

**Disciplinary Panel
American Stock Exchange, LLC**

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	:	Case No. 02-08
	:	
IN THE MATTER	:	Hearing Officer – JN
OF	:	
TODD ALLEN HORAN	:	Disciplinary Panel Default Decision
	:	
	:	January 30, 2003
	:	

Digest

Former employee of an Exchange Member organization submitted an application for registration that contained false information; failed to amend that application to reflect a subsequent felony conviction; failed to promptly notify the Exchange of his arrest, arraignment, and indictment; and failed to cooperate with an Exchange investigation. For this misconduct, Respondent was permanently barred.

Appearances

Eric Brown, Esq., Senior Attorney, American Stock Exchange, LLC, New York, NY, for the Department of Enforcement.

No appearance for Todd Allen Horan.

DECISION

I. Procedural Background

On August 12, 2002, the American Stock Exchange issued a Statement of Charges, alleging that Todd Allen Horan, a former employee of Pro-Ex Securities, a Regular Member organization of the Exchange, committed several violations. The Statement charged that Horan: submitted a registration application in which he falsely answered “no” to the question whether he

had been charged with any felony, a violation of Exchange Rule 345(a)(2); failed to amend such registration to reflect his later felony conviction, a violation of Rule 345(a)(4); failed to promptly notify the Exchange of his arrest, arraignment, and indictment, a violation of Rule 341, Commentary .08(9); and failed to cooperate with an Exchange investigation, a violation of Rule 345(c). Horan did not file an answer to the Statement of Charges.

On October 28, 2002, the Exchange's Department of Enforcement filed a request for a default decision. Mr. Horan did not respond to that request. On December 3, 2002, an Exchange Disciplinary Panel conducted a hearing at which Respondent failed to appear. To establish an evidentiary basis for the charges and demonstrate its efforts to serve Horan, Enforcement presented an Affirmation from Eric Brown, Senior Attorney for the Exchange (cited as "Aff.") and twenty-five exhibits (CX-1 through CX-25).

II. Discussion

A. Factual Background

On October 27, 2000, Respondent was indicted for Conspiracy to Manufacture a Quantity of Marijuana, a "class D" federal felony, and on November 16, 2000, he was arraigned on that charge (CX-3). On May 6, 2001, he completed a Form U-4 in order to be registered with the Exchange. In answer to Question No. 23A(1)(b), which asked "[h]ave you ever been charged with any felony," Horan answered "No" (CX-1; emphasis in original).

Question 23A(1)(a) asked "[h]ave you ever ... pled guilty ... in a domestic ... court to any felony?" Respondent truthfully answered "No" on May 6, 2001. Thereafter, on June 6, 2001, he pleaded guilty to the felony charge (CX-2; CX-3). In submitting the Form, Respondent signed an agreement, which stated, inter alia: "I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported"

(CX-1, p. 4). He did not file an amendment reflecting any changed answer to Question 23A(1)(a) (Aff., p. 2).

On February 8, 2002, Enforcement sent letters to Horan requesting his appearance at a deposition which was to be scheduled and which concerned an investigation of violations of the Exchange's Rules involving his Form U-4 (CX-6; CX-7). The Department sent the letters by certified mail, addressed to his last known addresses – one in Jackson Heights, NY and one in Woodside, NY (Aff., p. 3). The Jackson Heights letter was returned as unclaimed, after it had been forwarded to the Woodside address (Aff., p. 3; CX-9). The Woodside letter was signed for by someone other than Horan (Aff., p. 3; CX-8). Between February 8, 2002 and February 19, 2002, Enforcement tried unsuccessfully several times to reach Horan at a telephone number furnished by his prior employer (Aff., p. 4).

On February 19, 2002, Enforcement again sent letters to Horan requesting his appearance at a deposition to be scheduled. The Department sent a certified letter and first class letter to each of the above two addresses. The Postal Service returned the certified letters as unclaimed, but did not return the first class mailings (Aff., p. 4). On February 19, 2002, Enforcement staff telephoned Horan at the above number and spoke with a person who said that Respondent lived there and that he would transmit Enforcement's message to have him contact the staff as soon as possible (Id.). Horan did not return that telephone call (Id.).

