

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 78066 / June 14, 2016

Admin. Proc. File No. 3-15764

In the Matter of
GARY L. MCDUFF

OPINION AND ORDER OF THE COMMISSION DENYING INTERLOCUTORY REVIEW

Petition filed: April 25, 2016
Last brief received: May 9, 2016

Gary L. McDuff seeks interlocutory review of pre-hearing decisions that the law judge made concerning the scope of a hearing and the evidence to be admitted in follow-on proceedings against him based on a federal district court order that enjoined him from future violations of certain registration, antifraud, and broker-dealer provisions of the federal securities laws.

The law judge previously granted a Division of Enforcement's motion for summary disposition in this matter and imposed a collateral bar.¹ McDuff appealed, and the Commission reversed, finding that the law judge had erred in applying preclusive effect to a civil complaint on which McDuff defaulted and a superseding indictment on which a jury returned a general jury verdict.² The Commission remanded the matter to the law judge for further consideration of two issues: (1) whether McDuff was acting as a broker or dealer at the time of his misconduct and, if so, (2) whether imposing sanctions against him is in the public interest. The law judge has scheduled a hearing for June 14 and 15, 2016.

As explained below, McDuff's petition for interlocutory review is denied. The Commission may at any time review an interlocutory ruling on any issue, whether on its own initiative or at a party's urging, even absent certification by a law judge. However, the issues raised by McDuff's petition are not appropriate for Commission review at this time, and we therefore deny his motion.

¹ *Gary L. McDuff*, Initial Decision Release No. 663, 2014 WL 4384138 (Sept. 5, 2014).

² *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119 (Apr. 23, 2015).

Facts and Procedural Background

The Commission instituted this follow-on proceeding on February 21, 2014, alleging that McDuff had been permanently enjoined by a United States district court from future violations of Securities Act Sections 5(a), 5(c), and 17(a);³ Exchange Act Sections 10(b) and 15(a);⁴ and Exchange Act Rule 10b-5.⁵ The injunction was entered after the Commission filed a civil complaint on March 26, 2008, alleging that McDuff participated in a wide-ranging scheme to defraud investors.⁶ After McDuff failed to answer the complaint, the district court granted the Commission's motion for default judgment, enjoined McDuff from further violations of the federal securities laws, and ordered him to disgorge \$136,336 plus \$65,004 in prejudgment interest and pay a civil penalty of \$125,000.⁷ McDuff did not appeal the district court's orders.

McDuff was indicted on August 13, 2009 and charged with laundering monetary instruments and conspiracy to commit wire fraud.⁸ McDuff was found guilty on both counts pursuant to a general jury verdict. On April 16, 2014, the district court sentenced McDuff to 300 months in prison and a three-year term of supervised release and ordered him to pay \$6,563,179 in restitution. The U.S. Court of Appeals for the Fifth Circuit affirmed McDuff's conviction and sentence on February 3, 2016.⁹

McDuff and the Division both moved for summary disposition. The law judge denied McDuff's motion and granted the Division's motion. The law judge found that there was no genuine issue of material fact that the Division had met the two statutory prerequisites for imposing remedial sanctions under Exchange Act Section 15(b)(6)—namely that the district court's entry of a default judgment against McDuff established that he had been acting as a broker-dealer at the time of his misconduct and that McDuff did not dispute that he had been enjoined from engaging in conduct in connection with the purchase or sale of a security.¹⁰ The

³ 15 U.S.C. §§ 77e(a), 77e(c), 77q(a).

⁴ *Id.* §§ 78j(b), 78o(a).

⁵ 17 C.F.R. § 240.10b-5.

⁶ Complaint, *SEC v. McDuff*, No. 3-08-cv-526 (N.D. Tex. Mar. 26, 2008).

⁷ *McDuff*, 2015 WL 1873119, at *1–2 (citing Final Default Judgment, *SEC v. McDuff*, No. 3:08-cv-526 (N.D. Tex. Feb. 22, 2013)).

⁸ Superseding Indictment, *United States v. Reese*, No. 4:09-cr-90 (E.D. Tex. Aug. 13, 2009).

⁹ *United States v. McDuff*, No. 14-40780, 2016 WL 425136 (Feb. 3, 2016).

