

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57857 / May 23, 2008

Admin. Proc. File No. 3-12693

In the Matter of the Application of

SCHON-EX, LLC
c/o John R. Hewitt, Esq.
McCarter & English, LLP
245 Park Avenue
New York, NY 10167

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Exchange Rules

Submission of Inaccurate Trading Data

Failure to Adhere to Principles of Good Business Practice

Failure to Establish and Maintain Adequate Supervisory Procedures

Member firm of registered securities exchange submitted inaccurate electronic trading data to the exchange and failed to have in place a system to verify the accuracy of its electronic trading data before it was submitted to the exchange. Held, exchange's findings of violations and sanction are sustained.

APPEARANCES:

John R. Hewitt, of McCarter & English, LLP, for Schon-Ex, LLC.

Susan Light, Suzanne Elovic, Howard L. Kneller, and Donald C. Sullivan, for Financial Industry Regulatory Authority, Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: July 12, 2007

Last brief received: October 18, 2007

I.

Schon-Ex, LLC ("Schon-Ex" or the "Firm"), a member of the New York Stock Exchange LLC ("NYSE" or the "Exchange") appeals from NYSE disciplinary action. 1/ The Exchange found that Schon-Ex violated NYSE Rules 410A and 401 2/ by providing inaccurate trading data of "short sale" transactions through electronic "blue sheet" submissions in response to NYSE requests for such data. 3/ The Exchange further found that Schon-Ex violated NYSE Rule 342 as

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- 1/ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority. See Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.
- 2/ NYSE Rule 410A provides, in relevant part, that a "member . . . shall submit [certain specified] . . . trade data elements . . . in such automated format as may be prescribed by the Exchange from time to time, in regard to such transaction or transactions as may be subject of a particular request for information made by the Exchange." In addition, Rule 410A(c) directs that, "[i]n addition to the above trade data elements, a member . . . shall submit such other information in such automated format as may be prescribed by the Exchange, as may from time to time be required." NYSE Rule 401 requires that a member "shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs."
- 3/ Blue sheets (so-called because of the traditional blue paper in which such records were reported and maintained prior to their conversion to an electronic format) are documents in an automated format that are generated by self-regulatory organization ("SRO") members, at the request of the Commission and the SROs, of certain customer and proprietary trading information. See Exchange Act Rel. No. 25859 (June 27, 1988), 41 SEC Docket 398. This information includes, among other data, "customers' names and addresses; trade dates, settlement dates, and whether the transactions were purchases or sales; and the stock symbol, number of shares, and purchase or sale price." United States v. Reifler, 446 F.3d 65, 122 (2d Cir. 2006). See generally Exchange Act Rel. No. 44494 (continued...)

a result of the Firm's inadequate written supervisory procedures relating to its blue sheet submissions. ^{4/} Based on these findings of violation, the NYSE censured Schon-Ex and fined it \$300,000. We base our findings on an independent review of the record.

II.

The relevant facts are largely undisputed and concern efforts by Schon-Ex to respond to blue sheet requests made by the NYSE between 2002 and 2004.

A. Schon-Ex provides execution services for NYSE and American Stock Exchange listed securities for its much larger affiliate, Schonfeld Securities, LLC, a clearing firm ("Schonfeld"). ^{5/} According to Schon-Ex's chief executive officer ("CEO"), James Nardone, the Firm's employees were also "joint-employees" of Schonfeld "in their daily functions and responsibilities." Thus, Nardone was also CEO of Schonfeld and Schon-Ex's compliance officer, Annemarie Cichy, also served in that capacity for Schonfeld.

When Schon-Ex became a member of the NYSE in June 2002, it arranged, through Schonfeld, with ADP Financial Information Services, Inc. ("ADP"), which provides trade data processing services to Exchange members, to file the Firm's electronic blue sheets with regulators. Under that arrangement, Schon-Ex provided ADP with data, including the Firm's trading in

^{3/} (...continued)

(June 29, 2001), 75 SEC Docket 1034 (discussing the reasons for, history of, and rules governing, the submission of electronic blue sheets). A November 16, 1992 Exchange memo to members states that blue sheet submissions must indicate whether a trade is a "long" or "short" sale -- the type of data entry involved in this proceeding, as discussed below. See n.6, infra.