On April 8, 2002, Enforcement sent letters to Horan telling him that the deposition would be held on April 24, 2002 and that his failure to appear would result in charges against him (Id., at p. 5). Enforcement sent certified and first class letters to each of the above two addresses. The Postal Service returned the certified mailings as unclaimed, but did not return the first class mailings (Id.). Respondent did not appear on April 24, 2002 for the requested deposition (Id.).

B. Jurisdiction

Under Exchange Rule 345(c), the Exchange may retain jurisdiction over a formerly registered employee if, within one year of termination, it gives written notice to such person that it is investigating any specified matter which occurred prior to termination. Horan was terminated from Pro-Ex on January 31, 2002 (Aff., p. 1). On February 5, 2002, Enforcement sent the requisite written notice to him, using certified mail addressed to the last known two addresses described above (Aff., p. 3). Each receipt was signed “Todd Horan” (Aff., p. 3). The Exchange has jurisdiction over Respondent Todd Allen Horan.

C. Horan’s Default

Article V, Section 1(b)(6) of the Exchange Constitution provides that Enforcement may properly serve a Statement of Charges on a member “by mailing it to such member ... at his ... office address or place of residence.” On August 12, 2002, Enforcement sent the Statement of Charges, via certified and first class mail addressed to Respondent at his Jackson Heights address and at his Woodside address – i.e. the last known two addresses (CX-20). The Postal Service returned the certified mailings as unclaimed, but did not return the first class mailings (Aff., p. 6).

On September 13, 2002, after contacting all New York State telephone listings for “Todd Horan” or “T. Horan,” the staff spoke with a person who identified himself as Todd Horan and stated that he had previously worked for Pro-Ex on the Exchange floor. In that conversation, the staff advised Horan of the investigation and of the Statement of Charges against him. He refused to divulge any employment information, but gave the staff a new address (in Brooklyn) where correspondence could be sent (Aff., p. 6). On September 19, 2002, the staff sent the Statement of

Charges to that new address, using certified and first class mail (CX-23). The Postal Service returned both mailings as unclaimed (Aff., p. 6).

Horan has not answered the Statement of Charges. Other than the September 13, 2002 telephone conversation, Horan has “failed to correspond or communicate with the Exchange in any way” concerning the alleged violations (Id.).

Enforcement mailed the Statement of Charges to Horan at the Jackson Heights and Woodside addresses, his then last known addresses, where a person named “Todd Horan” signed the receipts for the certified mailings of the Exchange’s notice of investigation and retention of jurisdiction (Aff., p. 3). Thereafter, the staff mailed the Statement of Charges to the Brooklyn address, which he furnished as “an address to which Exchange correspondence could be sent” (Id., p. 6). These mailings constituted proper service under Article V, Section 1(b)(6) of the Exchange Constitution. Indeed, the staff’s telephone conversation with a person named Todd Horan, who identified himself as having worked for Pro-Ex at the Exchange, tends to show that Respondent had actual knowledge of this proceeding and chose to ignore it.

D. Liability

Although the Respondent defaulted, the Panel required Enforcement to make a sufficient presentation to enable the Panel to find that there was at least an evidentiary basis for the Statement of Charges. See James M. Russen, Exchange Act Rel. No. 32895, 1993 SEC LEXIS 2339 (September 14, 1993). The Panel finds that Enforcement made the requisite demonstration here.

First, the record demonstrates that Horan falsely answered Question 23A(1)(b) by stating that he had never been charged with a felony. In fact, as noted, he had been charged with a drug

offense which was a federal felony. Exchange Rule 345(a)(2) creates a disciplinary violation for “making a misstatement to the Exchange.” Respondent’s denial of the felony charge violates that Rule.

Second, despite having signed a commitment to update his U-4 whenever prior answers needed to be changed, Horan failed to update his answer to Question 23A(1)(a) to reflect his subsequent guilty plea to that felony. Rule 345(a)(4) precludes conduct “inconsistent with just and equitable principles of trade.” This non-disclosure involves a statutory disqualification (i.e. a felony conviction) and such conduct is obviously inconsistent with that requisite standard.¹

Third, the Statement of Charges also alleged a violation of Exchange Rule 341, Commentary .08(9), which requires that registered employees notify the Exchange if they have been “summoned, arraigned, or indicted for a criminal offense.” Respondent failed to notify the Exchange of any aspect of his criminal proceedings.

