

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20485

In the Matter of

Alpine Securities Corporation,
Respondent.

**Division of Enforcement's Memorandum in Opposition to Respondent's Motion for an
Interim Stay or Extension/Postponement/Adjournment of Proceedings**

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The Division of Enforcement opposes Respondent’s Motion for an Interim Stay or Extension/Postponement/Adjournment of Proceedings pending a decision on Respondent Alpine Securities Corporation’s (“Alpine” or “Respondent”) petition for certiorari to the United State Supreme Court (“Motion”).¹

I. INTRODUCTION

Respondent’s Motion ignores clear law establishing that an appeal of a related judgment in a follow-on proceeding does not justify delay or postponement. Respondent also fails to show that its case will be substantially prejudiced absent a delay, which is required to justify an exception to the policy against postponements pending appeal. And contrary to Respondent’s assertions, the Supreme Court will very likely rule on Respondent’s petition for certiorari well before any final decision in this proceeding could impact Alpine and its business. The Motion should be denied.

II. BACKGROUND

This administrative proceeding is a “follow-on” proceeding based on the final judgment and permanent injunction entered against Respondent in Securities and Exchange Commission v. Alpine Securities Corporation, Civil Action Number 1:17-cv-04179, in the United States District Court for the Southern District of New York (“Civil Action”). See *Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing*, dated August 26, 2021 (“OIP”), ¶ 2.

A. **The district court found that Respondent acted knowingly and with disregard for its obligations under the law.**

In the Civil Action, the district court found that Respondent violated Section 17(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 17a-8 thereunder 2,720 times. *SEC v.*

¹ The Division of Enforcement takes no position on Respondent’s related motion for expedited review of its motion to stay.

Alpine Securities Corp., 413 F.Supp. 3d 235, 244 (S.D.N.Y. 2019). The district court entered the final judgment against Respondent on summary judgment. *See id.* at 244. No trial or evidentiary hearing was necessary for the district court to find these violations.

These violations stemmed from Respondent's years-long failure to comply with Suspicious Activity Report ("SAR") requirements. The district court agreed with findings by OCIE that Respondent's conduct was "recidivist activity" that "obscured the true nature of suspicious activity" and that Respondent's "SARs appeared to indicate that [Respondent] was intentionally trying to obfuscate or distort the truly suspicious nature of the activity that [Respondent] is required to report to law enforcement." *Id.* at 241 (emphasis in original) (quotation omitted). Without the need for an evidentiary hearing, the district court found that Alpine "acted knowingly and with disregard for its obligations under the law." *Id.* at 245; *see also id.* at 245, n.17 (Alpine "has not explained what additional discovery would achieve. Nor is a hearing on its scienter necessary. The Court has considered Alpine's arguments and evidence submitted in opposition to this motion."). Respondent argued extensively that its conduct must have improved over time because fewer violations had been detected and established on summary judgment in the later years of its misconduct, but the district court found that "[t]he deficiencies persisted notwithstanding an intensive examination by FINRA in 2011 and a highly critical FINRA Report issued in 2012. Although the extraordinary scale of Alpine's violations decreased over the years, the violations did not cease." *Id.* at 247.

As for the risk of loss to investors, the district court found that "[g]iven the sheer scale of Alpine's violations and the risk of fraud inherent in the [low priced securities] markets, Alpine's violations of Rule 17a-8 risked substantial losses to investors in those markets." *Id.* at 246.

The district court entered an injunction permanently enjoining Respondent from future violations of Section 17(a) and Rule 17a-8 because “Alpine’s persistent refusal to admit wrongdoing and its record of noncompliance with SAR reporting obligations demonstrate a substantial likelihood that Alpine will continue to violate federal securities laws in the future. Given its function as a broker-dealer, Alpine remains in a position where future violations could be anticipated.” *Id.* at 251. The district court also imposed a civil penalty of \$12,000,000. *Id.* at 250.

