

NYSE ALTERNEXT US LLC

HEARING BOARD DECISION 09-ALT-1

February 19, 2009

FAGENSON & CO., INC
MEMBER ORGANIZATION

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Violated AMEX Rule 30 and Article V, Section 4(h) of AMEX Constitution by failing to file or file accurately weekly short sale reports and transaction reports as well as mid-month short interest reports to AMEX; violated AMEX Rule 320(e) by failing to establish and maintain appropriate polices, systems and procedures of supervision and control, including written supervisory procedures, and failing to establish separate system of follow-up and review to ensure compliance with short interest, short sale and transaction reporting requirements of AMEX – Consent to censure and \$25,000 fine.

Appearances:

For the Division of Enforcement
David Rosenstein, Esq.
Theresa C. Clarkson, Esq.

For Respondent
Philip Pignato

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A Hearing Officer on behalf of the NYSE Alternext US LLC (“NYSE Alternext”) considered a Stipulation of Facts and Consent to Penalty entered into between NYSE Regulation, Inc.’s Division of Enforcement (“Enforcement”) and Fagenson & Co., Inc (“Respondent”), an NYSE Alternext member organization. Without admitting or denying guilt, Respondent consented to a finding by a Hearing Officer that it:

- I. Violated AMEX Rule 30 and Article V, Section 4(h) of the Exchange Constitution in that the Firm either failed to file or file accurately weekly short sale reports and transaction reports as well as mid-month short interest reports to the AMEX.
- II. Violated AMEX Rule 320(e) in that the Firm failed to establish and maintain appropriate polices, systems and procedures of supervision and control, including written supervisory procedures, and failed to establish a separate system of follow-up

and review to ensure compliance with the short interest, short sale and transaction reporting requirements of the AMEX.

For the sole purpose of settling this disciplinary proceeding, without adjudication of any issues of law or fact, and without admitting or denying any allegations or findings referred to in the Stipulation of Facts and Consent to Penalty, Respondent stipulates to certain facts, the substance of which follows:*

Background and Jurisdiction

1. During all relevant periods herein, Fagenson was a member organization and a registered broker-dealer at the American Stock Exchange (“AMEX” or the “Exchange”).¹

Overview

2. The Market Surveillance Department (“MSD”) of FINRA commenced an investigation into Fagenson’s short interest positions following a routine review of AAA² common stock. The review began after MSD observed a 100,000 share difference in Fagenson’s reported short interest for AAA between November 2003 and December 2003.
3. During all relevant times, the AMEX has relied on the accuracy of the short interest reports submitted by member organizations in compiling its own calculation of overall short interest in AMEX-listed securities, which is made available to the marketplace. Market analysts and economists use the publicly available short interest reports as an indicator of market trends.

Failure to Properly File Short Interest Reports

4. During all relevant periods herein, AMEX Rule 30 required that every member and member organization timely file with the AMEX such periodic or special reports at such time or times and in such form as the AMEX might prescribe. Information reported to the Exchange must be true and correct.
5. During all relevant periods herein, Article V, Section 4(h) of the Exchange Constitution provided: “A member, member organization or approved person who or

* Hearing Officer Note: The facts, allegations, and conclusions contained in paragraphs 1 to 18 are taken from the executed Stipulation of Facts and Consent to Penalty between Enforcement and Respondent. No changes have been made to the stipulated paragraphs by the Hearing Officer.

¹ On October 1, 2008, the AMEX was acquired by the NYSE Euronext and was renamed NYSE Alternext US LLC. Thus, while the rules of NYSE Alternext govern the procedural aspects of this Stipulation and Consent, because the conduct referred to herein occurred prior to the acquisition date, the violations were of “AMEX Rules.”

² “AAA” is a generic identifier used for the subject security.