Finally, the record shows that Horan repeatedly refused to cooperate with the staff, which was seeking to take his deposition in connection with the above matters. Rule 345(c) requires cooperation with Exchange investigations, and Respondent’s conduct violated that Rule.

E. Sanctions and Publicity

Where multiple related violations arise out of the same underlying transaction or event, a single set of sanctions may be appropriate and effective. See, e.g., Department of Enforcement v. Respondent Firm 1, No. C8A990071, 2001 NASD Discip. LEXIS 6, at *30-31 (NAC Apr. 19, 2001). The present violations center on Respondent’s criminal record – his failures to disclose it

¹ See Dist. Bus. Conduct Committee v. Bernadette Jones, 1998 NASD Discip. LEXIS 60 at *9 (NAC August 7, 1998) (U-4 “serves as a vital screening device”). See also NASD IM-1001-1 “the filing with [NASD] of [registration] information ... which is incomplete ... so as to be misleading ... may be deemed to be conduct inconsistent with just and equitable principles of trade.”

on the U-4 and to the Exchange and his failures to appear for investigatory testimony concerning these matters. Enforcement urged a single sanction, a bar, and the Hearing Panel agrees.

Though the American Stock Exchange has no sanction guidelines, the Panel may appropriately consider the NASD Sanction Guidelines (see, David Wong, Exchange Act Rel. No. 45426, 2002 SEC LEXIS 339, at *22 (February 8, 2002)), a publication widely accepted for such purposes.² Those Guidelines recommend a bar for egregious U-4 violations; and for outright failures to respond to staff inquiries they state that “a bar should be standard” (NASD Sanction Guidelines (2001) pp. 39, 78). In the instant case, Horan failed to disclose a felony conviction (which creates statutory disqualification) and repeatedly refused to cooperate with the staff’s investigation. The Panel believes that a permanent bar is the appropriate sanction for this misconduct.

Rule 12 of the Exchange Rules on Disciplinary Proceedings provides that “[w]henver” a Panel finds a person guilty of an offense and such determination becomes final, “the Exchange shall announce publicly the results of such disciplinary proceeding....” The Rule further provides that it shall be inapplicable if the Panel finds that “the offense relates solely to minor administrative requirements of the Exchange and does not materially affect the public interest or the interest of investors.”

The Disciplinary Panel finds that the results of this disciplinary proceeding should be publicly disclosed, as provided in the Rule.

² See, e.g., Stoiber v. S.E.C., 161 F.3d 745, 753 (D.C. Cir. 1998); Alderman v. S.E.C., 104 F.3d 285, 289 (9th Cir. 1997).

III. Conclusion

A. Horan violated Exchange Rules 345(a)(2) and 345(a)(4) by submitting a registration application containing a false statement and by failing to update his application after his felony conviction. He violated Rule 341, Commentary .08(9) by failing promptly to notify the Exchange that he had been arrested, arraigned, and indicted for a criminal offense. He violated Rule 345(c) by failing to cooperate with an Exchange investigation.

B. For this misconduct, Horan shall be permanently barred from functioning as a regular member, regular options principal, holding associated or allied membership, holding the status of approved person or limited permit holder, and from employment or association in any capacity with an Exchange member or member organization.

C. The panel also unanimously determined that the results of this proceeding shall be made public and included in the Exchange's Weekly Bulletin.

FOR THE DISCIPLINARY PANEL

Jerome Nelson
Chair

Dated: Washington, DC
January 30, 2003

Copies to: Todd Allen Horan (via overnight delivery and first class mail)
Eric S. Brown, Esq. (via first class mail and electronically)

Disciplinary Panel
American Stock Exchange LLC

.....	X	
	X	
IN THE MATTER	X	
OF	X	STATEMENT OF CHARGES
TODD ALLEN HORAN	X	Case Number 02-08
.....	X	August 12, 2002

Charges are hereby preferred pursuant to Exchange Rule 345(d) of the Constitution of the American Stock Exchange LLC (the “Exchange”) against TODD ALLEN HORAN (“Horan”), a former employee of Pro-Ex Securities (“Pro-Ex”), a Regular Member organization of the Exchange.