B. The Second Circuit affirmed the district court, and declined Alpine’s motion for stay of judgment.

The U.S. Court of Appeals for the Second Circuit affirmed the district court’s orders granting summary judgment and imposing a penalty. *SEC v. Alpine Securities Corp.*, 982 F.3d 68, 83-86 (2d Cir. 2020), *petition for cert. filed, Alpine Securities Corp. v. SEC*, NO. 21-82. Alpine filed a motion with the Second Circuit seeking to stay issuance of the mandate pending Alpine’s filing and the disposition of its petition for writ of certiorari. *SEC v. Alpine Securities Corp.*, Second Circuit Case No. 19:3272, Dkt. No. 202-2. The Second Circuit denied Alpine’s motion, issued its mandate, and Alpine is making payments required under the judgment. *See SEC v. Alpine Securities Corp.*, Second Circuit Case No. 19:3272, Dkt. No. 225. While Alpine continues to pursue in its petition for certiorari the argument that the SEC cannot enforce Rule 17a-8, it has abandoned any argument challenging the district court’s factual findings about its conduct or any other findings specific to Alpine.

C. This proceeding is based on the district court’s findings.

The district court’s findings regarding Respondent’s violations are undisputed for the purpose of this proceeding. “It is well established that [Respondent] is collaterally estopped from challenging in this administrative proceeding the judgement of the District Court in the injunctive proceeding.” *Conrad P. Seghers*, Adv. Act Rel. No. 2656, 2007 WL 2790633, at *5,

n. 27 (Sept. 26, 2007) (collecting cases) (citations omitted). Moreover, “[t]he doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual issues that were actually litigated and necessary to the court’s decision to issue the injunction.” *Id.* (citation omitted); *see also, e.g., Ran H. Furman*, Exch. Act Rel. No. 65680, 2011 WL 5231425, at *2 (Nov. 3, 2011) (“Generally, a respondent in a ‘follow-on’ proceeding is precluded from challenging the basis for, or findings in, the underlying injunctive action.”). And 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.” *Seghers*, 2007 WL 2790633, at *3 (collecting cases).

Litigating this proceeding will not be expensive or burdensome because this is a follow-on administrative proceeding under the 75-day timeframe specified in SEC Rule of Practice 360(a)(2)(i). There will be no depositions pursuant to Rule of Practice 233 or other burdensome discovery during this proceeding, *see* OIP at 3, and summary disposition “is ordinarily appropriate in follow-on proceedings.” *James S. Tagilafferri*, Exch. Act Rel. No. 80047, 2017 WL 632134, at *7 (Feb. 15, 2017). If a hearing is necessary, under Rule of Practice 360(a)(2)(ii) a hearing officer may schedule the hearing to begin up to six months after service of the order instituting proceedings.

III. ARGUMENT

A. Requests for delay pending any appeal—especially a petition for Supreme Court review—are disfavored and routinely rejected.

At the outset, Respondent relies on the incorrect rule and legal standard. Respondent cites SEC Rule of Practice 401 and cases applying that rule, *see, e.g.*, Motion at 1, 12-13, nn.42-48, but that rule and the cases cited by Respondent that apply that rule govern requests to stay final

Commission orders (Rule 401(c)) or actions by a self-regulatory organization (Rule 401(d)).² See, e.g., *Application of Elec. Transaction Clearing, Inc.*, Exch. Act Rel. No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014) (application for stay of decision by the Chicago Board Options Exchange) (cited by Motion at 12, 14). Respondent does not appeal either type of order contemplated by Rule 401 but instead seeks to stay a pending administrative proceeding based on its request for Supreme Court review of a decision of the Second Circuit Court of Appeals.

When, as here, a respondent seeks a delay of an administrative proceeding pending an appeal in civil or criminal actions, the Commission does not review the request under Rule 401, but may review the request under SEC Rule of Practice 161. See, e.g., *Francis V. Lorenzo*, Sec. Act Rel. No. 10460, 2018 WL 994316, at *1 (Respondent “cites Commission Rule of Practice 401 for the basis of his stay request, but that rule permits stay motions only by persons aggrieved by a Commission order who would be entitled to review in a federal court of appeals.”) (Quotations omitted); *Paul Free, CPA*, Exch. Act Rel. No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012) (“Although Rule 401 is inapplicable, we will consider Free’s motion as a request for an extension of time, postponement, or adjournment under Rule 161.”).

Rule 161 authorizes a postponement only for “good cause shown.” When considering a request for a postponement under Rule 161, the Commission adheres “to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would *substantially prejudice his or her case.*” *Paul Free, CPA*, 2012 WL 266986, at *2 (quotation omitted) (emphasis added).

