

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-10 (C10990212).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. C10990212
	:	(Consolidating No. C10990212
	:	and No. C10000031)
	:	
Respondents.	:	Hearing Officer - EBC

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
v.	:	
	:	
	:	
Respondents.	:	

ORDER GRANTING ENFORCEMENT’S MOTION TO CONSOLIDATE

On April 18, 2000, the Department of Enforcement (Enforcement) moved, pursuant to Code of Procedure Rule 9214(b), for an Order consolidating the two above-captioned disciplinary proceedings. In its motion, Enforcement represented that the Respondents in both proceedings favor consolidation. In fact, none of the Respondents has filed papers in response to Enforcement’s consolidation motion, and their time to do so has expired. For the reasons set forth below, the motion is granted.

Background

1. Procedural History

On December 13, 1999, Enforcement filed a five-cause Complaint against _____ and _____, Disciplinary Proceeding No. C10990212. According to the Complaint, _____ was part-owner, principal, and Vice Chairman of _____, a former NASD member firm, and _____ was President and CEO of the Firm. As set forth in the Complaint, _____ was responsible for supervising _____, a Respondent in the other above-captioned disciplinary proceeding, and, on or about April 16, 1997, _____ became the Firm's Compliance Officer.¹ _____ and _____ filed Answers to the Complaint on January 26 and January 28, 2000, respectively, and both requested a hearing on the charges against them.

On February 25, 2000, Enforcement filed a four-cause Complaint against _____ and _____, Disciplinary Proceeding No. C10000031. According to the Complaint, _____ was part-owner, principal, and Chairman of _____ and _____ was Firm's Compliance Officer from approximately June 9, 1995 until April 15, 1997.² _____ and _____ filed Answers to the Complaint on April 17 and March 23, respectively. Both denied the substantive allegations in the Complaint. _____ requested a hearing and _____ explicitly waived his right to a hearing.

2. The Nature of the Allegations in the Two Proceedings

There is substantial overlap between the allegations contained in the Complaints filed in the two proceedings. Both Complaints allege that the Respondents violated Rule 2110 by permitting a person

¹ _____ Complaint, ¶¶ 3-5.

² _____ Complaint, ¶¶ 4-5.

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who they knew or should have known was subject to statutory disqualification, _____,³ to become and remain associated with the Firm without having obtained the NASD's or SEC's approval for _____'s association.⁴ Both proceedings also involve charges stemming from the Firm's alleged failure to comply with the disclosure requirements of Conduct Rule 3070 during the period from approximately October 1, 1995 through April 15, 1997. The Complaint in _____ alleges that _____ violated Conduct Rules 3070 and 2110 by failing to timely and accurately report customer complaints and other information, and the Complaint in _____ alleges that _____ violated Rules 2110 and 3010(a) by failing to supervise _____ to achieve compliance with Rule 3070.⁵ Finally, both proceedings also involve charges stemming from the Firm's alleged failure to comply with the Firm Element of NASD's Continuing Education Program during the period from approximately July 1995 through April 15, 1997. The Complaint in the _____ proceeding alleges that Respondent _____ violated NASD Membership and Registration Rule 1120(b) and Conduct Rule 2110 by failing to ensure that _____ complied with the Firm Element of the NASD's Continuing Education Program for the Firm's covered personnel, and the Complaint in _____ alleges that _____ violated Rules 2110 and 3010(a) by failing to supervise _____ to achieve compliance with Membership and

³ Both Complaints alleged that _____ had pleaded guilty in New York state court to attempted criminal possession of a forged instrument and attempted robbery. _____ Complaint, ¶6; _____ Complaint, ¶6.

⁴ _____ Complaint, ¶¶ 8-10; _____ Complaint, ¶¶ 8-10. The _____ Complaint also alleges that _____ and _____ violated Section 15(b)(6)(B) of the Securities Exchange Act of 1934 based on this conduct; however, the _____ Complaint, which contains the identical factual allegations as the _____ Complaint regarding _____ association with the Firm, does not allege a violation of Section 15(b)(6)(B).

⁵ _____ Complaint, ¶¶ 11-16; _____ Complaint, ¶¶ 11-13. _____ also is charged with violating Rules 3070 and 2110 by failing to timely and accurately report statistical and summary information regarding customer complaints during the period from approximately April 15, 1997 through October 1997. _____ Complaint, ¶¶ 17-19.

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Registration Rule 1120(b).⁶ The Complaints, however, set forth factually discrete failure to respond charges against _____ and _____.⁷

Discussion

Rule 9214(b) provides that a Party may move for consolidation of two or more disciplinary proceedings “if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact or one or more of the same Respondents, or if one or more of the factors favoring consolidation set forth in [Rule 9214(a)] appear to be present.” The factors set forth in Rule 9214(a) are: “(1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether the proposed consolidation would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation.” In its motion, Enforcement suggests that most of the factors that favor consolidation are present here and that there is no reason to believe that any of the Parties would be prejudiced as a result of the consolidation.

It is evident, based on a review of the Complaints filed in both proceedings, that the allegations in the _____ Complaint and _____ Complaint implicate many of the same underlying facts and that, consequently, there will be substantial overlap in documentary evidence and testimony offered at the hearings in each of these cases. In particular, both cases will involve the presentation of evidence relating to: (1) _____’s association with _____; (2) the Firm’s compliance or lack of compliance with NASD Conduct Rule 3070 and NASD Membership and Registration Rule 1120(b); and (3) _____’s role in ensuring the Firm’s compliance with Conduct Rule 3070 and Membership and

⁶ _____ Complaint, ¶¶ 20-25; _____ Complaint, ¶¶ 14-16.

⁷ _____ Complaint, ¶¶ 26-30; _____ Complaint, ¶¶ 17-22.

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Registration Rule 1120(b). Indeed, Enforcement has represented that _____ and the Respondents are potential witnesses at the hearings in both proceedings. It also follows that whatever legal issues may stem from the common underlying facts will need to be resolved in both proceedings.

In addition, given the procedural posture of each proceeding, it does not appear that any Party would be prejudiced as a result of consolidation. Because no hearing dates or deadlines for the completion of pre-hearing activities have been established in either proceeding, consolidation will not adversely affect the rights or ability of any of the Parties to prepare for hearing; impinge on the orderly progress of either proceeding; or delay the ultimate resolution of the charges against any of the Respondents.

Thus, under the circumstances presented and based on an analysis of the relevant factors, it is clear that consolidation is appropriate and beneficial. In this case, consolidation will promote efficiency in the disciplinary process, by eliminating duplicative effort, the need for witnesses to attend two proceedings, and the costs that would be attendant to litigating two separate proceedings.

Therefore, Enforcement's motion is granted, and Department of Enforcement v. _____ (Disciplinary Proceeding No. C10990212) and Department of Enforcement v. _____ (Disciplinary Proceeding No. C10000031) are hereby consolidated under proceeding number C10990212.

SO ORDERED.

Linda D. Fienberg
Chief Hearing Officer

Dated: May 5, 2000
Washington, DC