UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 77772 / May 5, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4382 / May 5, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32108 / May 5, 2016

Admin. Proc. File No. 3-16463

In the Matter of AEGIS CAPITAL, LLC, CIRCLE ONE WEALTH MANAGEMENT, LLC, DIANE W. LAMM, STRATEGIC CONSULTING ADVISORS, LLC, AND DAVID I. OSUNKWO	ORDER DENYING MOTION TO SEVER

Respondents Strategic Consulting Advisors, LLC ("SC Advisors"), and David I. Osunkwo ("Osunkwo," and, collectively with SC Advisors, the "Moving Respondents") request that we sever the claims against them from the remainder of this proceeding. The Moving Respondents have not demonstrated the "good cause" required under Rule of Practice 201(b) for severance, and we therefore deny the motion.[1]

I. Background

On March 30, 2015, the Commission issued an order instituting proceedings ("OIP") against registered investment advisors Aegis Capital, LLC ("Aegis Capital") and Circle One Wealth Management, LLC ("Circle One"); their Chief Operating Officer ("COO"), Diane W. Lamm ("Lamm"); and the Moving Respondents.[2] The OIP alleges that, between January 2010 and December 2011, SC Advisors—a firm that offered compliance consulting and Chief Compliance Officer ("CCO") services to investment management firms—provided those

[1] 17 C.F.R. § 201.201(b).

[2] *Aegis Capital, LLC*, Exchange Act Release No. 74608, 2015 WL 1407563 (Mar. 30, 2015).

services to Aegis Capital and Circle One (collectively, the "Registrants"). Osunkwo, an attorney and principal at SC Advisors, purportedly was designated to serve as the Registrants' CCO and reported to Lamm.

The OIP alleges that the Registrants failed to file timely and accurate reports with the Commission and to maintain required books and records.[3] On March 31, 2010, Aegis Capital allegedly filed a false 2009 Form ADV, which Lamm signed, overstating its assets under management ("AUM") and number of advisory accounts.[4] The OIP also alleges that Aegis Capital failed to file a required annual update of that form in 2011. As a result, Aegis Capital allegedly willfully violated Advisers Act Section 204 and Rule 204-1(a), which require a registered investment adviser to amend its Form ADV "[a]t least annually, within 90 days of the end of [its] fiscal year" and "[m]ore frequently, if required by the instructions to Form ADV."[5] SC Advisors and Osunkwo purportedly caused violations of these provisions.

As an additional basis for liability, the OIP alleges that, on March 31, 2011, "Osunkwo filed a [2010] Form ADV for Circle One" that overstated Circle One's AUM and number of advisory accounts. According to the OIP, "pursuant to the contract with SC Advisors, Osunkwo was responsible for, among other compliance-related matters, preparing, reviewing, and filing a Form ADV for Circle One for the year ended December 31, 2010." Osunkwo allegedly relied exclusively on estimated information that Circle One's Chief Investment Officer ("CIO") provided hours before the filing deadline. Although Osunkwo purportedly knew the information was estimated, he allegedly misrepresented that the CIO certified the contents of Circle One's Form ADV to be true and correct and forged the CIO's electronic signature on the filing. The OIP alleges that Circle One, SC Advisors, and Osunkwo, among others, willfully violated Advisers Act Section 207, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any [Form ADV], or willfully to omit to state in any such application or report any material fact which is required to be stated therein."[6]

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[3] The OIP does not assert any claims against the Moving Respondents based on violations of recordkeeping obligations. Rather, the Registrants are alleged to have willfully violated, and Lamm to have willfully aided and abetted and/or caused violations of, Advisers Act Section 204 and Rule 204-2(a).

[4] The OIP alleges that "Aegis Capital's Form ADV for that year was filed by Osunkwo based on information obtained from Lamm." In an order on a motion for more definite statement filed by the Moving Respondents, the law judge concluded that "[t]he Division [of Enforcement] is not relying on Aegis's 2009 Form ADV to demonstrate that Mr. Osunkwo and Strategic Consulting are liable." *Aegis Capital, LLC*, Administrative Proceedings Rulings Release No. 2732 (May 27, 2015), *available at* https://www.sec.gov/alj/aljorders/2015/ap-2732.pdf.

[5] 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-1(a).

[6] The OIP also asserts claims against Lamm and Aegis Capital under the same provisions.

On June 10, 2015, the law judge stayed this proceeding in favor of a related criminal proceeding against Lamm in which she was charged with securities and bank fraud.[7] The law judge found that the criminal proceeding arose "out of the same or similar facts" as the administrative proceeding, and that "a stay w[as] . . . in the public interest because without a stay both the criminal and administrative proceedings m[ight] be prejudiced."[8]

On January 21, 2016, the Moving Respondents filed a motion requesting that we sever the causes of action against them from those against the other respondents. They principally argued that good cause existed to grant this relief because, given the stay, they were unable to litigate the claims against them in a hearing and dispel "a cloud over Osunkwo's reputation and professional life" that they attributed to the proceeding. The Division of Enforcement opposed the motion.

