money laundering compliance programs. **These provisions impose substantive obligations upon all covered persons regardless of whether they receive or hold funds or securities for customers or have customers. Accordingly, all covered persons are expected to comply fully with these regulations.**

(C004 at 1 (footnotes omitted).)<sup>3</sup>

In April, the Exchange posted a notice on its website giving members “a reminder that the Amex’s Sales Practice Regulation Department will begin issuing initial document requests and scheduling on-site examinations on or about May 1, 2003 to ensure that all registered brokers and dealers ... have reasonably and sufficiently met the requirement to develop and put in place anti-money laundering programs ....” (C005; Tr. 17, 20-21.)<sup>4</sup> In accordance with this notice, in May the Sales Practice Regulation Department sent letters to more than 200 members, including Hawkey, requesting that they complete an enclosed questionnaire and provide certain documents relating to their anti-money laundering programs. The letter to Hawkey, dated May 7, 2003, explained: “Broker-dealers that do not handle money or securities logically may face less risk of customers engaging in money laundering, however, regardless of a broker-dealer’s size or business, **all broker-dealers** must have anti-money laundering programs in place.” The letter required a response from Hawkey by May 23, 2003. (C006; Tr. 23-25, 27-28.)

The May 7 letter was addressed to Hawkey at his Central Registration Depository (CRD) address, which was his box on the floor of the Exchange. (C003; Tr. 22-26.) Hawkey testified that he did not receive the letter. (Tr. 53, 62.) In any event, he did not complete the

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<sup>3</sup> The Patriot Act is formally known as the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>4</sup> According to the Enforcement Department’s staff witness, the Exchange was under pressure from the SEC, which had expressed concern that the Exchange was not enforcing Exchange Rule 432, which requires members to have anti-money laundering programs in place. (Tr. 16.)

questionnaire or otherwise respond to the letter. (Tr. 25.) Indeed, only approximately one-half of the more than 200 members to whom the Sales Practice Regulation Department sent the May letters responded. (Tr. 27-28, 43-44.)

In June, the Sales Practice Regulation Department sent a “Second Request” to all of the members who had not responded to the May letter, including Hawkey. (Tr. 25.) The Second Request reiterated the request that the member complete and return the enclosed questionnaire, and specifically cited Exchange Rule 31, concerning the obligations of Exchange members to provide books and records, as well as sworn testimony, if requested by the Exchange. (C007.) The June letter was also addressed to Hawkey at his CRD address, his box on the floor of the Exchange. Again, Hawkey testified, he did not receive the letter; it is undisputed that he did not complete and return the questionnaire. (Tr. 63.)

In October 2003, the Sales Practice Regulation Department sent a “Final Notice” reiterating the request for a completed questionnaire to all of the members who had not responded to the Second Request, including Hawkey. (C009; Tr. 32-33.) The Sales Practice Regulation Department again sent the Final Notice to Hawkey at his CRD address, but this time by certified mail. Postal Service tracking records indicate that the mailing “arrived” at an unspecified location in New York, NY, but do not establish that it was delivered to Hawkey, and Hawkey testified that he did not receive it. (C010; Tr. 33-34, 65-69, 73.) Once again, it is undisputed that he did not complete and return the questionnaire.

The Sales Practice Regulation Department referred approximately 20 members who had not responded to the Final Notice, including Hawkey, to the Enforcement Department for further action. (Tr. 36-37.) On December 3, 2003, the Enforcement Department hand-delivered a letter to Hawkey on the floor of the Exchange. The letter advised Hawkey that the Sales Practice

Regulation Department had referred to Enforcement for investigation and possible disciplinary action Hawkey's "alleged failure ... to respond to numerous Exchange requests for information pertaining to the Anti-Money Laundering Program," and requested that he provide "all responsive Anti-Money Laundering materials no later than December 17, 2003." (C011-C012, Tr. 107.) The Enforcement Department acknowledged that Hawkey provided an immediate and satisfactory response to this letter. Having reviewed that response, the Enforcement Department did not contend that Hawkey failed to establish appropriate anti-money laundering procedures as required by Amex Rule 432, but only that he failed to respond to the Sales Practice Regulation Department's requests for information in a timely manner. (Tr. 10, 147, 151-52.)

