This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF000045.

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF000045 Hearing Officer—Andrew H. Perkins **Extended Hearing Panel Decision Granting Respondents' Motion for Summary Disposition Based on *In re Hayden*** December 14, 2001

The Respondents moved for summary disposition that delay has rendered this proceeding inherently unfair. The Hearing Panel concluded that the SEC's decision in *Hayden* compelled the Hearing Panel to dismiss the case.

Appearances:

For the Department of Enforcement: Rory C. Flynn, Barry R. Goldsmith, David R. Sonnenberg, Robert L. Furst, Roger B. Sherman, Thomas B. Lawson, and Robert W. Turk, NASD REGULATION, INC., Washington, DC.

For _____: _____.

For _____: _____.

For _____: _____.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision CAF000045.

DECISION

The Department of Enforcement ("Department") brings this disciplinary proceeding against _____ ("_____" or the "Firm"), _____ ("_____"), and _____, Jr. ("_____") (collectively the "Respondents") for alleged violations of the Conduct Rules of the National Association of Securities Dealers, Inc. ("NASD") in connection with the marketing of three closed-end trusts between October 1992 and November 1993.[1] The three term trusts are called TCW/DW Term Trust 2002, TCW/DW Term Trust 2003, and TCW/DW Term Trust 2000 (collectively "Term Trusts"). The Department alleges that _____ used a firm-wide, internal marketing campaign that misrepresented the nature of the Term Trusts, resulting in fraudulent and unsuitable sales to an unidentified number of customers. The Respondents have moved for summary disposition arguing that this proceeding is time-barred under two theories: first, that *In re Hayden*, Exchange Act Release No. 42,772, 2000 SEC LEXIS 946 (May 11, 2000), compels the conclusion that the delay in bringing this proceeding renders it inherently unfair; and second, that the five-year statute of limitations contained in 28 U.S.C. § 2462 has run. The Department responds that its claims are not time-barred under *Hayden* and that the statute of limitations in 28 U.S.C. § 2462 does not

[1] The NASD has jurisdiction of this disciplinary proceeding. _____ is a member of the National Association of Securities Dealers, Inc. ("NASD"), and _____ is registered with the NASD. See Article XII and Article XIII, By-Laws of the National Association of Securities Dealers, Inc. _____ was registered with the NASD both at the time of the alleged misconduct and at the time the Department filed the Complaint. _____'s registration terminated effective February 12, 2001.

apply to enforcement actions brought by self-regulatory organizations, such as NASD Regulation, Inc. The Department also has cross-moved for summary disposition on *Hayden* and laches.[2]

On November 13, 2001, the Extended Hearing Panel[3] heard argument on the motions at the offices of the National Association of Securities Dealers, Inc., in Washington, DC.[4] The Respondents submitted four exhibits, which the Panel accepted without objection.

For the following reasons, the Panel must grant Respondents' motion based on *Hayden*.[5] All of the applicable periods of delay in this case are longer than the corresponding periods the Securities and Exchange Commission ("SEC") found excessive in *Hayden*, Accordingly, the Panel must dismiss this proceeding. However, because of the uncertainty *Hayden* created due to the SEC's failure to set out a standard in *Hayden* and the importance of the issue, the Panel recommends that the National Adjudicatory Council ("NAC") call this case for an expedited review.[6]

I. BACKGROUND[7]

The Complaint alleges that, in 1992 and 1993, _____ violated the antifraud, suitability, and supervisory provisions of the NASD's Conduct Rules in connection with the sale of the Term

[2] The Respondents did not move for summary disposition on laches, arguing that it required a factual determination after a hearing on the merits.

[3] The Extended Hearing Panel is compris ed of the Hearing Officer, a former member of the District 11 Committee, and a former member of the District 10 Committee and the NASD Board of Governors.

[4] References to the transcript of this conference are cited as: "Tr. at ___."

[5] Because the motion is granted, the Panel need not decide the Respondents' motion for summary disposition on the statute of limitations or the Department's cross-motion for summary disposition on the statute of limitations and laches.

