UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
April 4, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 71875 / April 4, 2014

Admin. Proc. File No. 3-15794

In the Matter of the Application of

MITCHELL T. TOLAND
c/o Brad S. Maistrow
17 Battery Place, Suite 711
New York, NY 10004

For Review of Action Taken by

FINRA

ORDER DENYING STAY AND SETTING BRIEFING SCHEDULE

Mitchell T. Toland, a general securities representative formerly associated with Hallmark Investments, Inc., a FINRA member firm, appeals from a FINRA decision denying Hallmark's application to permit Toland, a person subject to statutory disqualification, to continue to associate with the firm.[1] Toland moves to stay that decision pending our consideration of his appeal. FINRA opposes that motion. For the reasons discussed below, Toland's motion is denied. In addition, in light of our recent receipt of the record from FINRA, we set a briefing schedule on Toland's application for review.[2]

[1] *In the Matter of the Continued Ass'n of Mitchell T. Toland as a Gen. Sec. Rep. with Hallmarks Invs., Inc.*, SD-1812 (Feb. 19, 2014), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p448164.pdf. Although Hallmark made the application at issue, Commission precedent allows Toland to appeal FINRA's decision denying it. *See Timothy P. Pedregon, Jr.*, Securities Exchange Act Release No. 61791, 2010 WL 1143089 (Mar. 26, 2010) (considering associated individual's appeal of FINRA decision denying firm's membership continuation application).

[2] On March 26, 2014, FINRA filed the certified record and record index pursuant to Rule 420(e) of the Commission's Rules of Practice. 17 C.F.R. § 201.420(e). Rule 450(a)(2)(ii) provides for the issuance of a briefing schedule "within 21 days, or such longer time as provided

(continued . . .)

I. Background

On February 19, 2014, FINRA's National Adjudicatory Council denied Hallmark's application to allow the firm to continue to associate with Toland notwithstanding his statutory disqualification for willful failure to disclose an October 2005 bankruptcy filing on his Uniform Application for Securities Industry Registration or Transfer ("Form U4").[3] The NAC concluded that Hallmark failed to meet its burden to establish that it was in the public interest to permit the firm to continue to associate with Toland and found that his association with the firm would create an unreasonable risk of harm to the market or investors. The NAC found that, over a four-year period following the events that gave rise to his statutory disqualification, Toland repeatedly failed to disclose on his Form U4 "numerous outstanding liens and judgments" totaling approximately $490,000. The NAC concluded that "[r]egardless of the serious nature of Toland's original misconduct," his subsequent disclosure failures were "on their own, sufficiently egregious to warrant denial of the Application." In addition, the NAC found Hallmark's disciplinary and regulatory history to be "disconcerting" such that it "also warrant[ed] denial of the Application." Finally, the NAC found that the proposed supervisory plan and supervisors for Toland were inadequate but concluded that it was unnecessary to provide an opportunity to cure those defects because it was not inclined to approve the application.

In denying the application, the NAC also rejected Toland's assertion that he was denied "due process" because the FINRA Hearing Panel denied his request for a postponement of the October 17, 2013 hearing to permit Toland to take his mother for cancer treatment. The NAC explained that there was no abuse of the Hearing Panel's discretion because Hallmark's application had been pending for nearly four years at the time of the hearing, the hearing previously had been continued several times,[4] serious intervening and continuing misconduct by Toland was alleged, and Toland continued to work in the industry while the application was

---

(. . . continued)

by the Commission, after . . . receipt by the Commission" of such an index. 17 C.F.R. § 201.420(a)(2)(ii).

[3] Section 3(a)(39)(F) of the Securities Exchange Act of 1934 makes subject to "statutory disqualification" any person who willfully makes a false or misleading statement of material fact, or omits to state a material fact required to be disclosed, in any application or report filed with FINRA. 15 U.S.C. § 78c(a)(39)(F). FINRA's By-laws incorporate the definition of statutory disqualification set forth in Exchange Act Section 3(a)(39).