¹⁰ *See* 15 U.S.C. § 78o(b)(6) (authorizing the Commission to determine whether a sanction is in the public interest if, as relevant here, (i) the respondent is associated, is seeking to become associated, or, at the time of the alleged misconduct, was associated or was seeking to become associated with a broker or dealer, and (ii) the respondent has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security); *see also, e.g., Gibson v. SEC*, 561 F.3d 548, 555 (6th Cir. 2009) (affirming Commission's imposition

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law judge then determined that a collateral bar was in the public interest based on the allegations in the civil complaint and superseding indictment.

McDuff appealed, and the Commission found that the law judge had erred in granting summary disposition. The Commission explained that, in the case of a default judgment, collateral estoppel “does not apply with respect to any issue in a subsequent action” and therefore the default judgment did not provide an adequate basis for finding that McDuff acted as an unregistered broker-dealer or determining that a collateral bar was in the public interest.¹¹ The Commission similarly held that the public interest determination could not be based on allegations in the superseding indictment. As the Commission explained, a jury convicted McDuff of money laundering and conspiracy to commit wire fraud in a general verdict without making a specific finding as to which, if any, of the alleged overt acts McDuff committed with respect to the wire fraud.¹² The jury’s general verdict that McDuff had committed money laundering established only that McDuff caused the transfer of illegal proceeds with the intent to promote wire fraud.¹³ The Commission therefore reversed and remanded the matter to the law judge for further proceedings to determine whether McDuff was acting as a broker or dealer at the time of his misconduct and, if so, to admit and consider additional evidence to determine whether imposing sanctions against McDuff is in the public interest.

On remand, McDuff and the Division again both filed motions for summary disposition. The law judge denied the motions and ruled that the matter would proceed to a hearing. During a February 18, 2016, prehearing conference, the law judge stated that there was “really only one question” that he needed to address, which was “whether or not [McDuff was] acting as a broker.” McDuff subsequently filed a motion for clarification of the law judge’s remarks and argued that the law judge should not limit the hearing to the “broker-dealer issue.” On February 29, 2016, the law judge responded in an order stating that the Commission had directed him to

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of a collateral bar in a follow-on proceeding where a broker-dealer was enjoined by a U.S. district court from violating the federal securities laws).

¹¹ *McDuff*, 2015 WL 1873119, at *2 (quoting *Arizona v. California*, 530 U.S. 392, 414 (2000)).

¹² *Id.* at *3 (citing *United States v. Jones*, 733 F.3d 574, 584 (5th Cir. 2013) (holding that conspiracy to commit wire fraud does not require that the defendant committed an overt act); *see also United States v. Wainer*, 211 F.2d 669, 672 (7th Cir. 1954) (observing that, “[o]bviously a general verdict of guilty, or for that matter the entry of a plea of guilty, on a count for conspiracy does not determine which of the particular means charged in the indictment were used to effectuate the conspiracy”)).

¹³ *McDuff*, 2015 WL 1873119, at *3 (citing *United States v. Valuck*, 286 F.3d 221, 225 (5th Cir. 2002) (describing elements of money laundering)).

consider two questions: whether McDuff was acting as a broker or dealer at the time of his misconduct, and what sanctions, if any, are in the public interest.¹⁴ The law judge further stated “[t]he question of sanctions was thoroughly addressed in the parties’ summary disposition briefing, and may not require additional evidence.”¹⁵ The law judge added, however, that he had “issued no orders and made no final rulings on the scope of the issues to be litigated at the hearing, and [he] intend[ed] to give both parties an opportunity to be heard on that subject before the hearing commences.”¹⁶

On April 1, 2016, McDuff filed another motion for a ruling on the scope of the hearing, arguing that the hearing should “not be limited to the broker-dealer issue” but “must be plenary instead.” The law judge held a second prehearing conference on April 11, 2016, during which McDuff argued that he should be allowed to relitigate issues from the underlying civil and criminal proceedings, including calling certain witnesses, and that the Division should not be allowed to rely on transcripts from those earlier proceedings. The law judge rejected these arguments, stating that McDuff could not relitigate issues that had been previously decided against him and finding that McDuff’s proposed witnesses were not relevant given the hearing’s limited scope—explaining that the “main issue” at the hearing would be to consider whether McDuff had acted as a broker-dealer at the time of his misconduct, but adding that “[t]he hearing will also proceed on some of the public interest factors.”¹⁷ To that end, the law judge stated that McDuff and his son could testify about whether a sanction would be in the public interest.

