BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Market Regulation Committee,[1] Complainant, vs. J.C. Bradford & Co. Nashville, TN, Respondent.	DECISION Complaint No. CMS960194 Dated: June 10, 1999

On review of complaint's dismissal by the Market Regulation Committee, reversed. Held, respondent violated Rule 10b-6A by purchasing securities above the highest independent bid during the qualifying period while engaging in passive market making.

This matter was called for review by the National Adjudicatory Council ("NAC") pursuant to Procedural Rule 9312 to review the November 6, 1997 decision of the Market Regulation Committee ("MRC"). For the reasons discussed below, we hold that J.C. Bradford & Co. (Bradford or the Firm) violated Rule 10b6-A by purchasing a security above the highest independent bid during the qualifying period while engaged in passive market making. We direct that this decision serve as a Letter of Caution.

Background[2]

Effective March 4, 1997, the Securities and Exchange Commission (SEC) adopted Regulation M, which replaced several trade practice rules, under -the authority of various provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and other federal statutes. See

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[1] The complaint in this matter was brought by the Market Surveillance Committee, now known as the Market Regulation Committee ("MRC"), after an MRC staff investigation discovered the conduct at issue.

[2] Bradford has been a member of the NASD since 1939.

Exchange Act Rel. No. 38067 (Dec. 20, 1996). Regulation M replaced Rule 10b-6 and its companion rule, Rule 10b-6A, the rule presently at issue before us.[3]

SEC Rule 10b-6. Rule 10b-6 was adopted in 1955 under the Exchange Act of 1934 as a codification of principles which historically have been applied in considering questions relating to manipulative activity and stabilization in connection with a distribution. [4] It was an anti-manipulation rule intended to prevent participants in a distribution of securities from artificially conditioning the market for the securities and to protect the integrity of the market as an independent pricing mechanism.[5] The rule thus prohibited persons participating in a distribution, including issuers, underwriters, prospective underwriters, dealers, and affiliated purchasers from bidding for or purchasing, or inducing others to purchase, a security or any related security until they have completed their participation in such distribution.

Rule 10b-6 contained several exceptions which permitted market making prior to a distribution in order to ensure that depth and liquidity for the security were maintained in the market. One of these exceptions, Rule 10b-6 (a)(4)(xi) ("Exception (xi)"), allowed dealers to effect solicited principal transactions prior to a two-business-day or nine-business-day "cooling-off" period during which they were required to withdraw from the market. Whether distribution participants were subject to the two-business-day or the nine-business-day cooling off period depended on certain features of the offered securities. Generally, for stock with a minimum price of five dollars per share and a minimum float of 400,000 shares, the two-business-day cooling off period applied; for other securities, the nine-business-day cooling off period generally applied.

Rule 10b-6A. Rule 10b-6A, the predecessor to Regulation M's Rule 103, was adopted as a companion rule to Rule 10b-6 in 1993 in response to a Petition for Rulemaking filed by the NASD. See Exchange Act Release No. 32117 (Apr. 8, 1993). In requesting the rulemaking, the NASD noted its concern that the required withdrawal of Nasdaq market makers and their affiliated purchasers from the market during the cooling off period created special liquidity problems for Nasdaq securities. Rule 10b-6A was therefore adopted to permit market makers in securities that qualified for the two-business-day cooling off period to engage in passive market making during the period when Rule 10b-6 otherwise prohibited such activity. In order to be eligible for passive market making, the distributed securities were required not only to have qualified for the two-business-day cooling off period, but also to have been traded on the Nasdaq National Market or The Nasdaq SmallCap Market. In addition, the underwriting was required to have been a firm-commitment fixed-price offering.

Rule 10b-6A therefore permitted NASD market makers to continue to make markets in a stock while participating in an underwriting of that stock, subject to several conditions.[6] One of those

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[3] We find no need to reach the determination of whether the concepts discussed in this case are equally applicable to Rule 103 of Regulation M.

[4] Exchange Act Release No. 31347 (Oct. 22, 1992).

[5] See Exchange Act Release No. 32117 (Apr. 8, 1993).

