This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-13 (C05970037).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C05970037
v.	:	
	:	Hearing Officer - EBC
Respondent.	:	

ORDER DENYING MOTION TO STAY PROCEEDING

The Department of Enforcement's Complaint in this disciplinary proceeding alleges that _____, in "contravention" of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, misused and converted customer funds for her own use and benefit; effected unsuitable and excessive trades for customers; and effected discretionary securities transactions in the accounts of certain customers without having obtained from her employer written acceptance to treat those accounts as discretionary. _____ is charged with violating NASD Conduct Rules 2110, 2120, 2310, 2510(a), 2510(b), and 2330(a). According to the Department of Enforcement, _____ is currently registered as a General Securities Principal. (Complaint, p. 1.)

On November 21, 1997, _____ filed with the Office of Hearing Officers a letter requesting an indefinite stay of this disciplinary proceeding. The Hearing Officer previously

granted the Respondent leave to file her request in the form of a letter[1] and, accordingly, will treat Respondent's letter as a motion. On December 1, 1997, the Department of Enforcement filed papers in opposition to the Respondent's motion.

The Respondent has proffered two distinct grounds in support of her motion to stay this proceeding: (1) she is presently exploring filing a petition for bankruptcy under Chapter 11 of the Bankruptcy Code; and (2) there is an ongoing federal criminal investigation, involving "some if not all of the parties named in this Disciplinary Proceeding," that may result in the filing of charges against her. More specifically, with respect the latter, the Respondent states:

> I would not be able to defend or respond to any of the issues without giving some if not all of my defense if the U.S. Attorney decides to charge me. Given those circumstances, I would respectfully request the hearing officer to stay the above mentioned proceeding until I have been fully apprised of the Federal investigation.

Based on the pending criminal investigation, _____ also has requested a stay of the Department of Enforcement's disciplinary proceeding against _____.[2]

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 Code, and postpone the commencement of a hearing for a "reasonable period of time." Further,

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[1] Leave to do so was granted during a November 17, 1997 Pre-Hearing Conference in this proceeding. Because the Respondent is without legal representation, the Hearing Officer determined that it was appropriate to excuse her from complying with the provisions of Rule 9146, which require the filing of formal motions.

[2] At the same time it commenced this proceeding against _____, the Department of Enforcement also commenced a separate disciplinary proceeding against _____, the member firm with which ____ was associated during the time of her alleged misconduct, and _____, who was a General Securities Principal and Financial and Operations Principal at the firm during the relevant time. The Department of Enforcement has moved to consolidate these two disciplinary proceedings.

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.

While the Rule undoubtedly is intended to give Hearing Officers the ability to manage their dockets, the Rule primarily 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. In the Hearing Officer's judgment, an indefinite stay of a proceeding, such as that sought by the Respondent, ordinarily would be inconsistent with these goals. Further, and upon careful consideration of the Respondent's arguments, the Hearing Officer has concluded that there is no basis to grant the relief requested.

I. The Possible, Future Bankruptcy Proceeding

While _____ has stated that she intends to pursue alternative avenues for filing a petition for protection under the Bankruptcy Code,[3] the mere prospect of a future bankruptcy filing does not justify a stay of this proceeding. Further, the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a), is not triggered unless and until a petition is filed. If and when the Respondent files a petition in Bankruptcy Court, she should promptly apprise the Hearing Officer and the Department of Enforcement to enable the Hearing Officer to ensure that there are no inadvertent violations of the automatic stay provision and to allow the Department of Enforcement to decide what action, if any, it wishes to take with respect to the bankruptcy proceeding.

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[3] _____ previously filed a petition for bankruptcy under Chapter 13 of the Bankruptcy Code. The United States Bankruptcy Court for the _____ dismissed that petition on or about _____. (See Attachment A to "Complainant's Response to Respondent _____ Request to Stay Proceedings Pending Federal Criminal Investigation.")

II. The Ongoing Criminal Investigation

In essence, _____ maintains that a stay of this proceeding is required in order to avoid being forced to choose between defending the charges in this disciplinary proceeding, which may result in the premature disclosure of her defense in some future criminal proceeding, or refusing to respond, which may result in adverse consequences. The analysis of the issues presented by this motion must begin with the proposition that the NASD's disciplinary proceedings do not implicate the privilege against self-incrimination.[4] 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 the 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). The SEC, on numerous occasions, has applied these general principles in addressing challenges to the fairness of disciplinary actions brought by self-regulatory organizations. Indeed, based on the precept that the Fifth Amendment privilege does not apply to these actions, the SEC rejected a respondent's claim that he was denied a "fair opportunity to respond to charges against him" due a pending criminal proceeding, and rejected his claim that the New York Stock Exchange's disciplinary action should have been stayed pending the completion of the criminal case. In so doing, the SEC stated:

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[4] 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).