[6] The NASD Code of Procedure does not authorize interlocutory appeals or the certification of important issues to the NAC to obtain its guidance.

Trusts to approximately 100,000 purchasers.[8] In general, the Complaint alleges that _____ instructed and encouraged its sales force to sell the Term Trusts as safe, low-risk investments equivalent to Certificates of Deposit, without disclosing the Term Trusts' substantial investment risk. The Term Trusts invested primarily in mortgage-backed securities and municipal zero-coupon securities. The Complaint further alleges that, as a result of _____'s internal marketing campaign, its sales force made material misrepresentations and failed to state material information in connection with the sale of the Term Trusts, and that the sales force recommended and sold the Term Trusts to customers for whom such securities were unsuitable. The Complaint concludes that this activity violated NASD Conduct Rules 2110 (just and equitable principles of trade), 2120 (antifraud), 2310 (unsuitability), and 3010 (supervision). The Complaint does not, however, specify which brokers committed the alleged fraud or identify the purchasers for whom the Term Trusts were unsuitable investments.

In 1992-93, _____ was the Director of National Sales for _____, a subsidiary of _____ responsible for marketing certain _____ proprietary products, including the Term Trusts. The Complaint alleges that _____ failed to observe high standards of commercial honor and just and equitable principles of trade when he "oversaw and approved [internal] roadshow sales presentations that provided an unbalanced picture of the Trusts, omitted disclosure of

---

[7] The facts set forth below are taken from the Parties' Statements of Undisputed Facts and supporting affidavits with every inference favoring the non-moving Party.

[8] To give some further idea of the magnitude of the sales, the record reflects that _____ sold shares worth approximately $2 billion and that _____ earned more than $119 million in underwriting fees and sales concessions from those sales, as well as approximately another $7 million per year in management fees.

any risks, and misinformed _____'s brokers about the nature of the investment." (Compl. ¶ 80.) Currently, _____ is a registered representative with _____.

_____ was the regional director of _____'s Northeast Region in 1992-93. The Complaint alleges that _____ failed to observe high standards of commercial honor and just and equitable principles of trade by sending memoranda to the branch managers under his supervision that directed the use of misleading sales presentations to customers. The Complaint further alleges that _____ exhorted his branch managers to sell the Term Trusts to meet various sales goals he established.[9] (Compl. ¶ 92.) _____ retired from _____ in February 2001 after approximately 45 years with the Firm; he is no longer registered with the NASD.

The offerings of the three Term Trusts occurred in November 1992, April 1993, and November 1993. By mid-1994, a substantial number of customer complaints had surfaced regarding _____'s sales practices and risk disclosures. As early as 1993, NASD Regulation began receiving customer complaints from Term Trust shareholders. These complaints continued into 1994 and 1995, and, starting in the summer of 1994, _____ filed numerous Form U-4s and Form U-5s with the NASD that reported customer complaints alleging problems with sales of the Term Trusts.[10]

Issues regarding the Term Trusts, and particularly their reliance on mortgage-backed derivatives and collateralized mortgage obligations ("CMOs"), spawned a number of private and public responses. Beginning in 1993, a substantial amount of information began to appear in articles and news reports

[9] Sales in _____'s Northeast Region represented 22% of the total number of Term Trust shares sold.

[10] The Respondents claim that at least two Form U-4s were filed in 1994 alleging customer losses of nearly $218,000. By April 1995, another 14 Form U-4s and U-5s were filed with the NASD, alleging losses in excess of $300,000.

concerning term trust products—including the TCW/DW Term Trusts. In the Complaint, the Department points to the fact that by November 1993 concerns about the Term Trusts had been raised in the press. (Compl. ¶ 32.) The Respondents point out that a number of the articles in 1993 singled out _____. For example, in April 1993, Dow Jones News Service ran an article discussing the planned investments for the TCW/DW Term Trust 2003, and in October 1993, *Worth* magazine ran an article discussing the risks and complexity of funds, such as the Term Trusts, which invested in inverse floaters. By 1994, many more news reports had run, including a story in the *New York Times* in July 1994 that disclosed that the New York Attorney General ("NYAG") was investigating such funds and that the TCW/DW Term Trust 2000 was a possible target of the probe. Similarly, the national Bloomberg news wire service published a report in November 1994, stating that the NYAG was checking whether _____ broke securities laws in connection with its offering of the Term Trusts.

