U.S. SECURITIES AND EXCHANGE COMMISSION

In the Matter of NUVEEN SECURITIES, LLC, Respondent.	**File No. 3-21767**

RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO MODIFY ORDERED UNDERTAKINGS IN ADMINISTRATIVE PROCEEDING, MOTION FOR STAY OF EFFECTIVENESS OF UNDERTAKINGS, AND MOTION FOR ADMINISTRATIVE STAY

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OS Received 03/14/2025

Table of Contents

The Commission's Most Recent Off-Channel Settlements Result in Materially Disparate Sanctions for Similarly Situated Firms 1

There Are Compelling Reasons to Grant Respondent's Request to Equalize the Undertakings 3

The Commission Should Stay the Effectiveness of the Ordered Undertakings Pending Resolution of the Motion to Modify the Ordered Undertakings 8

Conclusion 12

OS Received 03/14/2025

Table of Authorities

Page(s)

Cases

Arthur Lipper Corp. v. SEC,
547 F.2d 171 (2d Cir. 1976).....4

Collins v. SEC,
736 F.3d 521 (D.C. Cir. 2013).....3

Gilder v. PGA Tour, Inc.,
936 F.2d 417 (9th Cir. 1991).....9

Hornes v. Flores,
557 U.S. 433 (2009).....3

Lorenzo v. SEC,
872 F.3d 578 (D.C. Cir. 2017).....3

Lucia v. SEC,
585 U.S. 237 (2018).....6

McCarthy v. SEC,
406 F.3d 179 (2d Cir. 2005).....4

Mexichem Specialty Resins, Inc. v. EPA,
787 F.3d 544 (D.C. Cir. 2015).....9

Nat'l Ctr. for Pub. Policy Rsch. v. SEC,
2024 WL 4784358 (5th Cir. 2024).....6

Restaurant Law Ctr. v. Dep't of Labor,
66 F. 4th 593 (5th Cir. 2023*)*.....9

SEC v. Alexander,
2013 WL 5774152 (E.D.N.Y. Oct. 24, 2013).....5

Smith v. Davis,
953 F.3d 582 (9th Cir. 2020).....6

United States v. Texas,
144 S. Ct. 797 (2024).....12

Wis. Gas Co. v. FERC,
758 F.2d 669 (D.C. Cir. 1985) (per curiam).....9, 10

OS Received 03/14/2025

Statutes and Regulations

Securities Exchange Act of 1934 Section 15(b)(4).....4

17 C.F.R. § 201.100(c)..... 12

17 C.F.R. § 201.401 12

5 U.S.C. § 706(2)(A).....3

Other Authorities

In the Matter of Charles Schwab & Co., Inc., Rel. No. 34-102172 (Jan. 13, 2025)..... 2

In the Matter of Janus Cap. Mgmt., LLC, Rel. No. IAA-3065 (Aug. 5, 2010) 5

In the Matter of Massachusetts Fin. Servs. Co., et al., Rel. No. IAA-29858 (Nov. 9, 2011) 5

In the Matter of Max Zavanelli, Rel. No. IAA-4471 (Aug. 4, 2016)..... 10

In the Matter of MDC Holdings, Inc., Rel. No. 34-39537 (Jan. 9, 1998) 5

In the Matter of Micah J. Eldred, Rel. No. 34-96083 (Oct. 14, 2022) 8, 9

In the Matter of Millenium Partners et al., Rel. No. 34-78364 (July 19, 2016).....5

In the Matter of Minim, Inc., Rel. No. 34-101502 (Nov. 1, 2024) 11, 12

In the Matter of Minim, Inc., Rel. No. 34-102482 (Feb. 25, 2025) 10

In the Matter of Nuveen Securities, LLC, Rel. No. 34-98630 (Sept. 29, 2023).....2