^{4/} NYSE Rule 342 mandates that members provide reasonable supervision and "appropriate supervisory control" over their employees and the members' activities, including "delegat[ing] to qualified principals or employees responsibility and authority for supervision and control of each office, department or business activity, . . . provid[ing] for appropriate procedures of supervision and control . . . [and] establish[ing] a separate system of follow-up and review to determine that the delegated authority and responsibility is being properly exercised."

^{5/} Both Schon-Ex and Schonfeld are owned by The Schonfeld Group, LLC. According to Schon-Ex's brief, the Firm currently has seven employees, although its chief executive officer testified that, in January 2006, it had twenty employees. As of June 30, 2006, according to the Firm's FOCUS (Financial and Operational Combined Uniform Single) Report, Schon-Ex had total assets of nearly \$2.8 million and ownership equity of \$1.65 million after the Firm set aside \$300,000 to cover payment of the fine imposed by the NYSE. Schonfeld has over 850 employees and generated over \$115 million in revenues in 2005.

NYSE-listed securities. Among other things, ADP prepared electronic blue sheets with the data and, upon request, transmitted it on Schon-Ex's behalf to regulatory authorities, including the NYSE, that had requested it from Schon-Ex.

Cichy testified that, during the period at issue, no one at the Firm checked ADP's blue sheet submissions for accuracy. According to Cichy, the Firm "had no specific written procedures" regarding the verification of blue sheet data because the Firm "had no reason or no red flag at that point in time." Nardone stated that the Firm "had a procedure in place to verify that the orders were entered [into Schon-Ex's computer systems] as sell shorts . . . [that] order tickets indicated sell shorts [and that] the traders . . . uploaded the [information] as a sell short." Nardone further testified that this was the only verification procedure the Firm had during the period at issue. Nardone conceded that, although a copy of the transmission would be sent to the Firm by ADP, the Firm did not customarily review the data, as formatted by ADP, before ADP transmitted it to the Exchange.

B. In March 2004, staff in the Exchange's Division of Market Surveillance asked the Firm to provide blue sheets for its trading in the securities of Martha Stewart Living Omnimedia Inc. ("Martha Stewart"). The staff was investigating apparent "weakness in the price of the stock" in anticipation of a criminal jury verdict against a senior executive of the company and wanted data regarding contemporaneous short selling by Schon-Ex. According to John Kroog, a senior Exchange official who supervised the Martha Stewart investigation, upon comparing the electronic blue sheets submitted by ADP on Schon-Ex's behalf with internal NYSE databases, NYSE staff discovered that the Firm's blue sheets erroneously identified "short" sales executed by the Firm as "long" sales. ^{6/} According to the Exchange, it "uncovered this systemic error in April of 2004 during an investigation into Blue Sheet practices at numerous firms."

On April 23, 2004, NYSE staff notified the Firm that its blue sheets conflicted with the Exchange's records of Schon-Ex's short sales in Martha Stewart stock. NYSE staff requested that

^{6/} A "long" sale is the sale of a security that the seller owns. 13 Andrews Sec. Litig. & Reg. Rep. 16 n.2. The term "short sale" means "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller." 17 C.F.R. § 242.200(a). As we explained in Short Sales, Exchange Act Rel. No. 50103 (July 28, 2004), 83 SEC Docket 1492:

In order to deliver the security to the purchaser, the short seller will borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owned, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.

the Firm provide a listing of all accounts that sold Martha Stewart short through the Firm during the period from March 1 through March 5, 2004, along with the specifics of each transaction. Schon-Ex provided this information on April 30, 2004. The April 30 submission showed that the Firm executed 146 Martha Stewart short sale transactions during the period. ADP had misidentified approximately 100 out of the 146 transactions as long sales on Schon-Ex's original submission.

After the Firm informed ADP of the disparity, ADP tested its system and "confirmed" that short sales were not being properly reported. Nardone subsequently stated in an e-mail to ADP that the Firm's blue sheets "obviously are incorrect" and explained to ADP that there was "a regulatory issue" involved. ^{7/} On June 3, 2004, the Firm informed the Exchange about this ADP system problem, acknowledging that the Firm's blue sheets "did not properly reflect the short sale code on accounts."

