INITIAL DECISION RELEASE NO. 333
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12596

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	
SALVATORE F. SODANO	:	INITIAL DECISION
	:	August 20, 2007
	:	

APPEARANCES: Stephen L. Cohen, Donald N. Dowie, Amy L. Friedman, and Daniel Weinstein for the Division of Enforcement, United States Securities and Exchange Commission

William R. Baker III, Richard Owens, Michele E. Rose, Douglas N. Greenburg, and J.Scott Ballenger for Salvatore F. Sodano

BEFORE: Robert G. Mahony, Administrative Law Judge

INTRODUCTION

On March 22, 2007, the Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) against Respondent Salvatore F. Sodano (Sodano), pursuant to Section 19(h) of the Securities Exchange Act of 1934 (Exchange Act). The OIP charges that Sodano, during his term as Chairman and Chief Executive Officer (CEO) of the American Stock Exchange LLC (Amex or Exchange), without reasonable justification or excuse violated Exchange Act Section 19(h)(4) by failing to enforce compliance with the Exchange Act, the rules and regulations thereunder, and the Amex rules. The only sanction the Division of Enforcement (Division) seeks against Sodano, who is no longer with the Amex, is censure. Sodano filed his Answer to the OIP on April 17, 2007.

Pending is Sodano's Motion for Summary Disposition (Motion), pursuant to Rule 250 of the Commission's Rules of Practice, seeking dismissal of the charges in the OIP.[1] The Division filed an Opposition to the Motion (Opposition) on July 31, 2007, to which Sodano filed a

[1] Sodano was granted leave to file his Motion at the July 18 prehearing conference.

Response on August 3, 2007. On August 8, 2007, the undersigned held oral argument on these pleadings.[2]

The Motion asserts that, as a matter of law, the OIP must be dismissed with prejudice because: (1) Section 19(h)(4) of the Exchange Act does not confer authority to institute public administrative proceedings against an individual who is no longer an "officer or director" of a self-regulatory organization (SRO); and (2) Section 19(h)(4) requires proof of scienter and the Division has not alleged that Sodano acted with the requisite state of mind or any facts that could support such a finding. For the reasons stated below, Sodano's Motion is granted and the charges of the OIP are dismissed. Because Sodano prevails on his first argument that Section 19(h)(4) does not provide for sanctioning a former officer or director, his second argument is rendered moot.

STANDARDS FOR SUMMARY DISPOSITION

Commission Rule of Practice 250 permits a party to make a motion for summary disposition of any or all allegations in the OIP after a respondent files an answer and the Division has made its documents available for inspection and copying, both of which have occurred. The comment to Rule 250 states that "[s]ummary disposition is a procedure that can resolve issues prior to hearing, thereby reducing costs of [a] hearing and expediting resolution of the proceeding." This procedure, however, "should not delay the planned start of the hearing" as such motions must be ruled on "promptly" by the administrative law judge. 17 C.F.R. § 201.250(b) & cmt.

Under Rule 250, all facts of the pleadings of the party against whom the motion is made shall be taken as true—except as modified by stipulations, admissions, uncontested affidavits, or facts officially noted—and the administrative law judge may grant the motion if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(a)-(b).

STATEMENT OF RELEVANT FACTS

From September 1999 until January 2005, Sodano was Chairman and CEO of the Amex, a national securities exchange located in New York, New York, and registered with the Commission pursuant to Exchange Act Section 6. From 1998 until December 2004, the Amex was a subsidiary of NASD, Inc. (NASD). At all relevant times, however, the Amex was an SRO with all of an SRO's attendant obligations under the Exchange Act. (OIP ¶¶ A.1-B.2.)

As an SRO, the Amex is a quasi-governmental body that has responsibilities fundamental to the enforcement of the federal securities laws. The Amex and its officers have an obligation to comply, and to enforce compliance by its members, with the Exchange Act, the rules and regulations thereunder, and the Exchange's own rules. As the Amex's Chairman

[2] Sodano's Motion and accompanying memorandum will be cited throughout as "(Motion at ___.)," the Division's Opposition as "(Opposition at ___.)," and Sodano's Response as "(Response at __.)." The August 8 oral argument transcript will be cited as "(Tr. ___.)."

and CEO, Sodano failed to enforce compliance with federal securities laws, rules and regulations, and Amex rules by the Amex's members and persons associated with the Amex's members. (OIP ¶ C.3.)