In July 1994, investors filed a federal class action lawsuit against _____, alleging that _____ misrepresented the risks of the Term Trusts and used deceptive marketing practices in selling the products. That case, *Sheppard v. TCW/DW Term Trust 2000*, 938 F. Supp. 171 (S.D.N.Y. 1996), ultimately was dismissed in part on the grounds that "the prospectus for the trust sufficiently disclosed the risks related to the types of securities in which the Trusts would invest, including the interest rate risk." *Sheppard* at 176.[11]

In the summer of 1994, the U.S. House of Representatives Subcommittee on Telecommunications and Finance held public hearings on the use by funds of derivative products. SEC

[11] The Respondents also point out that two similar state court cases were also dismissed.

Chairman Arthur Levitt and New York Attorney General G. Oliver Koppell, among others, testified at the hearings. The Respondents claim that Mr. Koppell testified concerning his office's probe into several funds' use of CMO inverse floaters.

Despite all this activity, the Department maintains that NASD Regulation did not become aware of possible significant misconduct by _____ until January 1995 at the earliest. (Dep't Opp'n at 5.) The Department claims that there is no evidence that anyone at the NASD knew of any of the class action lawsuits, the contents of the congressional hearings, or, with the exception of one article that appeared in *Barron's* in January 1995, any of the news reports the Respondents reference. (Dep't Statement ¶¶ 17-19.) The Department tacitly concedes that NASD Regulation staff was aware of the *Barron's* article because a staff member referenced it in an internal memorandum dated February 7, 1995 ("NYAG Memorandum").

The Department cannot rule out, however, that the alleged problems with the marketing of the Term Trusts came to NASD Regulation's attention earlier. This critical information, along with other information about the commencement of the investigation, is lost. According to the Department, there is no one still remaining at the NASD who can recall the exact course of events that led to the commencement of the investigation in January 1996, when the staff sent _____ a request for information regarding all transactions in the Term Trusts up to April 30, 1994.[12] (Goodman Decl. ¶ 8.)

Whatever triggered the investigation, NASD Regulation staff elected to undertake a sweeping review of all transactions in the Term Trusts. Between January 1996 and September 1998, the

[12] NASD Regulation opened the "formal" investigation in March 1996.

Department issued 163 formal requests for documents, information, and testimony to _____ and more than 100 of its current and former employees. At times, those requests produced such a volume of electronic data that it overwhelmed NASD Regulation's computer systems for days. The Department also deposed 60 individuals, which resulted in 64 transcripts totaling approximately 6537 pages.[13]

NASD Regulation staff also requested and obtained assistance from the NYAG. In 1996, NASD Regulation staff received more than 1600 documents and at least 10 deposition transcripts from the NYAG that had been gathered by the NYAG over the course of its investigation of the Term Trusts. The documents supplied by the NYAG included Term Trust documents such as: internal sales literature; sales kits; prospectuses; road show materials; internal sales newsletters; newspaper articles; customer complaints; and internal memos. The NYAG also supplied 101 five-page customer questionnaires completed by Term Trust customers.

Despite the broad-based approach NASD Regulation staff took to the investigation, it substantially completed its fact gathering by July 1998. With the exception of one brief on-the-record interview in October 1998, all of the on-the-record interviews were completed by July 2, 1998. And NASDR staff had received most of the documents requested of the NYAG and _____ by January 1997.

On June 21, 1999, the Department sent _____ a *Wells* letter.[14] In September 1999,

[13] With one possible exception, NASD Regulation staff did not interview any of the customers who purchased shares in the Term Trusts before the Complaint was filed.

[14] A "Wells letter" refers to a letter sent by NASD Regulation Staff notifying a respondent that a recommendation of formal disciplinary charges is being considered and usually provides the respondent with an opportunity to submit a written statement explaining why such charges should not be brought. NASD Notice to Members 97-55 (Aug. 1997).

the Respondents submitted their respective *Wells* submissions to the Department. In November 1999, _____ met with the Department to discuss the case. The Department filed the Complaint on November 20, 2000.