[4] A hearing was scheduled for November 10, 2011 but was postponed to allow the firm time to find a suitable backup supervisor for Toland after the individual the firm had designated to serve in that capacity received a "Wells notice," *i.e.*, a notice from a regulator that it intends to bring an enforcement or disciplinary action against the recipient. After a new prospective backup supervisor qualified as a principal and at least one proposed hearing date had been rejected because Toland's counsel was unavailable, FINRA scheduled a hearing for August 15, 2013. That hearing was rescheduled over FINRA Member Regulation's objection because Toland's counsel unexpectedly needed to assist with his daughter's move to college.

pending.[5] The NAC also noted that FINRA had offered to move the hearing to its New York or New Jersey district office to accommodate Toland, that he declined its subsequent offer to participate in the hearing telephonically, and that neither Toland, his counsel, nor anyone associated with the firm appeared in support of the application at the hearing.[6]

II. Analysis

The Commission considers the following factors in determining whether to grant a stay: (i) the likelihood that the moving party will eventually succeed on the merits of its appeal; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer substantial harm as a result of a stay; and (iv) a stay's impact on the public interest.[7] The moving party has the burden of establishing that a stay is warranted.[8] Toland has failed to discharge this burden.

Our analysis of the merits of Toland's appeal is necessarily preliminary.[9] But at this stage there does not appear to be a strong likelihood that Toland's appeal will succeed on the merits. Toland argues that, by declining to postpone the hearing to allow him to attend to his mother on the date of her treatment, FINRA denied him "an opportunity to defend against" its assertions of misconduct,[10] and thus failed to implement its procedures fairly as required by Exchange Act

---

[5] Pursuant to FINRA policy, Toland was able to continue to associate with Hallmark pending resolution of the firm's application.

[6] Toland apparently failed to file his witness and exhibit lists by the October 3, 2013 deadline set by the Hearing Panel. Toland first sought a continuance of the hearing on October 2, 2013.

[7] *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *3 (Jan. 29, 2013) (citing *Intelispan, Inc.*, Exchange Act Release No. 42738, 54 SEC 629, 2000 WL 511471, at *2 (May 1, 2000)); *see also Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32,738, 32,772 (June 23, 1995) (prior comment to Rule of Practice 401).

[8] *Hunt*, 2013 WL 325333, at *3 (citing *Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000)).

[9] *Hunt*, 2013 WL 325333, at *4 (noting that "[f]inal resolution must await the Commission's determination of the merits of [movant's] appeal").

[10] *See* Exchange Act Section 15A(h)(1), 15 U.S.C. § 78-o3(h)(1) (generally requiring that "[i]n any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined . . . the association shall bring specific charges, notify such member or person of, and give him *an opportunity to defend against*, such charges, and keep a record") (emphasis added). Toland also relies on Exchange Act Section 15A(b)(8), which requires that the rules of registered securities associations must, among other things, "provide a fair procedure for the disciplining of members and persons associated with members." 15 U.S.C. § 78-o3(b)(8).

Section 19(f).[11] In response, FINRA asserts that the NAC properly denied Hallmark's application on its merits and that, in denying postponement, the Hearing Panel appropriately exercised the "broad discretion" afforded it in such matters.[12] Based on the briefs the parties have filed concerning Toland's motion to stay FINRA's decision, it appears that FINRA made reasonable efforts to accommodate Toland with regard to scheduling and that it was prudent for FINRA to proceed promptly to a hearing given Toland's apparent serious continued violation of its disclosure requirements. Because Toland admittedly "ground[s]" his appeal in this scheduling decision and does not (at this stage) seriously challenge FINRA's substantive reasoning for denying Hallmark's application, it does not appear likely that Toland will succeed on the merits in his appeal.

Toland also has failed to establish that he is likely to suffer irreparable harm. Toland asserts that, unless a stay is granted, he will suffer irreparable harm because (1) his "reputation and good will, which he cultivated over more than two decades, will be gone," and (2) he will lose financial opportunities "for the balance of a career that may span another 10-15 years," the value of which cannot be estimated with certainty. FINRA argues that, under Commission precedent, the alleged harm to Toland's reputation and customer goodwill does not constitute irreparable harm,[13] and observes that such injury is present whenever an applicant is subject to statutory disqualification or any other FINRA disciplinary sanction. We agree with FINRA that Toland has failed to discharge his burden. Toland's asserted reputational injury falls short of irreparable harm, particularly given that Toland fails to dispute the material substantive findings of the FINRA decision he challenges.[14] Moreover, any adverse impact on Toland's earning power over the next 10 to 15 years would appear to be attributable to the ultimate resolution of his appeal, not that of his stay motion. In any event, as the Commission repeatedly has noted,

---

[11] *See* 15 U.S.C. § 78s(f) (requiring that to sustain SRO action challengeable under Section 19(d), Commission must, among other things, find that the SRO's operative rules "are, and were applied in a manner, consistent with the purposes of" the Exchange Act).