[6] Market makers also were required to have been registered in the security for two calendar months

conditions was that a passive market maker's bid could not exceed the highest bid displayed by a market maker not participating in the distribution of the offering (the "independent bid"). In addition, passive market makers were prohibited from purchasing securities at prices above the highest independent bid during the qualifying period,[7] such is at issue here.

Facts. The facts are undisputed. Bradford was a syndicate member participating in a distribution of Landrys Seafood Restaurant, Inc. ("LDRY") on May 30, 1996. On May 28 and May 29, 1996, during the qualifying period, the Firm was identified as a passive market maker in LDRY. On May 28, 1996 at 14:51:59, Bradford purchased 400 shares of LDRY for its Over-The-Counter (OTC) trading account via the Small Order Execution System ("SOES") at a price of 23 1/4, while the highest independent bid was 23.

Bradford asserts that on May 28, 1996, at 14:51, the highest independent bid for LDRY dropped from 23 1/4 to 23. At that time, Bradford's bid was 23 and was identified as passive. Bradford's bid was therefore equal to, not in excess of, the highest independent bid. At the same time, a non-independent bid of 23 1/4 remained in the market. At 14:51, the highest bid for LDRY was 23 1/4, the highest independent bid was 23, and Bradford's bid was 23. At 14:51:59, Bradford had executed against it 400 shares of LDRY at 23 1/4, the price of the highest bid in the market. Bradford asserts that this occurred, even though its bid was at 23, because the contra side had preferenced Bradford in SOES.[8]

Discussion. The one-cause complaint alleged that Bradford violated SEC Rule 10b-6A by purchasing LDRY for its OTC trading account above the highest independent bid during the qualifying period.[9] Bradford waived a hearing and the case was decided on the written record. The MRC

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immediately prior to the offering and to have accounted for 30 percent of the average daily trading volume in that security. In addition to the eligibility requirements, certain net purchase volume limitations, identification, and notification requirements applied. For example, passive market-making transactions were subject to a net purchase volume limitation. During the two day "cooling off" period, a passive market maker was required to close its market for the remainder of the day if its net purchases (the number of securities purchased less sales) exceeded 30 percent of its average daily trading volume. Passive market makers also were required to notify the NASD in advance of their intention to engage in passive market making and to identify their bids as such. See Rule 10b-6A(T)(c); Special NASD Notice to Members 93-29.

[7] The term "qualifying period" refers to the time an eligible market maker otherwise would be prohibited from effecting transactions during the two-day "cooling off" period, until the earlier of the time of the commencement of offer or sales in the distribution or the time at which a stabilizing bid is made pursuant to Rule 10b-7 under the Exchange Act. See Rule 10b-6A(T)(b)(10).

[8] SOES is an automated trading system owned and operated by the Nasdaq Stock Market, Inc. which enables SOES participants to execute transactions of limited size in active SOES-authorized securities. SOES accepts orders that are either preferenced to a particular market maker or unpreferenced. A preferenced order will be executed against that market maker at the inside market price, and unpreferenced orders are executed against market makers at the inside quote in rotation. Market makers may establish the order-entry firms from which they will accept preferenced orders. See Marketplace Rules 4710(a), 4730(c). A market maker may disable the SOES preferencing feature. See NASD Regulatory & Compliance Alert (Sept. 1997).

[9] Bradford argues that Rule 10b-6A is a "safe harbor" for violations of Rule 10b-6 and that the

dismissed the complaint after determining that Bradford did not act with the requisite scienter for a Rule 10b-6A violation. We called this case for review to examine all legal issues raised, including the scienter issue. [10] For the reasons discussed below, we reverse the MRC's dismissal.

The MRC determined that scienter was required for Rule 10b-6A violations consistent with Bradford's arguments on the issue.[11] Bradford principally relies on the Supreme Court's decisions in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (Hochfelder) and Aaron v. SEC, 446 U.S. 680 (1980) (Aaron), and on a federal district court case, SEC v. Burns, 614 F. Supp. 1360 (S.D. Cal. 1985), aff'd on other grounds, 816 F.2d 471 (9th Cir. 1987) (Burns). We find, however, neither Hochfelder, Aaron, nor Burns to be dispositive on the issue of whether scienter is required for violations of Rule 10b-6A.

