

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 02-01 (C8A010066).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C8A010066

Hearing Officer—Andrew H. Perkins

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

On December 4, 2001, the Respondent filed a Motion to Dismiss (“Motion”) along with his Answer. By order of the Hearing Officer, on December 28, 2001, the Respondent filed a Memorandum of Points & Authorities in support of his motion. On January 7, 2002, the Complainant filed its opposition to the motion.

The Motion seeks dismissal of the Complaint for lack of jurisdiction. The Respondent contends that Article V, Section 4(a) of the NASD By-Laws, entitled “Retention of Jurisdiction,” limits when NASD Regulation, Inc. (“NASD Regulation”) may bring a disciplinary proceeding to two years after a respondent’s termination from the member firm with which the respondent was associated at the time of the alleged violation. In this case, since the Respondent left Financial Network Investment Corporation, Inc. (“Financial Network”) on October 27, 1999, and was not registered with the NASD or associated with a member firm until April 2000, the

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Respondent contends that NASD Regulation lacked jurisdiction when it filed the Complaint on November 7, 2001. The Respondent argues that it is irrelevant that he registered with another member firm in April 2000. On the other hand, the Complainant contends that the deadline under Article V, Section 4(a) of the NASD By-Laws is measured from the date a respondent is last registered—in this case, August 4, 2000. Thus, according to the Complainant, jurisdiction does not end until August 2002.

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

Discussion

According to the Complaint,¹ between February 23 and August 16, 1999, the Respondent offered and sold securities issued by TLC America, Inc. without providing prior written notice to his firm, Financial Network, as required by NASD Conduct Rule 3040.² At the time, the Respondent was registered as an Investment Company and Variable Contracts Products Representative. The Complaint further alleges that the Respondent's registration with Financial Network terminated in October 1999. He later registered with another member firm, which registration terminated in August 2000. The Complainant filed the Complaint on November 7, 2001.

Article V, Section 4(a) of the NASD By-Laws provides, in pertinent part, as follows:

A person whose association with a member has been terminated and is no longer associated with any member of the NASD or a person whose registration has been revoked . . . shall continue to be subject to the filing of a complaint under the

¹ For the purposes of this Motion, the allegations in the Complaint are accepted as true.

² In the alternative, the Complaint alleges that the same conduct consisted of engaging in outside business activities in violation of NASD Conduct Rule 3030.

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Rules of the Association based upon conduct which commenced prior to the termination, revocation . . . , but any such complaint shall be filed within:

(a) two years after the effective date of termination of registration pursuant to Section 3 . . . (emphasis added).

Section 3 requires an NASD member firm to notify the NASD of the termination of an associated person's registration within 30 days of the termination.

Under the Respondent's construction of Article V, Section 4(a), the NASD loses jurisdiction to file a Complaint against a respondent who has a gap in his periods of registration. In essence, the Respondent asserts that Section 4 operates like a statute of limitations for each period of registration. Thus, if a Respondent committed a violation while registered at Firm A and then terminated his registration before joining Firm B, the NASD would have two years from the date his registration with Firm A ended to bring a disciplinary action. In this manner, a registered individual could limit his exposure to disciplinary action simply by assuring that there was a break in his registrations. The Hearing Officer rejects this proposition and finds nothing in the cited authority to support it.

Both Parties rely on *Gurfel v. SEC*, 205 F.3d 400 (D.C. Cir. 2000). In *Gurfel*, the court rejected a nearly identical challenge. *Gurfel* argued that section 4 of the NASD By-Laws must be read as if it were 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.*

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Nevertheless, the Respondent argues that *Gurfel* did not address directly the effect a gap in registration has under section 4. The Hearing Officer disagrees and finds *Gurfel* controlling.

Accordingly, the Hearing Officer denies the Respondent's Motion to Dismiss.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

January 22, 2002