

NYSE AMEX LLC

HEARING BOARD DECISION 09-AMEX-20

August 3, 2009

KELLOGG CAPITAL GROUP, LLC

MEMBER ORGANIZATION

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**Violated Amex Rule 155 by failing to give precedence to orders entrusted to it as agent in multiple equities before executing at same price purchases or sales in those multiple equities for accounts in which Firm had interest; violated Amex Rule 155, made applicable to options by Amex Rule 950, by failing to give precedence to orders entrusted to it as agent in multiple option contracts before executing at same price purchases or sales in those multiple option contracts for accounts in which Firm had interest; violated Exchange Act Rule 11Ac1-1, Regulation NMS Rule 602(b)(2) and Amex Rule 231(e) by failing to honor published quotation by failing to execute certain equity orders and ITS commitments upon presentment or by executing these orders at prices less favorable than those in published quoted market; violated Exchange Act Rule 11Ac1-4, Regulation NMS Rule 602(b)(2), Amex Rule 958A-ANTE and Amex Rule 941-ANTE, by failing to honor published quotation by failing to execute certain options and Linkage orders upon presentment or by executing these orders at prices less favorable than those in published quoted market; violated Exchange Rule 11Ac1-4 and Regulation NMS Rule 604 by failing to immediately display customer equity limit orders in its public quotation, when each such order was at price that would improve specialist's bid or offer in each such security, or when order was priced equal to specialist's bid or offer and national best bid or offer for each such security, and size of order represents more than de minimis change in relation to size associated with specialist's bid or offer in each such security; violated Amex Rule 16 by failing to adhere to principles of good business practice in conduct of their affairs, by failing to execute market orders in timely manner, by failing to post closing prints within 180 seconds of close in products for which it specialized, and by disseminating quote that locked or crossed quoted market of another ITS participant and then failing to promptly unlock or uncross ITS participant's market; violated Amex Rule 232 by failing to issue required ITS pre-opening notifications in eligible listed securities to other participant markets; violated Amex Rule 943(a) by disseminating quote that locked or crossed away market, and failing to promptly unlock or uncross away market, by sending additional Linkage order or re-quoting market; violated Rule 128A-AEMI (g) by failing to attempt to pair-off remaining imbalances within ten seconds in order to re-enable Auto-Ex after being presented with buy or sell imbalance that had locked or crossed**

**AEMI Book and Auto-Ex had been disabled – Consent to censure and \$75,000 fine.**

**Appearances:**

For the Division of Enforcement  
Robert A. Marchman, Esq.  
Kenneth R. Bozza, Esq.  
Bryan C. Wallace, Esq.

For Respondent  
George Brunelle, Esq.

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

- I. Violated Amex Rule 155 during the period of March 2005 through November 2006, by failing to give precedence to orders entrusted to it as agent in multiple equities before executing at the same price purchases or sales in those multiple equities for accounts in which the Firm had an interest.
- II. Violated Amex Rule 155, made applicable to options by Amex Rule 950, during the period of February 2004 through August 2005, by failing to give precedence to orders entrusted to it as agent in multiple option contracts before executing at the same price purchases or sales in those multiple option contracts for accounts in which the Firm had an interest.
- III. Violated, during the period of June 2005 through January 2007, Exchange Act Rule 11Ac1-1 (prior to August 29, 2005), Regulation NMS Rule 602(b)(2)(effective August 29, 2005) and Amex Rule 231(e) by failing to honor the published quotation by either failing to execute certain equity orders and ITS commitments upon presentment or by executing these orders at prices less favorable than those in the published quoted market.
- IV. Violated, during the period of August 2005 through July 2006, Exchange Act Rule 11Ac1-4 (prior to August 29, 2005), Regulation NMS Rule 602(b)(2)(effective August 29, 2005), Amex Rule 958A-ANTE and Amex Rule 941-ANTE, by failing to honor the published quotation by either failing to execute certain options and Linkage orders

upon presentment or by executing these orders at prices less favorable than those in the published quoted market.