Bradford argues that the Hochfelder and Aaron decisions established that rules promulgated under Section 10(b) of the Exchange Act, such as Rule 10b-6A, require scienter. Hochfelder involved an action for damages under Section 10(b) and Rule 10b-5 by customers of a brokerage firm against an accounting firm for negligent failure to detect accounting irregularities and the fraudulent activity of a broker. The Hochfelder Court held that an allegation of scienter was necessary to state a private cause of action for damages under Section 10(b) and Rule 10b-5. Likewise, in Aaron, the Court held that the SEC was required to plead scienter in an injunctive action for violations of Rule 10b-5. In Aaron, the SEC sought injunctive relief against a managerial employee of a broker/dealer for violating and aiding and abetting violations of Section 17(a) of the Securities and Exchange Act of 1933, and Section 10(b) and Rule 10b-5 of the 1934 Act. In both Hochfelder and Aaron, the Court reasoned that Section 10(b)'s language evidenced Congressional intent to proscribe only knowing or intentional misconduct by its use of the words manipulative or deceptive device. [12] Thus, the Court reasoned that Rule 10b-

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complaint therefore should have alleged a violation of Rule 10b-6 itself rather than of 10b-6A. We reject this argument and note that the Commission has stated that "the exceptions [to Rule 10b-6] are not, and never have been, safe harbors." Exchange Act Rel. No. 37094, at 5068 (Apr. 11, 1996). Rule 10b-6A is such an exception under Rule 10b-6. See Rule 10b-6(a)(xiv). See generally Exchange Act Rel. No. 32159 (Apr. 16, 1993) (noting that NASD's notification procedures would "provide a mechanism to help prevent inadvertent violations of the notification requirement of Rule 10b-6A").

[10] By letter dated October 9, 1998, the subcommittee of the NAC ("Subcommittee") that presided over this hearing notified the parties that the following issue would be considered in connection with the appeal in the above-captioned matter: "Whether rules (including Rule 10b-6A) that are promulgated under Section 15(c)(2) of the Exchange Act of 1934 require scienter when the conduct in question involves a broker or dealer." Because this issue was not addressed below or in appellate briefs, the Subcommittee permitted the parties to submit additional briefs addressing it in accordance with Procedural Rule 9312(c)(2). We adopt the Subcommittee's ruling in this regard, and its other procedural rulings regarding postponement of the hearing and amendments to the briefing schedule.

[11] Scienter is defined as the mental state of knowingly intending to deceive, manipulate, or defraud. See Aaron v. SEC, 446 U.S. 680, 686-87 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). We affirm the MRC's determination that Bradford did not act with scienter.

[12] Section 10 of the Securities Exchange Act of 1934 provides in part:

5 violations could occur only when conduct was knowing or intentional.

In Burns, the SEC sought an injunction for violations of Rule 10b-6. The SEC alleged that Burns induced other persons to purchase common stock of Nucorp Energy, Inc. ("Nucorp") while a distribution of Nucorp common stock was in progress. At the time of the alleged inducement, Burns was Chairman of the Board of Directors and Chief Executive Officer of Nucorp. The United States District Court for the Southern District of California held that a violation of Rule 10b-6 required scienter. The court reasoned that under the rationale of Hochfelder and Aaron, because Rules 10b-6 and 10b-5 were both promulgated under Section 10(b), the SEC's rulemaking power in enacting Rule 10b-6 must include the same scienter requirement the [Court] required in Rule 10b-5. Id. at 1363.

Rule 10b-6A, however, unlike Rule 10b-5 (the rule at issue in Hochfelder and Aaron),[13] was promulgated not only pursuant to Section 10(b), but also pursuant to Section 15(c)(2) of the Exchange Act.[14] In Section 15(c)(2), Congress granted the Commission the authority to adopt rules reasonably designed to prevent fraud when the conduct in question involves a broker or dealer.[15] Courts

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It shall be unlawful for any person, directly or indirectly . . . . (b) [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5 provides in part that:

A[i]t shall be unlawful for any person, directly or indirectly . . . (1) To employ any device, scheme, or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[13] We note that Burns is not controlling because it did not involve a violation of Rule 10b-6A, passive market making, or the conduct of a broker/dealer. We also note that subsequent to the Burns decision, the 1993 amendments to Rule 10b-6 that created the passive market-making exception were promulgated pursuant to Section 15(c)(2), and that rules promulgated under that section do not require scienter. See discussion below and supra, at footnote 14. We make no determination here, however, as to Rule 10b-6.

