UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 78272 / July 8, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4446 / July 8, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32174 / July 8, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15141

In the Matter of MOHAMMED RIAD and KEVIN TIMOTHY SWANSON	PARTIAL STAY ORDER

Motion for stay filed:	June 24, 2016
Opposition filed:	July 1, 2016
Reply filed:	July 6, 2016

On June 13, 2016, the Commission issued an opinion and order finding that respondents Mohammed Riad and Kevin Timothy Swanson violated the antifraud provisions of the securities laws while associated with an investment adviser responsible for managing the portfolio of a closed-end investment company.[1] The Commission ordered respondents to cease and desist from violations of the securities laws, to disgorge ill-gotten gains, and to each pay a third-tier civil penalty. The Commission also imposed a permanent bar on Riad and a bar with the right to reapply after two years on Swanson.

Respondents now move for a stay of the Commission's Order Imposing Remedial Sanctions ("Order") pending judicial review.[2] We will deny the stay application; however, we

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1 *Mohammed Riad*, Exchange Act Release No. 78049, 2016 WL 3226836 (June 13, 2016).

2 The Commission *sua sponte* amended the opinion on July 7. *Mohammed Riad*, Exchange Act Release No. 78252, 2016 WL 3627184 (July 7, 2016), *amended opinion*,

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stay the disgorgement and civil monetary penalties imposed by the Order for the reasons discussed below.

The party requesting a stay pending appeal has the burden of establishing that a stay is justified.[3] The Commission's consideration of such requests is governed by the traditional, four-factor standard—namely, (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[4] Because the first two factors are the most critical, an applicant's failure to demonstrate the requisite likelihood of success or irreparable harm ordinarily will be dispositive of the stay inquiry.[5]

We conclude that respondents have not carried their burden on their request for a stay. Respondents have failed to demonstrate a likelihood that they will prevail on appeal. They urge the Commission to reflect upon the "gravity of the issues that will be considered by the appellate court on appeal." Yet their stay motion merely asserts, in conclusory fashion, that there are errors in the Commission's analysis.[6] Necessarily, they have failed to make a "strong showing

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Exchange Act Release No. 78049A, 2016 WL 3627183 (July 7, 2016). The Commission did not materially alter the opinion's reasoning or amend the Order itself. Thus, respondents' motion for a stay was appropriately directed to the June 13 Order. *See* Rule of Practice 401(c), 17 C.F.R. § 201.401(c).

3 *See, e.g.*, *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at *1 (Oct. 22, 2015); *Steven Altman*, Exchange Act Release No. 63665, 2011 WL 52087, at *2 (Jan. 6, 2011)).

4 *Raymond J. Lucia Cos.*, 2015 WL 6352089, at *1; *see, e.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Steven Altman*, 2011 WL 52087, at *2.

5 *See, e.g.*, *Nken*, 556 U.S. at 434; *Winter v. NRDC*, 555 U.S. 7, 22 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011).

6 In their reply in support of their stay request, respondents develop for the first time their contentions as to purported errors in the Commission's analysis. As these arguments were not made in the stay motion, we deem them waived. *See, e.g.*, *Gen. Carbon Co. v.* OSHA, 854 F.2d 1329, 1329 (D.C. Cir. 1988) (per curiam) (denying request for stay where motion failed to present argument on stay factors and finding that the movant's "attempt, by way of reply, to expand its arguments, and to address for the first time [the stay] factors omitted from its original motion, is unacceptable"); *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986). At any rate, even if the arguments had been timely presented, we would still find that respondents failed to establish a strong likelihood of success. They merely repeat arguments that the Commission already considered and rejected, *Riad*, 2016 WL 3226836, at *36 n.107 (bias); *id.* at *47-50 (Appointments Clause); *id.* at *50-51 (equal protection), or otherwise

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that [they] [are] likely to succeed on the merits." This factor thus weighs strongly against a stay.