[12] *See Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 2005 WL 1584983, at *13 (Jul. 6, 2005) ("In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance."); *Falcon Trading Grp., Ltd.*, Exchange Act Release No. 36619, 52 SEC 554, 1995 WL 757798, at *5 (Dec. 21, 1995) ("It is well settled that in NASD proceedings, as in judicial proceedings, the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented."), *pet. denied*, 102 F.3d 579 (D.C. Cir. 1996).

[13] *See Michael A. Rooms*, Admin. Proc. File No. 3-11621 (Nov. 14, 2004) (concluding in order denying stay that where applicant argued that "the bar imposed on him ha[d] resulted in severe financial loss and damages to his reputation," "these factors d[id] not rise to the level of irreparable injury").

[14] Nor is it clear that staying FINRA's decision would prevent any harm to Toland's reputation given the effect of his prior statutory disqualification, the continued existence of the decision he challenges, and his apparently undisputed failures to disclose a number of judgments and liens.

"the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay."[15]

Finally, Toland has failed to make a sufficient showing on the two remaining factors. Toland argues that because FINRA allegedly failed to timely schedule a hearing on Hallmark's application, FINRA could not have believed that his continued association with the firm presented an imminent risk of unreasonable harm to investors. In addition, Toland asserts that granting a stay would serve the public interest by ensuring that "punishment is not meted out without a full and fair opportunity to be heard." FINRA counters that Toland "brazenly continued" his "long history of ignoring FINRA's reporting obligations" after "promises, made in 2008, that going forward he would properly disclose judgments and liens on his Form U4." FINRA submits that it worked expeditiously to schedule a hearing on Hallmark's application when, in February 2013, it learned of this additional misconduct, and that the Hearing Panel's offers to accommodate Toland on scheduling provided him with an opportunity to make his case. FINRA thus asserts that the necessity of protecting the public from Toland far outweighs any potential injury he might suffer in the absence of a stay,[16] and that denying Toland's motion will serve the public interest.

On balance, our consideration of the NAC decision and the parties' briefs leads us to conclude that the risk of allowing Toland to continue participating in the securities industry pending his appeal outweighs the potential harm to Toland of denying his motion.[17] Under the present circumstances, we also agree with FINRA that the public interest favors denial.

---

[15] *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004); *see also William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) (recognizing that "[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough" to constitute irreparable harm (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958))).

[16] *See generally Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *9 (Nov. 9, 2012) (finding that representative's serious undisclosed financial problems "raise[d] concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional").

[17] *See Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 WL 442063, at *2 (July 20, 1995) (quoting *Richard D. Earl*, Exchange Act Release No. 22535, 48 SEC 334, 1985 WL 548312, at *2 (Oct. 16, 1985), *aff'd*, 798 F.2d 472 (9th Cir. 1986)) (noting that the securities business "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants"); *Mayer A. Amsel*, Exchange Act Release No. 37092, 52 SEC 761, 1996 WL 169430, at *6 (Apr. 10, 1996) (stating that the securities industry is "a business that is rife with opportunities for abuse").

Accordingly, IT IS ORDERED that the motion by Mitchell T. Toland to stay the effect of FINRA's decision is denied; and it is further

ORDERED, pursuant to Rule 450(a) of the Commission's Rules of Practice,[18] that a brief in support of the application for review shall be filed by May 6, 2014. A brief in opposition shall be filed by June 5, 2014, and any reply brief shall be filed by June 19, 2014.[19] Pursuant to Rule 180(c) of the Rules of Practice,[20] failure to file a brief in support of the application may result in dismissal of this review proceeding.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Lynn M. Powalski
Deputy Secretary

---

[18] 17 C.F.R. § 201.450(a).

[19] As provided by Rule 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rules of Practice 150 - 153, 17 C.F.R. § 201.150 - 153, with respect to form and service, and Rule of Practice 450(b) and (c), 17 C.F.R. § 201.450(b), (c), with respect to content and length limitations. Requests for extensions of time to file briefs will be disfavored.

[20] 17 C.F.R. § 201.180(c).