The law judge further stated that he “intend[ed] to rely upon the entirety of Mr. McDuff’s criminal record transcript” in making a final decision.¹⁸ The law judge acknowledged that many of the witnesses’ statements from the criminal trial “would not necessarily be considered admissible,” but concluded that “it would be in the interest of justice to do so” here because McDuff had the opportunity to cross-examine the witnesses at his criminal trial but chose not to do so.¹⁹ McDuff asked the law judge to certify his decisions for interlocutory review, which the law judge denied.

¹⁴ *Gary L. McDuff*, Admin. Proc. Rulings Release No. 3654, 2016 SEC LEXIS 754, at *2 (Feb. 29, 2016).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Transcript at 113.

¹⁸ *Id.* at 41.

¹⁹ *Id.* at 39; *see* Commission Rule of Practice 235(a), 17 C.F.R. § 201.235(a) (enumerating circumstances when prior sworn statements may be admitted into the record, including “in the interests of justice”).

I. Standards For Interlocutory Review

The Commission has “plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief.”²⁰ Section 4A of the Exchange Act provides that, with respect to the delegation of any of its functions, the Commission retains “a discretionary right to review the action of any . . . administrative law judge . . . upon its own initiative or upon petition of a party to or intervenor in such action. . . .”²¹ Indeed, the Commission has reviewed initial decisions of law judges and has corrected factual or legal errors, even when neither side has petitioned the Commission for review.²²

The Commission has directed law judges to prepare initial decisions in any proceeding at which they preside.²³ In so doing, law judges may regulate the course of a proceeding, including issuing subpoenas, receiving relevant evidence, and ruling upon procedural and other motions.²⁴ The propriety of each of those decisions, and the initial decision itself, are reviewable by the Commission.²⁵

²⁰ *Michael Lee Mendenhall*, Order Vacating Initial Decision and Remanding For Further Proceedings, Exchange Act Release No. 74532, 2015 WL 1247374, at *1 (Mar. 19, 2015).

²¹ 15 U.S.C. 78(d)-1(b).

²² *See, e.g., Robert I. Moses*, Exchange Act Release No. 37795, 1996 WL 580130 (Oct. 8, 1996) (reviewing and vacating sanction imposed by law judge, where neither party sought Commission review); *Hunter Adams*, Exchange Act Release No. 52859, 2005 WL 3240600 (Nov. 30, 2005) (remanding, following review on Commission’s own motion, order imposed by law judge for determination of whether offset on disgorgement was appropriate); *Duane Hamblin Slade*, Investment Advisers Act Release No. 4298, 2015 WL 9268719, at *1 (Dec. 21, 2015) (“Respondent . . . did not file a petition for review. The Commission has, on its own initiative, decided to review the initial decision for the limited purpose of reviewing and setting aside the municipal advisor and nationally recognized statistical rating organization (“NRSRO”) bars.”); *Dian Min Ma*, Exchange Act Release No. 74887, 2015 WL 2088438 (May 6, 2015) (vacating in part, on Commission’s own motion, law judge’s cease and desist order).

²³ 17 C.F.R. § 200.30-9(a); 17 C.F.R. 201.360(a)(1).

²⁴ 17 C.F.R. § 201.111; *see also A.S. Goldmen & Co, Inc.*, Order Postponing Proceedings, Admin. Proc. File No. 3-9933 (Sept. 1, 1999) (recognizing the Commission’s delegation of “its responsibilities for conducting hearings to a law judge”), *available at* 2000 WL 796128, at *4 n.14.

²⁵ Indeed, an initial decision of the Commission does not become a final decision of the Commission until the Commission takes action and issues a finality order. *See* 17 C.F.R. § 201.360(d)(2).