Schon-Ex attempted to get ADP to correct the error. However, ADP was slow to address the problem, despite repeatedly assuring the Firm that the problem would be quickly corrected -- assurances that Schon-Ex relayed to the Exchange. Nardone acknowledged during his testimony that ADP was dilatory in fixing the problem. Nardone testified that he spoke to "the customer service people who service our account" and the account manager, Peter Stoll, about the problem. However, Nardone further testified that he did not raise the issue of ADP's delay with anyone at ADP senior to Stoll. ^{8/}

In a November 9, 2005 letter, Schon-Ex informed the Exchange that, between June 2002 and October 2004, the Firm submitted 84 blue sheets that "incorrectly reported the short sales in the [affected] accounts as long sales." ^{9/} According to a chart included with the November 9, 2005 letter, 64 of these erroneous blue sheets were submitted before NYSE alerted Schon-Ex to the problem with the Martha Stewart blue sheet submission, and 20 were submitted by Schon-Ex

^{7/} Nardone testified that he had explained to ADP's representative in the summer of 2004 that "there is a regulatory issue [and that] . . . [i]t wasn't us requesting a pretty report, it had to be fixed for the purposes of the Stock Exchange reporting."

^{8/} Neither the Firm nor Schonfeld (which Nardone also headed) considered terminating their relationship with ADP because, Nardone testified, "[t]hey support our books and records . . . [and] have too much infrastructure with the regulatory agencies that we cannot support."

^{9/} Schon-Ex included with this letter a table summarizing these inaccurate blue sheets. According to Cichy, the Martha Stewart trades were not included in the summary because, she surmised, "that was the one that created the problem and they [NYSE] were aware of it," although she stated that she did not know for certain why they were not included.

subsequent to that notification. ^{10/} Cichy stated that the Firm did not adopt procedures for the purpose of ensuring the accuracy of its blue sheet submissions until May 2005 -- more than a year after the Exchange had first notified the Firm of the problem and after the Firm had been informed that it was subject to an Exchange investigation regarding its blue sheet submissions.

Exchange official Kroog testified that, if a trade is misidentified in the blue sheets as a long sale when, in fact, it is actually a short sale, the error could escape the staff's attention. For example, in the Martha Stewart investigation, initially the staff was "primarily focused on short sale activity" and not on long sales. Kroog added that the staff did not identify the extent of the Firm's blue sheet errors for at least two years because the staff "wasn't looking for such discrepancies," and "relied on [Schon-Ex] to provide accurate information." Kroog described blue sheets as "the foundation" of certain Exchange investigations, including short sale investigations. Kroog noted that electronic blue sheets permit the staff to "create certain databases" to assist in analyzing data on "trade date, time of day," as well as "last name [and] geographic concentrations," and to "compare that against . . . other databases."

Schon-Ex's expert witness, Peter J. Chepucavage, testified that, even though the Exchange is able to obtain trading data from its order-entry system, the blue sheet data system is "very important" because it enables the Exchange and other regulators to "make the digestion of the information easier and more manageable." Chepucavage explained that, although the Exchange could conduct its analysis without utilizing the blue sheet data by consolidating its internal information manually, that would have been "a big task" and noted that "the blue sheets are designed as a uniform technological assistance" to aid the regulators in evaluating the trading information. However, Chepucavage stated that, in his opinion, the Firm's erroneous April 2004 blue sheet submission "did not have a significant impact" on the Exchange's Martha Stewart investigation because, according to Chepucavage, "based on what [he had] read in the record and heard . . . [at the hearing], . . . the staff had the necessary information to investigate Schoenfeld" from the data generated by its own internal order-entry system.

Kroog testified that, because of the repeated delays in ADP's resolving the reporting error, the Exchange asked the Firm to identify manually "accounts that sold short." In November 2004, the Firm began providing the Exchange with the requested data manually. ^{11/} While, Kroog explained, the manual submission of requested data was preferable to the erroneous electronic submissions of the Firm, it was nevertheless only an "interim fix" since the data was not automated. It is unclear exactly when ADP fixed the error. Schon-Ex now asserts that the error

^{10/} NYSE's charge memorandum also noted that Schon-Ex submitted, through ADP, 58 erroneous blue sheets to Commission staff, all caused by the same ADP coding error. However, the Exchange did not base its findings of violations on them.