² One case quoted in the Motion that does not apply Rule 401 does not even involve an appeal. See Motion at 13, nn. 44-45 (quoting *Bloomberg L.P.*, Exch. Act Rel. No. 83755, 2018 WL 3640780, at *7 (July 31, 2018), which involved an application for a stay of a securities information processor’s limitation of access to services offered under Exchange Act Section 11A(b)(5)(A)).

The Commission has “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.” *Donald J. Fowler*, Exch. Act Rel. No. 89226, 2020 WL 3791560, at *2 (July 6, 2020).³ This is because an adjournment pending appeal could significantly delay this proceeding and concerns about “inefficient use of resources do not override the strong public interest in the prompt enforcement of the federal securities laws.” *Id.* (quotation omitted). Thus, a pending petition for certiorari to the United States Supreme Court, which is rarely granted,⁴ does not justify a postponement. *Lorenzo*, 2018 WL 994316, at *1 (denying a motion for stay under Rule 401 and postponement or adjournment under Rule 161 based on a pending petition for certiorari, noting “Supreme Court review is also, at best, speculative.”).

For the reasons explained below, Respondent fails to justify a delay under these authorities.

B. The Motion fails to justify postponement pending a decision on Respondent’s petition for certiorari.

As explained above, the Commission adheres to a policy of strongly disfavoring requests for extensions, postponements, and adjournments “except in circumstances where the requesting

³ See also *Daniel Joseph Touizer*, Exch. Act Rel. No. 85321, 2019 WL 1225724, at *1 (Mar. 14, 2019) (“As a result, once a conviction has been entered, further challenges in the criminal case do not bear on follow-on administrative proceedings unless and until those challenges are successful.”) (quotation omitted); *John Thomas Capital Management Group LLC*, Sec. Act Rel. No. 9728, 2015 WL 728006, at *2 (Feb. 20, 2015) (“We adhere to a policy of strongly disfavoring such requests absent a strong showing of substantial prejudice and consider the pendency of an appeal generally ... an insufficient basis upon which to prolong a Commission proceeding.”) (quotation omitted); *Free*, 2012 WL 266986, at *2, (“[T]he pendency of an appeal generally is an insufficient basis upon which to prolong a Commission proceeding.”)

⁴ According to the U.S. Supreme Court website, the Court receives approximately 7,000-8,000 petitions for a writ of certiorari each term. Of those, the Court grants the writ and hears oral argument in about 80 cases. See U.S. Supreme Court Website, “FAQs- General Information,” https://www.supremecourt.gov/about/faq_general.aspx (last visited Sept. 12, 2021).

party makes a strong showing that the denial of the request or motion would substantially prejudice their case.” SEC Rule of Practice 161. Respondent fails to meet this burden because it points to no unique prejudice or circumstance not routinely rejected as insufficient to warrant a delay pending appeal. Respondent, like every party who files an appeal or, after failing on appeal files a petition for certiorari, necessarily contends that its appellate arguments have merit and that it would be harmed by “facing a new proceeding” based on “decisions that the Supreme Court may vacate in the near future...” Motion at 14.⁵ As set forth above, the Commission has regularly found that the pendency of an appeal is an insufficient basis to justify delay. Respondent does not cite the correct standard here, let alone show that it will suffer substantial prejudice to its case without a postponement. For this reason alone, the Motion should be denied.

The Motion should also be denied because the arguments asserted in the Motion are exaggerated and incorrect, as discussed below.

1. Respondent fails to show irreparable harm.

Respondent argues that it would suffer irreparable harm without a postponement because it contends that this proceeding is likely to conclude before the Supreme Court decides Respondent’s petition for certiorari. Motion at 13-16. This argument fails for at least two reasons: (1) it is highly unlikely that this proceeding will conclude before the Supreme Court considers the petition; and (2) this is not the type of prejudice that justifies a postponement under Rule 161.