> [The respondent] was given the opportunity to testify and defend himself; he chose not to do so. He cannot now use the Fifth Amendment privilege against self-incrimination as a shield in this disciplinary proceeding.

In re Dan Adlai Druz, Exchange Act Rel No. 36306, 60 S.E.C. Docket 911, 1995 SEC LEXIS 2572, at *34 (Sept. 29, 1995).

Thus, any sanction or further disciplinary action that might result from the Respondent's refusal to testify in this disciplinary proceeding – whether pursuant to an invocation of the privilege against self-incrimination or otherwise – would not violate due process or the Fifth Amendment privilege. 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"); District Business Conduct Committee No. 10 v. Stratton Oakmont, Inc., Complaint No. C10940044, 1996 NASD Discip. LEXIS 27, at *8-9 (NBCC April 16, 1996).[5] There is, then, no inherent unfairness in continuing a disciplinary proceeding when there is a pending, parallel criminal proceeding, and the cases indicate that there is likewise no impermissible risk to the Respondent should she decide to remain silent in this disciplinary proceeding.

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).

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[5] See also, e.g., In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at *3 (1994) ("a refusal to provide information is a violation without regard to the invocation of the right against self-incrimination"); In re Daniel C. Adams, 47 S.E.C. 919, 1983 SEC LEXIS 1367, at *6 (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 documents, since the NASD is not part of the government); In re Lawrence H. Abercrombie, Exchange Act Rel No. 16285, 18 S.E.C. Docket 678, 1979 SEC LEXIS 491, at * 2-5 (Oct. 18, 1979).

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). Further, prompt investigation and enforcement through both civil and criminal actions are sometimes necessary to protect the public interest and deferring either proceeding can jeopardize that interest. United States v. Kordel, 397 U.S. 1, 11 (1970). Absent substantial prejudice to the rights of the parties involved, parallel proceedings are unobjectionable under concepts of American jurisprudence. Dresser Industries, Inc., 628 F.2d at 1374.

In the securities industry, dual or parallel proceedings are not uncommon. The "Association's disciplinary and regulatory function coexists with other forums of redress, whether they be governmental or judicial, and the NASD's process does not stop when another entity's process begins." Market Surveillance Committee v. Wakefield Financial Corp., 1992 NASD Discip. LEXIS 124, at *36 (finding no unfair prejudice to the respondents as a result of the hearing panel's refusal to stay the disciplinary proceeding pending the outcome of criminal proceedings). Likewise, the courts have routinely acknowledged that the SEC and the Justice Department may each seek to enforce the federal securities laws, by pursuing "simultaneously or successively" separate civil and criminal actions arising out of the same set of operative facts.[6] Indeed, protection of the securities industry and members of the investing public often requires prompt action that cannot await the outcome of grand jury investigations and criminal prosecutions. Dresser Industries, Inc., 628 F.2d at 1377.

Moreover, in this case, any perceived prejudice to the Respondent that may result from the premature disclosure of her defenses to the prosecution is wholly speculative. No indictment

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[6] E.g., SEC v First Financial Group of Texas, Inc., 659 F.2d 660, 666-69 (5th Cir. 1981); SEC v. Grossman, 121 F.R.D. 207, 209-10 (S.D.N.Y. 1987); SEC v. Musella, Fed. Sec. L Rep. (CCH) ¶ 99,156 (S.D.N.Y. 1983).

has been issued against _____ and there is no telling if and when this will occur.[7] Even when otherwise warranted, federal courts typically will not stay a civil proceeding before a "criminal investigation has ripened into an indictment," In re Par Pharmaceutical, Inc. Sec. Litig., 133 F.R.D. 12, 13-14 (S.D.N.Y. 1990) and generally will deny pre-indictment requests to stay a civil proceeding. See, e.g., United States v. Private Sanitation Indus. Ass'n, 811 F. Supp. 802, 805-06 (E.D.N.Y. 1992) (the fact that the defendant had not yet been indicted was alone sufficient ground to the deny the motion to stay).[8] Further, the extent to which the issues in this proceeding may overlap with those involved in the criminal investigation and possible criminal action is unclear. Obviously, the risk of premature disclosure of the Respondent's defenses to the prosecution and the danger of self-incrimination are more likely when there is significant overlap between the issues in the two proceedings. Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp 1134, 1139 (S.D.N.Y. 1995). In this regard, the Respondent asserts only that the ongoing criminal investigation involves "some if not