^{11/} The Firm also manually provided data for trades that had occurred prior to this time. The Exchange does not allege that the Firm submitted any inaccurate blue sheet reports to it after October 2004.

was corrected in February 2005, but earlier had stated, in communications with the NYSE, that the problem was not "completely corrected and test verified" until May 2005. However, Schon-Ex continued to submit its data manually until May 2005.

C. On January 27, 2006, the NYSE Division of Enforcement instituted this proceeding. On June 7, 2006, the Division moved for summary judgment on the question of Schon-Ex's liability for the violations alleged in the complaint, *i.e.*, violations of Exchange Rules 410A, 401 and 342 based on its submission of inaccurate blue sheets and inadequate supervisory procedures related to those submissions. Although Schon-Ex asserted, in its response to the Division's motion, that it "conformed in all material respects with the [Exchange's] requirements" at issue, it did not challenge the facts underlying the Exchange's allegations, *i.e.*, that the Firm had incorrectly reported short sales as long and had no procedures to monitor the accuracy of the trading data ADP submitted on its behalf. The Hearing Panel granted the Division's motion and held a hearing regarding the appropriate sanction. The Hearing Panel censured the Firm and fined it \$300,000. On June 6, 2007, the NYSE Regulation, Inc. Board of Directors issued a decision affirming the decision of the Hearing Panel in all respects. This appeal followed.

III.

Schon-Ex does not dispute the Exchange's findings of violation and expressly admits in its brief to us, as it did before the Exchange, that its "Blue Sheet Reporting error occurred from June 2002 to February 2005, and resulted in 84 erroneous Blue Sheet Reports being sent to the NYSE." The record supports these admissions. It contains written summaries of the erroneous blue sheet submissions and hard copies of those submissions, which originally were transmitted by ADP electronically. We thus find that the Firm violated Rule 410A based on the inaccurate blue sheets submitted to the Exchange.

The record also includes evidence, in the form of testimony by the Firm's president and compliance officer, regarding Schon-Ex's lack of procedures designed to ensure that its blue sheet transmissions were accurate. This evidence supports the Exchange's findings that Schon-Ex submitted inaccurate blue sheet reports and that, during the period at issue, the Firm did not maintain adequate supervisory procedures relating to blue sheet submissions. Although Schon-Ex does not deny that it lacked procedures to ensure the accuracy of the blue sheet information transmitted on its behalf by ADP and does not expressly challenge the Exchange's findings that, as a result, it violated Rule 342, it states that it "believes that its procedures were effective." In support of this assertion, it notes that all of the data it supplied to ADP was correct and that the errors at issue were caused by ADP. We find that Schon-Ex violated Rule 342 based on the Firm's lack of procedures and controls, during the period at issue, to verify that ADP's submissions, on the Firm's behalf, were accurate.

We further believe that the evidence, establishing Schon-Ex's repeated failure to submit accurate blue sheet data over a multi-year period, supports the Exchange's finding that the Firm failed to adhere to principles of good business practice in the conduct of its business affairs. We consequently sustain the NYSE's finding that the Firm violated Rule 401.

IV.

Schon-Ex challenges the amount of the fine that the Exchange imposed. According to Schon-Ex, the fine "is palpably disproportionate to the violation and is without justification in light of the facts of this case." The Firm asks that we either "reduce the fine to an amount that is proportionate to the facts and violation" or "remand the case" back to the Exchange.

Our review of the sanctions imposed by the NYSE is governed by Section 19(e)(2) of the Securities Exchange Act of 1934. ^{12/} Section 19(e)(2) provides that we will sustain NYSE's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition, in which case we "may cancel, reduce, or require the remission of such sanction." ^{13/}

When evaluating whether a sanction imposed by the NYSE is excessive or oppressive, we "address[] the nature of the violation and the mitigating factors presented in the record." ^{14/} In determining whether the sanction is appropriately remedial and not excessive and punitive, we look at, among other relevant factors, "[t]he seriousness of the offense, the corresponding harm to the trading public, the potential gain to the broker for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the offending broker and others." ^{15/} We also have considered factors identified in an October 2005 Information Memo from the Exchange to NYSE members "regarding the factors considered by the Enforcement Division in determining sanctions." ^{16/} These include the nature and extent of the misconduct, resulting harm, prior disciplinary record, and the effectiveness of the compliance controls involved. Based on the foregoing, and as discussed below, we have determined that the sanctions are remedial and are not excessive or oppressive.