⁵ Respondent goes so far as to claim, without explanation, that “[e]ven the filing of an answer to the OIP given the present circumstances would put Alpine in an untenable position.” *Id.*

As for timing of the two proceedings, and assuming that Respondent is correct that the decision on its petition for certiorari would issue no earlier than December 2021,⁶ the Motion fails to show that it is likely or even possible for this proceeding to conclude before that time. This proceeding is deemed to be one under the 75-day timeframe specified in SEC Rule of Practice 360(a)(2)(i) for purposes of applying Rules of Practice 233 and 250. OIP at 3. The 75-day timeline does not begin to run until the completion of briefing on a dispositive motion or post-hearing briefing, Rule 360(a)(2)(i), and no dispositive motion can be filed before Respondent's answer has been filed, Rule 250(b).

Respondent was served by mail on September 2, 2021, so its answer is due on September 22, 2021. Even if the Division immediately filed a dispositive motion and briefing was completed on a short schedule, the briefing would not be completed before early November. The 75-day time frame for an initial decision would expire no earlier than mid-January. Moreover, if a hearing is necessary, the hearing officer may schedule it to commence up to 6 months after service of the OIP, Rule 360(a)(2)(ii). Thus, contrary to the basic premise of Respondent's assertion of

⁶ Based on the current briefing schedule, the Division expects that the Supreme Court will issue its decision on Alpine's petition by early December 2021. According to guidance from the Supreme Court of the United States Office of the Clerk, "if a brief in opposition has been filed, the case will generally be placed on the next relevant conference list that is at least 14 days after the filing date for the brief in opposition." Supreme Court of the United States Office of the Clerk, *Memorandum Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference*, February 2020, at 4(c), <https://www.supremecourt.gov/casehand/Guidance-on-Scheduling-Feb-2020.pdf>. Assuming the Office of the Solicitor General files its brief on behalf of the Commission in opposition to Respondent's petition on October 20, the date of the current deadline following extensions, the next relevant conference list that is at least 14 days later is November 9, 2021, which means that the petition would be considered by the Court at the December 3, 2021, conference. *See Case Distribution Schedule – October Term 2021*, <https://www.supremecourt.gov/casedistribution/casedistributionschedule2021.pdf>. We expect that a decision would be reflected in the order list issued either that day or the following Monday (December 6, 2021).

irreparable harm, the Supreme Court will almost certainly decide the petition for certiorari before a final decision in this proceeding is issued.⁷

Alpine's case will not be prejudiced, nor will it be irreparably harmed, by filing an answer and litigating this matter while the Supreme Court considers its petition. "[T]he Supreme Court long has recognized the 'expense and disruption of defending ... [a] protracted adjudicatory proceeding[]' does not constitute irreparable harm, even when the party questions the lawfulness of the agency's proceedings." *John Thomas Capital Mgmt. Group LLC*, Sec. Act Rel. No. 9728, 2015 WL 728006, at *4 (Feb. 20, 2015) (citations omitted).

Moreover, the potential harm to Alpine's business following a decision imposing remedial relief described in the Motion (at 15-16) is not prejudice to Alpine's case. *See* SEC Rule of Practice 161(b)(1). It is the same type of speculative harm every Respondent faces when arguing that a follow-on proceeding should await a civil appeal, which is routinely rejected. *See, e.g., Fowler*, 2020 WL 3791560, at *1-2. This rationale applies even where the respondent still has the right to appeal a district court order to the court of appeals, *id.*, at *2, and should therefore apply with even more force here because Respondent has only a hope of discretionary appeal.

Thus, Respondent fails to establish that it would suffer any irreparable harm and does not identify prejudice to its ability to defend this proceeding or any prejudice that is different in kind from the type that the Commission routinely finds insufficient to justify delay.

⁷ Also contrary to the Motion (at 15-16), the SEC's stipulation that Respondent's obligation to make installment payments toward its penalty obligation would be stayed if the Supreme Court grants Respondent's petition for certiorari is not at all inconsistent with the Division's opposition to the Motion. The Supreme Court has not granted the petition. If it does, the Division may consider a postponement of these proceedings depending on the circumstances at the time, but that issue is not presented in the Motion. Thus, contrary to Respondent's argument that "it would make no sense" to allow a stay of the penalty payments *if* the Supreme Court grants the petition (Motion at 15-16), moving forward with this proceeding aligns with the requirement that Respondent continue paying amounts owed under the judgment unless and until the Supreme Court alters the *status quo*.

