INITIAL DECISION RELEASE NO. 1053
ADMINISTRATIVE PROCEEDING
File No. 3-16463

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of AEGIS CAPITAL, LLC, CIRCLE ONE WEALTH MANAGEMENT, LLC, DIANE W. LAMM, STRATEGIC CONSULTING ADVISORS, LLC, AND DAVID I. OSUNKWO	INITIAL DECISION OF DEFAULT September 7, 2016

APPEARANCES: M. Graham Loomis, W. Shawn Murnahan, and Paul T. Kim for the Division of Enforcement, Securities and Exchange Commission

BEFORE: James E. Grimes, Administrative Law Judge

I grant the Division of Enforcement's motion for default as to Respondents Aegis Capital, LLC, and Circle One Wealth Management, LLC. The evidence presented by the Division, in combination with the allegations in the order instituting proceedings (OIP), which are deemed true for purposes of this order, establish that Aegis violated Sections 204 and 207 of the Investment Advisers Act of 1940 and Advisers Act Rules 204-1(a)(1) and 204-2(a). The evidence and the allegations establish that Circle One violated Sections 204 and 207 of the Advisers Act and Advisers Act Rule 204-2(a). For its conduct, Aegis is censured. Circle One is ordered to cease and desist from committing or causing violations of Sections 204 and 207 of the Advisers Act and Advisers Act Rule 204-2(a).

Procedural Background

As is relevant to Aegis and Circle One, the Commission initiated this proceeding in March 2015 by issuing an OIP under Section 203(e) and (k) of the Advisers Act and Section 9(b) of the Investment Company Act of 1940.[1] OIP at 1, 6; *see* 15 U.S.C. §§ 80a-9(b), 80b-3(e), (k).

[1] The OIP charges five respondents with various violations. The proceeding is ongoing as to the three respondents not addressed in this initial decision.

The Division alleges in the OIP that both Respondents violated Advisers Act Section 204 and Advisers Act Rule 204-2(a) and that Aegis violated Advisers Act Rule 204-1(a)(1).[2] OIP ¶¶ 23-24. As a general matter, these rules impose certain filing and record keeping requirements on investment advisers. *See* 17 C.F.R. §§ 275.204-1(a)(1), .204-2(a). The Division also alleges that Respondents violated Advisers Act Section 207. OIP ¶ 25. Section 207 prohibits willfully making material, untrue statements in filings submitted under Advisers Act Sections 203 or 204. 15 U.S.C. § 80b-7.

Because Respondents failed to timely answer the OIP, I ordered them to show cause why this proceeding should not be determined against them based on the allegations in the OIP. *Aegis Capital, LLC*, Admin. Proc. Rulings Release No. 2684, 2015 SEC LEXIS 1937, at *2 (ALJ May 18, 2015). In that order, I also directed that in the event Respondents failed to respond, the Division should "file a motion for default and sanctions." *Id.*; *see Aegis Capital, LLC*, Admin. Proc. Rulings Release No. 3692, 2016 SEC LEXIS 920, at *1-2 (ALJ Mar. 10, 2016). Respondents thereafter failed to respond to the order to show cause. The Division subsequently filed a timely motion for default and sanctions. I later granted the Division's request that it be permitted to amend its motion. *Aegis Capital, LLC*, Admin. Proc. Rulings Release No. 4016, 2016 SEC LEXIS 2553 (July 22, 2016). It filed its amended motion in August 2016.

Findings of Fact

The findings and conclusions in this initial decision are based on the record and on facts officially noticed under Commission Rule of Practice 323, 17 C.F.R. § 201.323. Because Respondents did not file answers to the OIP, and failed to respond to the order to show cause, they are in default. *See* 17 C.F.R. §§ 201.155(a), .220(f). As a result, I have accepted as true the factual allegations in the OIP relating to Aegis and Circle One.[3] *See* 17 C.F.R. § 201.155(a). In making the findings below, I have applied preponderance of the evidence as the standard of proof. *See Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14

[2] The Division does not specifically allege that Aegis is or was an investment adviser. *See* OIP ¶ 3. It only alleges that Circle One "formerly" was an investment adviser. *Id.* ¶ 4. The Division does allege, however, that each Respondent filed Forms ADV-W in 2012, withdrawing their registration statuses. *Id.* ¶¶ 3-4, 12. Form ADV-W is the form a registered investment adviser files "as a notice of withdrawal from registration as" an investment adviser. 17 C.F.R. § 279.2.