^{12/} 15 U.S.C. § 78s(e)(2).

^{13/} Schon-Ex does not claim, and we do not find, that NYSE's action imposed an unnecessary or inappropriate burden on competition.

^{14/} PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005)).

^{15/} McCarthy, 406 F.3d at 190. We note that, although deterrence is not, by itself, sufficient justification for imposing a sanction, "it may be considered as part of the overall remedial inquiry." Id. at 189; PAZ Sec., Inc., 494 F.3d at 1066.

^{16/} Factors Considered by the New York Stock Exchange Division of Enforcement in Determining Sanctions, Info. Memo No. 05-77 (Oct. 7, 2005), available at <http://www.nyse.com>.

A. Schon-Ex argues that the relevant factors identified by the courts and by the Exchange itself support a much smaller fine. It asserts that the data submission "error was not significant" because Exchange staff "already had the short sale information" from Schon-Ex's original trade entry -- a fact that Exchange official Kroog acknowledged during the hearing. ^{17/} Schon-Ex points out that the blue sheets were accurate "except the one field relating to short sales that was then unnecessary," because the NYSE already had that data. Schon-Ex further notes that the Exchange's Hearing Panel observed that "the harm that Enforcement alleged was caused by Schon-Ex should not weigh heavily in assessing [a] penalty." ^{18/}

Although the record is unclear about the extent to which the Firm's blue sheet errors impeded the Martha Stewart investigation or other Exchange investigations, we nevertheless view Schon-Ex's misconduct as significant. ^{19/} We have previously observed that the utilization of the electronic blue sheet format enables Exchange staff to "review and analyze blue sheet information more rapidly and effectively" and "significantly improve[s] the ability of the [Exchange] to conduct [its] market surveillance and monitoring responsibilities" ^{20/} As noted, NYSE official Kroog described blue sheets as "the foundation" of Exchange investigations and emphasized that the electronic blue sheet format helps the staff to search through the data more quickly and effectively. Schon-Ex's expert witness, Chepucavage, also testified to the importance

^{17/} As discussed above, NYSE official Kroog testified that the Exchange initially obtained the short sale trading data from the Exchange's own internal order-entry system, which monitors trading by Exchange members.

^{18/} Although the Exchange's Division of Enforcement had contended that Schon-Ex's erroneous submissions had impeded the Martha Stewart investigation, the Hearing Panel rejected Enforcement's contention, concluding that "these impediments seemed vague and unquantified."

^{19/} While the Hearing Panel did not fully accept Enforcement's claims of harm resulting from Schon-Ex's erroneous submissions, it nevertheless imposed the \$300,000 fine at issue. The Hearing Panel found that Schon-Ex's "failure to detect the problem in the first place and, once it became aware of the errors, to take timely and effective action to get its vendor to implement a solution suggested that Respondent did not take the matter seriously enough." According to the Panel, "the fine imposed must be sufficient to ensure that Respondent, as well as other firms in similar circumstances, will be more diligent and pro-active in the future." As indicated in the discussion below, we share the Hearing Panel's concerns.

^{20/} Exchange Act Rel. No. 25859 (June 27, 1988), 41 SEC Docket 398, 399-400. As we have noted, "the sheer bulk of the information that often results from such [blue sheet] requests can make analysis of blue sheet information by the surveillance staffs of the Exchanges difficult and time consuming, particularly where they must manually review records involving a large number of transactions, firms and accounts." *Id.* at 399.

of the blue sheet data system in enabling the Exchange to evaluate the trading information more effectively.