In the Matter of PJT Partners LP, Rel. No. 34-102167 (Jan. 13, 2025) 2

In the Matter of Putnam Inv. Mgmt., LLC, Rel. No. IAA-3600 (May 3, 2013) 5

In the Matter of Richard Feldmann, Rel. No. 33-10078 (May 10, 2016) 5

In the Matter of Robinhood Fin. LLC et al., Rel. No. 34-102170 (Jan. 13, 2025) 2

In the Matter of Santander US Cap. Mkts. LLC, Rel. No 34-102171 (Jan. 13, 2025)..... 2

In the Matter of Scottsdale Capital, Rel. No. 34-83783 (Aug. 6, 2018)..... 9, 10

In the Matter of Shawn K. Dicken, Rel. No. 34-89526 (Aug. 12, 2020) 4

In the Matter of the Application of Robert J. Prager, Rel. No. 34-50634 (Nov. 4, 2004) 10

SEC, Letter to Acting Clerk of Court for U.S. Court of Appeals for the Eighth Circuit, *State of Iowa, et al. v. SEC*, No. 24-1522, and all consolidated cases (Feb. 11, 2025). 12

OS Received 03/14/2025

The Commission should act promptly to modify certain prospective undertakings imposed on Nuveen Securities, LLC ("Respondent") in this proceeding, which arose out of the Commission's off-channel communications initiative. That relief is necessary to equalize the undertakings with those in the initiative's most recent settlements, which impose far less burdensome prospective undertakings than the undertakings the Commission had uniformly imposed on similarly situated firms for the same violations based on materially indistinguishable facts. In its Opposition, the Division of Enforcement does not dispute that Respondent is similarly situated with those firms that have less burdensome undertakings, that the underlying conduct and violations in all relevant settlements were materially indistinguishable, or that—in light of the more recent settlements—the Commission has concluded that Respondent's undertakings are unnecessary to remedy the underlying violations, ensure prospective compliance, protect investors, or otherwise vindicate the public interest. Instead, the Division incorrectly asserts that Respondent seeks broader relief than it has actually requested and fails to meaningfully distinguish the clear Commission precedent for modifying prospective undertakings in circumstances like this. In short, the Division offers no justification for the disparate sanctions imposed on Respondent, reinforcing that it would be arbitrary and capricious for the Commission to leave those sanctions in place.

Further, the Division ignores the clear authority under the Commission's rules to enter a stay while it considers Respondent's motion. The requirements for a stay are more than satisfied here, and that temporary relief should be granted promptly.

The Commission's Most Recent Off-Channel Settlements Result in Materially Disparate Sanctions for Similarly Situated Firms

As part of the Commission's off-channel communications initiative, Respondent agreed to a settled administrative proceeding that mirrored prior settlements in the initiative with

OS Received 03/14/2025

similarly situated firms (the "Order").[1] These settlements articulated substantially indistinguishable conduct and violations, and all required the settling firms to comply with substantially identical undertakings. The Commission's uniform treatment of settling firms was intentional, and Respondent was told, like other settling firms, that these uniform ordered undertakings were non-negotiable.

In January 2025, the Commission entered settlement orders (the "January 2025 Orders") that materially modified the sanctions it imposed in administrative settlements as part of the off-channel initiative.[2] As a result, although the January 2025 Orders and prior settlements were part of the same initiative involving substantially indistinguishable violations by similarly situated firms, the firms that settled in January 2025 are subject to undertakings that are substantially less burdensome, with far fewer collateral regulatory consequences, than undertakings that Respondent and dozens of other firms who settled earlier in the initiative must comply with.

There is no justification for this disparate treatment. Accordingly, Respondent is seeking to modify certain undertakings imposed by the Order (the "Ordered Undertakings") to equalize them with the undertakings enumerated in the January 2025 Orders. As explained in Respondent's initial brief, the Commission has granted this type of limited relief in the past, and it is warranted in these extraordinary circumstances. Granting the requested relief would vindicate basic notions of fairness, avoid arbitrary and capricious outcomes, serve the public interest, incentivize cooperation with the Commission during enforcement initiatives, and

[1] *See In the Matter of Nuveen Securities, LLC*, Rel. No. 34-98630 (Sept. 29, 2023).

[2] *See In the Matter of Charles Schwab & Co., Inc.*, Rel. No. 34-102172 (Jan. 13, 2025); *In the Matter of PJT Partners LP*, Rel. No. 34-102167 (Jan. 13, 2025); *In the Matter of Robinhood Fin. LLC and Robinhood Sec. LLC*, Rel. No. 34-102170 (Jan. 13, 2025); *In the Matter of Santander US Cap. Mkts. LLC*, Rel. No. 34-102171 (Jan. 13, 2025).

ultimately conserve Commission resources. The flaws in the Division's Opposition confirm that Respondent's request for limited, prospective relief is appropriate here.

There Are Compelling Reasons to Grant Respondent's Request to Equalize the Undertakings

As Respondent explained in its initial brief, the Commission may amend its orders to modify undertakings when prospective application of those undertakings is no longer equitable.[3] Indeed, once a movant "establish[es] that changed circumstances warrant relief," it is an abuse of discretion to "refuse[] to modify [the order] in light of such changes."[4] While only compelling circumstances may warrant relief, that standard is met here.

First, Respondent merely seeks to amend the Order to equalize the undertakings imposed on it with the undertakings enumerated in the Commission's most recent orders that settled actions in materially indistinguishable circumstances. Fundamental notions of fairness require that similarly situated firms be treated similarly, which was the principle underlying this initiative from the outset. Moreover, an agency's failure to resolve comparable situations on comparable terms would be arbitrary and capricious.[5]

Second, the January 2025 Orders confirm that the undertakings which Respondent seeks to modify are not necessary to protect investors or vindicate the public interest. The January 2025 Orders do not contain those undertakings even though the conduct and violations in the January 2025 Orders are materially indistinguishable from the conduct and violations addressed in Respondent's Order. That different determination justifies the relief sought here.

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[3] *See* Brief at 5.

[4] *Hornes v. Flores*, 557 U.S. 433, 447 (2009) (discussing Fed. R. Civ. Pro. 60(b)(5)).

[5] *See Collins v. SEC*, 736 F.3d 521, 525-26 (D.C. Cir. 2013); *see also Lorenzo v. SEC*, 872 F.3d 578, 596 (D.C. Cir. 2017), *aff'd* 587 U.S. 71 (2019); *see generally* 5 U.S.C. § 706(2)(A).

Third, the Ordered Undertakings are needlessly burdensome. Remedial sanctions should be tailored to remedy the relevant violations in light of the facts and circumstances[6] and should be no more burdensome than necessary to remedy the relevant misconduct.[7] Here, the Ordered Undertakings have caused, and will continue to cause, Respondent to incur years of heightened costs and regulatory burdens that will not be borne by the similarly situated firms subject to the January 2025 Orders. The Commission's January 2025 Orders reflect a judgment that updated (and less burdensome) undertakings are appropriate to address the common conduct in this initiative—thereby confirming that the heightened costs and regulatory burdens imposed on Respondent are not necessary to remedy the underlying violations or ensure prospective compliance.

Although the Division opposes granting the tailored, prospective relief that Respondent requests, it offers no justification for the inequitable sanctions imposed in Respondent's Order. Instead, the Division focuses on relief that Respondent is not requesting and arguments that Respondent is not advancing. For example, although Respondent has been clear that it is seeking narrow relief solely to equalize certain prospective undertakings while leaving the substance of the Order otherwise unmodified (including the censure, the cease-and-desist order, and the significant monetary penalty that Respondent has already paid),[8] the Division erroneously

[6] *See* Section 15(b)(4) of the Exchange Act (stating that remedial sanctions must be in the public interest); *In the Matter of Shawn K. Dicken*, Rel. No. 34-89526 at 1 (Aug. 12, 2020) (Commission order) ("When determining whether remedial action . . . is in the public interest under Exchange Act Section 15(b), the Commission must consider the question with reference to the underlying facts and circumstances of the case.").

[7] *See McCarthy v. SEC*, 406 F.3d 179, 189–90 (2d Cir. 2005) (vacating purportedly remedial sanction because the "facts in the record that suggest the sanction may be excessive and punitive"); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 184 (2d Cir. 1976) (Friendly, J.) (vacating purportedly remedial sanction that was "too severe" and "unnecessary" in the circumstances).

[8] *See* Brief at 1 n.1, 6, 8, 9, 12, and Exhibits A and B.

contends that Respondent is attempting to "vacate" the Order.[9] Respondent has not asked to vacate the Order, so the Division's discussion of caselaw in which a party sought to vacate a final judgment is simply inapplicable.[10]

Similarly, the Division bases its opposition on precedent holding that the penalties imposed in settled actions cannot be appropriately compared to potentially more lenient sanctions imposed in subsequent litigation.[11] But that caselaw is irrelevant here. Respondent is seeking only to equalize certain of the prospective undertakings imposed in connection with its settlement with the undertakings imposed by the Commission *in other settlements* that were part of the same enforcement initiative. Respondent is not trying to equalize its sanctions with those imposed in any litigated proceeding, rendering the authorities cited by the Division beside the point.

Indeed, the Division does not cite any relevant authority for its argument that compelling circumstances do not exist here.[12] To the contrary, Respondent established in its initial brief that Commission precedent clearly supports the relief Respondent requests.[13] The Division's attempts to distinguish *Millenium Partners* and related Commission precedents fail. Just like *Millenium Partners*, Respondent is seeking to modify only the prospective application of certain

[9] *See* Opposition at 2, 3, and 7.

[10] If anything, the caselaw the Division cites confirms that relief is appropriate here. For example, in *SEC v. Alexander*, 2013 WL 5774152, at *2 (E.D.N.Y. Oct. 24, 2013) (cited in Opposition at 3), the court explained that, even in settled actions, relief under Rule 60(b)(5) is appropriate if the movant establishes that the ongoing sanction "is no longer equitable."

[11] *See* Opposition at 4 (citing *In the Matter of Richard Feldmann*, Rel. No. 33-10078, 2016 WL 2643450, at *2 (May 10, 2016)).

[12] *See* Opposition at 4.

[13] *See* Brief at 7 nn.16 & 17 (citing *In the Matter of Millenium Partners et al.*, Rel. No. 34-78364 at 2 (July 19, 2016); *In the Matter of Putnam Investment Management, LLC*, Rel. No. IAA-3600 (May 3, 2013); *In the Matter of Massachusetts Financial Services Co., et al.*, Rel. No. IAA-29858 (Nov. 9, 2011); *In the Matter of Janus Capital Management, LLC*, Rel. No. IAA-3065 (Aug. 5, 2010); and *In the Matter of MDC Holdings, Inc.*, Rel. No. 34-39537 (Jan. 9, 1998).

undertakings. Just like *Millenium Partners*, Respondent has been complying with the relevant undertakings since the issuance of the Order. And just like *Millenium Partners*, the undertakings that Respondent seeks to modify have become "impractical or outdated" in light of recent developments—namely, the January 2025 Orders which reflect the Commission's judgment that the Ordered Undertakings are not necessary to remedy the same violations, ensure prospective compliance, protect investors, or vindicate the public interest. Contrary to the Division's claim, the fact that Respondent has promptly sought relief after entry of the January 2025 Orders is no reason to deny it.[14] Further, the fact that "the Division had either supported the requested relief or did not oppose it"[15] in prior cases cannot distinguish the precedents that support Respondent here. The Commission's ability to grant relief does not hinge on the Division's permission.[16]

The Division also speculates that modifying the prospective undertakings here would open the proverbial floodgates of relitigation over settled administrative proceedings.[17] History disproves the Division's speculation. The Commission for decades has granted the type of limited relief that Respondent requests in rare and narrow circumstances, including in *Millenium Partners* and other settled actions. Doing so has not led to a deluge of collateral attacks on settled actions and has not otherwise undermined the Commission's enforcement program. That is unsurprising because those modifications reflected highly unusual circumstances that will not exist for most settled enforcement actions. But the circumstances here—a broad enforcement

[14] *See Smith v. Davis*, 953 F.3d 582, 590 (9th Cir. 2020) ("equity aids the vigilant") (quotation marks and citation omitted).

[15] Opposition at 4.

[16] *See Lucia v. SEC*, 585 U.S. 237, 241 (2018) (holding that the authority to enforce the federal securities laws resides in the Commission); *Nat'l Ctr. for Pub. Policy Research v. SEC*, 2024 WL 4784358, at *6 (5th Cir. 2024) (per curiam) ("[T]he SEC's regulatory framework anticipates that any ultimate enforcement decision belongs to the Commission alone . . . .").

[17] Opposition at 2.

sweep involving similar firms, similar conduct, and similar violations, but with inequitably different outcomes for similarly situated firms who simply settled before the Commission came to a different view—present exactly the kind of unusual situation where a limited modification to prospective undertakings is warranted, with no risk to the finality of settlements in general.

Perversely, denying Respondent the requested relief would actually cause the harm the Division seeks to avoid. In broad enforcement sweeps such as the off-channel communications initiative, an important consideration when registrants are engaging with the Commission and the Commission staff is that all registrants who are part of the initiative will be treated equitably. Treating registrants uniformly promotes cooperation, the voluntary production of documents and information, self-reporting, and the prompt resolution of matters. Indeed, and contrary to the Division's arguments, those very reasons animated the uniform approach the Commission had taken when settling actions related to the initiative—at least until the January 2025 Orders—and the Division's representation to Respondent and (as we understand it) scores of other firms, that the Ordered Undertakings were a required and non-negotiable component of all settlements related to the Commission's initiative.[18]

The orderly resolution of multiple, similar enforcement actions in Commission initiatives depends on an understanding by registrants that they will be treated equitably, and prompt resolutions are aided by the availability of a mechanism to amend undertakings if later settlements as part of the same initiative impose less onerous prospective sanctions for substantially similar conduct. That understanding promotes cooperation, preserves Commission resources, and fosters more prompt resolution of matters through settled administrative

[18] While the Opposition raises the fact that the Order followed discussions between the Division and Respondent's counsel, *see* Opposition at 2, the Opposition does not contend that the Ordered Undertakings were in any way negotiable. So, unlike the caselaw cited by the Division, this is not a situation where a respondent merely misestimated the costs or consequences of sanctions or regretted settling.

proceedings. Denying the relief Respondent requests would jeopardize those benefits, chill self-reporting, and substantially increase the likelihood that Commission enforcement initiatives will become more protracted and require more Commission resources.

Accordingly, there is no reasonable basis for different sanctions to be imposed on similarly situated firms as part of the same enforcement initiative, particularly where the January 2025 Orders reflect the Commission's most recent judgment that the Ordered Undertakings are not necessary to remedy the same violations, ensure prospective compliance, protect investors, or otherwise promote the public interest. The Commission's precedents, the Administrative Procedure Act, fundamental fairness, and policy considerations all confirm that Respondent is entitled to the relief it requests.

The Commission Should Stay the Effectiveness of the Ordered Undertakings Pending Resolution of the Motion to Modify the Ordered Undertakings

For the reasons explained in Respondent's initial brief, the Commission should grant a stay of the Ordered Undertakings pending its resolution of Respondent's underlying motion. The Division's opposition misapprehends the relief requested, misconstrues precedent, and misapplies the four-factor test that governs whether a stay should be granted.

Respondent has moved for a stay pursuant to Rule 401 and Rule 100(c) of the Commission's Rules of Practice. The Division never disputes that Rule 100(c) fully authorizes the issuance of a stay here. Instead, the Division argues only that a ruling in *Micah J. Eldred* indicates that Rule 401 cannot be used to seek a stay where there is no final Commission order.[19] But that matter concerned a motion for a stay filed by the respondent in an *ongoing*

[19] *See* Opposition at 6 (*citing In the Matter of Micah J. Eldred.*, Rel. No. 34-96083, 2022 WL 9195015, at *1 (Oct. 14, 2022)).

administrative proceeding.[20] Because the Commission had not yet entered a final order in that administrative proceeding, the motion was construed as a "request under Rule 161" for an adjournment or postponement of the ongoing proceeding.[21] Here, in contrast, Respondent seeks a stay of the Ordered Undertakings that were imposed in the Order—which was a final order in this administrative proceeding. *Eldred* is no bar to the issuance of a stay here.

On the merits, the Division does not persuasively argue that any of the four factors that govern the issuance of a stay are absent here. *First*, Respondent has established that there is a strong likelihood that the Commission will grant the requested relief, for all the reasons provided above and in our opening brief. At a minimum, Respondent has "raised a serious legal question on the merits."[22]

Second, Respondent has established that it will be irreparably harmed absent a stay. The Division does not dispute that the Ordered Undertakings require Respondent to expend significant time and resources—including those associated with the multi-year plan of heightened supervision by FINRA that results from the MC-400A process, which itself is triggered by the Ordered Undertakings. Nor does the Division argue that the costs or resources can somehow be recouped through litigation. The Division also does not dispute the authority Respondent cites that establishes that "purely economic costs may count as irreparable harm where they cannot be recovered in the ordinary course of litigation."[23] And the Division has no

[20] *In the Matter of Micah J. Eldred.*, Rel. No. 34-96083, 2022 WL 9195015, at *1 (Oct. 14, 2022).

[21] *Id.*

[22] *In the Matter of Scottsdale Capital*, Rel. No. 34-83783 at 3 (Aug. 6, 2018); *see also Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) ("Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits.") (quotation marks and citation omitted).

[23] *Restaurant Law Center v. Dep't of Labor*, 66 F. 4th 593, 597 (5th Cir. 2023) (citations omitted); *see also Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Wis. Gas Co. v. FERC*, 758

answer to the fact that, just weeks ago, the Commission held that economic costs which cannot necessarily be remedied after the fact qualify as a type of irreparable harm that warrants the issuance of a stay.[24] Instead, the Division bases its argument on a decision that declined to stay an NASD sanction where the movant's arguments for irreparable harm were merely speculative.[25] Unlike that matter, but like circumstances where irreparable harm has been found, Respondent's representation that it "will suffer harm absent a stay does not appear merely theoretical or speculative."[26] The exact requirements of the Ordered Undertakings are clearly set forth in the Order, so there is nothing speculative about them, and the Division does not contend Respondent's costs are theoretical. The Division does not dispute that, under *Minim*, Respondent has established irreparable harm.

Third, the Division appears to argue that the Ordered Undertakings are necessary for "investor protection[]" purposes and to "ensure that remedial measures are promptly undertaken."[27] But, as reflected in the January 2025 Orders, the Commission has already concluded that the Ordered Undertakings are *not* a necessary component of settlements and are not needed to ensure that remedial measures are taken. Indeed, the Commission has already found in the Order that Respondent promptly took remedial efforts to address the relevant issues prior to the issuance of the Order.

F.2d 669, 674 (D.C. Cir. 1985) (per curiam); *see also In the Matter of Max Zavanelli*, Rel. No. IAA-4471 at 3 n.12 (Aug. 4, 2016) (quoting *Wis. Gas Co. v. FERC* in discussion of irreparable injury that warrants issuance of a stay).

[24] *In the Matter of Minim, Inc.*, Rel. No. 34-102482 at 6 (Feb. 25, 2025).

[25] *See* Opposition at 7 (citing and indirectly quoting *In the Matter of the Application of Robert J. Prager*, Rel. No. 34-50634, 2004 WL 2480717, at *1 (Nov. 4, 2004)).

[26] *In the Matter of Scottsdale Capital*, Rel. No. 34-83783 at 5 (Aug. 6, 2018) (granting stay).

[27] Opposition at 7.