II. DISCUSSION

The Respondents move for summary disposition dismissing the Complaint on the grounds that the proceeding is time-barred. Relying on the SEC's decision in *Hayden*, the Respondents assert that on the three relevant periods identified in *Hayden*, the delays in this case are substantially longer. Thus, the Respondents contend that the Panel has no choice but to dismiss the case. The Panel agrees. Regardless of the merits of the case, the Panel is of the opinion that *Hayden* compels dismissal.

By dismissing the case, the Panel does not mean to signal that the case is without merit or that NASD Regulation staff acted improperly in its investigation. Nor has the Panel ignored the gravity of the violations alleged in the Complaint. Indeed, if proven, the allegations are serious, reflecting a severe lack of concern for the investing public and involving significant investor harm. But *Hayden* did not formulate a standard for hearing panels to weigh the seriousness of the charges or the alleged customer harm. Accordingly, the Panel has no choice but to dismiss the Complaint.

See also Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, Rel. No. 33-5310 (Sept. 27, 1972) (discussing recommendations of the Advisory Committee on Enforcement Policies, which came to be known as the "Wells Committee," including the suggestion that persons be given the opportunity to present a statement to the Securities and Exchange Commission ("SEC") regarding an investigation pre-complaint).

A. Summary Disposition Standard

NASD Code of Procedure Rule 9264(d) provides that a motion for summary disposition may be granted when "there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law." *See also Department of Enforcement v. Usher*, No. C3A980069, 2000 NASD Discip., LEXIS 5, at n.3 (NAC Apr. 18, 2000) (reiterating summary disposition standard). Under the analogous federal summary judgment rule, it is clear that the moving party bears the initial burden of showing "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the opposing party must come forward with facts "showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). At the same time, however, at the summary judgment stage, it is incumbent on the court to resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir. 1995). A motion for summary judgment will not be granted if the trier of fact could resolve an outcome-determinative issue in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. The SEC Decision in *Hayden* and the Fairness Principle

In *Hayden*, the SEC emphasized that "a fundamental principle governing all SRO disciplinary proceedings is fairness," and that an SRO has "a statutory obligation to ensure the fairness and integrity

of its disciplinary proceedings."[15] *Hayden*, 2000 SEC LEXIS 946, at *4-5. Applying such principles, and without significant comment, the SEC held that "the delay in the underlying proceedings was inherently unfair." *Id.* at *6.

The SEC based its decision on the time that had elapsed in the case, not the underlying facts. The SEC did not consider the nature of the charges or the reasonableness of the course of the SRO's investigation, nor did it balance the relative equities of the parties.[16] In particular, the SEC did not rely on a finding that the delay prejudiced the respondent. The SEC stated, "[w]ithout further inquiry, we cannot find, as a factual matter, that Hayden's ability to mount an adequate defense was impaired by the [New York Stock] Exchange's delay." *Hayden* at *6.

In *Hayden*, the SEC cited just three circumstances: first, the elapsed time between the last alleged occurrence of misconduct and the date the Complaint was filed (6 years, 7 months); second, the elapsed time between the date the SRO received notice of the alleged misconduct and the date the Complaint was filed (approximately 5 years); and third, the elapsed time between the date the investigation commenced and the date the Complaint was filed (3 years, 6 months). *Hayden* at *5. However, the SEC did not explain how the three time periods factored into its decision, and it did not provide guidance on how an SRO should apply its holding in other contexts. Accordingly, "*Hayden* can only be applied in light of the specific facts in that case; it does not establish a discernible standard that

[15] The SEC based its ruling on Section 6(b)(7) of the Securities Exchange Act of 1934, which requires exchanges to "provide a fair procedure for the disciplining of members and persons associated with members . . .." While Section 6(b)(7) applies only to exchanges, Section 15A(b)(8) of the Exchange Act, which does apply to NASD proceedings, contains an identical requirement.

may be applied to any less egregious circumstances." Redacted Order 01-11, C3A000056 (OHO May 10, 2001) <http://www. nasdr.com/pdf-text/01_11oho.pdf.>.