Here, the erroneous data submissions occurred over several years, involved numerous blue sheet reports, and continued for several months after Exchange staff notified the Firm about the problem. Schon-Ex evidenced an apparent lack of urgency in resolving the matter. Although Schon-Ex claims that it did all that it could to get ADP to remedy the problem promptly, it admittedly failed to raise the matter with any ADP personnel higher than Schon-Ex's account executive or take other action that might have impressed upon ADP the seriousness of the matter. The Firm also could have begun manually submitting the blue sheet data much sooner than it did and not waited several months for the Exchange to make this request. 21/

Although we, like the NYSE, acknowledge the Firm's subsequent efforts to revise its procedures to detect errors, its failure to have such procedures in place earlier facilitated at least 84 erroneous submissions. Moreover, the Firm did not revise its blue sheet oversight procedures for over a year after learning of the problem and acted only after being notified that it was subject to an enforcement investigation related to its blue sheet submissions.

B. Schon-Ex also complains that, in setting sanctions for Schon-Ex, the Hearing Panel considered settled proceedings with 20 different NYSE members. These settled proceedings involved allegations of erroneous electronic blue sheet submissions and inadequate internal controls. Schon-Ex insists "they have no precedence in this matter." Schon-Ex further contends that, because these settled cases were resolved without any hearing, the settled cases are of doubtful value because these cases do not contain enough information about the settling firm, the precise nature of the violation, or mitigating factors to provide a meaningful comparison. Schon-Ex asserts that these settled cases were clearly used as precedent in setting Schon-Ex's fine.

NYSE procedures expressly direct that, "[i]n arguing penalty, the parties may cite to prior NYSE disciplinary decisions," and these procedures do not distinguish between settled and contested disciplinary actions. We have recognized that it may be appropriate for an SRO to review settled precedent "as one of many guideposts" to determine the appropriate sanction,

21/ Schon-Ex complains that the Exchange "did nothing to assist or guide Schon-Ex in correcting" the problem. ADP, however, was not an Exchange member nor subject to Exchange jurisdiction. Moreover, we have repeatedly held that members and their associated persons "cannot shift their burden of compliance" to the SRO. Richard F. Kresge, Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3086-87 and n.33 (quoting B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994)); see also Nazmi C. Hassanieh, 52 S.E.C. 87, 90-91 n.13 (1994) (rejecting defense, in failure to cooperate proceeding, that SRO "failed to take reasonable steps to locate" respondent by contacting his former attorney).

particularly where, as here, the SRO had no published sanction guidelines. 22/ Moreover, the Hearing Panel did not treat the settled decisions as binding or having precedential value. Indeed, as Schon-Ex notes, the Hearing Panel expressly rejected this assertion in its opinion. 23/

The record shows that the Hearing Panel examined the settled cases carefully to determine their relevance to this case. It appears that these settled cases were developed during the same investigation that led to the Schon-Ex inquiry, and they were all resolved less than eight months prior to the Schon-Ex penalty hearing. The Hearing Panel reviewed each of the stipulations entered in these settled cases, and asked questions about the facts of the cases, relevant precedents and the proposed penalties during hearings attended by counsel for the Firm and Enforcement. 24/ The Hearing Panel rejected the applicability of those settlements where

22/ See Arthur James Niebauer, Exchange Act Rel. No. 54384 (Aug. 30, 2006), 88 SEC Docket 2728, 2740 & n.46 (noting approvingly in upholding NYSE's sanction determination that the sanctions imposed fell within the range of sanctions imposed in five settled cases for violations of comparable NYSE trading rules); see also David Wong, 55 S.E.C. 602, 614 (2002) (finding it appropriate for American Stock Exchange to consider a settled case, among numerous other factors, in assessing a sanction).

Schon-Ex cites to certain administrative and court decisions that, it asserts, held that settled cases have no precedential value. See, e.g., Office of Consumers' Counsel v. FERC, 783 F.2d 206, 235 (D.C. Cir. 1986) (holding that a settled administrative disciplinary matter "will not establish principles or precedent or control future proceedings or otherwise 'settle issues'" because the "essence of a settlement agreement [is] that the participants can agree on an end result without necessarily agreeing upon the reasoning, data, analyses or principles which led to the agreement"). However, the decisions cited by Schon-Ex do not hold that a self-regulatory organization may not use settled cases as one factor, among others, in determining an appropriate sanction, as the Hearing Panel did here.