On February 29, 2016, the law judge lifted the stay because the "defendants in the related criminal proceeding ha[d] pled guilty and the criminal trial has been canceled."[9] On March 7, 2016, the Moving Respondents filed a supplemental brief in support of their motion to sever. In that brief, the Moving Respondents argued that good cause still existed to grant their motion based on other arguments that they asserted in their initial briefing. The Moving Respondents argue, among other things, that (1) because Osunkwo was the Registrants' CCO, his actions should be evaluated under a different standard than applies to the other Respondents; (2) the claims against the Moving Respondents should never have been brought; and (3) the Commission should pursue claims against the Moving Respondents in federal court, rather than an administrative proceeding.[10]

II. Analysis

Under Rule of Practice 201(b), we may sever any proceeding with respect to one or more parties on a showing of good cause.[11] "[C]onsiderations of adjudicatory economy carry great

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[7] *Aegis Capital, LLC*, Administrative Proceedings Rulings Release No. 2794 (June 10, 2015) (Order on Stay Motion), *available at* https://www.sec.gov/alj/aljorders/2015/ap-2794.pdf.

[8] *Id.* at 3; *see also* Rule of Practice 210(c)(3), 17 C.F.R. § 201.210(c)(3) (providing that "a motion for stay shall be favored" on a showing that "a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding" is "in the public interest or for the protection of investors").

[9] *Aegis Capital, LLC*, Administrative Proceedings Rulings Release No. 3653 (Feb. 29, 2015) (Order Lifting Stay), *available at* https://www.sec.gov/alj/aljorders/2016/ap-3653.pdf.

[10] The Division subsequently filed a motion for leave to respond to the Moving Respondents' supplemental brief, which the Moving Respondents did not oppose. We grant the Division's motion and consider its attached response brief, as well as the supplemental brief to which the Division responds.

[11] 17 C.F.R. § 201.201(b). Rule 201(b) also provides that "[a]ny motion to sever must be made solely to the Commission."

weight in the analysis of [a] motion [to sever]."[12] Consolidated hearings have advantages, including that testimony and other evidence can be presented once on common issues, rather than multiple times in separate hearings.[13] Because we find that each of the Moving Respondents' three arguments in favor of severing the claims against them from the remainder of this proceeding fails to establish good cause, we deny their motion.

First, the Moving Respondents argue that severance is appropriate because different legal standards govern the conduct of the Registrants' COO (Lamm) and their CCO (Osunkwo), and "different factual questions, different witnesses, and different evidence . . . will be at issue." The Moving Respondents argue that "the Commission has implicitly recognized that there are significant differences between the facts and legal standards related to the liability of CCOs—as opposed to principals of the adviser—by bringing separate proceedings against each."

We are not persuaded. Osunkwo is alleged to have filed the false Aegis Capital Form ADV that Lamm signed, and the claims against the Moving Respondents involve their conduct with respect to the Registrants' Forms ADV and include claims that they caused predicate violations by other Respondents. These matters necessarily present common issues of fact and law.[14] The claims against one respondent also need not be identical to those against another respondent to support litigating the claims against them in a single proceeding.[15] Indeed, our Rules of Practice allow us to consolidate separate "proceedings involving a [single] common question of law or fact."[16] And to the extent that the different legal standards apply to the

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12 *David A. Finnerty*, Exchange Act Release No. 56756, 2007 WL 3274455, at *3 (Nov. 6, 2007) ("*Finnerty II*") (internal citation omitted).

13 *See David A. Finnerty*, Exchange Act Release No. 52207, 2005 WL 1963821, at *2 (Aug. 4, 2005) ("*Finnerty I*") (concluding that the existence of "common legal, factual, and evidentiary issues" "indicates that a single proceeding [against multiple respondents] will be more efficient than separate trials from the standpoint of judicial economy and financial resources").

14 *See, e.g.*, *Phlo Corp.*, Exchange Act Release No. 55562, 2007 WL 966943, at *8 (Mar. 30, 2007) ("To establish that A. Hovis was a cause of Phlo's violations, Enforcement was required to show that (1) Phlo committed a primary violation, (2) an act or omission by A. Hovis caused the violation, and (3) A. Hovis knew or should have known that her act or omission would contribute to the violation.").

15 *See Finnerty I*, 2005 WL 1963821, at *1-2 (rejecting respondents' argument that claims against them should be severed despite respondents' assertion that "the particularized charges against each respondent allege[d] improper trading in different stocks at different times"); *cf. Michael Bresner*, Exchange Act Release No. 68464, 2012 WL 6608195, at *1, *2 (Dec. 18, 2012) (denying motion to sever claims against a respondent for failure to supervise from underlying claims against registered representatives, although proceeding included claims against one representative that respondent was "not alleged to have supervised").