With respect to Commission review of a law judge's rulings prior to the issuance of an initial decision, Rule of Practice 400 provides the governing standards.²⁶ Rule 400 "is the exclusive remedy for review of a hearing officer's ruling prior to Commission consideration of the entire proceeding."²⁷

Rule 400 provides that rulings may be submitted to the Commission for interlocutory review by obtaining certification from the law judge.²⁸ A hearing officer "shall not certify a ruling" unless, upon application by a party, the hearing officer is of the opinion (1) that the ruling "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and (2) an "immediate review of the order may materially advance the completion of the proceeding."²⁹ However, that a law judge certifies a question for interlocutory review does not require that the Commission grant review.³⁰

The rule, however, also provides that the Commission may consider petitions for interlocutory review by a party who has not sought certification. Rule 400 provides that the

²⁶ See 17 C.F.R. § 201.400; see also *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 2004 WL 503739, at *12 & n.29 (Mar. 12, 2004) (amending Rule 400 to clarify that it is the sole route for interlocutory review of determinations by a law judge and the sole mechanism for appeal of actions delegated pursuant to 17 C.F.R. 200.30-9 and deleting the reference to 17 C.F.R. 200.30-9 in Rule 430); *Proposed Amendments to the Rules of Practice and Related Provisions*, Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003) (clarifying that Rule 430 permits review of matters delegated to the staff, that under 17 C.F.R. 200.30-9 certain matters are delegated to the law judges, and that those matters are subject to interlocutory review under Rule 400 and not Rule 430); cf. Rules 430 and 431, 17 C.F.R. §§ 201.430, 431. (Commission review of actions delegated to the staff); Rules 410 and 411, 17 C.F.R. §§ 201.410, .411 (Commission review of initial decisions).

²⁷ 17 C.F.R. § 201.400(a).

²⁸ 17 C.F.R. § 201.400(a), (c).

²⁹ *Id.* A "controlling question of law" is one that typically involves a "pure" question of law that can be decided "quickly and cleanly without having to study the record." *Ahrenholz v. Board of Trustees*, 219 F.3d 674, 676-78 (7th Cir. 2000) (denying interlocutory appeal). The hearing officer may also certify a ruling that "would compel testimony of Commission members, officers, or employees or the production of documentary evidence in their custody." *Id.*

³⁰ 17 C.F.R. § 201.400(a). Compare e.g., *Benjamin G. Sprecher*, Exchange Act Release No. 36574, 1995 WL 735903, at *1 (Dec. 12, 1995) ("The law judge has also certified to us her refusal to issue the subpoenas We find that interlocutory review of that ruling is not warranted or appropriate, and we accordingly decline to consider it.") with e.g., *Albert Glenn Yesner*, Exchange Act Release No. 42030, 1999 WL 955777, at *1 (Oct. 19, 1999) ("The Division then filed an application to have the December 3, 1998 Order ("Order") certified to us. The law judge certified the Order on December 11, 1998. We accept certification.").

Commission may decline to consider “the petition of a party who has been denied certification if it determines that interlocutory review is not warranted or appropriate under the circumstances.”³¹ That the Commission may *decline* to consider a petition for interlocutory review where certification is denied contemplates that there are also appropriate circumstances where the Commission may *accept* a petition for interlocutory review following a denial of certification. The Commission’s discretion to grant interlocutory review exists “even when the law judge has declined to certify the ruling in question.”³² A petition in such a posture is no different from a petition where certification has not been sought at all. The Commission’s authority to review a petition for interlocutory review—absent certification or where certification is denied—is derivative of its plenary authority over its administrative proceedings, and is embodied in Rule 400: the Commission “may, at any time, on its own motion, direct that any matter be submitted to it for review.”³³

Thus, a party, absent certification, may seek interlocutory review directly from the Commission. To the extent that prior Commission opinions or Rule 400 may be read to suggest

³¹ 17 C.F.R. § 201.400(a).

³² See, e.g., *Harding Advisory LLC*, Exchange Act Release No. 30892, 2014 WL 988532, at *4 n.15 (Mar. 14, 2014); *Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 370829, at *32772 (June 23, 1995) (“[T]he Commission may take up a matter on its own motion at any time, even if a hearing officer does not certify it for interlocutory review.”)

³³ *Rules of Practice*, 1995 WL 370829, at *32771; see also *Adoption of Amendments to the Rules of Practice*, 2004 WL 503739, at *12 (“[T]he Commission retains discretion to undertake such [interlocutory] review on its own motion at any time.”); cf. 17 C.F.R. § 201.411(d) (providing that on review by the Commission of an initial decision the Commission may, “at any time prior to the issuance of [a final Commission] decision, raise and determine any . . . matters that it deems material”).

otherwise,³⁴ we clarify—and state again—that the absence of certification is not a barrier to a party’s ability to seek interlocutory review of an issue before a law judge.³⁵