Given respondents' failure to show a strong likelihood of success, they must marshal a much more compelling showing of irreparable injury absent a stay.[7] This they have also failed to do. To be cognizable, an asserted irreparable "injury must be both certain and great; it must be actual and not theoretical."[8] The Commission has consistently found that the kinds of harms asserted by respondents—*e.g.*, financial detriment, the loss of employment prospects, and the potential for collateral proceedings initiated by third parties—do not amount to irreparable injury.[9] So too here. For example, Swanson asserts that his reputation suffered when the CFA Institute, a professional organization, acted to summarily suspend his membership following the Commission's decision in this matter. Swanson identifies no concrete consequences flowing from loss of membership, let alone grave and irreparable ones. Moreover, as a general matter, a concern that the Commission's decision could be employed "against [the respondents] in collateral . . . litigation does not constitute irreparable harm because reversal of the decision on appeal . . . would vitiate its use in other proceedings."[10] If respondents ultimately prevail, there

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advance competing characterizations of the evidence or the governing legal regime that the Commission already declined to accept, *id.* at *33 & n.99, 39-42 (Form N-2); *id.* at *33-35 (value at risk); *id.* at *36-37 (foreseeability of 2008 financial crisis); *id.* at *18-19 (hedging); *id.* at *22-24, 38-39, App. B (advice of counsel); *id.* at *9-10, 27-31, App. A (scienter); *id.* at *22-25, 30, Apps. A-B (sufficiency of existing disclosures).

[7] *Sherley*, 644 F.3d at 393; *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

[8] *See, e.g.*, *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[9] *See, e.g.*, *Raymond J. Lucia Cos.*, 2015 WL 6352089, at *1; *William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) ("'Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough" to constitute irreparable harm.'") (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *see also Donald L. Koch*, Exchange Act Release No. 72443, 2014 WL 2800778, at *2 (June 20, 2014) ("[E]ven if Respondents could show the initiation of proceedings by professional organizations and state authorities were more than speculative, they have failed to show how the initiation of such proceedings constitutes an injury that is irreparable."); *Dawson James Sec., Inc.*, Exchange Act Release No. 76440, 2015 WL 7074282, at *3 n.15 ("[S]evere financial loss and damages to [a respondent's] reputation [caused by a bar] . . . d[id] not rise to the level of irreparable injury.") (quotation marks omitted); *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004) (holding that "financial detriment does not rise to the level of irreparable injury").

[10] *John Thomas Capital Mgmt. Grp.*, Exchange Act Release No. 73375, 2014 WL 5282156, at *4 (Oct. 16, 2014) (collecting cases).

is every reason to believe that the CFA Institute (and other third parties) will take note accordingly. Indeed, the CFA Institute's Rules of Procedure for Professional Conduct provide that a summary suspension of membership "may be rescinded . . . if the [affected member] provides reliable evidence demonstrating that the underlying . . . industry bar . . . has been reversed."[11]

Furthermore, any harm that might be suffered by respondents is outweighed by the danger posed by allowing them to continue to serve in the securities industry while their appeal is pending.[12] As explained in the Commission's opinion, the sanctions imposed on respondents are in the public interest. The Commission found that respondents' fraudulent "conduct was egregious and undertaken with scienter," "recurrent," and resulted in substantial losses to investors.[13] The Commission also found that respondents failed to "recognize[] the wrongful nature of their misconduct" or "suppl[y] assurances against future violations."[14] In light of these considerations, the Commission found that investor protection and the public interest required imposing bars. Respondents have provided no persuasive reason to revisit the determination that they pose a continuing, substantial threat to investors and to the public interest. Given these findings, consideration of the potential harm to third parties and the public interest supports keeping sanctions in place during the pendency of the judicial review process.

The instant matter is unlike *Michael E. McCune* and *Electronic Transaction Clearing, Inc.*, which respondents cite for the proposition that denying a stay "would put them in jeopardy of losing the benefit of a successful appeal." Those cases both involved short-term suspensions issued by an SRO that would likely terminate before the Commission could dispose of the

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11 *See CFA Institute*, Rules of Procedure for Professional Conduct Rule 10.6, *available at* https://www.cfainstitute.org/ethics/Documents/Professional%20Conduct%20Program%20Documents/rules_of_procedure.pdf (last visited July 6, 2016).

12 *See, e.g.*, *Al Rizek*, Exchange Act Release No. 41972, 1999 WL 955890, at *2 (Oct. 1, 1999) (finding that, despite applicant's claim that he would be forced to close his securities firm without a stay, "[a]ny harm that he may suffer from the denial of his stay request is outweighed by the danger he poses to customers and potential customers"), *denying request for stay pending appeal*, *Rizek v. SEC*, No. 99-2114 (1st Cir. Oct. 29, 1999), *aff'd*, 215 F.3d 157 (1st Cir. 2000); *Stratton Oakmont, Inc.*, Exchange Act Release No. 38026, 1996 WL 707982, at *2-3 (Dec. 6, 1996) (finding that, "[a]lthough the sanctions here will have a substantial impact on [the parties seeking a stay], … any harm that [they] may incur from the denial of . . . their stay requests is outweighed by the danger to the investing public if the effect . . . is delayed").