- V. Violated, during the period of July 2005 through January 2007, Exchange Rule 11Ac1-4 (prior to August 29, 2005) and Regulation NMS Rule 604 (effective August 29, 2005), by failing to immediately display customer equity limit orders in its public quotation, when each such order was at a price that would improve the specialist's bid or offer in each such security; or when the order was priced equal to the specialist's bid or offer and the national best bid or offer for each such security, and the size of the order represents more than a de minimis change in relation to the size associated with the specialist's bid or offer in each such security.
- VI. Violated Amex Rule 16 during the period of September 2005 through January 2007, by failing to adhere to the principles of good business practice in the conduct of their affairs, in that it failed to execute market orders in a timely manner.
- VII. Violated Amex Rule 232 during the period of October 2006 and June 2007, by failing to issue required ITS pre-opening notifications in eligible listed securities to other participant markets.
- VIII. Violated Amex Rule 16 during the period of April 2006 through November 2008, by failing to adhere to the principles of good business practice in the conduct of its affairs, in that it failed to post closing prints within 180 seconds of the close in products for which it specialized.
- IX. Violated Amex Rule 16 during the period of November 2005 through October 2006 by failing to adhere to the principles of good business practice in the conduct of its affairs, in that it disseminated a quote that locked or crossed the quoted market of another ITS participant and then failed to promptly unlock or uncross the ITS participant's market.
- X. Violated Amex Rule 943(a) during the period of November 2006 through January 2007 by disseminating a quote that locked or crossed the away market, and failing to promptly unlock or uncross the away market, by sending an additional Linkage order or re-quoting the market.
- XI. Violated Rule 128A-AEMI(g) during the period of March 2008 through August 2008, by failing to attempt to pair-off remaining imbalances within ten seconds in order to re-enable Auto-Ex after being presented with a buy or sell imbalance that had locked or crossed the AEMI Book and Auto-Ex had been disabled.

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, Kellogg was a member organization and registered equities, options and Exchange Traded Funds (“ETF”) specialist organization of the American Stock Exchange (“Amex”).<sup>1</sup>
2. During all relevant periods herein, Kellogg served as specialists for various equities, options and ETFs that traded on the Floor of the Amex.

### **Equity Trading Ahead Violations**

3. During all relevant periods herein, Amex Rule 155 required that a specialist give precedence to orders entrusted to him as an agent in any stock in which he is registered before executing at the same price any purchase or sale in the same stock for an account in which the specialist has an interest.
4. As set forth below, from March 2005 through November 2006, the Respondent violated its agency obligations by failing to give precedence to equity orders entrusted to it. During the period March 2005 through November 2006, equity orders were electronically transmitted to the Floor of the Amex through the New Equity Trading System (“NETS”) electronic equity trading platform. As described more fully below, on certain occasions during the period March 2005 through November 2006, Kellogg executed transactions in equities of which it was registered for accounts in which it had an interest before executing at the same price any purchase or sale in the same equities orders transmitted to it as specialist.
5. During the period March 2005 through November 2006, on approximately 119 occasions, Kellogg failed to take steps to ensure that it gave precedence to orders entrusted to it as agent in multiple equities before executing at the same price purchases or sales in those multiple equities for accounts in which the Respondent had an interest.
6. During the period of March 2005 through November 2006, on certain occasions there were trading ahead transactions in DEF<sup>2</sup> in the dealer account for Kellogg. For

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\* Hearing Officer Note: The facts, allegations, and conclusions contained in paragraphs 1 to 41 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.

<sup>1</sup> On October 1, 2008, the Amex was acquired by the NYSE Euronext and was subsequently renamed NYSE Amex LLC. Thus, while the rules of NYSE Amex 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.”

<sup>2</sup> A generic identifier has been used in this example.

example, on November 15, 2006 at 11:50:49 a.m., the quoted market in DEF was 26.54 – 26.61, (100x100). At 11:50:51 a.m., an Intermarket Trading System (“ITS”) limit commitment to buy 100 shares of DEF at 26.61 arrived in the specialist’s book, which was executable at the time of arrival of the ITS participant’s commitment. At 11:51:03 a.m., the specialist executed an order for his own account by buying 2100 shares of DEF at 26.61, ahead of the ITS participant’s commitment. The ITS participant never received a fill and the commitment was cancelled at 11:51:13 a.m.