[3] The findings and conclusions in this initial decision apply only to Aegis and Circle One and do not apply to the remaining Respondents who are not the subject of this initial decision. Aegis or Circle One may move to set aside their defaults in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

(June 30, 2005) ("[I]t is well settled that the applicable standard . . . is preponderance of the evidence."), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

In part, this matter concerns Respondents' Forms ADV. Form ADV is used by an investment adviser to register with the Commission. *See* 17 C.F.R. §§ 275.203-1(a), 279.1. An adviser's Form ADV must be amended "[a]t least annually, within 90 days of the end of [the adviser's] fiscal year." 17 C.F.R. § 275.204-1(a)(1).

At all relevant times, Aegis and Circle One were investment advisers registered with the Commission. OIP ¶¶ 3-4, 23-25; Exs. A, B. In its 2009 Form ADV, filed in March 2010, Aegis asserted that it had almost $165 million in assets under management and over 1,500 client accounts. OIP ¶¶ 3, 10; Ex. A at 10. These figures were "grossly overstated" and "false."[4] OIP ¶¶ 1, 3, 17. Aegis did not file an annual update for 2010. *Id.* ¶ 12. It terminated its Commission registration in March 2012, when it filed a Form ADV-W. *Id.*

In its 2010 Form ADV, filed in March 2011, Circle One asserted that it had $182 million in assets under management and nearly 1,300 client accounts. OIP ¶ 14; Ex. B at 9. These figures were, as with Aegis, "grossly overstated" and "false." OIP ¶ 1, 4 17. Circle One overstated its assets under management by up to $119 million.[5] OIP ¶ 17; Ex. C at 3. Circle One terminated its registration status with the Commission in March 2012. OIP. ¶ 4. It terminated its registration status with state regulators in May 2012. *Id.* It is "no longer in business." *Id.*

Between 2009 and 2011 in the case of Aegis and between 2010 and 2011 in the case of Circle One, Respondents did not keep segregated books and records, instead maintaining these records in the name of their parent holding company. OIP ¶¶ 18-19.

> Specifically, [Respondents each] failed to make and keep [separate,] advisory-specific trial balances, financial statements, and internal working papers; journals, including cash receipts and disbursements, and any other records of original entry forming the basis of entries into ledgers; general ledgers reflecting asset,

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[4] The OIP does not allege the degree to which these figures were "grossly overstated." Instead it says that the 2009 figures were overstated in a manner similar to the overstatement alleged to have occurred with respect to 2010. OIP ¶ 17. But the OIP does not allege the degree to which *Aegis* overstated the number of its assets and clients in 2010. Instead it alleges combined overstatements by Aegis and Circle One for 2010.

[5] The OIP alleges that as of December 31, 2010, Respondents' combined assets under management was $62,862,270.28 and that Respondents' combined overstatement of assets under management was $119,137,728.72. OIP ¶ 17. Evidence submitted by the Division suggests that Aegis's assets under management were transferred to Circle One and then reported as Circle One's assets under management on Circle One's Form ADV filed in March 2011. Ex. C at 3. Aegis, therefore, apparently had no assets under management as of December 31, 2010, and Circle One was solely responsible for the "combined" overstatement of assets under management.

> liability reserve, capital, income and expense accounts; checkbooks, bank statements, cancelled checks and cash reconciliations; and bills or statements, paid or unpaid.

Id. ¶¶ 18-19. In August 2011, Commission staff asked Respondents to produce certain books and records they were required by regulation to keep. *Id.* ¶ 20. Respondents were unable to comply with the requests. *Id.* ¶ 21.

Conclusions of Law

Advisers Act Section 204 requires investment advisers to keep certain records and submit reports required by Commission rules. 15 U.S.C. § 80b-4(a). It also provides that an adviser's records are subject to examination by the Commission. *Id.* The Division need not prove scienter to show a violation of Section 204. *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *16 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

Under the grant of authority in Section 204, the Commission promulgated Advisers Act Rule 204-1(a)(1), which requires advisers to annually amend their Form ADV within ninety days of the end of the adviser's fiscal year. 17 C.F.R. § 275.204-1(a)(1). Although it filed its annual Form ADV update for 2009, Aegis failed to file an annual Form ADV update for 2010. OIP ¶ 12. By failing to file the update for 2010, Aegis willfully violated Section 204 and Rule 204-1(a)(1).[6] *See Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 989, 1985 WL 548332, at *1 (Sept. 24, 1985) ("It is well settled, however, that the failure to make a required report, even if inadvertent, constitutes a willful violation.").