[14] Rule 10b-6A and the amendments to Rule 10b-6 (passive market making exception) were adopted under Sections 2, 3, 9(a)(6), 10(a), 10(b), 15(c)(2), and 23(a) of the Exchange Act. See Exchange Act Rel. No. 32117 (Apr. 8, 1993).

[15] Section 15(c)(2)(A) provides, in pertinent part: "No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice." Section 15(c)(2)(D) further provides that "[t]he Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Section 15(c)(2) specifically applies only to the conduct of broker/dealers.

examining the language of 15(c)(2)(D) have recognized the prophylactic nature of rules promulgated under that Section and have rejected any scienter requirement. See United States v. O'Hagan, 521 U.S. 642, 753 (1997) (noting that Section 14(e)'s rulemaking prescription tracks Section 15(c)(2)(D), and holding that under Section 14(e), the Commission may prohibit acts, not themselves fraudulent under the common law or Section 10(b), if the prohibition is reasonably designed to prevent . . . acts and practices [that] are fraudulent) (citing Schreiber v. Burlington Northern Inc., 472 U.S. 1, 11 n.11 (1985) (construing reasonably designed language of Section 14(e) to give the SEC latitude to regulate nondeceptive activities as a means of preventing manipulative acts) (Schreiber)). In addition, the SEC has recognized the prophylactic nature of rules promulgated under Section 15(c)(2). See In re Franklin N. Wolf, Exchange Act Rel. No. 36523 (Nov. 29, 1995) (citing Schreiber and finding scienter not required under SEC Rule 15c2-6 because it is a rule reasonably designed to prevent manipulative acts).

Accordingly, for us to find that scienter is required here would render meaningless Congress' grant of authority and the Commission's designation of Section 15(c)(2) as the promulgating authority in this instance. We thus decline to read a scienter requirement into Rule 10b-6A because that Rule's adoptive authority includes Section 15(c)(2), which contains no such scienter requirement.[16]

We note that the Commission has not spoken directly on this issue.[17] We find it persuasive, however, that with respect to Regulation M, the Commission has stated that it continues to believe that a prophylactic approach to anti-manipulation regulation is the most effective means to protect the integrity of the offering process.[18] Interpreting Rule 10b-6A to be prophylactic in nature is consistent with the structure and purpose of Rule 10b-6A, which applied only to the conduct of brokers and dealers acting as Nasdaq market makers. We believe that the rule's prophylactic nature would be ill-served by the creation of a scienter requirement.

We thus turn to the language of Rule 10b-6A, which plainly requires a finding of violation in this case. Rule 10b-6A(T)(c)(1) provides that during the qualifying period, a passive market maker shall not effect a transaction in an eligible security at a price that exceeds the highest independent bid for the eligible security at that time of the transaction. Because Bradford purchased LDRY at a price

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[16] We likewise reject Bradford's argument that the SEC's citation to Section 15(c)(2) as additional authority for Rule 10b-6A cannot eliminate the scienter requirement because to do so would exceed the SEC's power under Section 10(b). We find that the SEC's authority to adopt rules pursuant to Section 15(c)(2) gives the Commission the authority to adopt rules specifically tailored to broker/dealer conduct even in the face of Section 10(b)'s apparent limits. Indeed, Section 10(b)'s language tracks the same language as Section 15(c)(2)(A), which proscribes manipulative and deceptive devices. Section 15(c)(2)(D), however, permits the Commission to design rules to prevent that manipulative conduct.

