

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-125

July 27, 2004

HOWARD EISEN  
FORMER MANAGING DIRECTOR

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**Violated Specialist Allocation Policy and Procedures, as set forth in Exchange Rule 103B, by improperly contacting a listing company; caused Firm to violate Allocation Policy and Procedures by failing to disclose contacts with a listing company to the Exchange; violated Exchange Rule 476(a)(4) by causing Firm to submit an allocation application letter containing a misstatement – Consent to censure and \$30,000 fine.**

**Appearances:**

For the Division of Enforcement  
Margaret M. Tolan, Esq.

For the Respondent  
Andrew J. Levander, Esq.  
Robert Topp, Esq.

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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 Howard Eisen, former Managing Director of the Corporate Relations Department of Spear Leeds and Kellogg Specialists LLC (the "Firm"). Without admitting or denying guilt, Mr. Eisen consents to a finding by the Hearing Panel that he:

- I. Violated the Exchange's Allocation Policy and Procedures as set forth in Rule 103B by improperly contacting a listing company after the company had released a notice to the specialist units soliciting their allocation applications.
- II. Engaged in acts detrimental to the interests or welfare of the Exchange by improperly contacting a listing company after it had released a notice to the specialist units soliciting their allocation applications in violation of the Exchange's Allocation Policy and Procedures as set forth in Rule 103B and causing his firm to violate the Exchange's Allocation Policy and Procedures as set forth in Rule 103B by failing to disclose one or more contacts to the Exchange with a listing company.
- III. Violated Exchange Rule 476(a)(4) in that he caused the Firm to submit to the Exchange an allocation application letter which contained a misstatement.

For the sole purpose of settling this disciplinary proceeding, the Division of Enforcement and Mr. Eisen stipulate to the entry of certain findings, the substance of which follows:

### **Background and Jurisdiction**

1. The Firm is a broker-dealer registered with the Securities and Exchange Commission, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), since December 1996. In addition, the Firm is an Exchange member organization. On October 31, 2000, the Firm’s parent company, Spear, Leeds & Kellogg, L.P., was acquired by The Goldman Sachs Group, Inc., the securities of which are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and the Firm became an indirect subsidiary of the Goldman Sachs Group, Inc.
2. Howard Eisen (“Eisen”), former Managing Director of the Firm’s Corporate Relations Department was born on August 28, 1965. He entered the securities industry in November 1994 as a Regional Director of Market Development at a stock exchange, and was employed there until February 1997. In February 1997, Eisen became employed with the Firm as a Managing Director in the Corporate Relations Department and continued to work in this position until his employment at the Firm was terminated in August 2002.
3. Eisen was one of two co-managing directors in the Corporate Relations Department with supervisory responsibility for 15 employees. The Corporate Relations Department is responsible for managing the Firm’s relationships with the listed companies it represents as specialist and developing new business with prospective listed companies.
4. The Exchange’s Division of Market Surveillance commenced an investigation to determine if the Firm and/or any of its employees violated the Exchange’s Allocation Policy and Procedures as set forth in Rule 103B by impermissibly contacting a listing company (the “Company”) after the “green sheet” and accompanying Company letter was issued by the Exchange soliciting allocation applications from specialist units (hereinafter “the restricted period”) and by failing to disclose its communications with the Company.
5. By letter dated September 23, 2002, Enforcement notified the Firm that a formal investigation had been commenced based on a matter referred by the Division of Market Surveillance.

### **Overview**

6. In direct contravention of the Exchange’s Allocation Policy and Procedures as set forth in Rule 103B (“Allocation Policy”), Eisen contacted a company which was about to list its shares on the Exchange, during a restricted period in the Specialist Allocation Process. Also in contravention of the Allocation Policy and Procedures, Eisen failed to disclose all contacts that he had with the company in the six months prior to the time allocation applications were solicited and caused his Firm to make a misstatement in its allocation application letter submitted to the Exchange.