23/ The Hearing Panel stated:

[W]hile settled cases are not binding on a Hearing Panel, they can provide 'a useful starting point' in determining a reasonable range of sanctions. See Info Memo 05-77 at 2. Of course, a trier of fact must always base its decision on the particular facts and circumstances of the case before it.

24/ We note in this connection that parties that settle disciplinary proceedings often receive less severe sanctions than those who do not. See Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (noting that "the rationale for the imposition of lower sanctions in settled proceedings is, at least in part, that settlement lets the Commission avoid time-consuming adversary proceedings and the concomitant expenditure of staff resources"); Philip A. Lehman, Exchange Act Rel. No. 54660 (Oct.

(continued...)

the highest fine (\$500,000) was imposed, finding that, unlike the respondents in those cases, Schon-Ex did not make inaccurate representations to the NYSE that the problem had been corrected or misreport several different types of data. On the other hand, the panel did not find that Schon-Ex self-reported its errors to the NYSE or expended significant resources to correct its problems so as to bring itself into compliance within a reasonable time, as had occurred in those cases in which the lowest (\$150,000) fine had been assessed. 25/

C. Schon-Ex and its predecessor entities have been subject to three prior disciplinary actions. 26/ In the most serious of these matters, in 2002, a Schon-Ex predecessor entity, Major League Securities, LLC, consented to findings that its "supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations," in connection with improper loans made by an executive officer to persons who used these funds to open accounts at the predecessor entity. Pursuant to that settlement, the predecessor entity agreed to pay a fine of \$225,000. Another matter, settled in 2000, involved books and records failures on the part of another predecessor entity, Major League Securities Inc., 27/ in which the firm consented to findings that it had "failed to make and keep order memoranda" concerning a number of separate securities transactions, "failed to record the time of execution" with respect to other transactions, and "failed to prepare, maintain, and enforce adequate written supervisory procedures." As part of that settlement, the firm agreed to pay a fine of \$15,500. The third matter resulted in a summary fine of \$5,000 imposed in July 2004

24/ (...continued)

27, 2006), 89 SEC Docket 536, 550 (pointing out that sanctions imposed in settled proceedings may understate the sanctions imposed in litigated cases "because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversarial litigation"); Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (noting that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings") (citation omitted). Thus, we do not believe that Schon-Ex suffered from having its sanctions compared to those in similar settled proceedings.

25/ One member of the three member hearing panel would have imposed a fine in the "five-figure range" on the grounds that the violations in this case were not significant and did not affect a large number of trades or accounts and that such a lower amount would have been sufficient to achieve the goal of deterrence. However, it is the final decision of the Exchange that we review. The NYSE Board affirmed the Hearing Panel majority, making that majority view the final decision of the Exchange.

26/ Schon-Ex does not assert that the disciplinary history of its predecessors should not be imputed to it.

27/ It is unclear from the record when Major League Securities Inc. changed its name to Major League Securities, LLC.

under NYSE Rule 476A in connection with Schon-Ex's submission of inaccurate account indicators. 28/

Schon-Ex also asserts that the Exchange improperly considered disciplinary history involving its affiliate, Schonfeld, in sanctioning the Firm. 29/ Although we believe that it was not improper for the Hearing Panel to consider Schonfeld's disciplinary history in light of the clear overlap in personnel and other ties between the two affiliated firms, we nevertheless have not considered Schonfeld's misconduct in assessing the appropriateness of the sanction imposed by the Exchange. We view the Firm's own prior disciplinary history, independent of Schonfeld's, as serious and of a similar nature to that found here, which provides additional justification for the sanctions imposed.

D. Schon-Ex argues that the Exchange erred in not treating its misconduct under the "minor rule violation" provisions of NYSE Rule 476A and imposing a fine of only \$5,000, as provided for under that rule. Rule 476A(a) provides that, "[i]n lieu of commencing a formal disciplinary proceeding . . . the Exchange may . . . impose a fine, not to exceed \$5,000, on any member . . . for any violation the Exchange shall have determined is minor in nature [emphasis added]." Rule 476A(e) further states that "the Exchange shall be free, whenever it determines that any violation is not minor in nature, to proceed under Rule 476 [i.e., commence a formal disciplinary proceeding] rather than under this Rule." Rule 476A thus clearly grants the Exchange the discretion to determine whether Schon-Ex's violation of Rule 410A should be treated as a minor rule violation or the subject of formal disciplinary procedures.