STATEMENT OF FACTS:

- 1.0 In May 2001, Horan joined Pro-Ex as a clerk on the Exchange Floor. Horan was terminated from his employment with Pro-Ex on January 31, 2002. On information and belief, Horan has not been employed in the securities industry since his termination from Pro-Ex.
- 1.1 During all relevant periods herein, Exchange Rule 345(a)(2) provided that the Exchange may disapprove or suspend or withdraw its approval of the employment of an employee of a member or member organization and the Exchange may, in addition to or in lieu of any such action, (a) censure him; (b) declare him ineligible for employment in specified capacities; and/or (c) assess a fine against him if the Exchange determines that such employee has been guilty of making any misstatement to the Exchange.

- 1.2 During all relevant periods herein, Exchange Rule 345(a)(4) provided that the Exchange may take the action referred to in paragraph 1.1 against an employee of a member or member organization if the Exchange determines that such employee has been guilty of any conduct or proceeding inconsistent with just and equitable principles of trade.
- 1.3 During all relevant periods herein, Exchange Rule 341, Commentary .08(9) provided that any employee registered with the Exchange must promptly notify the Exchange and his employer if arrested, summoned, arraigned or indicted for a criminal offense.
- 1.4 At all relevant periods herein, Exchange Rule 345(c) provided that:
- “If, during the period of one year immediately following receipt by the Exchange of (a) written notification of termination of a person’s status as an allied member, approved person, or registered or non-registered employee of a member or member organization, or (b) any amendment to such termination notice, the Exchange gives written notice to such person that it is making inquiry into any specified matter or matters occurring prior to termination of such person’s employment, the Exchange may thereafter require such person to appear and testify, submit records, respond to written requests, attend hearings, and accept disciplinary charges or penalties with respect to the matter or matters specified in such notice in every respect in conformance with the Constitution and Rules and practices of the Exchange, in the same manner and to the same extent as such person would have been required to do if such person would have been required to do if such person had remained an employee.

Misstatements to the Exchange:

- 2.0 All clerks seeking employment on the Exchange Floor are required to submit fingerprints to the Exchange, which subsequently delivers them to the Department of Justice (“DOJ”), which compares them against criminal databases.

- 2.1 After submitting a request for a fingerprint analysis to DOJ for Horan, the Exchange received a report from DOJ that revealed that Horan had been convicted of 21 U.S.C. section 846, Conspiracy to Manufacture a Quantity of Marijuana, a class D Felony, on June 6, 2001. Further investigation by the Exchange's Enforcement Department revealed that Horan had been charged with this conduct on October 27, 2000, and had appeared in court for his arraignment on this, and other charges, on November 16, 2000.
- 2.2 During all relevant periods herein, Section 3(a)(39)(F) and Section 15(b)(4) of the Securities Exchange Act of 1934 provided that a person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person has been convicted of a felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization.
- 2.3 In connection with his employment with Pro-Ex, Horan submitted to the Exchange a "Uniform Application for Securities Industry Registration or Transfer" ("Form U-4"), dated May 6, 2001, in order to become registered with the Exchange. In connection with and notwithstanding the fact that, as described in above paragraph 2.1, Horan had been charged with a felony on October 27, 2000, Horan, in completing his May 6, 2001 Form U-4, answered question #23A91)(b) ("Have you ever been *charged* with any felony?"), "No." Upon signing his Form U-4, Horan also agreed to cause an amendment to his Form U-4

- to be filed on a timely basis whenever changes occurred to answers previously reported.
- 2.4 The conviction referred to in paragraph 2.1 above made Horan subject to a statutory disqualification.
- 2.5 Notwithstanding the fact that Horan was *convicted* of a felony on June 6, 2001, Horan failed to amend his Form U-4 to report his felony conviction.
- 2.6 Horan also failed to notify the Exchange of his arrest, arraignment, and indictment for a criminal offense in accordance with Exchange Rule 341, Commentary .08(9).