Nonetheless, the Commission’s “emphatic preference—which embodies the ‘general rule’ disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review after ‘the entire record [has been] developed’ and ‘after issuance by the law judge of an initial decision.’”³⁶ A party’s disagreement with the law judge’s determination “does not make a ruling ‘appropriate for interlocutory review.’”³⁷

Indeed, Rule 400 provides that petitions for interlocutory review are “disfavored” and will be granted only in “extraordinary circumstances” to “make clear that petitions for interlocutory review . . . rarely will be granted.”³⁸

The Commission has emphasized, for example, that it will not grant petitions for interlocutory review of “fact-bound, discretionary procedural rulings.”³⁹ Similarly, it will not grant petitions for interlocutory review of decisions about the hearing’s scope or the admission of

³⁴ In *Jean-Paul Bolduc*, Exchange Act Release No. 42096, 1999 WL 1048643, at *2 (Nov. 4, 1999), for example, we said that “Rule 400 does not contain any provision relating to a party’s ability to petition the Commission directly for interlocutory review of a hearing officer’s ruling.” That was the case at the time of that decision. See *Rules of Practice*, 1995 WL 370829, at *59. But the Commission subsequently amended Rule 400 to include the language regarding petitions for interlocutory review discussed above. *Adoption of Amendments to the Rules of Practice*, 2004 WL 503739, at *12, 29. Even under the prior rule, the Commission retained the authority to conduct interlocutory review on its own motion. 15 U.S.C. 78(d)-1(b); 17 C.F.R. 201.400 (1999). Indeed, although the law judge had declined to certify the ruling in *Bolduc*, the Commission determined “to review the law judge’s ruling in the July 2 Order on our own motion pursuant to Rule of Practice 400(a).” 1999 WL 1048643, at *2.

³⁵ For example, in *American Electric Power Co.*, Order Denying Intervention as a Party and Granting Right of Cross-Examination, Admin. Proc. File No. 3-11616 (Jan. 7, 2005), the law judge denied a party’s request to intervene in the proceeding, and denied certification of that ruling for interlocutory review. *Id.* Notwithstanding the denial of certification, we granted the party’s petition for interlocutory review and reversed the law judge. *Id.*; see also *Clarke T. Blizzard*, Advisers Act Release No. 2030, 2002 WL 662783, at *1 (Apr. 23, 2002) (granting interlocutory review “notwithstanding the denial of law judge certification”).

³⁶ *John Thomas Capital*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (footnotes omitted).

³⁷ *Id.* (citation omitted).

³⁸ *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting *Adoption of Amendments to the Rules of Practice*, 2004 WL 503739, at *12).

³⁹ *Nat. Blue Res.*, Exchange Act Release No. 74215, 2015 WL 470453, at *3 (Feb. 5, 2015); *accord Harding Advisory LLC*, 2014 WL 988532, at *5.

evidence.⁴⁰ The Commission will also not grant petitions for interlocutory review of “pre-trial discovery orders,” and “complaints about production of documents” will not ordinarily “warrant . . . interference with the orderly hearing process.”⁴¹ “When denying interlocutory review of law judges’ discovery rulings, the Commission has often invoked the principle that review following issuance of an initial decision is sufficient to protect parties’ rights.”⁴² Interlocutory review would be granted only in “a truly unusual case,” where “serious and prejudicial error were plainly apparent upon even a cursory review of the record,” and where “deferring review until issuance of an initial decision might well postpone an inevitable later vacatur and remand.”⁴³ Otherwise, the petition for interlocutory review will not present the “extraordinary circumstances justifying our intervention before the completion of proceedings before the law judge.”⁴⁴ The filing of a petition for interlocutory review “shall not stay proceedings” unless the law judge or the Commission enters an order to that effect;⁴⁵ thus, unless and until a stay is obtained, parties must continue to comply with the law judge’s rulings, file any required papers, and appear at scheduled hearings.⁴⁶

This standard for granting petitions for interlocutory review highlights the importance of the certification process:

First, issues that do not satisfy Rule 400(c) will almost never be appropriate for interlocutory consideration by the Commission. The Commission generally does not grant petitions for interlocutory review where the law judge has declined to certify the ruling.⁴⁷ The Rule 400(c) inquiry is intended to identify the rare set of issues that are appropriate for

⁴⁰ See *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *1 (Nov. 16, 1999).

