UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

HOWARD MILLER

CFTC Docket No. 92-4

ORDER DENYING STAY

Respondent Howard Miller ("Miller") petitions the Commission to stay pending judicial review a civil monetary penalty imposed in our recent opinion and order. *In re Miller,* CFTC Docket No. 92-4, 2004 WL 1637297 (CFTC July 23, 2004). For the reasons that follow, the motion for stay is denied.

Litigants requesting a stay of the effective date must show that they are likely to succeed on the merits, that they will suffer irreparable harm if a stay is denied, and that neither the public interest nor the interests of any other party will be adversely affected if a stay is granted. Commission Rule 10.106(b)(2).

Miller principally claims that his challenge to the Commission's decision will likely be successful on the merits. A strong showing under this factor of the stay standard is a prerequisite to the relief he requests. *In re Mayer, [* 1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) p. 27,260 (CFTC Mar. 23, 1998). In this regard, he argues that the Commission did not comply with guidance provided by the appellate court in *Miller v.* CFTC, 197 F.3d 1227, 1235-1236 (9`h Cir. 1999). Miller, however, has made this assertion without any accompanying analysis. *See Mayer,* 127,260 at 46,142.

Thus, Miller has not made a persuasive argument that he is likely to succeed on the merits of his appeal.

We note that Miller also states that the Commission's decision "was signed by only three (3) Commissioners out of five (5) Commission seats and it included a dissent and a concurring opinion." Petition to Stay at 1. We infer that he contends these circumstances somehow impair the weight or persuasive power of the decision. This argument is unavailing. The Commission's authority is not determined by the number of commissioners in office. *See* Commodity Exchange Act § 2(a)(3). All Commissioners participating in this case agreed that a civil monetary penalty of $350,000 was warranted.

Miller contends that he will suffer irreparable financial harm if the stay is denied. He asserts that because the Commission revoked his registration in 1995, he is unable to pay the $350,000 civil monetary penalty. Miller also urges that a grant of the stay will not adversely affect the public interest and no other party will be adversely affected.

Pecuniary loss "falls far short" of the type of irreparable injury necessary for the relief sought. *Sampson v.* Murray, 415 U.S. 61, 91-92 (1974); *Haltmier v. CFTC,* 554 F.2d 556, 564 (2nd Cir. 1977); *In re Reddy,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) p. 27,272 (CFTC Mar. 9, 1998). *See also In re Grossfeld* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) p. 26,961 at 55,661 (CFTC Feb. 28, 1997) ("[t]he civil monetary penalty cannot be deemed an irreparable harm because it can always be refunded"). Furthermore, a stay pending judicial review would not serve the public interest. The Commission has been entrusted to enforce fair practice and honest dealing in the commodity futures markets. *Silverman v. CFTC,* 562 F.2d 432, 438 (7t' Cir. 1977). Although Miller is no longer registered, further delay in the imposition of the civil monetary penalty would serve only to erode public confidence in our stewardship of this trust. The public interest outweighs personal detriment to Miller.

We find that Miller has failed to demonstrate that he meets the requirements for grant of a stay. Accordingly, we deny his petition.

IT IS SO ORDERED.

By the Commission (Acting Chairman BROWN-HRUSKA and Commissioner LUKKEN).

Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: August 23, 2004