In September 2000, the Commission, prompted by a 1999 inspection report by the Commission's Office of Compliance Inspections and Examinations (OCIE), instituted a settled administrative proceeding against the Amex in which the Commission found, among other things, that the Amex had failed to adequately enforce certain option order handling rules including critical customer-protection rules relating to firm quote and trading ahead (September 2000 Order). Although the Commission's order required the Amex to enhance and improve its regulatory programs for enforcing these rules, an inspection by OCIE ending in June 2003 revealed that the Amex had failed to do so. Additional internal reviews revealed similar failures.[3] For example, several of the Amex's representations made to OCIE staff following the September 2000 Order regarding steps the Amex purportedly had taken to improve its regulatory function in its options market proved to be inaccurate and misleading. (OIP ¶ C.4.)

The Amex's regulation of its equities markets and its floor brokers had shortcomings similar to those in the Amex's options regulation. Many of these shortcomings remained after OCIE inspection reports alerted the Amex to them years earlier. These deficiencies in both the options and equities markets were emblematic of Sodano's failure to ensure that the Amex maintained an adequate regulatory program. (OIP ¶ C.5.)

The Amex's regulatory deficiencies resulted in large part from Sodano's failure to pay adequate attention to regulation, to put in place an oversight structure, to ensure the regulatory staff was properly trained, and to dedicate sufficient resources to ensure that the Exchange was meeting its regulatory obligations. These failures were particularly significant with respect to the options market because Sodano knew the Exchange was subject to the September 2000 Order, which identified numerous regulatory failures in that area. Sodano's inattention to and apparent lack of interest in regulation filtered down the management chain creating an environment in which regulation was not a priority and, therefore, compliance with the securities laws and the Amex's rules was not enforced. (OIP ¶ C.6.)

Notwithstanding this responsibility and numerous red flags throughout the period 1999 to 2004, Sodano failed to fulfill his responsibilities as an officer of the Amex to enforce compliance with federal securities laws and the Amex's rules. (OIP ¶ C.7.)

In December 2004, control of the Amex changed. (OIP ¶ B.2.) Thereafter, Sodano resigned his posts as CEO and Chairman in January and April 2005, respectively. (OIP ¶ A.1.)

[3] It was after OCIE's June 2003 report that the Division began an investigation of Sodano's conduct. Sodano was subsequently afforded the opportunity to submit multiple Wells Submissions and the Division and Sodano's counsel met numerous times. (Tr. 25.)

He is currently the Dean of the Frank G. Zarb School of Business at Hofstra University in Hempstead, NY.[4]

DISCUSSION AND CONCLUSIONS OF LAW

The OIP was issued pursuant to Section 19(h)(4) of the Exchange Act. This Section reads:

> The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to remove from office or censure any officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such officer or director has willfully violated any provision of this title, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance.

15 U.S.C. § 78s(h)(4) (emphasis added).

A. *Positions of the Parties*

Sodano asserts that the Commission lacks authority to institute these proceedings because Section 19(h)(4) only applies to a current "officer or director" of an SRO. (Motion at 1, 6.) Sodano has not been an officer or director of the Amex since April 2005. (Motion at 5.) He argues that "[i]f Congress had intended to extend the Commission's Section 19(h)(4) jurisdiction over 'officers or directors' of an SRO to individuals no longer occupying either position, it could have (and would have) said so explicitly." (Motion at 9.)

As evidence of Congress's ability to pass a statute that institutes disciplinary proceedings against someone who was, but is no longer, associated with the securities industry, Sodano points to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). Both of these sections were amended by Congress in 1987 to allow for a permanent bar against "any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, was associated or was seeking to become associated" with a broker or dealer or investment adviser." (Motion at 9-10 (emphasis in original); Response at 6 & n.1 (also referencing a host of "technical amendments" to the Exchange Act).) However, at the same time, Sodano adds, Congress did not amend Section 19(h)(4) to apply to former officers and directors. Additionally, Sodano points out that, in the only two proceedings brought under Section 19(h)(4), both settlements, respondents were "then-current" officers or directors. (Motion at 8; Response at 5 (citing National Stock Exchange, 85 SEC Docket 1653 (May 19,

[4] Hofstra University, http://www.hofstra.edu/Academics/Colleges/Zarb/zarb_deansoffice.html (last visited Aug. 17, 2007) (official notice, pursuant to 17 C.F.R. § 201.323).