⁴¹ *John Thomas Capital*, 2013 WL 6384275, at *3 (citing *Michael Sassano*, Exchange Act Release No. 56874, 2007 WL 4699012, at *3 (Nov. 30, 2007)).

⁴² *Id.* (citing *Lammert*, 2007 WL 2296106, at *7 (denying petition for interlocutory review regarding Division’s alleged failure to “preserve crucial evidence”)); *Kevin Hall*, Exchange Act Release No. 55987, 2007 WL 1892136, at *1 (June 29, 2007) (declining interlocutory review where respondents sought extension of time to review “tardy” production of Division’s investigative file); *Sprecher*, 1995 WL 735903, at *1 (denying interlocutory review of “law judge’s refusal to issue . . . requested subpoenas”).

⁴³ *John Thomas Capital*, 2013 WL 6384275, at *4 (citation omitted).

⁴⁴ *Id.* at *3 (citation and internal quotation marks omitted).

⁴⁵ Rule of Practice 400(d), 17 C.F.R. § 201.400(d).

⁴⁶ Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180.

⁴⁷ *Eric David Wagner*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012) (quoting *Montford & Co.*, Advisers Act Release No. 3311, 2011 WL 5434023, at *2 (Nov. 9, 2011)).

interlocutory review.⁴⁸ Rarer still are the extraordinary circumstances that are appropriate for interlocutory review but that do not involve issues that meet the standards of Rule 400(c).⁴⁹

Second, a petition for interlocutory review in a case where there has not been any consideration by the law judge of the relevant issues, *e.g.* where certification has not been sought, is also likely inappropriate for interlocutory consideration.⁵⁰ That is for good reason. As part of the certification process, the law judge makes certain determinations that are helpful to the Commission’s analysis as to whether interlocutory appeal is appropriate. The certification process, therefore, promotes the development of the record relevant to the Commission’s review of the interlocutory petition. A law judge’s evaluation of the Rule 400(c) factors, given its familiarity with the facts and legal issues involved in the case and the proceedings to-date, will aid the Commission’s determination as to whether interlocutory review is appropriate.⁵¹

⁴⁸ *Cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474–75 n.25 (“[The] [r]equirement that the Trial Court certify the case as appropriate for [interlocutory] appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases.”) (quoting H.R. Rep. No. 1667, 85th Cong., 2d Sess., 5-6 (1958)).

⁴⁹ *See Philip L. Pascale, CPA*, Order Granting Postponement of Administrative Proceedings, Admin. Proc. File No. 3-11194 (Nov. 24, 2003) (finding “extraordinary circumstances which justify Commission review,” notwithstanding the denial of certification, in light of the law judge’s refusal to postpone the hearing due to respondent counsel’s necessary post-operative medical treatment), *cited in Sassano*, 2007 WL 4699012, at *3 n.9

⁵⁰ *See Edward M. Daspin*, Exchange Act Release No. 77088, 2016 WL 492228, at *1 (Feb. 9, 2016) (treating the Division’s motion to stay proceedings before a law judge as “an interlocutory appeal” and ruling that the application was “premature” because “there ha[d] been no ruling by the law judge and the Division ha[d] not sought certification for interlocutory review”).

⁵¹ This is why, in some cases, we have said that, “[s]tanding alone, a failure to seek or obtain certification [is] basis enough for the Commission to deny . . . interlocutory review.” *John Thomas Capital*, Exchange Act No. 9664, 2014 WL 5282156, at *3 (Oct. 16, 2014) (quotations and alterations omitted); *accord Harding Advisory LLC*, 2014 WL 988532, at *4. In *John Thomas Capital*, 2013 WL 6384275, at *2, and *John Thomas Capital*, Exchange Act Release No. 71415, 2014 WL 294551, at *1 (Jan. 28, 2014), we also said that a party must “obtain[] certification from the law judge” before seeking interlocutory review. In each of these cases, and others, including *Bolduc*, *supra* note 34, in which we have said that the denial of certification presents a “sufficient basis” to deny a petition for interlocutory review, we have also done so while considering the merits of the application for interlocutory review and finding the denial of certification appropriate. *Harding Advisory LLC*, 2014 WL 988532, at *4; *John Thomas Capital*, 2014 WL 294551, at *1; *John Thomas Capital*, 2013 WL 6384275, at *2.

