

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 98-31 (C06980015).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C06980015
v.	:	
	:	Hearing Officer - EBC
Respondent.	:	

ORDER DENYING MOTION TO STAY PROCEEDING

On June 17, 1998, the Department of Enforcement (Enforcement) filed a one cause Complaint against _____ (“_____” or “Respondent”) alleging that he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to three requests for information and documents. Respondent, through his counsel, has moved for an indefinite stay of this proceeding pending the conclusion of a federal criminal investigation in which he is purportedly a “target.” Enforcement has opposed the motion. The Hearing Officer orally denied Respondent’s motion at a Pre-Hearing Conference on October 6, 1998, and stated her reasons for doing so. Because _____ has sought to re-argue his stay motion, in his pre-hearing submission, the Hearing Officer has determined that a written explanation of her reasons for denying the motion is appropriate.

Discussion

There is no provision in the Code of Procedure that specifically authorizes a Hearing Officer to grant an indefinite stay of a disciplinary proceeding. Under Code of Procedure Rule 9222, the Hearing Officer may, for good cause shown, extend any time limits prescribed by the

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Code, and postpone the commencement of a hearing for a “reasonable period of time.” Further, pursuant to Rule 9222(b)(2), a Hearing Officer may not postpone a hearing or grant extensions of time in excess of 28 days, without providing reasons why a longer period is necessary. The Rule is intended to ensure prompt resolution of the NASD’s disciplinary proceedings, which is necessary to enable the Association to carry out its regulatory mandate and fulfill its responsibilities in protecting the public interest. An indefinite stay of a proceeding, such as that sought by Respondent, ordinarily would be inconsistent with these goals. Further, Respondent has failed to demonstrate that he is entitled to even a limited stay of this proceeding.

In support of his motion, _____ asserts that he is presently the “target” of a federal criminal investigation, by the _____, “relative to the underlying subject matter of the Complaint” in this disciplinary proceeding. He claims that, absent a stay “[h]e is effectively being forced to choose between his right to remain silent (in which case he loses his securities license and means to is [sic] livelihood) and his obligation to answer the questions that the NASD poses to him (in which case he furthers prosecution of the [criminal] investigation.” As a corollary, _____ argues that, under the Fifth Amendment, he has a right to refuse to answer questions, put to him by the NASD, that relate to matters at issue in the criminal investigation. Respondent’s argument is misguided in several significant respects.

First, this not a proceeding to compel _____ to provide the information that he allegedly failed to provide in response to NASDR’s Rule 8210 requests. Rather, this proceeding has been brought to determine whether Respondent failed to provide the requested information and, if so, after consideration of all aggravating and mitigating factors, the sanctions that should be imposed.

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Second, NASD disciplinary proceedings and investigations do not implicate the privilege against self-incrimination.¹ As stated by the Court of Appeals for the Second Circuit with respect to New York Stock Exchange proceedings:

interrogation by the New York Stock Exchange in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination. . . . Most of the provisions of the Fifth Amendment, in which the self-incrimination clause is embedded, are incapable of violation by anyone except the government in the narrowest sense. . . . [T]his is but one of many instances where government relies on self-policing by private organizations to effectuate the purposes underlying federal regulating statutes.

United States v. Solomon, 509 F.2d 863, 867, 869 (1975). Thus, any sanction that might result from Respondent's refusal to provide information – pursuant to an invocation of the privilege against self-incrimination – would not violate due process, the Fifth Amendment, or be considered impermissibly costly. In re Vincent Musso, 47 S.E.C. 606, 1981 SEC LEXIS 994, at *8-9 (1981) (only the state, not private entities, are prohibited from offering an individual the “Hobson's choice between self-incrimination or loss of employment”).² See also, e.g., In re Vladislav S. Zubkis, Exchange Act Release No. 40409, n.2 (September 8, 1998) (“It is well established . . . that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government.”); In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at *3 (1994) (“a refusal to provide

¹ See, e.g., District Business Conduct Committee No. 10 v. Stratton Oakmont, Inc., Complaint No. C10950081, 1996 NASD Discip. LEXIS 52, at *25-28 (NBCC Dec. 5, 1996); District Business Conduct Committee No. 8 v. Kowalski, Complaint No. C8B950012, 1996 NASD Discip. LEXIS 60, at *25-26 (NBCC Oct. 23, 1996); Market Surveillance Committee v. Wakefield Financial Corp., Complaint No. MS-936, 1992 NASD Discip. LEXIS 124, at *36-37 (NBCC May 7, 1992).

² Similarly, the federal courts have recognized that even when parties may assert a Fifth Amendment privilege in civil proceedings, the Constitution “does not ordinarily require a stay of civil proceedings pending the outcome of related criminal proceedings.” SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1375 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980). Indeed, civil, regulatory, and criminal laws often overlap, creating the possibility of simultaneous or successive proceedings. Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52 (1912).

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information is a violation [of Rule 8210], without regard to invocation of the right against self-incrimination”); In re Daniel C. Adams, 47 S.E.C. 919, 921 (1983) (an invocation of the Fifth Amendment privilege would not affect the right of the NASD to sanction the respondent for his refusal to provide information, since the NASD is not a part of the government); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979).³

Based on the foregoing, the Hearing Officer concludes that there is no unfairness to Respondent in allowing this proceeding to continue. Therefore, Respondent’s motion is DENIED.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: Washington, DC
October 23, 1998

³ The Hearing Officer also notes that _____ has not provided any information to substantiate his claim that the NASD’s investigation and the criminal investigation involve substantially similar issues. However, the question of relatedness between the two investigations is irrelevant to determine his stay motion.