**Violation of Allocation Policy**

7. In or about April 2002, the Company was in the process of listing its shares of stock on the Exchange. At or about this time, the Company exercised its option to make its final selection of a specialist unit from a group selected by the Exchange Allocation Committee.
8. On April 11, 2002, the Exchange issued a notice (“green sheet”) to all specialist units soliciting applications for the allocation of the Company. The Company attached a letter to the notice stating certain specialist firm characteristics that the Company preferred. The Company’s letter also indicated that it preferred a specialist firm that did not act as a specialist for one of its competitors.
9. The Firm is a specialist for one of the Company’s competitors.
10. The Exchange’s Allocation Policy as set forth in Rule 103B states, in relevant part:

Specialist units must describe in their applications to be allocated the stock of a listing company any contacts they, or any individual acting on their behalf, have had with any employee of that company, or any individual acting on behalf of that company with regard to its prospective listing on the Exchange, within six months prior to the earlier of the date that written notice is given that the listing company filed its listing application with the Exchange or the date that allocation applications are solicited with respect to that company.

Specialist units or any individual acting on their behalf may not have any contact with a listing company from the earlier of the time that written notice is given that the listing company filed its listing application with the Exchange; or the time that the allocation applications are solicited with reference to that company.
11. On the afternoon of April 11, 2002, Eisen contacted the Company after the Company’s green sheet had already been disseminated and before the Firm had submitted its allocation application for the Company. In this conversation, Eisen raised the issue of the Company’s preferences and explained to the Company about why there was no conflict if a specialist firm represented the Company and one of its competitors. As a result of this conversation, the Company inquired of the Exchange about the possibility of changing the Company’s letter regarding the Company’s preferences.
12. Eisen failed to note his conversation with the Company in the Firm’s ACT database, the database where the Firm records substantive contacts with listing companies and contacts that were likely to affect the listing company’s view of the Firm and the Exchange.
13. Although the ACT database was the central repository for contacts with customers, employees of the Firm exercised discretion regarding whether an interaction with a listing company or prospect was important enough to enter into the ACT database.

14. There were no Firm written procedures to inform Firm employees about the requirements and restrictions of the Allocation Policy as set forth in Rule 103B.
15. On the evening of April 11, 2002, Eisen instructed an employee to prepare a draft of the Firm's allocation application for the Company including who the proposed individual specialist would be. The employee, in preparing the application letter, reviewed the Firm's ACT database in order to report prior contacts with the company for inclusion in the application letter. The employee completed a draft of the letter on April 11 and submitted it, along with a one page standard application form, to a member of the Firm's management team for final review.
16. On the afternoon of April 12, 2002, the Managing Director, or his subordinate, contacted a director of the Exchange Committee Support, to inform her that the Firm was in the process of submitting its application to trade the Company a few hours past the deadline.
17. As a result of Eisen's failure to disclose his contacts with the Company, Eisen caused the Firm to fail to disclose in its application the following contacts with the Company:
  - a. e-mail to the Company from Eisen, dated March 16, 2002, attaching various documents relevant to NYSE listing process;
  - b. e-mail to the Company from Eisen, dated March 16, 2002, with additional recap of marketing meeting;
  - c. e-mail to the Company from the Firm, dated March 20, 2002, following up on Eisen's previous correspondence and referencing an attachment the Company might find useful as it progressed through the listing and allocation process.
18. The application and letter were submitted to the Exchange on April 12, 2002 and affirmatively stated "all contact has ceased due to the release of the "green" sheet on April 11, 2002." The application letter failed to disclose Eisen's post-green sheet call to the Company.
19. In contravention of the Allocation Policy as set forth in Rule 103B, Eisen and the Firm failed to disclose in its application contacts that the Firm had with the Company in the six months prior to the time allocation applications were solicited.
20. The Firm's application and letter were submitted to the Exchange with the signature of the Firm's Chief Executive Officer despite the fact that he did not review or sign the Company application or letter and had not formally delegated the authority to sign his name to anyone.
21. At that time, the Firm lacked adequate procedures for the review and signature of the final application and letter.

**DECISION**

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Eisen 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. Eisen of a censure and a fine in the amount of \$30,000.

For the Hearing Panel

Milton M. Stein  
Hearing Officer