

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 01-16

January 25, 2001

CHARLES FRANCIS SMITHERS, III
REGISTERED REPRESENTATIVE

* * *

Violated Rule 472(a) by posting communications on the Internet without the knowledge and approval of his employer; and posted without approval on the Internet speculative statements which might reasonably be expected to affect market conditions of securities in which he held an interest --Consent to censure and one month suspension.

Appearances:

For the Division of Enforcement
David H. Steiner, Esq.
Danielle I. Schanz, Esq.

For the Respondent
Lawrence B. Carlson, Esq.

* * *

An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and Charles Francis Smithers, III, a registered representative with PaineWebber Incorporated (the "Firm"). Without admitting or denying guilt, Smithers consents to findings by the Hearing Panel that he:

- I. Violated Exchange Rule 472(a) on one or more occasions by posting communications concerning securities on an Internet web site without the knowledge and approval of his member firm employer.
- II. Engaged in conduct inconsistent with just and equitable principles of trade on one or more occasions by posting on an Internet web site, without approval from his member firm employer, communications containing speculative statements concerning securities which might reasonably be expected to affect market conditions at a time when he, his family and/or his customers held an interest or position in such securities.

For the sole purpose of settling this disciplinary proceeding and without admitting or denying any allegations, facts or conclusions herein, Smithers consents to findings by the Hearing Panel that:

Background and Jurisdiction

1. Smithers was born in 1956. He entered the securities industry in July 1978 with the Firm and subsequently was approved as a registered representative ("RR") by the Exchange. Smithers is currently employed as an RR by the Firm.

2. On or about November 16, 1998, the Exchange received a Form RE-3 from the Firm reporting that Smithers had participated in Internet discussions concerning securities without the Firm's approval and, as a result, had been the subject of disciplinary action by the Firm. The Form RE-3 specified that Smithers was issued a Letter of Reprimand, fined \$15,000, suspended without pay for one month and ordered to undergo additional compliance training relating to the Internet.
3. By letter dated November 27, 1998, which Smithers received, Enforcement notified him that it was investigating the matter reported in the Form RE-3. Thereafter, Smithers appeared and, represented by counsel, testified in connection with Enforcement's investigation.

Summary of Violative Conduct

4. As set forth below, between June 1996 and August 1998 (the "Relevant Period"), Smithers violated Exchange Rule 472(a) on one or more occasions by posting communications concerning three securities on an Internet web site without the knowledge or approval of his member firm employer. During the Relevant Period, Smithers also engaged in conduct inconsistent with just and equitable principles of trade on one or more occasions by posting on an Internet web site, without approval from his member firm employer, communications containing speculative statements concerning securities which might reasonably be expected to affect market conditions at a time when he, his family and/or his customers held an interest or position in such securities.

Unapproved Communications with the Public on Internet Web Site

5. Prior to December 1997, Exchange Rule 472(a) (Communications with the Public) provided that "Any communication which is generally distributed or made available by a member or member organization to customers or the public shall be approved in advance by a member, allied member, supervisory analyst or person designated under the provisions of [Exchange] Rule 342(b)(1)."
6. In December 1997, Exchange Rule 472(a) was amended to delete the words "Any communication" and to include instead the words "Each advertisement, market letter, sales literature or other similar type of communication." The amended Rule 472(a) defined "communication" as including all electronic communications which are shown or distributed to customers or the public.
7. During the Relevant Period, Smithers was an RR in the Firm's branch office at 200 Park Avenue in New York City (the "Branch"). He did not have access to the Internet through his computer terminal at the Branch. He was permitted to use his personal laptop while at work.
8. Throughout the Relevant Period, the Firm had written procedures prohibiting RRs from posting messages concerning securities via the Internet and requiring supervisory review of all communications with the public.

9. During the Relevant Period, Smithers posted messages to the Internet concerning securities from his personal laptop during business and non-business hours without seeking approval of the Firm.
10. From June 6, 1996 to June 27, 1997, without seeking or obtaining the Firm's authorization, Smithers posted 16 electronic messages regarding XYZ, an Exchange-listed security, in the chat room of an Internet web site for investment news.
11. For example, Smithers posted communications containing speculative statements regarding XYZ, which included the following:

Thursday, June 6, 1996, 8:49am

... There is some indication that RST is considering XYZ's automobile diagnostic machine to replace AB as their domestic supplier – that would be huge....
This company remains a buy in my book....

Monday, November 18, 1996, 1:29pm

... Now I think more and more of their earnings will come from software...
The jump in the stock is CD and EF from what I hear....
Call me if you need more info (212)370-8711

Wednesday, January 22, 1997, 2:58pm

Earnings will be out on Wednesday ... I think you'll be pleasantly surprised.

Monday, March 3, 1997, 12:06pm

... Consensus is \$1.25 for this year (I'm \$1.40) ...
I guess the stock is likely to be flat here until numbers come out in April.
Or until Forbes comes out in a couple of weeks.

Tuesday, June 17, 1997, 3:18pm

No, not an employee, just a broker who does his homework.

Wednesday, June 18, 1997, 11:20am

... There really is only two people covering this stock and they are marginal at best ...
PaineWebber, by the way.

12. During the time period that he was sending electronic messages over the Internet regarding XYZ, Smithers executed approximately 67 trades of XYZ stock for his customers. During the same time period, Smithers held a position in XYZ stock in a personal account that he maintained at the Firm, and his mother, wife and sister also held shares of XYZ in their personal accounts.
13. From July 29, 1997 to August 19, 1998, without seeking or obtaining the Firm's authorization, Smithers posted five electronic messages regarding UVW, a security traded in the over-the-counter market, to the web site.

14. For example, Smithers posted communications containing speculative statements regarding UVW, which included the following:

Tuesday, July 29, 1997, 2:16pm

(After four paragraphs describing UVW's business)

The second half should be explosive for revenues and earnings.

Apparently they showed well at SuperCom in New Orleans and the WorldComs and MCI of the world were very impressed (especially with their Remote Agent product). I think one of the better stories I have heard. And we're not waiting to reinvent the wheel here. The networks exist – they are very complicated – technicians are expensive – we need this product NOW.

Good luck.

15. During this time period, Smithers executed approximately 123 trades of UVW stock for his customers and purchased UVW stock for his wife's account.
16. From November 18, 1996 to November 25, 1996, without seeking or obtaining the Firm's authorization, Smithers posted five electronic messages regarding OPQ, a security traded in the over-the-counter market, to the web site.
17. During this time period, Smithers entered one customer transaction involving OPQ and his wife held shares of OPQ in her personal account.
18. In summary, Smithers made electronic communications available to the public which should have been reviewed and approved by his supervisor pursuant to Exchange Rule 472(a).

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Smithers guilty as set forth above by unanimous vote.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Mr. Smithers of a censure and a one month suspension from membership, allied membership, approved person status and from employment or association in any capacity with any member or member organization. In assessing this penalty, the Hearing Panel considered the disciplinary action taken by the Firm.

For the Hearing Panel

Edward W. Morris, Jr.
Chief Hearing Officer