2005) (imposing censure); William M. Briggs, 68 SEC Docket 367 (Sept. 30, 1998) (imposing censure and removal from office).)[5]

Sodano argues that the two remedies authorized by Section 19(h)(4), censure and removal from office, further demonstrate Congress's lack of intent to reach former officers and directors. (Motion at 10-11.) According to Sodano, removal of the officer or director of an SRO is "corrective" and "forward-looking" because only one who is currently an officer or director can be removed from office. (Motion at 12.) Sodano asserts that censure was added in a 1975 amendment to the Exchange Act to provide the Commission with a less severe sanction, but not "[as] a basis for extending the Commission's unique authority over the officers and directors of SROs to members of the general public who are not otherwise subject to its jurisdiction." (Motion at 11-12.) As further evidence that Congress intended to limit Section 19(h)(4) to current officers and directors, Sodano asserts that it did not include a more severe sanction, such as an associational bar from the industry, as is found elsewhere in the securities laws. (Response at 5.) Had it done so, it would have evidenced Congressional concern that an officer or director could resign yet return to the industry at a later time. (Motion at 11.) Sodano adds that when "'Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.'" (Response at 6-7 (citing S.D. Warren Co. v. Maine Bd. Of Envt'l Prot., 126 S.Ct. 1843, 1852 (2006); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002); accord S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 894 (D.C. Cir. 2006).)

The Division asserts that Congress authorized the Commission to censure a former officer or director pursuant to Section 19(h)(4). The Division urges what it deems a "common sense" reading of the Section that requires only that a respondent be an officer or director when the alleged statutory or regulatory failure occurred. (Opposition at 7-8.) By using words such as "failed to enforce compliance," the Division argues that the focus of the language is on the past, not present; thus, there is nothing in the language of the statute that precludes censuring someone who was, but is no longer, an officer or director. (Opposition at 8 (emphasis added).) The Division argues that if the statute is given the reading proposed by Sodano**,** "an officer could always evade a censure simply by resigning as an officer or director." (Opposition at 8.)

To support its position that Congress intended to give the Commission authority to censure former officers or directors, the Division cites two cases that predated the 1987

[5] Sodano argues that the Safety and Soundness Act of 1992, 12 U.S.C. § 4511, is an additional example of how Congress drafts a statute that retains jurisdiction over a former office holder. (Motion at 9.) That Act, which created the Office of Federal Housing Enterprise Oversight (OFHEO), contains a provision that permits the Director of OFHEO to retain jurisdiction over a former director or executive officer of a Government Sponsored Enterprise for up to two years after that person "ceases to be associated with the enterprise." 12 U.S.C. § 4637.

For a similar proposition, Sodano cites the Amex's own constitution, which retains jurisdiction for up to one year. (Motion at 10 (citing Constitution of the American Stock Exchange, Art. V, sec. 6).) He also cites other provisions of the Exchange Act that may apply to former officers or directors, including 15 U.S.C. § 78u(d)(3)(A). (Motion at 13 n.4.)

Exchange Act amendments. (Opposition at 10-11.) In both cases, the Commission imposed associational bars, pursuant to Section 15(b)(6) of the Exchange Act,[6] on individuals who were associated with a broker-dealer when the violations occurred, but had since left their positions. Adrian Antoniu, 48 S.E.C. 909, 910 (1987) ("We have consistently interpreted Section 15(b)(6) as authorizing proceedings against persons who were associated with a broker or dealer at the time of their misconduct, regardless of their subsequent employment.") vacated on other grounds, 877 F.2d 721 (8th Cir. 1989); John Kilpatrick, 48 S.E.C. 481, 487 (1986) ("[I]t has been our longstanding interpretation that we have jurisdiction under Section 15(b)(6) as well as Section 203(f) of the Investment Advisers Act, to bring proceedings against persons who were associated with a broker-dealer or investment adviser at the time they committed an alleged violation . . . . [Otherwise, brokers could] avoid administrative sanctions simply by leaving the business and stating they have no intention of returning.")[7] Finally, the Division asserts that censure is an equitable remedy and may be imposed on a former officer or director no matter when he or she left that position. (Tr. 30.)

B. *Ruling*

When interpreting a statute, the analysis begins with the language of the statute to determine whether Congress has already answered the question at issue. Norfolk & W. Ry. Co. v. Am. Train Dispatcher's Ass'n, 499 U.S. 117, 128 (1991). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S 837, 842-843 (1984). If, the language is ambiguous, however, the legislative history can aid in interpreting the statute. Toibb v. Radloff, 501 U.S. 157, 162 (1991). Undefined words in a statute are given their ordinary meaning. Perrin v. United States, 444 U.S. 37, 42 (1979).

Section 19(h)(4) of the Exchange Act is unambiguous on its face, referring to the officers and directors of an SRO only in the present. Section 3(a)(7) of the Exchange Act, which applies here, also defines director in the present: "any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or not." (emphasis

[6] Under Exchange Act Section 15(b)(6)(A), a conviction for any offense specified in Section 15(b)(4)(B) within the prior ten years is grounds for the Commission to censure, place limitations on, suspend, or bar that individual.