### **III. Violation**

Rule 31 requires that "[a] member ... shall comply with any request by an authorized representative ... of the Exchange to produce his or its books, papers or records ...." Because the Exchange lacks subpoena power, this Rule is critical to Exchange's performance of its self-regulatory responsibilities, and members must respond fully and promptly to all requests under Rule 31. "Failure to provide information fully and promptly undermines the [Exchange]'s ability to carry out its regulatory mandate."<sup>5</sup>

Hawkey testified that he did not receive the requests sent to him by the Sales Practice Regulation Department, and was unaware of them until the Enforcement Department's letter was delivered to him on the floor of the Exchange. There is no conflicting evidence to show that he actually received the requests, but the Sales Practice Regulation Department mailed all of them to Hawkey's CRD address.

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<sup>5</sup> Michael David Borth, 51 S.E.C. 178, 180 (1992) (addressing NASD Rule 8210, which corresponds to Exchange Rule 31).

Article V, Section 2(1) of the Exchange Constitution provides:

Every member and member organization shall register with the Exchange an address and subsequent changes thereof where notices may be served. Any notice mailed to a member or member organization at the last address registered at the Exchange shall be presumed to have been received by such member or member organization.

Under this provision, it is the responsibility of the member to designate an address to which the Exchange may send notices, and it is the responsibility of the Exchange to send its notices to that address. Hawkey indicated that, in essence, his Exchange box was not a secure and reliable depository for important Exchange notices, but he chose to make it his address of record, and he must take responsibility for his choice. During the hearing, Hawkey acknowledged that the Exchange was entitled to rely on his CRD address when communicating with him, and the Panel agrees. (Tr. 91.)

Therefore, regardless of whether Hawkey actually received the Sales Practice Regulation Department's requests, he is deemed to have received them because they were sent to his CRD address. He argues that the Sales Practice Regulation Department could have delivered the requests to him on the Exchange floor, just as the Enforcement Department delivered its letter, but the Sales Practice Regulation Department sent out hundreds of letters. It was entitled to send them to each member's address of record; it would be inappropriate to impose on the Exchange staff the burden to identify and track down members who have provided unreliable addresses.

Therefore, the Panel finds that Hawkey violated Rule 31 by failing to respond to the requests in a timely manner.

#### **IV. Penalties and Publicity**

Although, as explained above, it is not a defense to the charge, the Panel accepts Hawkey's testimony that he did not, in fact, receive the requests sent by the Sales Practice

Regulation Department. As Hawkey testified, if he had received the requests, he would have had no reason not to complete and return the questionnaire. (Tr. 63, 150.) The Enforcement Department's staff witness testified that the Sales Practice Regulation Department would have accepted any response to its requests as satisfactory, even if it disclosed that Hawkey did not yet have an anti-money laundering program in place. The Sales Practice Regulation Department was simply attempting to open a dialog with the members regarding the status of their efforts to establish anti-money laundering programs, so that it could work with those members who were having difficulty understanding and fulfilling their obligations. (Tr. 46-51.)

Moreover, Hawkey was not ignoring his responsibility to comply with the Patriot Act and Exchange Rule 432. He spoke to Governors of the Exchange on the floor and he testified that, on their advice, he placed calls to Exchange staff in an effort to learn more about his anti-money laundering obligations, given that he did not carry any customer accounts or handle customer funds, but received no response. (Tr. 53-54, 70-72, 76-77.) There is no dispute that when the Enforcement Department notified Hawkey of the Sales Practice Regulation Department's requests, he provided a prompt and adequate response. (Tr. 10, 147, 151-52.) Thus, there is no basis for inferring that Hawkey deliberately failed to respond in order to conceal violations of the Patriot Act or Exchange Rule 432.

Therefore, the Panel finds that Hawkey's failure to respond in a timely manner was not deliberate or willful. Nevertheless, it took three letters from the Sales Practice Regulation Department and a fourth from the Enforcement Department to obtain his response. Even if Hawkey's delay was not willful, it caused the unnecessary expenditure of Exchange staff resources and impeded the Exchange staff's ability to conclude its review of the members' anti-

money laundering programs. As a result, the Panel concludes that substantial sanctions are appropriate.