16 Rule of Practice 201(a), 17 C.F.R. § 201.201(a).

alleged violations of each respondent,[17] it is routine to adjudicate such cases in a single consolidated proceeding when there is a common nucleus of facts, as there is here.[18] Therefore, administrative efficiency favors litigating such claims here in a single proceeding.

We also reject Moving Respondents' argument that, because we have brought separate administrative proceedings against CCOs and principals in other cases, we also should do so here. The Commission's decision whether to institute one or more proceedings is discretionary. Our determination to pursue separate cases in one instance under the applicable facts and circumstances does not mean that we must do so in every case. In any event, Respondents base their argument on three settled proceedings in which we accepted separate offers of settlement from individual respondents.[19] These cases were not litigated, either together or separately, and do not support severance here.

Second, the Moving Respondents argue that the case against them should not have been brought because the Division is "doing nothing more than challenging the exercise of Osunkwo's good faith judgment" as a CCO. But this is an argument about the merits of the allegations against Osunkwo and is not relevant to whether the Moving Respondents have established the required good cause to sever the proceeding.

Third, the Moving Respondents contend that the claims against them should be severed and the Commission should proceed in federal court based on a May 2015 Division policy statement regarding its forum selection recommendations.[20] Citing a single factor articulated in

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[17] In ruling on the Moving Respondents' motion, we do not address the merits of the claims against any of the respondents, which are pending before the law judge. Nor do we suggest any view of them.

[18] *See, e.g.*, *Finnerty I*, 2005 WL 1963821, at *2 (denying motion to sever in light of "common legal, factual, and evidentiary issues in these proceedings"); *Finnerty II*, 2007 WL 3274455, at *3 (same); *cf. Bresner*, 2012 WL 6608195, at *2 (declining to sever claims against supervisor in light of the fact that "the Division commonly pursues combined proceedings against alleged violators of the securities laws together with their supervisor(s)").

[19] *Theodore R. Augustyniak*, Advisers Act Release No. 4175, 2015 WL 4882533, at *1 (Aug. 17, 2015) ("In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement . . . which the Commission has determined to accept."); *Tamara Kraus*, Advisers Act Release No. 4176, 2015 WL 4882534, at *1 (Aug. 17, 2015) (same); *Bradford D. Szczecinski*, Advisers Act Release No. 4177, 2015 WL 4882535, at *1 (Aug. 17, 2015) (same).

[20] *See Division of Enforcement Approach to Forum Selection in Contested Actions*, https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf (setting out a nonexclusive "list of potentially relevant considerations" that "the Division may in its discretion consider . . . in assessing whether to recommend that a contested case be brought in the administrative forum or in federal district court"). "The Division's forum recommendations are in all cases subject to review and approval by the Commission." *Id.* at 1.

the statement,[21] Respondents argue that district court litigation is appropriate because we purportedly we do "not have an inherent expertise" in resolving "unsettled and complex legal issues of federal law" pertaining to Advisers Act Rule 206(4)-7. We disagree, but even assuming that this factor weighs in the Moving Respondents' favor, there are many other factors that the Division considers under its policy statement, and the policy statement does not "create any rights, substantive or procedural, enforceable at law by any party in any matter."[22] The Commission has the sole discretion to determine whether to institute administrative proceedings or file a civil enforcement action in district court, and the Commission appropriately invoked its discretion to authorize an administrative proceeding for the case against the Moving Respondents.[23]

Because they have failed to establish good cause for severing the claims against them from the remainder of this proceeding, IT IS ORDERED that the motion of Strategic Consulting Advisors, LLC, and David I. Osunkwo to sever is accordingly DENIED.

By the Commission.

Brent J. Fields
Secretary

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21 *See id.* at 3 ("If a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission's rules, consideration should be given to whether, in light of the Commission's expertise concerning those matters, obtaining a Commission decision on such issues, subject to appellate review in the federal courts, may facilitate development of the law.").

22 *Id.* at 4.

23 *See* 17 C.F.R. § 202.5(b) (providing that "[a]fter investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings …, initiation of injunctive proceedings in the courts," among others); *Harding Advisory LLC*, Securities Act Release No. 9561, 2014 WL 988532, at *8 (Mar. 14, 2014) ("Simply put, the Commission takes many considerations into account when deciding whether, in its sole discretion, to institute administrative proceedings.").

Respondents also argue that, if the proceeding remains in the administrative forum, proposed amendments to our Rules of Practice should apply to it. *See Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 75976 (Sept. 24, 2015), 80 Fed. Reg. 60091, 60097 (Oct. 5, 2015) (stating that "we have determined that it would be useful to publish these proposed rules for notice and comment before adoption"). Because these rules are proposed, and not final, only the current Rules of Practice apply to this proceeding.