

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 02-08 (C10010145).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C10010145

Hearing Officer—Andrew H. Perkins

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

During the Initial Pre-Hearing Conference on March 27, 2002, Respondent _____ (“_____”) raised the issue of whether the Department of Enforcement (“Department”) has jurisdiction over the First Cause of Complaint. _____ pointed out that the First Cause of Complaint alleges that, on April 22, 1999, he submitted a false Form U-4 to Hanmi Securities, Inc. (“Hanmi”), but the Department did not file the Complaint until November 12, 2001. The Respondent contended that the NASD By-Laws require the Department to file a complaint against an unregistered person within two years after the date such person filed his Uniform Application for Securities Industry Registration or Transfer (Form U-4).

Following _____'s explanation of his objection, he requested leave to file a motion to dismiss the First Cause of Complaint. The Hearing Officer granted _____'s request and ordered

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_____ to file the motion and any memorandum in support no later than April 17, 2002. _____, however, failed to file the motion. The Department nevertheless filed an opposition.

By Order dated April 19, 2002, the Hearing Officer denied the Respondent's request to dismiss the First Cause of Complaint and granted him 14 days to renew the motion in writing.

On May 5, 2002, the Office of Hearing Officers received _____'s submission on the issue of jurisdiction, which adds little to _____'s oral request. _____ contends that the First Cause of Complaint must be dismissed because he "has never been a NASD registered member and the Complaint was filed two years after Respondent executed his Form U-4 to become associated with Hanmi." (Submission at 2.) Moreover, _____ contends that any association he may have had with Hanmi ended more than two years before the Department filed the Complaint. (*Id.*)

On the other hand, the Department contends that the date _____ submitted his Form U-4 to become associated with Hanmi is irrelevant. According to the Department, the controlling date for the purposes of jurisdiction is the date he last submitted a Form U-4—in this case November 14, 1999.¹ Thus, since the Department filed the Complaint on November 12, 2001, the Department claims it has jurisdiction of both the First and Second Causes of Complaint pursuant to Article V, Section 4(c) of the NASD By-Laws.

For the reasons discussed below, the Hearing Officer denies the Respondent's motion.

¹ Under Article V, Section 4(c), the period in which the Department must file a Complaint against an unregistered person actually commences to run on the date such person was last associated with a member firm, not the date he filed the Form U-4.

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Discussion

According to the Complaint,² on or about April 22, 1999, _____ completed and executed a Form U-4 to become registered with Hanmi, an NASD member firm. (Compl. ¶ 15.) On or about April 30, 1999, Hanmi filed the Form U-4 with the NASD. (*Id.*) In answering the questions on the Form U-4, _____ failed to disclose that an order had been entered against him by the Board of Governors of the Federal Reserve System because of alleged misconduct while employed by Chemical Bank. (*Id.* ¶¶ 15-20.) The Complaint does not state when _____ ceased to be associated with Hanmi.

The Complaint further alleges that, on or about November 14, 1999, _____ completed and executed a Form U-4 to become associated with All-Tech Direct, Inc. ("All-Tech"), an NASD member firm. (Compl. ¶ 2.) On or about December 22, 1999, All-Tech filed a Form U-4 with the NASD. (*Id.* ¶ 3.) The Complaint alleges that _____ became an "associated person" of All-Tech as a result of his submission of the Form U-4, his ownership of one or more branches of All-Tech, and his engagement in All-Tech's securities business. (*Id.* ¶ 5.) _____'s association with All-Tech ended on May 11, 2000, the date All-Tech filed a Uniform Termination Notice For Securities Industry Registration (Form U-5) on _____'s behalf. Finally, the Complaint alleges that _____ also failed to disclose the Federal Reserve Board Order or any of the facts surrounding his alleged misconduct while employed by Chemical Bank.

The Department charged _____ with filing the two false Form U-4s, in violation of Article V, Section 2(a)(2) of the NASD By-Laws, NASD IM-1000-1, and NASD Conduct Rule

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2110. The First Cause of Complaint pertains to the Hanmi Form U-4, and the Second Cause of Complaint pertains to the All-Tech Form U-4.

According to Article V, Section 4 of the NASD By-Laws, the NASD retains jurisdiction for two years over persons formerly associated with member firms. This jurisdiction extends to two kinds of violations: (1) misconduct that occurred before respondent's association terminated; and (2) failure to provide information requested by the NASD during that two-year period. In such cases, the Department must file a complaint "within two years after the date upon which such person ceased to be associated with the member." (Art. V, Sec. 4(c).)

In essence, _____ argues that the foregoing provision of the NASD By-Laws operates like a statute of limitations. According to _____, the NASD loses jurisdiction to file a complaint against unregistered persons who have a gap in their periods of association with NASD member firms. Thus, if a respondent committed a violation while associated with Firm A, the NASD would have two years from the date his association with Firm A ended to bring a disciplinary action, despite the fact that he become associated with Firm B. In this manner, an associated person could limit his exposure to disciplinary action simply by moving from one firm to another.

The Circuit Court of Appeals for the District of Columbia rejected a similar construction of Article V, Section 4(a), which provides that the NASD must file a disciplinary action against a formerly registered person within "two years after the effective date of revocation or cancellation of registration pursuant to the Rules of the [NASD]." In *Gurfel v. SEC*, 205 F.3d 400 (D.C. Cir. 2000), the respondent argued that Section 4 of the NASD By-Laws must be read as if it were

² For the purposes of this Motion, the allegations in the Complaint are accepted as true.

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analogous to a statute of limitations. (*Id.* at 401.) In rejecting this construction, the court concluded that the “place at which the misconduct occurred appears irrelevant.” (*Id.* at 402.) “The ‘termination’ which begins the running of the two-year period, after which the NASD loses jurisdiction, is the termination from a person’s last job in the industry.” (*Id.*)

The Hearing Officer finds that the same construction applies to Article V, Section 4(c). The critical date from which the period of retained jurisdiction is calculated is the date an unregistered person was last associated with an NASD member firm. Here, the Complaint alleges that _____’s association with All-Tech terminated on May 11, 2000, the date All-Tech filed the Form U-5 on _____’s behalf. The Department filed the Complaint on November 12, 2001, well within two years after _____’s association with All-Tech terminated. Accordingly, the Hearing Officer finds that the NASD has jurisdiction over this proceeding. The Hearing Officer therefore denies _____’s motion to dismiss the First Cause of Complaint for lack of jurisdiction.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

May 8, 2002