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[7] As is apparent from the discussion above, even if the Respondent were indicted on charges involving some or all of the same matters at issue in this disciplinary proceedings, a stay would not necessarily issue. To the contrary, an NASD disciplinary proceeding is only one of several avenues that may be pursued simultaneously with other proceedings to redress alleged misconduct by member firms and associated persons. Further, the public interest involved and the fact that the NASD's sanctions and criminal remedies serve different purposes might well require the denial of a post-indictment request for a stay. See, e.g., In re Richard N. Cea, 44 S.E.C. 8, 1969 SEC LEXIS 268, at *36-37 (1969).

[8] See also, e.g., Citibank v. Hakim, 1993 U.S. Dist. LEXIS 16299, at *3 (S.D.N.Y. 1993) ("[a]lthough defendant . . . allegedly is a target of a continuing grand jury investigation, he does not claim to have been indicted. Accordingly, [his] pre-indictment motion to stay can be denied on this ground alone") (citations omitted); Dresser, 686 F.2d at 1376 (where no indictment has issued, the purpose of staying civil proceedings during the pending criminal proceedings is "a far weaker one"); SEC v. First Jersey Sec. Inc., Fed. Sec. L. Rep. (CCH) ¶ 93,204 (S.D.N.Y. March 26, 1987); SEC v. Musella, Fed. Sec. L Rep. (CCH) ¶ 99,156.

all of the parties named in this Disciplinary Proceeding," and has failed to provide any detail as to the matters under investigation.[9]

Finally, the interest of the NASD and that of the investing public in securing a prompt resolution of the charges against the Respondent – whatever the outcome – outweighs any potential prejudice to the Respondent in defending against uncertain, future criminal charges that may or may not involve some of the same matters at issue in this proceeding. Assuming criminal charges are brought against _____, it could take years before such criminal proceedings are ultimately resolved. As the Court of Appeals for the District of Columbia noted:

> [g]rand jury investigations take time, as do criminal prosecutions. If Justice moves too slowly . . . witnesses may die or move away, memories may fade, or enforcement resources may be diverted.

Dresser Industries, Inc., 628 F.2d at 1377. The potential for a long delay in the disposition of this disciplinary proceeding further compels the conclusion that it would be improvident to grant a stay.

In conclusion, speculative and uncertain claims of criminal prosecution cannot be the basis for halting the NASD's disciplinary proceedings, and to grant a stay, under the circumstances described above, would set a dangerous precedent and significantly impair the Association's ability to protect the securities industry and the investing public.[10]

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[9] See, e.g., Volmar Distrib., Inc. v. New York Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (in deciding whether to issue a stay "'[t]he most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues.'") (quoting Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (Pollack, J.)); In the Matter Ronald D. Wheeler, Sr., 1991 SEC LEXIS 2963, at *4-5 (Sept. 20, 1991) (denying the respondents' motion to stay because they failed to establish that the allegations in the administrative proceeding involved the same matters alleged in the indictment).

[10] The Department of Enforcement suggests that the Respondent has also raised a double jeopardy argument. The Double Jeopardy Clause of the Fifth Amendment protects an individual from being subject to multiple criminal prosecutions and multiple punishments for the same offense. The Hearing Officer does not agree that this is an issue in the pending motion. In any event, the short answer is that the Double Jeopardy Clause is not implicated in an NASD disciplinary proceeding, because the NASD is a private party and not

Based on the foregoing, the Respondent's motion to stay this proceeding is denied. For the reasons set forth above, there is likewise no basis to stay the disciplinary proceeding against _____.

SO ORDERED.

_____
Ellen B. Cohn
Hearing Officer

Dated: Washington, DC
December 15, 1997

a government agent. See Jones v. SEC, 115 F.3d 1173, 1183 (4th Cir. 1997). See also United States v. Merriam, 108 F.3d 1162 (9th Cir.) (rejecting defendants' argument that lifetime bar orders imposed in an NASD proceeding were punitive for the purpose of implicating the double jeopardy clause and prohibited subsequent criminal prosecution), cert. denied, 118 S. Ct. 69 (1997).