The Enforcement Department urged a censure and a \$7,500 fine, relying in part on the fact that Hawkey has been sanctioned in the past for (1) filing his 1999 year end FOCUS Report 15 days late (C015); (2) failing to submit option trade comparison data on time on three occasions, once in 2000 and twice in 2001 (C016-018); (3) filing his 2001 Annual FOCUS Report 31 days late (C019); and (4) filing his December 31, 2002 FOCUS Report 23 days late (C020). Although it may be appropriate to increase sanctions if a respondent's past disciplinary history indicates that the respondent is a recidivist or has a disregard for regulatory requirements, the Panel does not find that Hawkey's violations, over a period of several years, support such conclusions in this case. The Panel also notes that Hawkey was a sole proprietor and is no longer a member of the Exchange.<sup>6</sup>

Therefore, the Panel finds that, considering all the relevant circumstances, the appropriate sanctions for Hawkey's violation are a censure and a \$3,000 fine.<sup>7</sup> 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.<sup>8</sup>

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<sup>6</sup> Cf. NASD Sanction Guidelines (2001 ed.) at 3: "Adjudicators should consider firm size with a view toward ensuring that the sanctions imposed are not punitive" (footnotes omitted).

<sup>7</sup> The Panel notes that in several recent cases, the Exchange has approved stipulations and consents imposing censures and \$2,500 fines for similar failures to respond timely to the Sales Practice Regulation Department's requests for information. The penalties in each case, however, must be based upon the particular facts and circumstances presented, and Panel concludes that a somewhat higher fine is appropriate in this contested case.

<sup>8</sup> 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.

**V. Conclusion**

The Disciplinary Panel, by unanimous vote, finds that Respondent John W. Hawkey failed to respond to Exchange requests for information in a timely manner, in violation of Exchange Rule 31. As a penalty, the Panel imposes a censure and a \$3,000 fine.

**FOR THE DISCIPLINARY PANEL**

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David M. FitzGerald, Chair

Copies to: John F. Hawkey (*via overnight courier and first class mail*)  
Alison H. W. Mijares, Esq. (*electronically and via first class mail*)  
Arlene Collins-Day (*via facsimile and first class mail*)

Disciplinary Panel  
American Stock Exchange LLC

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	X	
IN THE MATTER	X	STATEMENT OF CHARGES
OF	X	Case Number 03-96
JOHN F. HAWKEY	X	April 23, 2004
	X	
.....	X	

Charges are hereby preferred pursuant to the American Stock Exchange LLC (“AMEX” or the “Exchange”) Constitution, Article V, Section 6, against John F. Hawkey (“Hawkey”) (Organization CRD# 43501 and Individual CRD# 2906971), a Regular Member of the Exchange.

**STATEMENT OF FACTS:**

1.0 Since 1996, Hawkey has been a Regular Member of the Exchange, acting as a sole proprietor in the capacity of a \$2 broker. Jurisdiction was retained over Hawkey pursuant to a hand delivered letter dated December 3, 2003, receipt of which was acknowledged on December 3, 2003.

1.1 At all relevant times herein, Exchange Rule 31 provided that:

“A member, member organization, approved person or any employee, partner, trustee or director of a member organization or member shall comply with any request by an authorized representative or committee of the Exchange to produce his or its books, papers or records, or to appear and testify as to any matter pertaining to his or its business, within the time specified by the representative or committee of the Exchange making the request.”

- 1.2 On or about May 1, 2003, the Sales Practice Regulation Department (“SPR”) of the Exchange initiated an examination program to ensure that all registered brokers and dealers, including all AMEX member organizations, members not associated with a member organization, and all AMEX Limited Trading Permits Holders (hereinafter, collectively referred to as “covered persons”), had reasonably and sufficiently met requirements to develop and implement anti-money laundering programs as prescribed by federal law and Exchange Rules (hereinafter, collectively referred to as the “Exchange’s Anti-Money Laundering Compliance Program”).
- 1.3 In an effort to effect compliance, an Exchange Notice to Members entitled, “Anti-Money Laundering Compliance Programs Required By Federal Law” was published and distributed to all Exchange members, including Floor Members, on March 5, 2003. This notice provided guidance on the minimum standards required for each covered person with regard to the Exchange’s Anti-Money Laundering Compliance Program.
- 1.4 A subsequent Exchange Notice to Members entitled, “Examination of Firms’ Anti-Money Laundering Procedures by the Sales Practice Regulation Department” was published and distributed to all Exchange members, including Floor Members, on April 16, 2003. This notice reminded all covered persons that SPR would begin requesting documentation on or about May 1, 2003 to determine whether covered persons were in compliance with the Exchange’s Anti-Money Laundering Compliance Program.

