

SECURITIES AND EXCHANGE COMMISSION
Securities Exchange Act of 1934
Release No. 34-57028

December 21, 2007

File No. SR-NASD- 2006-109

In the Matter of the Application of

Richard L. Sacks

**For Stay of Commission Order Approving
Proposed Rule Changes by the National
Association of Securities Dealers,
Incorporated (n/k/a Financial Industry
Regulatory Authority, Incorporated)**

ORDER DENYING STAY

On November 13, 2007, Petitioner Richard L. Sacks (“Petitioner”) filed, in the United States Court of Appeals for the Ninth Circuit, a Petition for Review of a Securities and Exchange Commission (“Commission”) Order by delegated authority approving proposed changes to three rules of the National Association of Securities Dealers (“NASD” n/k/a Financial Industry Regulatory Authority, Inc. (“FINRA”)).¹ Pending such review, Petitioner filed with the Commission on November 16, 2007, a motion, pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 (“Exchange Act”),² requesting a stay of the Order approving changes to the three rules.³ On December 18, 2007, FINRA filed a brief opposing Petitioner’s Motion to Stay.⁴

The Division of Market Regulation (n/k/a Division of Trading and Markets) (“Division”), acting pursuant to delegated authority, approved the proposed rule changes on September 26, 2007.⁵ The September 26th Order was published in the Federal Register on October 3, 2007 and the changes are set to become effective on December 24, 2007 (“Effective Date”).⁶ After

¹ See Securities Exchange Act Rel. No. 56540 (Sept. 26, 2007), 72 FR 56410 (Oct. 3, 2007) (“September 26th Order”).

² 15 U.S.C. 78y(c)(2).

³ See Motion of Petitioner Richard L. Sacks For a Stay of the Sept. 26, 2007 Order (“Motion to Stay”).

⁴ See FINRA’s Brief in Opposition to Sacks’ Motion to Stay Pending Appellate Review, dated December 18, 2007. (“FINRA’s Opposition Brief”).

⁵ See September 26th Order, supra note 1.

⁶ Id. See also FINRA Regulatory Notice 07-57, Representation of Parties in Arbitration and Mediation (Nov. 2007).

reviewing the foregoing submissions, as well as the record underlying the September 26th Order, the Commission has determined, for the reasons discussed below, that the Motion to Stay should be denied.

I. Background

Petitioner's Motion to Stay challenges rule changes to NASD's Code of Arbitration for Customer Disputes ("Customer Code"), Code of Arbitration Procedure for Industry Disputes ("Industry Code"), and Code of Mediation Procedure ("Medication Code") that address who may represent parties in arbitration and mediation (hereinafter "rule changes"). Among other things, the rule changes provide that parties may be represented in an arbitration or mediation by a person who is not an attorney, unless state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred.⁷

NASD proposed these changes based on its view that it may be difficult for some investors to retain an attorney on a contingency-fee basis.⁸ While NASD stated investors should be able to seek other assistance for a more affordable fee in these circumstances, it also concluded that any non-attorney representatives should not be persons who have been found by a regulatory body, in essence, to be unfit to represent clients or conduct securities business with the public.⁹ To accommodate existing cases in which a party is represented by a person that is suspended or barred from the securities industry, NASD indicated that a barred or suspended individual may continue representing parties in cases pending prior to the Effective Date of the rule changes, but may not serve on new cases.¹⁰

Petitioner does not address the merits of his challenge to the rule. He only claims that he will be irreparably harmed if the rule is not stayed pending review. He states he has been representing parties in arbitrations since 1991.¹¹ Petitioner also states that prior to such time he was barred from the securities industry.¹² Petitioner is requesting a stay of the rule changes because the requirement that parties cannot be represented by non-attorneys that are currently suspended or barred from the securities industry in any capacity would prohibit Petitioner from representing parties in arbitration and mediation.¹³

In discussing the points raised by Petitioner, FINRA's Opposition Brief generally notes that Petitioner's Motion to Stay raises no new issues, and both FINRA and the Commission have

⁷ See Customer Code Rule 12208(c), Industry Code Rule 13208(c), and Code of Mediation Procedure 14106(c).

⁸ See September 26th Order, supra note 1, at 72 FR 56411.

⁹ Id.

¹⁰ Id.

¹¹ See Motion to Stay.

¹² Id.

¹³ Id.

considered all of the Petitioner's arguments in evaluating the rule changes under Section 19 of the Act.¹⁴

II. Discussion

Under Section 25(c)(2) of the Exchange Act, the Commission may grant a stay pending judicial review if it finds that "justice so requires."¹⁵ The Commission generally considers a request for a stay in light of four criteria: (A) whether the petitioner has shown a strong likelihood that he will prevail on the merits on appeal; (B) whether the petitioner has shown that, without a stay, he will suffer irreparable injury; (C) whether there would be substantial harm to other parties if a stay were granted; and (D) whether the issuance of a stay would likely serve the public interest.¹⁶ The applicant has the burden of demonstrating that a stay is warranted.¹⁷

The Commission has considered carefully the Motion to Stay in light of these four criteria. As discussed below, the Commission finds that the Petitioner has not demonstrated a substantial likelihood of success on the merits, nor has he demonstrated that the other three factors strongly favor interim relief.