7. The conduct described above constitutes a violation of Amex Rule 155.

### **Option Trading Ahead Violations**

8. During all relevant periods herein, Amex Rule 950 (Rule of General Applicability) provided that Amex Rule 155 also applies to Amex option transactions and other transactions on the Amex in option contracts and indicates that unless the context otherwise requires, the term “stock” whenever used in Rule 155 shall be deemed to include option contracts.
9. As set forth below, from February 2004 through August 2005, Kellogg violated its agency obligations by failing to give precedence to option orders entrusted to it. During the period February 2004 through May 2004 orders were electronically transmitted to the Floor of the Amex through the Amex Option Display Book (“AODB”) electronic options trading platform and entrusted to Kellogg, as agent. In June 2004, the Amex implemented a new electronic options trading platform and orders began transmitting to the Floor of the Amex through the Amex New Trading Environment (“ANTE”). ANTE remained in effect through August 2005. As described more fully below, on certain occasions during the period of February 2004 through August 2005, Kellogg executed transactions in options of which it was registered for accounts in which it had an interest before executing at the same price purchases or sales in the same options orders which had been transmitted to it as specialist.
10. During the period February 2004 through August 2005, on approximately 203 occasions, Kellogg failed to take steps to ensure that it gave precedence to orders entrusted to it as agent in multiple options before executing at the same price purchases or sales in those multiple options for accounts in which the Respondent had an interest.
11. During the period February 2004 through August 2005, on certain occasions there were trading ahead transactions in ABC<sup>3</sup> in the dealer account for Kellogg. For example, on May 21, 2004 at 1:38:50 p.m., the quoted market in ABC was 4.20 – 4.40, (11 x15). At 1:40:41 p.m., an ANTE limit order to buy 30 contracts of ABC at 4.40 arrived in the specialist’s book. At 1:40:57 p.m., the specialist executed an order

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<sup>3</sup> A generic identifier has been used in this example.

for his own account by buying 5 contracts of ABC at 4.40, ahead of the agency order. The order was cancelled at 1:41:10 p.m.

12. The conduct described above constitutes a violation of Amex Rule 155 made applicable to options by Amex Rule 950.

#### **Equity/ETF/ITS Firm Quote Violations**

13. During the relevant period herein, subject to certain exceptions, Regulation NMS Rule 602(b)(2), which prior to August 29, 2005 was designated as Rule 11Ac1-1 of the Securities and Exchange Act of 1934 (“Exchange Act Rule 11Ac1-1”), required Amex specialists to execute orders to buy or sell securities, which includes equities and ITS commitments, at the best available price reflected in the quoted market. Amex Rule 231(e) required Amex specialists to execute incoming ITS commitments to trade at the best available price reflected in the quoted market.
14. During the period of June 1, 2005 through August 26, 2005 on approximately 64 occasions and December 1, 2005 through January 31, 2007 on approximately 65 occasions, in multiple products, orders were presented to Kellogg, including orders through ITS at the published bid or offer in an amount up to the published quotation size. The Respondent failed to honor the published quotation by either failing to execute these orders upon presentment or by executing these orders at prices less favorable than those in the published quoted market.
15. The conduct described above constitutes violations of Exchange Act Rule 11Ac1-1 (prior to August 29, 2005), Regulation NMS 602(b)(2)(effective August 29, 2005) and Amex Rule 231(e).

#### **Option/Linkage Firm Quote Violations**

16. During the relevant period herein, subject to certain exceptions, Amex Rule 958A-ANTE required Amex specialists for each series of each listed option class to promptly communicate to the Exchange its best bid, best offer, quotation size and aggregate quotation size and to execute any customer order in an option series in an amount up to its published size. Amex Rule 941-ANTE required Amex specialists to execute valid incoming Linkage orders at the best available price reflected in the quoted market, and Regulation NMS Rule 602(b)(2), which prior to August 29, 2005 was designated as Exchange Rule 11Ac1-1, required Amex specialists to execute orders to buy or sell securities, which includes options and Linkage orders, at the best available price reflected in the quoted market.
17. During the period of August 1, 2005 through August 26, 2005 on approximately 15 occasions, and August 29, 2005 through July 2006 on approximately 54 occasions, multiple products orders were presented to Kellogg at the published bid or offer in an amount up to the published quotation size. The Respondent failed to honor the published quotation by either failing to execute these orders upon presentment or by

executing these orders at prices less favorable than those in the published quoted market.

18. The conduct described above constitutes violations of Exchange Act Rule 11Ac1-1 (prior to August 29, 2005), Regulation NMS 602(b)(2)(effective August 29, 2005), Amex Rule 958A-ANTE and Amex Rule 941-ANTE.

#### **Equity Limit Order Display Violations**

19. During the relevant period herein, subject to certain exceptions, Regulation NMS Rule 604, which prior to August 29, 2005 was designated as Exchange Act Rule 11Ac1-4, required Amex specialists to immediately display customer equity limit orders in their public quotation, when each such order is at a price that would improve the specialist's bid or offer in each such security; or when the order is priced equal to the specialist's bid or offer and the national best bid or offer for each such security, and the size of the order represents more than a de minimis change in relation to the size associated with the specialist's bid or offer.
20. During the period of July 1, 2005 through August 26, 2005 on approximately 20 occasions, and August 29, 2005 through January 31, 2007 on approximately 100 occasions, equity limit orders that improved the quoted price or size were presented to the Respondent. The Respondent failed to immediately display these orders.
21. The conduct described above constitutes violations of Exchange Rule 11Ac1-4 (prior to August 29, 2005) and Regulation NMS Rule 604 (effective August 29, 2005).