Failure to Cooperate:

- 3.0 On February 5, 2002, the Exchange's Enforcement Department ("Enforcement") sent Horan letters by certified mail to his last known addresses (in Jackson Heights, New York and Woodside, New York) as reflected in Exchange records and records of his employer, advising him that pursuant to Exchange Rule 345(c), the Exchange was retaining jurisdiction over him in connection with an investigation involving, but not limited to, alleged violations of the Exchange Rules concerning statements made by him on his Form U-4. According to the certified mail receipts received by the Enforcement Department, the certified letters were both received on February 9, 2002, and each was signed for in the name of "Todd Horan".
- 3.1 On February 8, 2002, Enforcement sent Horan letters by certified mail to each known address requesting Horan's appearance at an "on-the-record" deposition

- concerning the investigation referred to in above paragraph 3.0. The letter sent to Horan's Woodside, New York address was signed for in the name of an individual other than Horan; however, the letter sent to Horan's Jackson Heights, New York address appeared to have first been forwarded to Horan's Woodside, New York address¹, but was subsequently returned to the Exchange unclaimed.
- 3.2 Between February 8, 2002 and February 19, 2002, Enforcement telephoned Horan on several occasions using a telephone number provided by his employer, but no individuals answered these telephone calls.
- 3.3 On February 19, 2002, Enforcement sent Horan letters by both certified mail and first class mail to the known addresses for Horan, again requesting his appearance at an "on-the-record" deposition concerning alleged violations connected to statements Horan had made on his Form U-4. In these letters, Horan was advised that he had a continuing obligation to cooperate with the Exchange's investigation and appear for testimony, and was warned that a failure to cooperate could result in disciplinary action pursuant to Exchange Rule 345(c). The letter also indicated that if Enforcement did not hear from Horan by March 1, 2002, a deposition date and time would be scheduled for him by Enforcement staff. The certified letters sent to Horan on February 19, 2002 were returned to the Exchange unclaimed. The letters sent to Horan on February 19, 2002 by first class mail were not returned by the postal authorities.
- 3.4 On February 19, 2002, Enforcement also telephoned Horan at the telephone number referred to in paragraph 3.2, and left a message with an individual to have

¹ All subsequent certified letters sent to Horan's Jackson Heights address were first forwarded to his Woodside address before reaching its ultimate destination.

Horan contact the Enforcement staff. The person who answered the telephone acknowledged that Horan lived there, and indicated he would relay Enforcement's message to Horan. However, Horan failed to return the February 19, 2002 telephone call placed to him by Enforcement staff.

3.5 On April 8, 2002, Enforcement sent additional letters to Horan by certified and first class mail to the known addresses for Horan. These letters referenced all previous attempts by Enforcement to secure Horan's appearance for an "on-the-record" deposition, and informed Horan that the Exchange was scheduling his deposition since he had failed to answer any communication or return any telephone message. These letters advised Horan that the deposition was scheduled for April 24, 2002 at 10:00 a.m. at the offices of the Exchange, and advised Horan that a failure to appear would result in the initiation of charges against Horan for failing to cooperate with an Exchange investigation. The certified letters sent to each of Horan's known addresses on April 8, 2002 were returned to the Exchange unclaimed²; the letters sent to Horan on April 8, 2002 by first class mail were not returned by the postal authorities.

3.6 On April 24, 2002, Horan failed to appear for his scheduled deposition, and to the date of charges herewith, Horan has failed to correspond with the Exchange in any way in connection with the investigation of alleged violations referred to in paragraph 3.0.

² However, these returned letters had not been marked "unclaimed"; rather, the box marked "other" had been checked as the reason for each letter's return.

CHARGES PREFERRED:

- 4.0 Horan violated Exchange Rule 345(a)(2) and Exchange Rule 345(a)(4) in that he (a) submitted an application for registration to the Exchange that contained false information, and (b) failed to appropriately amend such registration after his felony conviction as described in paragraphs 2.0 through 2.5.
- 4.1 Horan violated Exchange Rule 341, Commentary .08(9) in that he failed to promptly notify the Exchange after he had been arrested, arraigned and indicted for a criminal offense as described in paragraphs 2.0 and 2.6.
- 4.2 Horan violated Exchange Rule 345(c) by failing to cooperate with an Exchange investigation as described in paragraphs 3.0 through 3.6.

* * * * *

Horan shall have 20 days from the date of service of this Statement of Charges to answer such Charges in accordance with the provisions of the Exchange Constitution and Rules thereunder. The answer shall specifically indicate which statements, or portions thereof, are admitted and which are denied. Any statement, or portion thereof, not specifically denied shall be deemed admitted.

AMERICAN STOCK EXCHANGE

By: _____
Glen Barrentine
Vice President