[17] The parties have cited no case law specifically involving Rule 10b-6A. Bradford cites In re Swartwood Hesse, 50 S.E.C. 1301 (1992), and Pagel, Inc. v. S.E.C., 803 F.2d 942 (8th Cir. 1986), in support of its argument that scienter is required in SEC actions for Rule 10b-6 violations and thus would be required for Rule 10b-6A violations. Neither case, however, specifically holds that Rule 10b-6 violations require scienter. Moreover, we limit our holding in this case to Rule 10b-6A violations.

[18] See Exchange Act Release No. 38067 (Dec. 20, 1996).

that exceeded the highest independent bid for that security during the qualifying period, Bradford violated the unambiguous language of the rule.[19]

Bradford urges us to find that there is no basis for enforcement action for technical violations of Rule 10b-6A that have no manipulative potential. In support of this, Bradford cites two letters from the SEC's Division of Market Regulation which acknowledge that certain of the passive market-making rules might conflict with a market maker's customer order obligations under the NASD's Limit Order Protection Rule and the SEC's Limit Order Display Rule. In those situations, the SEC advised that passive market makers may purchase a security or display a bid above the highest independent bid even though this would otherwise be in technical violation of Rule 10b-6A, if the purchase is to fulfill the market maker's obligations under the NASD's Limit Order Protection Rule or the SEC's Limit Order Display Rule.[20]

We find that the instant case is not such a case contemplated by the SEC interpretations. The LDRY execution was not effected in order to comply with customer limit order obligations; rather, the purchase was for Bradford's OTC trading account. We likewise do not agree with Bradford that the Commission's letters essentially provide passive market makers with exceptions for technical violations. To the contrary, our reading of the Commission's letters is that they recognize that violations without manipulative intent do violate the Rule.

The MRC staff argues that Bradford could have avoided the automatic execution if it had disabled its preferencing feature on SOES. Bradford argues, however, that it should not be held responsible for compliance with Rule 10b-6A when the NASD did not provide guidance to firms that the SOES preferencing feature should be disabled during passive market making. Bradford points to Special Notice to Members 93-29 and Notice to Members 93-41, which provided a checklist of requirements for passive market makers under Rule 10b-6A, but did not specifically indicate that passive market makers should disable their SOES preferencing feature. The Market Regulation Department staff argues, however, that Bradford was advised to disable its preferencing feature in an April 1995 NASD Regulatory & Compliance Alert entitled NASD Encourages Members to Review and Supervise Passive Market Making Compliance (Compliance Alert). The Compliance Alert stated in part:

> Because members' automatic execution systems can execute trades that are unknown to the trader, firms should disable preferences on their internal systems or the

[19] We reject Bradford's argument that it did not "effect" the transaction and therefore did not violate the rule. Bradford's purchase of the LDRY for the firm's propriety account, albeit by automatic execution, "effected" a transaction.

[20] See Letter from Larry E. Bergmann, Associate Director, Division of Market Regulation, SEC, to Eugene Lopez , Assistant General Counsel, NASD (July 19, 1995); Letter from Richard Lindsey, Director, Division of Market Regulation, SEC, to Richard Grasso, Chairman and Chief Executive Officer of the New York Stock Exchange (Nov. 22, 1996); see also Exchange Act Release No. 37094 (Apr. 11, 1996) (proposing Regulation M and acknowledging that market makers can make bids or purchases above the highest independent bid to comply with any NASD or SEC rule relating to execution of customer orders).

> Advanced Computerized Execution System (ACES). Each firm can disable preferences for individual stocks. Nasdaq Market Operations cannot disable individual stocks, although it can remove a firm from ACES, thus disabling all of the firm's stock in that system.