C. The SEC Decision in *Hirsh*

The only other reported decision addressing the impact of delay on the fundamental fairness of an SRO's disciplinary process is *In re William D. Hirsh*, Exchange Act Release No. 43,691, 2000 SEC LEXIS 2703 (Dec. 8, 2000). In *Hirsh* the SEC acknowledged the principles set forth in *Hayden*, but it refused to dismiss the proceedings, offering minimal explanation for the different result.

In *Hirsh*, the SEC reaffirmed the *Hayden* fairness principle, recognizing that "under certain circumstances inordinate time delays can render a proceeding inherently unfair and be cause for dismissal." *Id.* at *18. Following a complaint filed in November 1998, Hirsh was found to have "effected unauthorized, unsuitable, and excessive trades in the accounts of two customers, . . . exercis[ed] discretion without prior written authorization from two customers," and kept inaccurate books and records for the accounts of the two customers with whom he had "personal relationships" — customers Mishel and Ratliff. *Id.* at *2-3.

On appeal, Hirsh did not challenge any of the NYSE's findings. Rather, he asserted that the findings, conclusions, and sanctions imposed in connection with his conduct related to the Mishel accounts were time barred by "any number of statutes of limitations." *Id.* at *3. Accordingly, he

[16] In this regard, *Hayden* is distinct from the doctrine of laches where the relative equities, including the degree of prejudice suffered by the respondent, is weighed.

requested the SEC to "consider only his violations with respect to Ratliff and reduce his suspension proportionately." *Id.*

The SEC rejected Hirsh's appeal, finding that no statue of limitations applies to SRO proceedings. *Id.* at *19.[17] In doing so, the SEC noted that "the factors discussed in *Hayden* [did not] necessarily require the dismissal of the charges as to Mishel." *Id.* at *18. The SEC noted that the NYSE filed the charges relating to Mishel just 20 months after it was notified of the subject misconduct. *Id.* at *18-19. But the SEC failed to explain how this distinction factored into its decision. Thus, *Hirsh* also fails to establish a discernable standard that may be applied in other cases. On the other hand, the SEC did signal that no single factor mentioned in *Hayden* is controlling. SRO adjudicators must look at all three factors identified in *Hayden*. The fact that nearly 8 years had elapsed between the last act of misconduct relating to Mishel and the filing of the complaint—approximately 16 months longer than in Hayden—did not compel dismissal of those charges.[18]

D. Application of Hayden to this Case

The Respondents argue that *Hayden* requires that this case be dismissed because each of the delays here is substantially longer than the corresponding delay that the SEC found impaired the fairness of the proceeding in *Hayden*. The Department filed the Complaint seven years after the last act of alleged misconduct occurred, approximately four years and nine months after the commencement of the

[17] In dictum, the SEC also noted that the gravity of Hirsh's misconduct towards Ratliff independently warranted the sanctions. *Id.* at *20-21.

[18] The Panel notes that the NYSE took only one year to investigate the charges in *Hirsh*. But the SEC did not cite that as a significant factor.

formal investigation, and five years and nine months after NASD Regulation staff received notice of the alleged misconduct. The following chart compares these delays with those in *Hayden*.[19]

Last Act to Filing of Complaint	_____: 7 years *Hayden*: 6 years, 7 months
Notice to Filing of Complaint	_____: Over 5 years, 9 months *Hayden*: about 5 years
Commencement of Investigation to Filing of Complaint	_____: About 4 years, 9 months *Hayden*: 3 years, 6 months

In each instance, the delay in the present case is longer than the corresponding delays in *Hayden*. Nevertheless, the Department argues that *Hayden* does not require the Panel to dismiss this case. The Department asserts that the SEC did not intend to create a one-size-fits-all rule analogous to a statute of limitations. (Tr. at 52-53.) According to the Department, fairness is inherently an equitable concept, requiring hearing panels to consider the causes for the delays on a case-by-case basis. (*Id.* at 105.) Specifically, the Department argues that the Panel should take into account the complexity of this case and the Respondents' conduct during the investigation, which the Department contends contributed significantly to the delay in bringing this proceeding. In effect, the Department urges the Panel to read into *Hayden* a number of factors not addressed in that decision, resulting in an analysis much like that typically applied to laches. (*See* Dept's Opp'n at 24; Tr. at 77.)

