

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53138 / January 18, 2006

Admin. Proc. File No. 3-10999

In the Matter of the Application of	:	
	:	
EDWARD JOHN MCCARTHY	:	ORDER REMANDING
	:	PROCEEDING TO
For Review of the Action Taken by the	:	REGISTERED SECURITIES
	:	EXCHANGE
New York Stock Exchange, Inc.	:	
	:	

On September 26, 2003, the Commission issued an opinion and order ("September 26 Opinion") sustaining a disciplinary action taken by the New York Stock Exchange, Inc. ("NYSE" or "Exchange") against Edward John McCarthy. We found that McCarthy, while an NYSE floor broker, violated Section 11(a)(1) of the Securities Exchange Act of 1934, 1/ Exchange Act Rule 11a-1, 2/ and parallel NYSE rules when he executed trades for an account maintained by Oakford Corporation, a non-member firm, over which he exercised discretion and in which he had an interest. We sustained the sanctions imposed by the Exchange: a censure, a \$75,000 fine, and a two-year bar from membership and employment in any capacity on the floor of the Exchange. 3/

McCarthy appealed the September 26 Opinion to the United States Court of Appeals for the Second Circuit. Although the Court of Appeals affirmed the Commission's findings that McCarthy violated the federal securities laws and NYSE rules, 4/ the Court vacated the portion of the Commission's order sustaining the two-year bar and remanded "to allow the Commission

1/ 15 U.S.C. § 78k(a)(1).

2/ 17 C.F.R. § 240.11a-1.

3/ Edward John McCarthy, Securities Exchange Act Rel. No. 48554 (Sept. 26, 2003), 81 SEC Docket 603.

4/ McCarthy v. SEC, 406 F.3d 179 (2d Cir. 2005).

an opportunity to reconsider its decision in light of the mitigating facts and circumstances presented by the record." 5/

We have determined to remand the portion of this proceeding addressing the imposition of a two-year bar to the NYSE. Under Section 19(e) of the Exchange Act, 6/ the Commission does not choose the sanction to be imposed in disciplinary proceedings brought by the Exchange and other securities industry self-regulatory organizations. Rather, Congress gave us a more limited review function. We may disturb an Exchange-imposed sanction only if we find that the sanction "imposes any burden on competition not necessary or appropriate . . . or is excessive or oppressive." 7/ Under this standard, the Commission must sustain the sanction chosen by the Exchange, even if we would not have imposed the sanction in the first instance, unless we find that the sanction crosses the statutory threshold of being "excessive or oppressive" or imposes an inappropriate or unnecessary burden on competition.

Given that, in proceedings of this type, it is the Exchange, and not the Commission, that chooses the sanction it deems appropriate for the misconduct, remanding to the Exchange will provide it an opportunity to explain further the findings and conclusions that support its chosen sanction. We note that Exchange Act Section 6(d)(1) requires that, when a national securities exchange seeks to impose a disciplinary sanction, its action be supported by an explanatory statement. 8/ The Exchange should consider "the protective interests to be served by removing McCarthy from the floor of the Stock Exchange" and whether his removal will deter McCarthy or other floor brokers from engaging in similar misconduct in the future. 9/

The NYSE also may address any other issue related to whether imposition of a suspension on McCarthy will serve a remedial purpose. However, only the portion of the September 26 Opinion addressing the two-year bar is subject to remand to the NYSE. All other findings of the September 26 Opinion remain undisturbed.

At the conclusion of the Exchange's proceedings on remand, and in the event the NYSE imposes a sanction in addition to the censure and fine, McCarthy will have the right to file an

5/ Id., 406 F.3d at 191.

6/ 15 U.S.C. § 78s(e).

7/ 15 U.S.C. § 78s(e)(2).

8/ New York & Foreign Securities Corp. Admin. Proc. File No. 3-7669, Order Granting Stay and Directing Supplementation of the Record (July 6, 1992) (remanding proceedings to Exchange after finding that the Board failed to meet this statutory responsibility).

9/ McCarthy, 406 F.3d at 189.

application for review of the Exchange's decision with the Commission pursuant to Exchange Act Section 19(d)(2) 10/ and Rule 420 of the Commission's Rules of Practice. 11/

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

By the Commission.

Nancy M. Morris
Secretary

10/ 15 U.S.C. § 78s(d)(2).

11/ 17 C.F.R. § 201.420.