13 *Riad*, 2016 WL 3226836, at *44.

14 *Id.*

applicant's appeals.[15] In determining that a stay was appropriate, the Commission observed that requiring the suspensions to start immediately "could denigrate the benefits" of an eventual victory on appeal.[16] The Commission also noted that the underlying misconduct was not found by the SRO to be "so troubling as to necessitate a permanent bar"—only a "relatively short suspension[]."[17]

The bars imposed on respondents are materially different from the suspensions at issue in *McCune* and *Electronic Transaction Clearing*. Here, the Commission permanently barred Riad and barred Swanson with the right to reapply after two years. In so doing, it specifically found that a bar was necessary to provide "sufficient protection of the public interest and investors" given the seriousness of their misconduct and other considerations.[18]

The Commission has recognized the "significant distinction[s] between a true time-limited bar and a bar that includes a right to reapply after a certain period of time."[19] Unlike a suspension or a time-limited bar (whose duration is limited by its terms), a bar with the right to reapply does not create an entitlement to *automatically* rejoin the securities industry after a pre-determined period of time. Swanson is *eligible* to reapply after two years; if he submits an application at that time, the Commission would determine whether, "under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit [him] to function in the industry."[20] Thus, in the event that Swanson ultimately prevails in court and the Commission's sanctions against him are vacated, he would enjoy a meaningful, tangible benefit—the ability to resume his advisory practice without seeking relief from the

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15 *Michael E. McCune*, Exchange Act Release No. 77921, 2016 WL 2997935, at *1 (May 25, 2016) ("six-month suspension"); *Elec. Transaction Clearing, Inc.*, Exchange Act Release No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014) (same).

16 *See, e.g.*, *Elec. Transaction Clearing, Inc.*, 2014 WL 6680112, at *2.

17 *Id.*

18 *Riad*, 2016 WL 3226836, at *45.

19 *Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *9 n.45 (May 27, 2016); *see also Rockies Fund, Inc.*, Exchange Act Release No. 56344, 2007 WL 2471612, at *4 n.21 (Aug. 31, 2007) ("[A]lthough Respondents characterize the sanction . . . as a 'one-year bar and no fine,' the sanction was in fact a permanent bar with the right to reapply after one year.").

20 *See, e.g.*, *Ciro Cozzolino*, Exchange Act Release No. 49001, 2003 WL 23094746, at *3 (Dec. 29, 2003); *see also* Rule of Practice 193, 17 C.F.R. § 201.193 (governing applications by barred individuals for consent to associate). The Commission does not usually impose a "time-limited bar" in its administrative proceedings because a "bar with a right to reapply provides additional investor protection." *Page*, 2016 WL 3030845, at *9 n.45.

Commission—regardless of whether he prevailed before or after the two-year period had run.[21] In short, the considerations that motivated *McCune*, *Electronic Transaction Clearing*, and similar cases have no application to permanent bars (with or without the right to reapply) because the respondent is not in "jeopardy of losing the benefit of a successful appeal."

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.[22] We have not been presented with a developed argument as to the continued application of this practice. Therefore, under the circumstances and in our discretion, we elect to stay the monetary components of the Order Imposing Remedial Sanctions.

Accordingly, it is ORDERED that respondents' motion to stay sanctions is DENIED. On the Commission's own motion, it is further ORDERED that the requirements in the Order Imposing Remedial Sanctions that respondents pay disgorgement and civil money penalties are STAYED 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 and the issuance of the court's mandate. The Order Imposing Remedial Sanctions remains effective in all other respects.

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

Brent J. Fields
Secretary

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[21] At any rate, respondents are incorrect to assert that "it would not be surprising if final adjudication of [their] appeal were to take all or nearly all of those two years." For the 12-month period ending March 31, 2016, the median time from the filing of a notice of appeal to disposition on the merits by a United States Court of Appeals was 8.6 months. *See* Administrative Office of the U.S. Courts, *Federal Court Management Statistics—Profiles* (Mar. 31, 2016), *available at* http://www.uscourts.gov/file/19991/download (last visited July 6, 2016).

[22] *Raymond J. Lucia Cos.*, 2015 WL 6352089, at *1 n.7.