Accordingly, these statements should be understood as reflecting the Commission’s strong preference that a party seek certification to provide the Commission with the law judge’s views on whether the issues are worthy of interlocutory review, not a holding that absent certification,

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The Commission’s decision not to accept a petition for interlocutory review does not preclude a party from renewing his arguments before the Commission in an eventual appeal, and the Commission can provide any necessary relief in the course of its review process. The Commission “can, if necessary, remedy a law judge’s erroneous ruling as to the scope of [the hearing or record] ‘in the same way that an [appellate court can] remedy a host of other erroneous evidentiary rulings: by vacating [the initial decision] and remanding for a new’ hearing at which the parties have access to all the evidence to which they are entitled.”⁵² Furthermore, the Commission has the authority to direct that the record be supplemented pursuant to Rule of Practice 452 and allow additional briefing before issuing a final Commission decision.⁵³ The Commission may also request that any “document offered in evidence but excluded by the hearing officer . . . be transmitted to the Commission by the Secretary.”⁵⁴ The Commission’s review of an initial decision protects a party from any erroneous evidentiary rulings or other ruling which may not be appropriate for interlocutory consideration.

II. McDuff’s Petition Does Not Raise Issues Appropriate For Interlocutory Review

McDuff asks the Commission to review the law judge’s allegedly erroneous decisions that

(1) this public hearing will be limited to the broker-dealer issue as purportedly instructed by this Commission on summary disposition reversal and remand, (2) affidavits and declarations previously submitted by both parties will be admitted into evidence without a witness availability showing, (3) the transcripts of the underlying criminal trial would be admitted into evidence without affording the undersigned the right to call and cross-examine them because it was not done so

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the Commission lacks authority to grant such review. To the extent these statements imply that the absence of certification is a jurisdictional bar to interlocutory review, such an interpretation is inconsistent, as discussed above, with the Exchange Act, the Rules of Practice, and our authority over administrative proceedings.

⁵² *John Thomas Capital*, 2013 WL 6384275, at *3 (second and third alterations in original) (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108–09 (2009) (confirming “settled” rule disfavoring interlocutory review of “pretrial discovery orders” on the ground that “postjudgment appeals generally suffice to protect the rights of litigants”); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (observing that review of “[o]rders relating to discovery matters . . . must usually wait until a final judgment”)); *see also* Rule of Practice 452, 17 C.F.R. § 201.452 (providing that the Commission may “remand . . . the proceeding to a hearing officer for the taking of additional evidence as appropriate”).

⁵³ Rule of Practice 452, 17 C.F.R. § 201.452 (providing that the Commission “may accept or hear additional evidence”).

⁵⁴ Rule of Practice 460(c), 17 C.F.R. § 201.460(c).

in the criminal proceeding on different issues, and (4) issues already litigated at said criminal trial would not be retried.

We conclude that the issues that McDuff has identified do not warrant granting his petition.

First, the law judge’s rulings on admissibility of evidence are inappropriate, for the reasons we explain above, for interlocutory consideration. *Second*, the law judge’s pre-hearing decisions about what issues McDuff can litigate at the hearing and whether to allow prior witness statements all turn on issues of collateral estoppel⁵⁵—issues that involve quintessentially mixed questions of law and fact that are inappropriate for certification.⁵⁶

Moreover, an interlocutory review of the law judge’s rulings will not materially advance completion of the proceeding. If the Division is ultimately unable to establish that McDuff was acting as a broker or dealer, there would be no statutory basis for further proceedings, and many of the issues McDuff now raises would become moot.

Although the Commission finds no basis to grant the petition for interlocutory review, we take this opportunity to clarify the legal parameters around some of the issues in the proceeding in light of our plenary authority over administrative proceedings.⁵⁷ While the law judge is correct that a respondent in a follow-on proceeding cannot relitigate an underlying district court decision,⁵⁸ we note the preclusive effects of McDuff’s civil injunction and criminal conviction

⁵⁵ See, e.g., *Wolfe v. Perry*, 412 F.3d 707, 716 (6th Cir. 2005) (stating that “[t]he availability of collateral estoppel is a mixed question of law and fact”); *Ibrahim v. FINR III, LLC*, No. 8:15-cv-1093-T-17, 2016 WL 409630, at *2 (M.D. Fla. Feb. 3, 2016) (denying interlocutory appeal of bankruptcy court’s application of collateral estoppel because that type of ruling did “not raise issues of pure law that can be decided quickly and cleanly,” but rather raised “mixed questions of law and fact that would require the reviewing court to go rooting through the record in search of facts” (quotations omitted)).