2. Respondent’s view of the merits of its petition is irrelevant.

Respondent next argues that it raises a “serious legal question” in its petition for certiorari. Motion at 16-17. The Commission need not consider this argument because, while this issue may be relevant to the different procedural posture envisioned by Rule 401, the merits or likelihood of success on Respondent’s petition for certiorari is not relevant to the applicable standard under Rule 161. When the Commission routinely denies requests for postponement pending the outcome of a civil appeal, the Commission does not assess the merits or likelihood of success of the appeal, nor should it here. *See, e.g., Lorenzo*, 2018 WL 994316, at *1.

For similar reasons, the Division will not comment on the merits of Respondent’s petition for certiorari or its likelihood of success. As much as a response is found helpful or necessary, the Division defers to the ruling of the Second Circuit on the question presented in the petition regarding whether the SEC can interpret and enforce the Bank Secrecy Act (“BSA”) (Motion at 6):

This enforcement action was brought solely under Section 17(a) of the Exchange Act and Rule 17a-8 promulgated thereunder. This suit therefore falls within the SEC’s independent authority as the primary federal regulator of broker-dealers to ensure that they comply with reporting and recordkeeping requirements of those provisions. The fact that Rule 17a-8 requires broker-dealers to adhere to the dictates of the BSA in order to comply with the recordkeeping and reporting provisions of the Exchange Act does not constitute SEC enforcement of the BSA. We thus reject Alpine’s argument that the SEC is enforcing the BSA, and not the Exchange Act.

SEC v. Alpine Securities Corp., 982 F.3d 68, 76 (2d Cir. 2020).

3. There is a strong public interest in prompt enforcement of the federal securities laws.

There is a strong public interest in the prompt enforcement of federal securities laws, *Fowler*, 2020 WL 3791560, at *2, and Respondent acknowledges, as it must, that enforcement of

federal securities laws serves the public interest, Motion at 18. But Respondent argues that its request for delay will not harm any party (Motion at 17-18) and that the public interest “favors a stay” (Motion at 18-19). Like the arguments about prejudice above, these arguments present no facts or circumstances to distinguish Respondent from the many respondents who argue that their appeal will succeed and fail to justify an exception to the policy against delay without a strong showing of substantial prejudice to Respondent’s case.

Respondent’s arguments are also exaggerated and incorrect. For example, Respondent argues that the conduct at issue in the Civil Action was “historical” and asserts that it is operating “under compliance with” SAR requirements. (Motion at 17). As explained in detail in Section II.A., *supra*, the district court rejected these efforts to minimize Respondent’s wrongful conduct and found that Respondent’s “persistent refusal to admit wrongdoing and its record of noncompliance with SAR reporting obligations demonstrate a substantial likelihood that Alpine will continue to violate federal securities laws in the future.” *SEC v. Alpine Securities Corp.*, 413 F.Supp. 3d 235, 251 (S.D.N.Y. 2019).

While Respondent is correct that the injunction entered by the district court provides some protection, the entire purpose of a follow-on proceeding is to determine whether an injunction is enough to protect investors. Respondent continues to operate and, given the district court’s findings that cannot be disputed in this proceeding, any undue delay in appropriate relief continues to put investors at risk of substantial losses. Thus, Alpine’s argument that its request would cause no harm is incorrect.

Finally, Respondent’s argument that the Division or SEC acted with undue delay in any of these proceedings is grasping at straws. Motion at 18. There is nothing unusual or improper in the timing of this proceeding or the SEC’s conduct on appeal in the civil action. If the timing of any of

the Division or SEC's conduct were improper (it is not), the remedy is not more delay as requested in the Motion.

C. Respondents' alternative argument under Rule 161 should be denied for the same reasons.

As explained above, Respondent's request for a postponement is asserted incorrectly under SEC Rule of Practice 401, and the request is properly addressed under Rule 161. As a result, the argument Respondent styles as an "alternative" request under Rule 161 for postponement or adjournment is cumulative of the arguments addressed above and fails for the same reasons. *See* Motion 19-20.

CONCLUSION

For the reasons above, the Motion should be denied in its entirety.

Respectfully submitted this 13th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Memorandum in Opposition to Respondent's Motion for an Interim Stay or Extension/Postponement/Adjournment of Proceedings was served on the following on this 13th day of September, 2021, in the manner indicated below:

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