[7] As further evidence that resignation will not eliminate a regulatory agency's authority to regulate conduct, the Division points to a number of state jurisdictions that have held that a judicial officer's resignation does not divest a governing body from the power to impose appropriate sanctions. (Opposition at 14-15 n.9. (citing In re Nelson, 86 P.3d 374, 376 n.1 (2004); Kennick v. Comm'n on Judicial Performance, 787 P.2d 591 (Cal. 1990); In re Probert, 308 N.W.2d 773 (Mich. 1981); Quinn v. State Comm'n on Judicial Conduct, 430 N.E.2d 879 (N.Y. 1981); In re Peoples, 250 S.E.2d 890 (N.C. 1978); Judicial Inquiry and Review Bd. v. Snyder, 523 A.2d 294 (Penn. 1987); In re Wharton, 332 S.E.2d 650 (W. Va. 1985); In re Sterlinske, 365 N.W.2d 876 (Wisc. 1985) (per curiam).)

added.)[8] However, when Congress wants to construct a statute to apply to individuals formerly associated with an entity, it knows how to do so. Both Section 15(b)(6)(A) of the Exchange Act and Section 203(f) of the Advisers Act explicitly cover "any person who is associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated" with a broker dealer or investment adviser, respectively. Another example, among many, is Section 21C of the Exchange Act where Congress uses the past, present, and future construction in the same provision, when it authorizes the Commission to enter a cease-and-desist order, after notice and opportunity for hearing, against "any person [who] is violating, has violated, or is about to violate" the Exchange Act or rules thereunder. See also Exchange Act Section 15B(c)(4) ("[t]he Commission . . . shall censure . . . any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated . . ."); Exchange Act Section 17A(c)(4)(A) ("any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated . . ."); Exchange Act Section 21(a)(1) ("any person has violated, is violating, or is about to violate . . ."); Securities Act of 1933 Section 8A(a) (same).

The remedies provided in the statute further demonstrate that the section applies only to current officers and directors. Section 19(h)(4) provides for removal from office and censure. One who is no longer in office clearly cannot be "removed from office"; therefore, this remedy only applies to current officers and directors. Censure is defined as "an official reprimand or condemnation." (Div. Opp. 8 (citing Black's Law Dictionary 237 (8th ed. 2004).) Given this definition and the order in which the remedies are listed, it is plain from the statutory construction that Congress's inclusion of censure in Section 19(h)(4) provides a less severe alternative remedy when sanctioning an incumbent officer and director. However, I cannot conclude that it justifies expanding the definitions of "officer or director" to those who formerly held the positions.[9]

I decline to credit the Division's argument by analogy that Antoniu and Kilpatrick are controlling and that I should read "former officer and director" into Section 19(h)(4). Absent here are the "longstanding interpretation[s]" that Antoniu and Kilpatrick noted of those provisions, the expansive language "any" persons, and the available remedy of an associational bar. See Antoniu, 48 S.E.C. at 910; Kilpatrick, 48 S.E.C. at 487. Further, the subsequent history of those antifraud provisions, whereby Congress in 1987 amended Sections 15(b)(6) and 203(f), along with other changes, to include persons formerly associated, undermines the Division's position. A better approach is articulated in Russello v. United States: "Where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We would not presume to ascribe this difference to a simple mistake

[8] While not defined in the Exchange Act, Webster's defines an officer as "one who holds an office of trust, authority, or command." Webster's Collegiate Dictionary 807 (10th ed. 1998).

[9] That censure was intended as a less severe alternative remedy for exchange management issues is supported by Feins v. Am. Stock Exch., Inc., 1995 WL 75482 (S.D.N.Y. 1995) (citing legislative history). Assuming arguendo that the statute is ambiguous on its face, Section 19(h)(4)'s legislative history is silent on sanctioning former officers and directors. See S. Rep. 94-75, reprinted in 1975 U.S.C.C.A.N. 179 (1975 WL 12347).

in draftsmanship." 464 U.S. 16, 23 (1983) (cited in Barnhart, 534 U.S. at 440). By omitting reference to former officers or directors, in comparison to wording in other parts of the securities laws, the intent of Congress is clear that this Section applies only to those who currently hold the position.

Based on the above, I find that there is no genuine issue with regard to any material fact and that Sodano is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). Accordingly, the charges in the OIP will be dismissed.[10]

ORDER

IT IS ORDERED, pursuant to Rule 250(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(b), that Respondent Salvatore F. Sodano's Motion for Summary Disposition is GRANTED; and

IT IS FURTHER ORDERED that the charges in the Order Instituting Proceedings are hereby DISMISSED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge

[10] Sodano requests that the OIP be dismissed with prejudice; however, the Commission's Rules of Practice do not distinguish between dismissing charges with or without prejudice. See John M. Lucarelli, Exchange Act Release No. 56075, at *2 (July 13, 2007) (Order Dismissing Administrative Proceeding).