- 1.5 On May 7, 2003, SPR sent a letter via First Class U.S. Mail to Hawkey at his CRD address, indicating that an inquiry into his anti-money laundering procedures had commenced and requesting that certain documents be provided to SPR no later than May 23, 2003.
- 1.6 No response, either verbal or written, was received from Hawkey regarding SPR's May 7, 2003 letter, and the U.S. Post Office did not return SPR's letter.
- 1.7 On June 10, 2003, SPR sent a second letter via First Class U.S. Mail to Hawkey at his CRD address, again indicating that an inquiry into his anti-money laundering procedures had commenced and requesting that certain documents be provided to SPR no later than June 25, 2003. The words "Second Notice," bordered by asterisks, were printed in the top right corner of the letter in large, bold letters.
- 1.8 No response, either verbal or written, was received from Hawkey regarding SPR's June 10, 2003 letter, and the U.S. Post Office did not return SPR's letter.
- 1.9 A third Exchange Notice to Members entitled, "Guidance for Preparing Anti-Money Laundering Procedures by the Sales Practice Regulation Department" was published and distributed to all Exchange members, including Floor Members, on July 25, 2003. This notice provided guidance, including sample language, on how to comply with the Exchange's Anti-Money Laundering Compliance Program.
- 1.10 On October 16, 2003, SPR sent a third letter via Certified Mail/Return Receipt Requested to Hawkey, indicating that an inquiry into the his anti-money laundering program had commenced and requesting certain documents be provided to SPR no later than November 3, 2003. SPR's October 16, 2003 letter stated that "requests for extensions must be made in writing and submitted at least

one day prior to the due date to be considered – the granting of extension is not guaranteed and will be done on an exception basis only.” Additionally, the letter reminded the non-responding covered persons of their obligations under Exchange Rule 31 and stated “failure to respond to this request may result in disciplinary action.” The words “Final Notice,” bordered by asterisks, were printed in the top right corner of the letter in large, bold letters. According to the U.S. Post Office, the letter was received on October 27, 2003.

- 1.11 No response, either verbal or written, was received from Hawkey regarding SPR’s October 16, 2003 letter, and the U.S. Post Office did not return SPR’s letter.
- 1.12 On December 3, 2003, Enforcement sent a letter via hand delivery to Hawkey regarding his failure to comply with document request made pursuant to the Exchange’s AML Compliance Program and requesting that he provide documentation on or before December 17, 2003. Hawkey acknowledged his receipt of the letter on December 3, 2003.
- 1.13 Hawkey has been fined under the Exchange Minor Rule Violation Fine System (Rule 590) on six prior occasions. Three Rule 590 violations were due to failure to timely file FOUCS reports with the Exchange. An additional three violations resulted from Hawkey’s failure to timely submit options trade comparison data.
- 1.14 Enforcement received documents responsive to its request for AML Compliance Materials from Hawkey on December 17, 2003.

**CHARGES PREFERRED:**

2.0 Hawkey violated Exchange Rule 31 in that he delayed and impeded an Exchange investigation by not providing his anti-money laundering procedures to the Exchange in a timely manner, as described in paragraphs 1.0 through 1.14.

\* \* \* \* \*

Hawkey shall have 20 days from the date of service of this Statement of Charges to answer such Charges in accordance with the provisions of the Exchange Constitution and Rules thereunder. The answer shall specifically indicate which statements, or portions thereof, are admitted and which are denied. Any statement, or portion thereof, not specifically denied shall be deemed admitted.

AMERICAN STOCK EXCHANGE LLC

By: \_\_\_\_\_

David Rosenstein  
Vice President and Chief Counsel