Also under the authority in Section 204, the Commission promulgated Rule 204-2. 17 C.F.R. § 275.204-2. This rule requires advisers to maintain a variety of different types of "accurate and current . . . books and records," including, journals, ledgers, check books, bank statements, business-related bills, trial balances, financial statements, and business-related internal audit working papers. 17 C.F.R. § 275.204-2(a)(1), (2), (4), (5), (6). As noted, both Respondents failed to keep a number of books and records, all of which they were required by Rule 204-2(a) to keep. Respondents were also unable to comply with the Commission's request that they produce these records. Respondents therefore willfully violated Advisers Act Section 204 and Rule 204-2(a). *See Zion Capital Mgmt. LLC*, Advisers Act Release No. 2200A, 2003 WL 25596513, at *7 (Dec. 11, 2003) ("Zion's failure to maintain . . . records constituted willful violations of Advisers Act Section 204 and Rules 204-2(a)(3) and 204-2(a)(7) thereunder.").

Advisers Act Section 207 prohibits "willfully . . . mak[ing] any untrue statement of a material fact in any registration application or report filed with the Commission under section . . . 204, or willfully . . . omit[ting] . . . in any such application or report any material fact which is

[6] A respondent acts "willfully" if he or she intentionally commits an act or omission that constitutes a violation; a respondent need not know he or she is committing a violation. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *see SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla. 2007) (applying this definition of willfulness to Section 207); *SEC. v. Moran*, 922 F. Supp. 867, 900 (S.D.N.Y. 1996) (same).

required to be stated therein." 15 U.S.C. § 80b-7. Both Respondents submitted Form ADV updates that contained inaccurate information regarding Respondents' assets under management and their total number of clients. In the case of Circle One, the sheer magnitude of its false, overstated claims about its assets under management belies any possible argument that its conduct was not willful or that its untrue statements were not material. The allegations in the OIP thus support the determination that it violated Section 207. *See Warwick Capital Mgmt., Inc*., Advisers Act Release No. 2694, 2008 WL 149127, at *8 (Jan. 16, 2008).

As to Aegis, the OIP alleges that it grossly and falsely overstated its assets under management and number of client accounts. The OIP does not, however, allege anything specific about the magnitude of Aegis's overstatement—as opposed to the magnitude of the Respondents' combined overstatements. On the other hand, the OIP alleges that both Respondents "grossly overstated" their assets under management and number of client accounts. OIP ¶ 1. This means that Aegis's and Circle One's overstatements were "[c]onspicuous by reason of [its] size or other attention-getting qualities" or that it was "obvious by reason of [its] magnitude." Black's Law Dictionary (10th ed. 2014) (defining "gross"). It is therefore the case that even without knowing the exact degree to which Aegis overstated its figures, the magnitude of its overstatements shows that its overstatements were willful and material. Aegis thus violated Section 207. *See Warwick Capital Mgmt., Inc*., 2008 WL 149127, at *8.

Sanctions

In its revised motion, the Division asks that I censure Aegis and issue a cease-and-desist order against Circle One. Revised Mot. at 5. The Commission may censure an investment adviser if, during the time the adviser acted in its capacity as an investment adviser, the adviser willfully violated any provision of the Advisers Act or rules thereunder and censuring the adviser would be in the public interest.[7] 15 U.S.C. § 80b-3(e)(5); *see J.S. Oliver Capital Mgmt., LP*, Securities Act of 1933 Release No. 10100, 2016 WL 3361166, at *11 (June 17, 2016). The Advisers Act permits the Commission to issue a cease-and-desist order on determining that a "person is violating, has violated, or is about to violate any provision" of the Act or rules thereunder. 15 U.S.C. § 80b-3(k). I have determined that Respondents were investment advisers when they committed their violations. I have also determined that Aegis and Circle One each willfully violated Sections 204 and 207 of the Advisers Act. As a result, the only question is whether the public interest supports censuring Aegis and ordering Circle One to cease and desist.