- which shall be adjudged guilty in a proceeding under this Article of a violation of the Constitution of the Exchange, of a violation of a rule adopted pursuant to the Constitution, of a violation of a resolution of the Board of Governors regulating the conduct or business of members or member organizations, or of conduct or proceeding inconsistent with just and equitable principles of trade, may, if a member or member organization, be suspended or expelled from membership or, if an approved person have his approval withdrawn, unless the offense is the violation of a provision, rule or resolution for which a different penalty had been provided, in which case such other penalty may be imposed.”
6. During all relevant periods herein, AMEX Information Circular #95-136, dated May 8, 1995, provided in pertinent part: “Pursuant to Amex Rule 30, members and member organization shall continue to file monthly short positions in Amex-listed securities directly with SIAC. Starting in May 1995, however, members and member organizations for which the Exchange is the Designated Examining Authority (“DEA”), will be required to also report short positions to SIAC in each stock or warrant listed in other marketplaces of which they are not members. SIAC will then report the positions to the appropriate SRO. ”
 7. During all relevant periods herein, AMEX Information Circular #98-0234, dated February 26, 1998, provided in pertinent part: “Commencing with the April 30, 1998, settlement date, all American Stock Exchange (‘Amex’) member organizations will be required to report short positions in Diamonds, SPDRS, MIDCAP SPDRS and the various WEBS series set forth on the attached list. Short positions in these securities must be reported for all accounts as of the close of the settlement date falling on the last business day of each month (i.e. April 30, May 29, June 30, etc.)...Please note that all member organizations must continue to file their regular short position reports for all Amex listed securities on the 15th of each month or, when the 15th is not a settlement date, on the closest preceding settlement date.”
 8. During all relevant periods herein, AMEX Rule 320(e) provided, in pertinent part: “Members and member organizations who have employees shall establish, maintain, enforce and keep current a system of compliance and supervisory controls, reasonably designed to achieve compliance with applicable securities laws and regulations and Exchange rules, that are appropriate to their business size, structure, customer accounts, transactions and business activities. (1) Such system of compliance and supervisory controls must include written compliance and supervisory policies and procedures.”
- Reporting of Short Interest Positions, Mid-Month Reports (Form 50)**
9. Fagenson sent MSD documentation that supported its reported short interest position in AAA as of settlement dates December 15, 2003 and January 15, 2004 and sent MSD copies of the Firm’s mid-month short interest reports (entitled “Form 50”)³ that

³ Form 50 is the title of the forms used by firms to send the mid-month short interest information to the AMEX manually prior to the data being submitted by firms via the website.

were dated between July 16, 2003 to November 17, 2003. Each Form 50 was stamped “Transmitted Short Securities Report.”

10. MSD reviewed the submitted reports along with the Exchange’s Form Filing System,⁴ which revealed that the Firm failed to file with the Exchange Form 50 reports for three months: August 2003, April 2004, and May 2004, and that the Firm inaccurately had reported its mid-month short interest position in AAA for ten months: July 2003, September 2003, October 2003, November 2003, February 2004, March 2004, June 2004, July 2004, August 2004, and September 2004.
11. MSD determined that between the period August 2003 and September 2004, the Firm accurately had reported short interest positions in AMEX securities on its Forms 50 reports for only December 2003 and January 2004.

Reporting of Weekly Short Sale Reports (Form 1-S and 1-RA)

12. As of March 11, 2001, Fagenson was granted an exemption from filing the weekly short interest reports, Forms 1-S and 1-RA. This exemption applied only when no applicable short selling activity was effected in AMEX-listed securities.
13. MSD reviewed the Form Filing System, which disclosed that during the review period, Fagenson failed to file Forms 1-S on five dates: July 18, 2003, August 1, 2003, August 8, 2003, September 5, 2003, and September 12, 2003.
14. MSD reviewed copies of the 1-RA filings, which the Firm provided on June 16, 2005 for the period July 1, 2003 to September 30, 2004, and found that Fagenson failed to file Forms 1-RA for 38 weeks from July 2003 to September 2004.

Supervision

15. During the subject time period, although Fagenson relied on a third-party service bureau to file the Firm’s mid-month short interest reports with the Exchange, Fagenson did not have adequate procedures in place to verify the accuracy of its short interest reports submitted to the AMEX by this third-party. Consequently, the Firm did not detect the short interest reporting errors during the above period.
16. The third-party service bureau utilized by Fagenson never informed the Firm that the third-party service bureau made internal system changes that resulted in a failure to file mid-month short interest reports to the AMEX, although the third-party service bureau continued to submit these reports to Fagenson. Fagenson believed that short interest reports were being filed with the Exchange.

⁴ Form Filing is an electronic application through which Exchange members submit short interest data to the Exchange. Before Firm Filing, firms used SIAC’s short interest collection process. The process was transitioned to Form Filing in and around February 2001.

17. During the subject time period, Fagenson relied on its internal controller to file the Firm's weekly Forms 1-S and 1-RA. Fagenson has indicated that during the relevant period, there was high turnover in this position.

Other Factor Considered

18. In determining to resolve this matter on the basis set forth here, Enforcement took into consideration the fact that Fagenson adequately has revised its supervisory system and procedures regarding the filing of short interest, short sale, and transaction reports with the AMEX.

DECISION

The Hearing Officer, in accepting the Stipulation of Facts and Consent to Penalty, found that Respondent committed the offenses as set forth above.

PENALTY

In view of the above findings, the Hearing Officer, imposed the penalty consented to by Respondent of a censure and a \$25,000 fine.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer