

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10202 / August 31, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 78739 / August 31, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4519 (corrected) / August 31, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32250 / August 31, 2016

Admin. Proc. File No. 3-15918

In the Matter of

DENNIS J. MALOUF

ORDER GRANTING PARTIAL STAY

On July 27, 2016, the Commission issued an opinion and order (the "Order") finding that Dennis J. Malouf, the majority owner, CEO, and president of UASNM, Inc. ("UASNM"), a registered investment adviser, violated antifraud provisions of the federal securities laws. The Commission found Malouf liable for failing to correct material misstatements in UASNM's Forms ADV and on its website, for failing to disclose conflicts of interest, and for failing to seek best execution for his clients' bond trades.¹ The Commission barred Malouf from the securities industry, imposed a cease-and-desist order, and ordered Malouf to pay disgorgement of \$562,001.26, plus prejudgment interest, and a \$75,000 civil money penalty.

Malouf now moves for a stay of the sanctions pending judicial review. The Commission considers the following four factors in determining whether to grant a stay: (i) whether there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) whether the moving party will suffer irreparable harm without a stay; (iii) whether any person will suffer

¹ *Dennis J. Malouf*, Exchange Act Release No. 78429, 2016 WL 4035575 (July 27, 2016).

substantial harm as a result of a stay; and (iv) whether a stay is likely to serve the public interest.² The party seeking a stay has the burden of establishing that relief is warranted.³

Malouf argues that he is likely to prevail on appeal because the Commission applied the wrong legal standard to hold him liable for violating Rule 10b-5(a) and (c) under the Securities Exchange Act of 1934 and Sections 17(a)(1) and (3) of the Securities Act of 1933. According to Malouf, Sections 17(a)(1) and (3) "should be interpreted the same" as Rule 10b-5(a) and (c) and liability under Rule 10b-5(a) and (c) requires "the performance of an inherently deceptive act . . . that is distinct from any alleged misstatement." But the Commission held that such a standard "contravenes the plain text of the rule."⁴ The Commission recognized that Rule 10b-5(a) proscribes deceptive "device[s]," "scheme[s]," and "artifice[s] to defraud," that Rule 10b-5(c) proscribes (among other things) deceptive "act[s]," and that it "would be arbitrary to read those terms as *excluding* the making, drafting, or devising of a misstatement."⁵ Because Malouf's deceptive failure to correct material misstatements in UASNM's Forms ADV and on its website in violation of his fiduciary duties also "operated as a 'device' or 'artifice' to defraud and an 'act,' 'practice,' and 'course of business' that misled his clients," the Commission found him liable for violating Rule 10b-5(a) and (c) and Sections 17(a)(1) and (3).⁶

Malouf also argues that he is likely to succeed on appeal because he reasonably believed that the relevant conflicts "had been disclosed," others at UASNM "removed the disclosures from the ADVs that Respondent believed were there," and "it was not until January 2011 . . . that Respondent became actually aware that the ADVs did not contain the disclosures." As the Commission found, however, Malouf admitted to reviewing the Forms ADV.⁷ And he acknowledged that as UASNM's CEO he was at least "partially responsible" for them.⁸

Malouf argues further that he is likely to succeed in arguing on appeal that he is not liable for violating Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 or for aiding and abetting and causing UASNM's violations of Advisers Act Section 206(4) and Rule 206(4)-1 thereunder and Section 207. Because Malouf merely repeats the arguments he makes regarding liability under Sections 17(a)(1) and (3) and Rule 10b-5(a) and (c), he has not demonstrated a strong likelihood of success on this argument either.

² *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at *1 (Oct. 22, 2015); *see also, e.g., Nken v. Holder*, 556 U.S. 418, 434 (2009); *Steven Altman*, Exchange Act Release No. 63665, 2011 WL 52087, at *2 (Jan. 6, 2011).

³ *See, e.g., Lucia*, 2015 WL 6352089, at *1; *Altman*, 2011 WL 52087, at *2.

⁴ *Malouf*, 2016 WL 4035575, at *8.

⁵ *Id.*

⁶ *Id.* at *15.

⁷ *Id.* at *14, 16, 17, 22.

⁸ *Id.* at *4, 14 n.101.

In addition, Malouf claims that the Commission erred in finding that he failed to seek best execution for his clients' bond trades. According to Malouf, the Commission should not have "held Respondent to a best execution practice of 'seeking multiple competing bids' before executing each trade." As the Commission stated, however, "the Division's expert witness testified that because of their high liquidity and AAA rating, fulfilling the duty of best execution for transactions in the Treasury and agency bonds at issue was primarily a matter of finding the lowest available cost for the trade (*i.e.*, the commission paid)," and that "because the commission cost is the driving factor in achieving best execution for these bonds, the best general practice was to seek multiple competing bids."⁹ Malouf also "agreed that the best approach to an adviser's best execution responsibilities was to seek multiple competing bids for client transactions." And Malouf "effectively concede[d] that the[] commissions were excessive."¹⁰

Malouf is no more likely to succeed on appeal on his argument that he is not liable because others at UASNM as well as an outside compliance consultant were responsible for the firm's best execution practices. The evidence established that Malouf executed between 60-70% of all of UASNM's bond trades, that Malouf was responsible for the large-dollar-amount bond trades at issue, and that Malouf's clients were the parties to the bond transactions on which excessive commissions were paid.¹¹ And the lead consultant testified that Malouf and others at UASNM told him that UASNM always followed a multiple bid process when executing client trades.¹²

Because the "first two factors" under the traditional standard for evaluating stay requests "are the most critical,"¹³ and because Malouf fails to establish a strong likelihood of success on the merits of his appeal, he must show irreparable injury absent a stay. Malouf claims that, absent a stay, "he will not be able to continue as an investment adviser and will have no source

⁹ *Id.* at *19.

¹⁰ *Id.* Although Malouf argues that he satisfied his duty to seek best execution by using BondDesk, a platform to research market prices, the Commission found that Malouf offered "no evidence showing how BondDesk's information regarding bid and ask spreads would inform Malouf as to the appropriate commissions he should pay to a broker-dealer." *Id.* at *19 n.131. No more persuasive is Malouf's contention that he "frequently obtained outside bids on the bond transactions." Malouf "conceded that he routinely failed to seek competing bids." *Id.* at *19.

¹¹ *Id.* at *20-21. In his reply brief, Malouf asserts that FINRA Regulatory Notice 15-46 supports his argument that he did not have to obtain multiple competing bids before placing each trade. He acknowledges that this notice "is not binding on the Commission." In any case, the notice states that "when routing . . . larger-size orders in any security, regular and rigorous review alone (as opposed to an order-by-order review) *may not* satisfy best execution requirements." See Regulatory Notice 15-46, Best Execution, *available at* http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf.

¹² *Malouf*, 2016 WL 4035575, at *21.

¹³ *Nken*, 556 U.S. at 434.

of income with which to pay any civil penalty or disgorgement." But the Commission has held repeatedly that "financial detriment does not amount to irreparable harm."¹⁴

Malouf also fails to show that the irreparable injury he claims he will suffer outweighs the need to protect the public.¹⁵ The Commission found that Malouf's "continued work as an investment adviser, combined with his apparent lack of understanding of the seriousness of his misconduct demonstrates that a bar is necessary to protect investors."¹⁶ Likewise, the Commission found the sufficient risk of future violations necessary to impose cease-and-desist orders.¹⁷ Malouf does not explain why these sanctions should be stayed despite these findings.¹⁸ Accordingly, none of the four factors militates in favor of a stay.

Nonetheless, the Commission has at times stayed monetary sanctions pending appeal without reference to the applicant's likelihood of success on the merits or the other components of the four-factor test.¹⁹ Under the circumstances and as a matter of discretion, we elect to stay the requirements in the Order that Malouf pay disgorgement plus prejudgment interest and a civil money penalty pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending the determination of that appeal.

Accordingly, IT IS ORDERED that the requirements in the Order that Malouf pay disgorgement plus prejudgment interest and a civil money penalty are stayed for sixty days from July 27, 2016 pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending determination of that appeal and the issuance of the court's mandate. The Order remains effective in all other respects.

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

Brent J. Fields
Secretary

¹⁴ *Lucia*, 2015 WL 6352089, at *1.

¹⁵ *Johnny Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *4 (Oct. 9, 2013) (finding, in denying a request for a stay, that respondent had not "shown that the financial losses he claims he will suffer outweigh protecting the public").

¹⁶ *Malouf*, 2016 WL 4035575, at *24.

¹⁷ *Id.* at *25.

¹⁸ In his reply brief, Malouf asserts that absent a stay his customers will be harmed because "they will necessarily have to seek the services of others." The Commission has held repeatedly that "failures to appreciate one's regulatory obligations outweigh[] claims . . . about the possible impact to clients." *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *5 (Jan. 29, 2013).

¹⁹ *See, e.g., Lucia*, 2015 WL 6352089, at *1 n.7.