Bradford maintains that SOES is not an internal system and is not like ACES, and that the Compliance Alert therefore does not advise members to disable their SOES preferencing feature. We find no need to resolve this issue. **[21]** We note that NASD Regulatory & Compliance Alerts and Notices to Members are provided only as guidance to assist members with compliance with NASD rules and the securities laws. It is well settled that firms cannot shift the responsibility for compliance to others, including the NASD. See, e.g., In re Thomas C. Kocherhans, Exchange Act Release No. 36556 at 5-6 (Dec. 6, 1995); In re Don D. Anderson & Co., Inc., 43 S.E.C. 989, 991 (1968), aff'd, 423 F.2d 813 (10th Cir. 1970). Rule 10b-6A's requirements are clear, such that a members' obligations under the Rule should plainly be known.[22]

Sanctions

The NASD Sanction Guidelines (Guidelines) for passive market-making violations recommend monetary fines of $1,000 to $100,000, with higher fines in egregious cases.[23] In

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[21] We note that Bradford was previously disciplined for a passive market-making violation. On November 22, 1995, the MRC issued a Letter of Caution to Bradford for improperly downticking its bid to a level above the highest independent market maker's bid on June 28, 1995, during the cooling off period for Kemet Corporation. MRC staff asserts that issued with the Letter of Caution was a bulletin entitled "Important Points Regarding Passive Market Makers," which advised that "firms should disable "preferences" on automatic execution systems (e.g., ACES or internal systems)." We do not find that this earlier Letter of Caution or the bulletin provided express warning about possible inadvertent violations of Rule 10b-6A resulting from SOES preferencing, and thus we do not consider them in aggravation of sanctions.

[22] Bradford asserts that after the SEC approved Rule 10b-6A, the NASD filed two proposed rule changes that promulgated detailed amendments to the then-existing Schedule D to the NASD By-Laws to assist members in their obligations under SEC Rule 10b-6 and Rule 10b-6A (these amendments are described in NTMs 93-29 and 93-41). The amendments set forth certain identification and notification requirements for passive market makers and for distribution participants that request excused withdrawal of their quotations. Bradford argues that under the doctrine of "expressio unius est exclusio alterius" (which holds that where specific items are enumerated in a statute, contract, or rule, the enumeration implies that all other items omitted are excluded), the requirement that members disable the SOES preferencing feature is not specified and therefore is excluded from the list of passive market making requirements. We reject this argument. The notification and identification requirements set forth in the By-Laws described above were adopted pursuant to Rule 10b-6A(T)(c)(7), which requires market makers to provide to the NASD information Ain such form as the NASD will prescribe." In addition, the doctrine does not apply to Notices to Members, to the extent they provide any further guidance on how to comply with Rule 10b-6A. We also reject any suggestion by Bradford that the NASD=s September 1997 Compliance Alert that advised members to disable the SOES preferencing feature imposed a new obligation on members that required SEC-approved rulemaking. Although a member=s participation in SOES is required, use of the SOES preferencing feature is optional. Moreover, Rule 10b-6A itself created the obligation not to execute transactions above the highest independent bid during the qualifying period.

[23] Guidelines (1996 ed.) at 37 (Passive Market Making). The recommended sanctions are below the range recommended by the Guideline.

accordance with the Guideline's principal considerations, we note the following in mitigation: first, Bradford failed to disable its SOES preferencing function during passive market making, but did not act intentionally in violating Rule 10b-6A. Second, Bradford's posted bid was not above the highest independent bid. Third, only one underwriting was involved, and the violative purchase was relatively small, consisting of only 400 shares. Fourth, within moments of learning of the automatic execution, Bradford canceled the trade. Finally, Bradford has implemented appropriately remedial procedures, which instruct its traders to disable the SOES preferencing feature before engaging in passive market making.

Because we find substantial mitigation in this case, and because Bradford has taken measures to reduce the likelihood of this violation occurring again, we find that a Letter of Caution is an appropriate remedial sanction. Our decision should not be read to indicate that violations of the passive market making rules warrant relatively light sanctions; nor do we suggest that respondent lacked notice of the passive market making requirements. Rather, given the unusual circumstances present, and the fact that this case arguably is the first to address a violation of this nature, we find that a Letter of Caution is appropriate.

Subsequent to the violation at issue, the NASD published an NASD Regulatory & Compliance Alert (Sept. 1997), which specifically advises members to address possible problems associated with SOES preferencing arrangements before engaging in passive market making. Members should therefore be fully aware that precautions should be taken before engaging in passive market making in order to avoid automatic executions that would result in passive market making violations.

Accordingly, this decision shall serve as a Letter of Caution.[24]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate Secretary

[24] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.