We agree with the Exchange that formal disciplinary proceedings were warranted by the large number of erroneous submissions over a two-year period in violation of Rule 410A. Moreover, the NYSE alleged violations of rules relating to supervisory procedures and compliance with good business practices, and NYSE rules do not provide for violations of these rules to be considered as minor rule violations.

28/ In its order, NYSE advised Schon-Ex of its right to contest the determination. It is unclear from the record whether Schon-Ex paid the fine or contested the decision.

29/ According to the Firm, Schon-Ex and Schonfeld "are two distinct entities that have different businesses, different registrations and different SROs" and, "[t]herefore, the disciplinary history of Schonfeld should not have been considered in evaluating the sanctions against Schon-Ex." Schon-Ex points out that, while it is a "NYSE registered broker-dealer, whose sole business is to execute listed securities for Schonfeld and its customers," Schonfeld is "an NASD member firm [that acts as an] executing and clearing broker [and] also conducts a DVP institutional business and a conduit stock loan business."

E. Schon-Ex further complains that the Exchange improperly considered Schonfeld's assets in determining a sanction. It observes that one of the sanctioning factors noted by the Exchange in its 2005 Information Memo is the size of the firm and that Schon-Ex's small size should weigh in favor of a lesser sanction. Schon-Ex argues that it was "a small firm of 7 employees" and that the fine imposed against it is excessive given its small size. According to Schon-Ex, the fine amounts to one-sixth of its entire net capital.

While we believe that it was not unreasonable for the Hearing Panel to consider the combined financial resources of Schon-Ex and Schonfeld given the overlap of the two companies' businesses, operations and key employees, we conclude that, even excluding Schonfeld's resources and looking only to Schon-Ex's financial position, the amount of the fine was neither excessive nor oppressive. Schon-Ex has not established that payment of the fine threatens its business. Indeed, Schon-Ex has presented no evidence to support its contentions that the payment of the fine would "work an excessive and punitive result" or cause the "destruction" of its business. 30/ Accordingly, we do not find Schon-Ex's small size and limited resources to be a mitigating factor warranting a lesser penalty.

In sum, the Firm's violations, in the nature and extent of its erroneous submissions, in its failure to timely remedy the problem, and in the inadequacies of its procedures in preventing or detecting the problem in the first place, warrant a substantial sanction. Under all the circumstances, we believe that the sanction imposed by the NYSE provides an appropriate level of deterrence -- both to Schon-Ex and to other firms that are required to supply similar data to regulators -- to encourage NYSE members to make every reasonable effort to ensure that their

30/ See McCarthy, 406 F.3d at 190 (holding that mitigating facts and circumstances existed "from which a compelling argument can be made that suspending McCarthy now will not serve remedial interests and will work an excessive and punitive result -- namely, the destruction of the brokerage practice McCarthy has built during several years of rule-abiding trading").

submissions are accurate and that this kind of systemic problem is not repeated. 31/ By so doing, we believe that the sanction furthers important objectives of the self-regulatory system, is neither excessive nor oppressive, and, therefore, satisfies the remedial requirements of the Exchange Act. 32/

An appropriate order will issue. 33/

By the Commission (Chairman COX and Commissioners ATKINS and CASEY).

Nancy M. Morris
Secretary

31/ Id. at 189.

32/ PAZ Sec., Inc., 494 F.3d at 1065-66.

33/ We have considered all of the parties' contentions. 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. 57857 / May 23, 2008

Admin. Proc. File No. 3-12693

In the Matter of the Application of

SCHON-EX, LLC
c/o John R. Hewitt, Esq.
McCarter & English, LLP
245 Park Avenue
New York, NY 10167

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
EXCHANGE

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

ORDERED that the disciplinary action taken by NYSE Regulation, Inc. against Schon-
Ex, LLC be, and it hereby is, sustained.

By the Commission.

Nancy M. Morris
Secretary