Fourth, the Division does not address Respondent's argument that the Commission "has a strong interest in not imposing materially different sanctions on similarly situated firms for essentially the same misconduct in connection with settlements entered into as part of the same Commission initiative,"[28] which is unassailably true for an administrative agency like the Commission. Instead, the Division advances only two arguments: "[t]he public interest is served when firms comply with their obligations under the securities laws" and a stay would allegedly "undermine the credibility and effectiveness of the Commission's orders."[29] The first argument is a non-sequitur, especially because the Ordered Undertakings impose obligations that are not themselves part of the federal securities laws.[30] As to the second, the Division does not provide any explanation for how issuance of a stay would generally raise questions about the credibility or effectiveness of settled orders—particularly when the Commission itself has determined that some settling firms never need to comply with the relevant undertakings. In short, all four factors warrant the issuance of a stay.

In Respondent's initial filing, it also sought an administrative stay to preserve the status quo until the Commission could resolve the underlying motions. The Division sees no difference between a request for a stay and a request for an administrative stay.[31] But, as Respondent explained in its initial brief and as the Commission's own decisions demonstrate, the two are not the same.[32] The "point" of an administrative stay "is to minimize harm" to the moving party that

[28] Brief at 10.

[29] Opposition at 7–8.

[30] For example, one of the undertakings requires Respondent to report certain employee discipline matters to the Commission staff—a requirement found nowhere in the statutes or the Commission's rules.

[31] *See* Opposition at 6; *see also In the Matter of Minim, Inc.*, Rel. No. 34-101502 at 1 (Nov. 1, 2024) (Commission order issuing administrative stay).

[32] Brief at 11.

would otherwise occur while the adjudicator considers the merits.[33] In this way, an administrative stay stops any ongoing harm and "give[s] the Commission an opportunity to consider [the underlying] motion for a stay," without opining on the underlying merits.[34] The Division's presumption that the same standards govern the issuance of a stay and an administrative stay is therefore incorrect.[35] Moreover, although the Division attempts to raise procedural objections to the issuance of an administrative stay in these circumstances, the Division does not dispute that Rule 100(c) permits the Commission to issue an administrative stay pursuant to Rule 401(d) here.[36]

At this point, the ongoing irreparable injury to Respondent calls for a temporary stay while its motion to modify the undertakings is pending. The Rules of Practice authorize the relief Respondent requests,[37] and entering an administrative stay will facilitate the Commission's orderly consideration of the substance of its motion.[38]

Conclusion

For the foregoing reasons, the Commission should grant Respondent's motion to modify the Ordered Undertakings. It should also promptly grant Respondent's motion to stay the effectiveness of the Ordered Undertakings pending the Commission's resolution of its motion to

[33] *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring).

[34] *In the Matter of Minim, Inc.*, Rel. No. 34-101502 at 1 (Nov. 1, 2024) (Commission order issuing administrative stay).

[35] *See* Opposition at 6. And in any event, as discussed above, Respondent satisfies the standard for the issuance of a stay.

[36] *See* Brief at 11 & n. 35.

[37] *See* 17 C.F.R. § 201.100(c) and 17 C.F.R. § 201.401.

[38] Last month, the Commission itself sought similar interim relief when it requested that the Eighth Circuit hold in abeyance pending litigation so that the status quo could be maintained while the Commission considered its position. *See* SEC, Letter to Acting Clerk of Court for U.S. Court of Appeals for the Eighth Circuit, *State of Iowa, et al. v. SEC*, No. 24-1522, and all consolidated cases (Feb. 11, 2025). Respondent asks for no more here.

modify or Respondent's motion for an administrative stay pending the Commission's resolution of the underlying motions.

March 14, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Commission Rule of Practice 150 and 151, I certify that on March 14, 2025, I filed this document using the eFAP system. I further certify that I caused a true and correct copy of the foregoing to be served by electronic mail on the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to the Commission's Rule of Practice 151(e), I hereby certify that I have omitted or redacted any sensitive personal information, as defined by Rule of Practice 151(e)(3), from this filing.

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