[19] For the purposes of this motion, the Respondents accept the Department's contention that it first received notice of the Respondents' alleged misconduct on or about January 31, 1995.

The Department's primary argument to distinguish *Hayden* is quite simply that it was fair to take longer with this case because it is more complex. *Id.* at 9-12. The Department emphasizes that the investigation in this case was plagued by staff turnover, a factor not mentioned in *Hayden*. The Department also suggests that the unprecedented size of this case overwhelmed NASD Regulation's available resources.[20] In essence, the Department urges the Panel to permit it all the time it needs under the particular facts and circumstances of each case. (*See* Tr. at 105.)

In *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), a case involving the application of the federal statute of limitations to administrative proceedings, the Court rejected a nearly identical argument. In *3M Co.*, the Environmental Protection Agency ("EPA") argued that government agencies should have virtually unrestricted time to discover violations and investigate them. The Court disagreed:

> An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others.
>
> . . .
>
> The subject matter seems more appropriate for a congressional oversight hearing. We seriously doubt that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations.

[20] The Department states that this is the largest and most complex case ever brought by the NASD Regulation. (Tr. at 53.)

. . .

> An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered.

3M Co., 17 F.3d at 1461.

The Panel likewise doubts that conducting disciplinary hearings to determine whether the Department adequately lived up to its responsibilities would be a workable or sensible method of applying *Hayden*. Indeed, such an inquiry would create a host of unanswerable questions. For example, when asked during oral argument, the Department could not offer a basis to compute how much additional time it should be given for "complex" cases or even provide a standard to gauge whether a case should be classified "complex." Moreover, the Panel is concerned that if the Department's proposed elastic standard were adopted, it would lead inevitability to hearing panels second-guessing staffing and strategy issues that are far beyond panelists' expertise. And the Panel cannot understand why the SEC would have wanted or allowed the determination of whether an SRO's procedures are inherently fair to be determined by such considerations. Most importantly, nothing in *Hayden* suggests that the determination of fairness may turn on the degree of difficulty the Department experiences in detecting and investigating a violation, regardless whether some of those difficulties are aggravated by the respondent's conduct.

The concepts underlying *Hayden* are not novel. Courts and legislative bodies have long recognized the principle that excessive delay in the prosecution of an action violates fundamental

principles of fairness. Thus, limitations (statutory or otherwise) on the period within which an action must be commenced are imposed to ensure fairness to defendants and serve the public interest. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("[Limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."). Indeed, encouraging prosecutors and plaintiffs to investigate and commence actions in a timely manner has been identified as an end in itself, fostering the public interest. *See Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("[L]imitations [on the period in which an action must be commenced] . . . have long been respected as fundamental to a well-ordered judicial system."); *see also United States v. Marion*, 404 U.S. 307, 322 and n.14 (1971). These same considerations apply with equal force to SRO disciplinary proceedings. Without doubt, Section 15A(b)(8) of the Exchange Act requires the NASD to establish and maintain a fair disciplinary process. And it is equally beyond dispute that delay alone can render proceedings unfair. The ultimate question then is how much delay is unfair.

Hayden does not provide sufficient guidance for SRO adjudicators to answer that question. The SEC could have spelled out a standard for SROs to apply in other proceedings, but it chose not to do so. Absent such guidance, it is the Panel's opinion that devising such a standard is a task best left to the NAC. This Panel is constrained to apply controlling law despite the seriousness of the charges and the alleged degree of investor harm. Thus, as all of the applicable periods of delay in the present case are

longer than the corresponding periods the SEC found excessive in *Hayden*, the Panel dismisses this proceeding.

III. ORDER

For the foregoing reasons, this proceeding is dismissed.

_____

Andrew H. Perkins
Hearing Officer
For the Extended Hearing Panel