

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89226 / July 6, 2020

Admin. Proc. File No. 3-19740

In the Matter of DONALD J. FOWLER Respondent.

ORDER DENYING MOTION TO STAY PROCEEDING

On March 31, 2020, the Commission issued an order instituting administrative proceedings (“OIP”) against Donald J. Fowler pursuant to Section 15(b) of the Securities Exchange Act of 1934.¹ The OIP alleged that Fowler had been associated with a broker-dealer and that a federal district court had enjoined Fowler from future violations of antifraud provisions of the federal securities laws.² The OIP instituted proceedings to determine whether the allegations were true and whether any remedial action was appropriate in the public interest.

We agreed, on the basis of the parties’ joint stipulation, to extend the time for Fowler to file his answer to June 12, 2020.³ On June 8, 2020, Fowler filed both a motion to stay this proceeding pending his appeal of the underlying civil suit and a “general denial of each and every allegation” in the OIP. On June 15, 2020, the Division of Enforcement filed an opposition to Fowler’s stay motion and a motion for summary disposition pursuant to Rule of Practice 250.⁴ On June 18, 2020, we issued an order extending the time for Fowler to respond to the Division’s

¹ *Donald J. Fowler*, Exchange Act Release No. 88529, 2020 WL 1545537 (Mar. 31, 2020).

² *SEC v. Fowler*, 1:17-cv-139-GHW, 2020 WL 906182 (S.D.N.Y. Feb. 25, 2020) (entering an injunction, ordering disgorgement, and imposing civil money penalties against Fowler after a jury trial for violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 17(a)(2) and (3) of the Securities Act of 1933).

³ *Donald J. Fowler*, Exchange Act Release No. 88821, 2020 WL 2214206 (May 6, 2020).

⁴ 17 C.F.R. § 201.250.

motion for summary disposition until after the resolution of his stay motion.⁵ For the reasons that follow, Fowler’s motion to stay the proceeding is denied.

Although Fowler moves for a stay pursuant to Rule of Practice 401, we consider Fowler’s motion to stay the proceeding under Rule of Practice 161 instead.⁶ Rule 401(c) authorizes a motion for a stay of a Commission order “by any person aggrieved thereby who would be entitled to review in a federal court of appeals.”⁷ But the Commission has not yet entered a final order, reviewable by an appellate court, that we could consider staying.⁸

Rule 161 authorizes us to order adjournments and postponements for “good cause shown.”⁹ The requesting party must make “a strong showing that the denial of the request or motion would substantially prejudice their case.”¹⁰ Fowler has failed to make such a showing.

Fowler seeks to stay the proceeding “pending the outcome of his appeal in the United States Court of Appeals for the Second Circuit.” His opening brief in that appeal is due on August 6, 2020, and he argues that “there is a significant chance” the Second Circuit will reverse the district court’s judgment. Thus, he contends that moving forward with this proceeding “would be a waste of the Commission’s limited resources.”

⁵ *Donald J. Fowler*, Exchange Act Release No. 89089, 2020 WL 3397776 (June 18, 2020).

⁶ *See Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *6 n.42 (Mar. 1, 2017) (“Consistent with our practice, we treat this request [to stay a follow-on proceeding pending an appeal of the underlying suit] as a motion for a postponement or adjournment under Commission Rule of Practice 161, but not for a stay under Rule 401.”).

⁷ 17 C.F.R. § 201.401(c).

⁸ *Joseph John Vancook*, Exchange Act Release No. 59550, 2009 WL 605322, at *1 (Mar. 10, 2009) (citing *Michael J. Markowski*, Exchange Act Release No. 40748, 1998 WL 960587, at *2 (Dec. 4, 1998) (“Neither the initial decision of the law judge nor our order scheduling briefing in this proceeding is a Commissioner order entitling Markowski to appellate review.”)).

⁹ 17 C.F.R. § 201.161(a).

¹⁰ *Id.* § 201.161(b). The Commission’s recent order that “all reasonable requests for extensions of time will not be disfavored” with respect to the filing and service of papers, *In re: Pending Administrative Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020), does not apply to this request to adjourn or postpone the proceeding itself pending an appeal of the underlying suit. *Cf. Fowler*, 2020 WL 2214206, at *1 (referencing the March 18 order in granting Fowler an extension of time to file his answer).

We have repeatedly held that “the pendency of an appeal of a civil or criminal proceeding does not justify any delay in related ‘follow-on’ administrative proceedings.”¹¹ The adjournment Fowler seeks “could delay significantly the outcome of these proceedings,” and as we have held previously, concerns about the “inefficient use of resources” do not “override the strong public interest in the prompt enforcement of the federal securities laws.”¹²

Fowler also argues that he does not currently work in the securities industry and does not “intend to do so in the future absent a successful appeal,” and thus an adjournment of the proceeding “will cause no prejudice or harm either to the Commission, or to the public interest.” But Fowler’s current intentions to remain out of the industry do not meet the standard of a strong showing that the denial of his motion would substantially prejudice him.¹³ Indeed, Fowler has failed to show any prejudice because, “[i]f [the] appellate court reverses the District Court’s judgment, [he] may seek to vacate any action based upon that judgment.”¹⁴

Accordingly, it is ORDERED that Fowler’s motion to stay, postpone, or adjourn the proceeding is denied; and it is further

¹¹ *Thomas D. Melvin*, Exchange Act Release No. 75844, 2015 WL 5172974, at *7 n.52 (Sept. 4, 2015) (citing cases); *see also Paul Free*, Exchange Act Release No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012) (“As we have previously stated, the pendency of an appeal generally is an insufficient basis upon which to prolong a Commission proceeding.”); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *3 (Sept. 26, 2007) (“It is well established that the existence of an appeal of the District Court’s decision does not affect the injunction’s status as a basis for administrative action.”).

¹² *Free*, 2012 WL 266986, at *2; *see also Francis V. Lorenzo*, Exchange Act Release No. 82755, 2018 WL 994316 at *1 (Feb. 21, 2018) (rejecting request to stay proceeding based on “unnecessary expenditure of resources” pending certiorari petition to the U.S. Supreme Court); *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 WL 1941502, at *3 n.21 (Aug. 23, 2002) (“[T]he pendency of an appeal does not preclude us from acting to protect the public interest.”).

¹³ *Cf. Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *41 (May 29, 2015) (rejecting argument that a bar was unnecessary since respondent had “left the industry” because “[a]bsent a bar, nothing would prevent [respondent] from reentering the industry”).

¹⁴ *Seghers*, 2007 WL 2790633, at *3.

ORDERED that the time for filing a brief in opposition to the Division's motion for summary disposition is extended to August 5, 2020, and that any reply brief shall be filed by August 19, 2020.

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

Vanessa A. Countryman
Secretary