⁵⁶ See, e.g., *Montford & Co.*, 2011 WL 5434023, at *2 (agreeing with the law judge’s decision not to certify respondents’ petition for interlocutory review where the controlling question was “a mixed one of law and fact”); *Sands Bros. Asset Mgmt., LLC*, Advisers Act Release No. 4083, 2015 WL 2229281, at *3 n.9 (May 13, 2015) (denying petition for interlocutory review where the law judge’s ruling did not involve a question of law that controlled the outcome of the proceeding).

⁵⁷ See, e.g., *City of Anaheim*, 1999 WL 1034489, at *1 (reviewing interlocutory order on Commission’s own motion “in the interests of expediting the disposition of this matter, avoiding a future remand, and providing general guidance with regard to the conduct of our proceedings”).

⁵⁸ See, e.g., *Elliot v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (refusing to entertain a collateral attack in a follow-on proceeding); *Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *5 (Aug. 26, 2011) (that “follow-on proceedings based on a criminal conviction are not an appropriate forum to ‘revisit the factual basis for,’ or legal defenses to, the conviction”); *Daniel Imperato*, Exchange Act Release No. 74596, 2015 WL 1389046, at *4 (Mar. 27, 2015) (stating that “doctrine of collateral estoppel precludes [respondent] from attacking in this

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are limited. The limited effect of those decisions include the related sentencing proceedings, which courts have warned should only be given preclusive effect “in those circumstances where it is clearly fair and efficient to do so” and that “the burden should be on the [party seeking preclusive effect] in the civil case to prove these elements.”⁵⁹ A respondent in a follow-on proceeding “may introduce evidence regarding the ‘circumstances surrounding’ the conduct that forms the basis of the underlying proceeding as a means of addressing ‘whether sanctions should be imposed in the public interest.’”⁶⁰ The law judge must also give careful scrutiny to any prior testimony that he determines may be introduced “in the interests of justice” under Rule 235⁶¹ but that was not subject to cross-examination.⁶² Given the preliminary stages of this proceeding, and

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proceeding the injunction and factual and procedural issues actually litigated and necessary to the district court’s decision”). The limitation on relitigating the underlying district court decision includes a prohibition against introducing “purported mitigation evidence that, in reality, constitute[s] a collateral attack on the [underlying] judgment.” *Siris v. SEC*, 773 F.3d 89, 96 (D.C. Cir. 2014).

⁵⁹ *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 306 (2d Cir. 1999) (stating that “precluding relitigation on the basis of [sentencing] findings should be presumed improper”); *see also Maciel v. C.I.R.*, 489 F.3d 1018, 1023 (9th Cir. 2007) (finding that criminal sentencing proceedings should not ordinarily be given preclusive effect in subsequent civil litigation); *United States v. Mickman*, No. CIV.A. 89-7826, 1993 WL 541683, at *3–4 (E.D. Pa. Dec. 22, 1993) (precluding defendant from contesting facts in civil litigation that he admitted during a previous sentencing hearing, but not precluding defendant from challenging facts that he disputed during sentencing but which the sentencing judge decided against him).

⁶⁰ *Schild Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *6 (Jan. 31, 2006) (quoting *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1110–11 (D.C. Cir. 1988) (agreeing with appellant’s argument that “[p]recluding petitioners in administrative disciplinary proceedings from presenting all evidence relevant to the issue of sanctions—whether or not previously presented to a District Court—would do violence to the considered allocations of adjudicatory responsibilities”).

⁶¹ 17 C.F.R. § 201.235(a).

⁶² *See, e.g., SEC v. Harrison*, 80 F. Supp. 226, 232 (D.D.C. 1948) (holding that investigative testimony that is not subject to cross-examination should not be disregarded, but “must be subjected to the strictest scrutiny for possible ambiguity and equivocation”), *appeal dismissed*, 184 F.2d 691 (D.C. Cir. 1950), *vacated as moot*, 340 U.S. 908 (1951).

the limited record presently before the Commission, we direct the law judge to determine in the first instance whether and to what extent these considerations apply here.

For the reasons above, it is ORDERED that Gary L. McDuff's petition for interlocutory review is denied.

By the Commission.

Brent J. Fields
Secretary