To determine whether the public interest supports censuring a respondent, the Commission considers the factors discussed in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). *See Don Warner Reinhard*, Advisers Act Release No. 3139, 2011 WL 121451, at *6 & n.25 (Jan. 14, 2011). These public-interest factors include:

[7] The Advisers Act also permits the Commission to "place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser." 15 U.S.C. § 80b-3(e).

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

David R. Wulf, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016). The public interest "inquiry . . . is flexible, and no single factor is dispositive." *J.S. Oliver Capital Mgmt., LP*, 2016 WL 3361166, at *10 (citation and internal quotation marks omitted).

The Commission also considers the public-interest factors in deciding whether to impose a cease-and-desist order. *Thomas C. Gonnella*, Securities Act Release No. 10119, 2016 WL 4233837, at *14 (Aug. 10, 2016). In deciding whether to impose a cease-and-desist order, the Commission additionally

> consider[s] whether the violation [at issue] is recent, the degree of harm to investors or the marketplace resulting from the violation, . . . the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings[, and] . . . the risk of future violations.

Id. "[E]vidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *24 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002); *see Thomas C. Gonnella*, 2016 WL 4233837, at *14 ("Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation.").

As investment advisers, Aegis and Circle One owed their clients and prospective clients an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts' and the obligation 'to employ reasonable care to avoid misleading' their clients." *Anthony Fields, CPA*, Securities Act Release No. 9727, 2015 WL 728005, at *14 n.83 (Feb. 20, 2015) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194 (1963)); *see Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 WL 5172953, at *24 (Sept. 3, 2015) ("As an investment adviser, Lucia owed fiduciary duties to his prospective clients."), *pet. denied*, 2016 WL 4191191 (D.C. Cir. Aug. 9, 2016). Respondents each violated this duty by "grossly overstat[ing]" their client accounts and assets under management in their Forms ADV. OIP ¶ 1. Violating one's fiduciary duty by falsely reporting information that any reasonable investor would find material—claiming to have significantly more assets under management than was actually the case—alone makes Respondents' conduct egregious. *See Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *8 (noting that an investment adviser's size and asset base are important qualities to clients and prospective clients in selecting an investment adviser).

Respondents' conduct is exacerbated because they both failed to maintain the records they were required by Rule 204-2 to keep. They thereby frustrated the Commission's attempts to

examine their operations. That Aegis wholly failed to file its 2010 Form ADV update only makes its conduct more deserving of a sanction.

Respondents' record-keeping violations were ongoing, in that there is no evidence that they were ever remedied. They have also not shown that they recognize the wrongfulness of their actions. On the other hand, it appears that both Respondents are no longer in business. They are thus unlikely to repeat their misconduct.

Considering the foregoing, I find that the public interest at least supports censuring Aegis. *See Piper Capital Mgmt., Inc.*, Securities Act Release No. 8276, 2003 WL 22016298, *22 (Aug. 26, 2003) (censuring a respondent that had "ceased operations and exist[ed] in name only"). Because the public interest supports that sanction and the Division has not requested any other penalty, Aegis is censured.

Weighing the foregoing factors, I also find that the public interest supports imposing a cease-and-desist order on Circle One. As to the additional factors relevant to cease-and-desist orders, *see Thomas C. Gonnella*, 2016 WL 4233837, at *14, although Circle One's violations are not recent and there is no specific evidence of harm to investors or the marketplace, issuing a cease-and-desist order would serve an important remedial function. Additionally, the fact of Circle One's violations "raises a sufficient risk of future violation" to justify a cease-and-desist order. *Id.*; *see Piper Capital Mgmt., Inc.*, 2003 WL 22016298, at *22-23 (issuing a cease-and-desist order to a respondent that had "ceased operations and exist[ed] in name only").

Order

Under Section 203(e) of the Investment Advisers Act of 1940, Aegis Capital, LLC, is CENSURED.

Under Section 203(k) of the Investment Advisers Act of 1940, Circle One Wealth Management, LLC, shall CEASE AND DESIST from committing or causing any violations or future violations of Sections 204 and 207 of the Investment Advisers Act of 1940 and Rule 204-2(a) thereunder.

This initial decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360, 17 C.F.R. § 201.360. Under that Rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the initial decision. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the order resolving such motion to correct a manifest error of fact. This initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the

initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

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James E. Grimes
Administrative Law Judge