

SHER TREMONTE LLP

June 24, 2022

BY EMAIL [rule-comments@sec.gov]

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: In the Matter of Securities America Advisors, Inc.;
Administrative Proceeding File No. 3-20381;
Comments Regarding Proposed Plan of Distribution;
Notice of Proposed Plan, Exchange Act Rel. No. 94995 (May 26, 2022)

Dear Sir or Madam:

This letter transmits comments regarding a Proposed Plan of Distribution in the above-captioned administrative proceeding in response to the Notice of Proposed Plan and Opportunity for Comment dated May 26, 2022.

Relevant Facts

This firm represents one of the families who were victimized by both a lengthy fraud scheme perpetrated by Mr. Hector May (“May”) and his company, Executive Compensation Planners, Inc. (“ECP”), and the gross failure by Securities America Advisors, Inc. (“SAA”) and Securities America, Inc. (“SAI”) to fulfill their legal obligations to supervise May through effectively designed and implemented compliance policies and procedures. This firm’s client family was identified as “Client A” in the Order Instituting Administrative And Cease-and-Desist Proceedings, dated June 30, 2021, against SAA [Advisers Act Rel. No. 5762] (the “OIP”).

The OIP found that, during the period from November 2014 to March 2018, SAA violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder by failing to implement reasonably designed policies and procedures concerning: (a) surveillance alerts regarding client disbursements; and (b) review of client disbursement requests for possible misappropriation by persons associated with SAA and SAI. The factual findings in the OIP concern the November 2014 to March 2018 time period. For example, paragraph 11 of the OIP describes disbursements of \$500,000 from Client A’s accounts at SAA and SAI during the period from June to December 2015. Similarly, paragraph 13 of

the OIP concerns disbursements of \$300,000 from Client A's accounts during the period from February through December 2016.

The Commission imposed several sanctions against SAA for the violations that occurred during the November 2014 through March 2018 time period, including a civil monetary penalty in the amount of \$1,750,000. The OIP further provided for the creation of a Fair Fund with the fine paid by SAA.

On May 26, 2022, the Commission published a Notice of Proposed Plan of Distribution for the Fair Fund established by the OIP. The Proposed Plan of Distribution, www.sec.gov/litigation/admin/2022/34-94995-pdp.pdf, ("Proposed Plan") states that it "seeks to compensate investors who held advisory accounts at [SAA] during the period November 1, 2014 through March 31, 2018 . . . and who suffered a loss as a result of the misconduct described in the [OIP]." Proposed Plan, ¶ 2. The Proposed Plan asserts that "the Commission staff has reasonably concluded that it has all records necessary to calculate each investor's harm" and, therefore, the Proposed Plan does not include for harmed investors, such as Client A, to submit claims and then have those claims reviewed and either approved or denied as part of the Proposed Plan. *Id.* However, the Proposed Plan does not disclose the nature of the "records" on which the Commission staff intends to calculate investor harm other than to state that the "information [was] obtained by the Commission staff during and after its investigation . . ." *Id.*

The Proposed Plan further represents that "[a]s calculated using the methodology detailed in the Plan of Allocation (attached as Exhibit A), investors will be compensated for losses suffered from the misappropriation of assets from advisory accounts held at [SAA]." Proposed Plan, ¶ 3. The Proposed Plan further states "[i]n the view of the Commission staff, [the Plan of Allocation] methodology constitutes a fair and reasonable allocation of the Fair Fund." *Id.*, ¶ 4.

The Proposed Plan identifies Catherine E. Pappas ("Pappas"), an experienced attorney with the Commission's Division of Enforcement, as the proposed Fund Administrator. *Id.*, ¶ 28. The Proposed Plan defines "Preliminary Claimant" as a "Person . . . identified by [Pappas] based on [the Staff's] review and analysis of applicable records during and after its investigation, who held advisory accounts at [SAA] during [November 2014 to March 2018] and who may have suffered losses as a result of the misconduct described in the [OIA]." *Id.*, ¶ 20. The Proposed Plan does not disclose how Pappas and the Commission staff "identified" the investors "who may have suffered losses as a result of the misconduct described in the [OIA]."

