

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A000056
v.	:	
	:	Hearing Officer - DMF
	:	
	:	
	:	
Respondent.	:	

ORDER DENYING MOTION TO DISMISS

Background

Respondent _____ filed a motion to dismiss this proceeding, arguing that it was barred by the five year limitations period set forth in 28 U.S.C. §2462, and that the delay in filing the Complaint made this proceeding “inherently unfair,” under the analysis applied in Jeffrey Ainley Hayden, Exchange Act. Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000). Evaluating the motion under the standards applicable to motions for summary disposition under Rule 9264(e), I denied the motion insofar as it was based on 28 U.S.C. §2462, but deferred decision on _____’s Hayden argument and directed Enforcement to supplement its opposition. Enforcement filed a supplemental opposition, with two declarations, on May 4, 2001, and _____ filed a response on May 7, 2001. The Hayden issue is now ripe for resolution. To prevail, _____ had to establish that “there is no genuine issue with regard to any material fact and [he] is entitled to summary disposition as a matter of law.” For the reasons set forth below, I find that he failed to do so.

Discussion

In Hayden, the SEC dismissed a New York Stock Exchange disciplinary proceeding because of undue delay, based upon Section 6(b)(7) of the Securities Exchange Act, which requires exchanges to “provide a fair procedure for the disciplining of members and persons associated with members” The SEC pointed out that the NYSE “was informed about significant misconduct by Hayden in 1991,” but did not begin its investigation until 1993, and did not bring charges against Hayden until 1996. The SEC concluded that “the delay in the underlying proceedings was inherently unfair,” even without evidence “that Hayden’s ability to mount an adequate defense was impaired by the Exchange’s delay.” The SEC did not explain how the various dates and time periods it cited factored into this conclusion.

Subsequently, in William D. Hirsh, Exchange Act Rel. No. 43691, 2000 SEC LEXIS 2703 (Dec. 8, 2000), the SEC refused to dismiss an NYSE proceeding even though the NYSE did not bring charges until nearly eight years after the misconduct ended. The SEC offered minimal explanation for the different result: “We do not believe that the factors discussed in Hayden necessarily require the dismissal of the charges Once the Exchange was notified of [an] arbitration award [against Hirsh] only 20 months elapsed before the charges were filed.”

Although Section 6(b)(7) of the Exchange Act does not apply to NASD proceedings, Section 15A(b)(8), which does apply, also requires “a fair procedure for the disciplining of members and persons associated with members” Here, the alleged misconduct took place between November 1993 and August 1995. According to Enforcement’s supplemental declaration, in October 1996 _____’s then-employer filed an amended Form U-4 with the NASD’s Central Registration Depository disclosing that customers RK and HK had made a complaint about _____. The complaint concerned a transaction that ultimately became one of the bases for the charges against _____ in this

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proceeding. In April 1997 the NASD staff received from the customers' attorney a copy of a civil complaint they had filed, along with a complaint letter the attorney had sent to the SEC. NASD District 3 staff opened an investigation in April 1997,¹ and took _____'s testimony in June 1997. During his testimony, _____ provided information giving the NASD staff their first indication of the other alleged misconduct charged in the Complaint. The declaration says that the NASD staff encountered a variety of justifiable delays in pursuing the investigation, which concerned not only _____, but several other associated persons. During the investigation, NASD staff accumulated "88 linear inches" of documents. Enforcement filed the Complaint in January 2001.

Based on these facts, Enforcement argues that the delay in this case was not unfair under Hayden, while _____ argues that it was unfair. In addition, _____ takes issue with some of the explanations offered by Enforcement for delays in the investigation.

This case highlights the problem posed by Hayden. There, the SEC signaled that, although no statute of limitations applies to a Self-Regulatory Organization's disciplinary proceedings, extreme delay by an SRO may render disciplinary proceedings "inherently unfair," even without evidence that the respondent was prejudiced by the delay. But the SEC articulated no framework that would allow SRO adjudicators to apply Hayden in other contexts, and the SEC again failed to offer any analysis when it distinguished Hayden in Hirsh. Under these circumstances, Hayden can only be applied in light of the specific facts in that case; it does not establish a discernible standard that may be applied to any less egregious circumstances.

In Hayden, the NYSE filed its charges 14 years after his first misconduct and more than six years after the last incident; in this case, Enforcement filed the Complaint approximately seven years

¹ According to the declaration, this "was one of 524 cause examinations opened by District 3 in 1997."

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after the first alleged misconduct and five and a half years after the last. In Hayden, the NYSE did not begin its investigation until about two years after its Division of Enforcement was “informed about significant misconduct” by Hayden through “a ‘voluminous’ sales practice examination report”; in this case, the investigation was begun some six months after _____’s employer filed a Form U-4 amendment and within a month after the District 3 staff received materials from the customers’ attorney. In Hayden, the NYSE filed its charges approximately three and a half years after it began its investigation; here Enforcement filed the Complaint about three years and eight months after it began its investigation. In Hayden the total time from the NYSE receiving notice of significant misconduct to filing charges was more than five years; in this case, it was four years and two months after the amended Form U-4 was filed and three years and nine months after the District 3 staff received materials from the customers’ attorney.²

Thus, although the time periods in this case are somewhat longer than usual, in general they are somewhat shorter than those in Hayden. Therefore, I conclude, as the SEC did in Hirsh, that Hayden does not, as a matter of law, compel dismissal of the charges against _____. Further, looking to the general “fairness” standard in Section 15A(b)(8) of the Exchange Act, I conclude that, in the absence of any evidence of prejudice, the delays in this case do not, as a matter of law, render this proceeding inherently unfair. In reaching these conclusions, I have not found it necessary to consider the various explanations that Enforcement offered for the delays that occurred, so _____’s objections to some of those explanations need not be addressed.

² For purposes of evaluating the inherent unfairness of investigative delay, it is by no means clear that CRD’s receipt of a Form U-4 amendment that merely reported a customer complaint about _____, or even the NASD District staff’s receipt of copies of the customers’ civil lawsuit and letter to the SEC should be treated as equivalent to the NYSE Enforcement Department receiving a voluminous sales practice examination report containing evidence of significant

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Conclusion

_____ failed to establish that, based upon undisputed material facts, he is entitled to dismissal of this proceeding as a matter of law. Therefore, his motion to dismiss is denied.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
May 10, 2001

misconduct by Hayden but, apparently, failing to act on that report, even by opening an investigation, for some two years. It is unnecessary for present purposes, however, to resolve that issue.