#### **Market Order Timeliness Violations**

22. During the relevant periods herein, Amex Rule 16 required Amex members and member organizations to adhere to the principles of good business practice in the conduct of their business affairs.
23. During the period of September 2005 through January 2007, on approximately 118 occasions, in certain products, market orders were presented to Kellogg. However, Kellogg failed to execute these orders in a timely manner.
24. The conduct described above constitutes violations of Amex Rule 16.

#### **ITS Pre-Opening Application Violations**

25. During the relevant period herein, subject to certain exceptions, Amex Rule 232 required Amex specialists to issue pre-opening notifications to other participant markets when the opening transaction on the Amex in an Eligible Listed Security was more than the applicable price change as defined by Amex Rule 232.

26. During the period of October 2006 through June 2007, on approximately 114 occasions, Kellogg failed to issue required ITS pre-opening notifications in Eligible Listed Securities to other participant markets.
27. The conduct described above constitutes violations of Amex Rule 232.

#### **Post 4:01:30 Violations**

28. During the period of April 2006 through November 2008, on approximately 66 occasions, Kellogg failed to post closing prints within 180 seconds of the close, in certain products in which it specialized.
29. The conduct described above constitutes violations of Amex Rule 16.

#### **ITS Locked & Crossed Violations**

30. Pursuant to the Intermarket Trading System (“ITS”) Plan (the “Plan”) that was adopted by the Securities and Exchange Commission in May 1982 and its subsequent amendments, ITS participants, which included the Amex, were advised to avoid locked markets in ITS securities.<sup>4</sup> Respondents, as member organizations and specialist firms at the Amex, were responsible for carrying out the duties and obligations of the Amex under the Plan.
31. During the period of November 2005 through October 2006, on numerous occasions in multiple products, Kellogg specialists disseminated a quote that locked or crossed the quoted market of another ITS participant and then failed to promptly unlock or uncross the ITS participant’s market.
32. The conduct described above constitutes violations of Amex Rule 16.

#### **Linkage Locked & Crossed Violations**

33. During all relevant periods herein, subject to certain exceptions, Amex Rule 943(a) required that an Eligible Market Maker<sup>5</sup> that created a Locked or Crossed Market unlock or uncross that market or direct a Principal Order through Linkage to trade against the bid or offer that the Eligible Market Maker locks or crosses.
34. During the period of November 2006 through January 2007, on approximately 48 occasions Kellogg created a Locked or Crossed Market and failed to unlock or uncross that market or failed to direct a Principal Order through Linkage to trade against the bid or offer that the Firm locked or crossed.

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<sup>4</sup> A locked market is defined by the ITS Plan as disseminating a bid (offer) for an ITS Security at a price that equals or exceeds (is less than) the price of the offer (bid) for the security then being displayed from another ITS participating market center (the “locked offer (bid)”).

<sup>5</sup> Kellogg is an Eligible Market Maker pursuant to Amex Rule 940(b)(5).

35. The conduct described above constitutes violations of Amex Rule 943(a).

**AEMI Auto-Execution Reactivation Violations**

36. During the relevant period herein, subject to certain exceptions, when a buy or sell imbalance in a security had locked or crossed the AEMI Book and the Auto-Execution function ("Auto-Ex") had been disabled for any of the reasons permitted therein, Amex Rule 128A-AEMI(g) required Amex specialists to attempt to pair off any remaining imbalance in order to re-enable Auto-Ex within ten seconds.
37. On at least 12 occasions during the period of March 2008 through August 2008, and in multiple products, the Respondent was presented with a buy or sell imbalance that had locked or crossed the AEMI Book and Auto-Ex had been disabled. In these situations, Respondent failed to attempt to pair off remaining imbalances within ten seconds in order to re-enable Auto-Ex. On these occasions, Auto-Ex was disabled on average for greater than 20 seconds.
38. The conduct described above constitutes violations of Amex Rule 128A-AEMI(g).

**Additional Factors Considered**

39. In determining to resolve this matter on the basis set forth herein, Enforcement took into consideration the significant number of trades executed by Kellogg in its capacity as a specialist firm on the Floor of the Exchange without incident.
40. In addition, Enforcement took into consideration system improvements developed by the Exchange, with certain assistance from Kellogg, which aided specialist firms in preventing instances of trading ahead and certain order handling violations.
41. Since the time periods specified herein, there has not been a reoccurrence of the trading ahead violations specified herein.

**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 \$75,000 fine.

For the Hearing Board

Peggy Kuo - Chief Hearing Officer