The Plan of Allocation (Exhibit A to the Proposed Plan) directs Pappas to calculate "each Preliminary Claimant's loss [sic] Recognized Loss" by:

1. Adding up all the Investments made by a Preliminary Claimant in any SAA account during the period from November 2014 to March 2018;

2. Calculating “the time value of money” by applying to each Investment “the Short-term Applicable Federal Rate plus three percent, compounded quarterly” during the period from November 2014 to March 2018;
3. Adding the amount of the Investments and the “time value of money” calculation to create an “Aggregate Adjusted Investment” for each Preliminary Claimant;
4. Adding up all the “redemptions, periodic withdrawals, interest or division payments” recovered from the SAA accounts “as well as compensation . . . received from another source, such as amounts recovered through litigation against [SAA] or FINRA proceedings, to the extent known to [Pappas]”, defined as Recoveries;
5. Calculating the “time value of money” for each Recovery by using the same interest rate as applied to “Investments” during the same November 2014 to March 2018 time period;
6. Adding the amount of the Recoveries and the “time value of money” calculation to create an “Aggregate Adjusted Recovery” for each Preliminary Claimant; and
7. Calculating the “Recognized Loss” for each Preliminary Claimant by subtracting the Aggregate Adjusted Recovery from the Aggregate Adjusted Investment.

Comments

The Proposed Plan is fundamentally flawed for several reasons described below and should not be adopted by the Commission as proposed. Instead, the Commission should direct the Commission staff to modify the Proposed Plan and republish the modified plan for an additional comment period pursuant to Rule 1104 of the Commission’s Rules on Fair Fund and Disgorgement Plans.

<https://www.sec.gov/about/fairfund042104.htm>

The Plan of Allocation Makes No Sense

The harm inflicted on clients, including Client A and as described in the OIP, arose from misappropriations of client funds by May and ECP that went undetected by SAA and SAI. The OIP and the Proposed Plan describe those misappropriations as totaling approximately \$8 million. OIP, ¶ 5; Proposed Plan, ¶ 6. While the OIP only concerns the period from November 2014 to March 2018, the Commission staff is well aware that the fraud scheme -- and the failure to detect it -- lasted for a much longer time period before Client A blew the whistle on the scheme in March 2018. For Client A, the

first misappropriations occurred in 2001 and most of the harm caused to Client A occurred before November 2014.

Rather than base a Plan of Allocation on the misappropriations actually made by May/ECP during the Relevant Time Period (as required by the Commission's Fair Fund Rules), the Proposed Plan creates a convoluted calculation that involves all deposits and withdrawals from SAA accounts during the Relevant Time Period. As a result, the proposed Recognized Loss will be impacted by completely unrelated transactions executed in SAA accounts by the victim families, such as ordinary deposits into and withdrawals from those securities accounts. There is no basis for including transactions unrelated to the misconduct described in the OIP in the calculation of Recognized Loss.

Even worse, the Plan of Allocation does not include deposits made by victim families in SAA accounts prior to November 2014. Paragraph 11 of the OIP describes how Client A deposited \$700,000 into SAA accounts in June 2014 and, thereafter, as much as \$500,000 of those monies was misappropriated during the period from June to December 2015. Under the Plan of Allocation in the Proposed Order, Client A's Recognized Loss during the Relevant Period would not include the \$700,000 deposited in June 2014 even though the OIP identifies that deposit as part of the misconduct for which compensation will be available pursuant to the Fair Fund.

In a telephone conversation between Pappas and undersigned counsel on June 23, 2022, Pappas acknowledged that the definition of "Investment" in the Proposed Plan needed to be changed. In that same conversation, Pappas described how she expected the Commission staff to change that definition in the Final Plan so that it covered all monies misappropriated by May and ECP going back to 2000 and would not concern monies deposited or withdrawn from SAA accounts.

The potential change in the definition of "Investment" described by Pappas may solve some problems while creating others. For example, the misconduct that is intended to be compensated by the Fair Fund only concerns the Relevant Period – November 2014 to March 2018 – and the relatively modest fine paid by SAA reflects that limited time period. If the Commission had been able to charge SAA for misconduct that lasted at least 17 years (and it did) instead of just 3.5 years (due to the applicable statute of limitations), surely the Commission would have insisted on a civil monetary penalty well in excess of \$1.75 million. Any attempt by the Fair Fund to cover misconduct outside the Relevant Period stretches the Fair Fund too far and could result in improper allocation of the Fair Fund.