A. Petitioner Has Not Demonstrated a Substantial Likelihood of Success on the Merits of His Appeal

To obtain a stay of a Commission order pending judicial review, Petitioner must demonstrate a strong likelihood of success on the merits of his appeal, yet petitioner does not address this element at all. The Commission notes that the imposition of a stay pending judicial review of an action by an administrative agency is an extraordinary remedy.¹⁸

Pursuant to Rule 430 of the Commission's Rules of Practice and Section 704 of the Administrative Procedure Act, a person aggrieved by a Commission action made by delegated authority must petition the Commission for review of that action as a prerequisite to seeking judicial review of a final order.¹⁹ An aggrieved person must file a written notice of intention to

¹⁴ See FINRA's Opposition Brief, at pg. 6.

¹⁵ 15 U.S.C. 78y(c)(2).

¹⁶ See, e.g., William Timpinaro, Order Denying Stay, Securities Exchange Act Rel. No. 29927 (Nov. 12, 1991), 50 SEC Docket 283, 290; Christian Klein & Cogburn, Inc., Order Denying Stay, Securities Exchange Act Rel. No. 33377 (Jan. 5, 1994), 55 SEC Docket 2622, 2624; see also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Commonwealth-Lord Joint Venture v. Donovan et al., 724 F.2d 67, 68 (7th Cir. 1983) (holding that the standard to be used in deciding applications for stays of administrative actions pending review is the same as for stays of district court orders pending review).

¹⁷ See Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1988).

¹⁸ See, e.g., Busboom Grain Co., Inc. et al. v. ICC et al., 830 F.2d 74, 75 (7th Cir. 1987) ("A strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process misfired.").

¹⁹ See 17 CFR 201.430(d) and 5 U.S.C 704.

petition for review within five days after the actual notice of the action to that aggrieved person, or fifteen days after publication of the notice of the action in the Federal Register, or five days after service of notice of the action on the aggrieved person, whichever is the earliest.²⁰ Within five days after the filing of a notice of intention to petition, the person seeking review is required to file a petition for review.²¹

The rule changes were approved by the Commission, acting by authority delegated to the Division, on September 26, 2007 and published in the Federal Register on October 3, 2007. Petitioner has not filed a notice of intention to petition the Commission for review, and more than fifteen days have passed since the date of publication of the September 26th Order in the Federal Register. As a result, Petitioner cannot satisfy the requirements for seeking Commission review pursuant to Rule 430 of the Commission's Rules of Practice. Since petition to the Commission for review of an action made by delegated authority is a prerequisite to seeking judicial review, this case should be dismissed by the Court of Appeals for failure to exhaust required administrative remedies, and petitioner has no likelihood of success on the merits.

B. Petitioner Has Not Demonstrated That He Would Suffer Irreparable Injury in the Absence of a Stay

In order to obtain a stay, Petitioner must also demonstrate that he will suffer irreparable injury absent a stay of the September 26th Order and that "the injury claimed is 'both certain and great.'"²² Petitioner states in his Motion to Stay that he relies on his income from representing parties in arbitration support himself and his wife, though he does not describe his financial situation or indicate how much hardship would result if the rule is not stayed pending review. He also asserts that if the rule changes are not stayed pending court review, his business will be destroyed in the interim. He does not explain why his business could not resume after review if the rule is set aside. Furthermore, the Commission has repeatedly held that "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay."²³ Apart from financial detriment, Petitioner has not alleged any injuries that would result in the absence of a stay.

C. Substantial Harm to Other Parties and the Public Interest

The third factor to be considered in granting a stay is the harm, if any, that could result to other parties if a stay is granted, and the fourth factor is the public interest. As noted above, the

²⁰ See 17 CFR 201.430(b).

²¹ See 17 CFR 201.430(c).

²² Cuomo, 772 F.2d at 976 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

²³ See Robert J. Prager, Securities Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 171. See also Joseph A Geraci, II, Admin Proc. File No. 3-11772, at p.3 (Dec. 22, 2004) (denying stay of personal bar despite applicant's claim of being the family's sole source of income and suffering person adverse financial effects.)

NASD proposed the rule based on its assessment of the public interest, including the protection of investors, yet petitioner does not address these factors in the Motion to Stay at all.

III. Conclusion

Petitioner does not address any of the relevant factors except to urge that he will suffer financial hardship if the rule is not stayed, and he faces an insuperable bar to judicial review of the challenged order because of his own failure to exhaust administrative remedies. Accordingly, the Commission finds that, in these instances, justice does not require a stay.

IT IS THEREFORE ORDERED, pursuant to Section 25(c)(2) of the Exchange Act, that the application of Petitioner filed on November 16, 2007 for a stay of the Order approving SR-NASD-2006-109 be, and hereby is, denied.

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

Nancy M. Morris
Secretary