Given the fundamental change that the Commission staff acknowledges must be made to the Proposed Plan concerning the Plan of Allocation, the Commission should publish a new Notice of Proposed Plan and Opportunity for Comment rather than making changes to the Plan of Allocation without giving the victim families the opportunity for comment.

The Plan of Allocation Should Not Deduct Private Claim Settlements

As currently proposed, the Plan of Allocation will deduct “compensation *for the loss that resulted from the conduct described in the [OIP]* that was received from another source, such as amounts recovered through litigation against [SAA] or FINRA proceedings, *to the extent known to the Fund Administrator*” in the calculation of Recognized Loss. Proposed Plan, ¶ 22 (emphasis added).

This proposed deduction from Recognized Loss ignores the fact that the “amounts recovered through litigation against [SAA] or FINRA proceedings” by any victim family may or may not constitute “compensation for the loss that resulted from the conduct described in the [OIP].” For example, Client A sought to recover substantial damages in private civil litigation and a FINRA arbitration that were above and beyond the damages arising from misappropriations that occurred during the Relevant Period. The Proposed Plan does not provide any guidance to the Fund Administrator concerning how to distinguish between settlement monies that relate or do not relate to the misconduct described in the OIP. Moreover, the Proposed Plan provides for deduction of such compensation only if “known to the Fund Administrator.”

Given these uncertainties, the simpler, safer approach for the Plan of Allocation concerning this particular Fair Fund is not to deduct any collateral compensation received from private civil proceedings involving the victim families and others. There should be no doubt that none of the victim families have been made truly whole by any such settlements and that a share of the Fair Fund will still leave victim families far short of recovering the full damages caused by May/ECP, SAA and SAI. For example, Client A has obtained a default judgment against May/ECP in an amount greater than \$20 million and that judgment gave May/ECP full credit for the compensation recovered by Client A from other defendants in that action. Client A has no realistic hope of collecting a significant portion of that judgment because May forfeited all of his assets in connection with his guilty plea to Federal criminal fraud charges and is not scheduled to be released from prison until after he reaches age 90.

In the Alternative, The Proposed Plan Should Include A Claims Process

If a new Proposed Plan provides for a Plan of Allocation that includes deductions for collateral compensation received in private civil proceedings, then the Proposed Plan must include a claims process pursuant to Rule 1101(b)(4) of the Commission’s Fair Fund Rules. The Fund Administrator should not be given carte blanche to decide how information that has been received by the Commission staff on a purely informal basis should or should not be used to calculate deductions from the calculation of the Recognized Loss for each victim family. For example, even though Client A has received settlement compensation that does not cover all the damages suffered by Client A arising from the misappropriations that occurred *prior to November 2014*, the proposed Fund Administrator has informed undersigned counsel that she intends to deduct those

settlement funds in making the Recognized Loss calculation for the Relevant Period and thereby conclude that Client A suffered no Recognized Loss during the Relevant Period.

Without a claims process, Client A will not have any opportunity to present evidence to the Fund Administrator concerning both: (a) the losses suffered from misconduct described in the OIP concerning the Relevant Period; and (b) the losses suffered by Client A prior to the Relevant Period for which Client A has still not recovered in full. Other victim families are likely to be similarly situated to Client A, with the amounts of their still-unrecovered losses dependent on those families' individual circumstances. While there may be some cases in which the Commission's staff may precisely "calculate each investor's harm" (Proposed Plan ¶ 2), this is not one of those cases; a claims process will be necessary to give all of the victims the right to present full claims and evidence to the Fund Administrator if collateral settlements will be deducted in the calculation of Recognized Loss.

Conclusion

We appreciate the opportunity to submit these comments for consideration by the Commission. Client A fully appreciates all the hard work of the Commission staff in bringing successful enforcement proceedings against May, ECP and SAA. We hope that the Commission will modify the Proposed Plan, provide the victim families an opportunity to comment on the modified Plan, and thereafter distribute the Fair Fund to the victim families as further partial compensation for the losses they all suffered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Knuts". The signature is fluid and cursive, written in a professional style.

Robert Knuts