UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16463

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In the Matter of

AEGIS CAPITAL, LLC, CIRCLE ONE
WEALTH MANAGEMENT, LLC,
DIANE W. LAMM,
STRATEGIC CONSULTING
ADVISORS, LLC and
DAVID I. OSUNKWO

Respondents.

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RESPONDENT STRATEGIC CONSULTING ADVISORS, LLC PRE-HEARING BRIEF

Respondent Strategic Consulting Advisors, LLC ("Strategic Consulting" or "SC" or "Compliance Consultants") hereby submits the following as its pre-hearing brief.

I. INTRODUCTION

The underlying facts of this case and applicable law and longstanding Commission precedent do not support the claims by the Division against Strategic Consulting on the following grounds as discussed further herein.

- Respondent Strategic Consulting as a Defunct and Dissolved Entity for the Last 4 ½ Years Should Be Dismissed from this Proceeding and Not Be Deemed Liable under Commission Precedent and Opinions
- No Sanctions under the Governing Steadman Factors Are Warranted against Respondent Strategic Consulting as a Defunct and Dissolved Entity for the Last 4 ½ Years
- There Is No Basis For Asserting Claims Against Strategic Consulting As A Chief Compliance Officer or as a Guarantor of Its Compliance Client's Conduct or Compliance
- An Investment Adviser Firm's Management and Senior Executives Are Clearly Responsible

For Supervision And Compliance By Their Firm With The Securities Laws, Including The Filing Of Accurate Form ADVs, Not A Compliance Services Firm Which Only Acts as a Third-Party Service Provider As Opposed To Operating or Supervising The RIA Firm

- There Is No Basis For Asserting Claims Against Strategic Consulting As a Mere Third-Party Outside Compliance Consultant and Advisor For a Compliance Client's Own Violations Of Advisers Act Sections 207, 204 Or Other Provisions Of The Advisers Act
- There Is No Basis For Asserting A Claim That Strategic Consulting Aided And Abetted Aegis' or Circle One's Filing Of Form ADVs With Inaccurate AUM As It Neither Knew That Aegis or Circle One Miscalculated Its AUM or Number of Accounts, Nor Were There Any Red Flags That Would Have Put It On Notice Of The Same
- Similarly, There Is No Basis For Asserting A Claim That Strategic Consulting Caused Circle One or Aegis To File Form ADVs With Inaccurate AUM or Number of Accounts Information
- Aegis Had No Obligation to File a Form ADV Pursuant to Rule 204-1(a)(1) Once Circle One Claimed All its Assets In Connection with the Acquisition and Subsequent Internal Merger-Consolidation Reorganization into Circle One, But Rather Was Required to File a Form ADV-W Which Circle One / Aegis Management Repeatedly Delayed Filing Despite Osunkwo Having Prepared it and Directing Them To Do So

Also Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section I of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein. For the reasons set forth herein, Respondent Strategic Consulting submits that the Division's claims are not justified by the facts or law.

II. FACTUAL BACKGROUND & UNDERLYING CIRCUMSTANCES

Evidence at the hearing will show the following:

1. Strategic Consulting is an Illinois limited liability company (LLC) that was dissolved by the Illinois Secretary of State as of February 2012 (see Exhibit #133). Since such dissolution, Strategic Consulting has been non-operational, defunct, and has not conducted business for approximately 4 ½ years.
2. To my knowledge, Strategic Consulting no longer has a bank account as its sole business account was closed or suspended on or about the end of year 2014 due to inactivity. At the time of such account closing or suspension, the account reflected approximately $16 (see Exhibit #134).

3. Strategic Consulting has never been registered with or regulated by the SEC.
4. During the relevant timeframe, Strategic Consulting entered into 2 consecutive compliance consulting and support services agreements with Capital L Group, LLC in relation to compliance consulting and support services for 2 RIA firms, Aegis Capital and Circle One Wealth Management. In addition, such agreements also provided for compliance consulting and advisory services for Capital L registered and un-registered affiliate RIAs, broker-dealers, private fund managers and affiliated private funds, and commodity pool operator and commodity trading adviser. The term of each these 2 agreements was approximately one-year in length and services were rendered under the terms of these agreements in exchange for the agreed-upon compensation as a third-party service provider compliance and outsourcing services firm.
5. The term of the 2nd of these 2 compliance services agreements was approximately March 2011 through February/March of 2012. Since the November/December 2011 period and the subsequent December 2011 early termination of this 2nd compliance services agreement by Capital L Management, Strategic Consulting has received no further compensation or fee payments, or monies from Capital L or any of its affiliates covered by such agreement.

Also, Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section II of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

III. LEGAL ANALYSIS & ARGUMENTS

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

A. Respondent Strategic Consulting as a Defunct and Dissolved Entity for the Last 4 ½ Years Should Be Dismissed from this Proceeding and Not Be Deemed Liable under Commission Precedent and Opinions

The Commission has dismissed administrative proceedings against respondent entities--none of which were registered with the Commission--where the administrative proceedings are no longer appropriate against such remaining respondents because they were "defunct entities, non-operational, not in good standing, and have no assets. The Commission explained it is appropriate to grant dismissal of the proceedings against such unregistered firms. See Diego F. Hernandez, Exchange Act Release No. 72210, 2014 WL 2112155, at *1 (May 21, 2014) Similarly, dismissal is

warranted where a respondent entity is defunct and is no longer operational, having withdrawn its registration. As to potential monetary relief in this context, the Commission has agreed that there is nothing for such a respondent to disgorge "because the conduct alleged in the OIP did not result in the firm receiving any money," and such respondent firm has minimal assets that could be used to satisfy any civil penalty imposed against it. See, e.g., Crucible Capital Management, LLC, Exchange Act Release No. 77414 (Mar. 21, 2016); Diego F. Hernandez, Exchange Act Release No. 72210, 2014 WL 2112155, at *1 (May 21, 2014) (granting motion to dismiss anti-fraud proceeding against respondents that were "defunct entities, non-operational, not in good standing, and have no assets"); LPB Capital d/b/a Family Office Grp., LLC, Exchange Act Release No. 69885, 2013 WL 3271085, at *1 (June 28, 2013) (granting motion to dismiss charges against "defunct entity that is non-operational, is not in good standing, has no assets, and has already withdrawn and terminated its Commission and state registrations").

Based on the above, dismissal would be appropriate and warranted for Strategic Consulting given that it has been a defunct and dissolved entity for the last 4 ½ years, non-operational, not in good standing and with minimal to no assets. Regarding potential monetary relief in this context, the Commission has concluded that there is nothing for such a respondent to disgorge where "the conduct alleged in the OIP did not result in the firm receiving any money," and such respondent firm has minimal to no assets that could be used to satisfy any civil penalty imposed against it. This is the case with respect to Strategic Consulting.

B. No Sanctions under the Governing Steadman Factors Are Warranted against Respondent Strategic Consulting as a Defunct and Dissolved Entity for the Last 4 ½ Years

In determining sanctions, the Commission must first consider such factors as:

> 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.

(Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978))). As recently as June 2016, Judge Fox-Foelak issued an Opinion-Order in which the Steadman factors were applied in the context of a defunct entity in an administrative proceeding and explained as follows:

> It is also noted, **with reference to the so-called Steadman factors that must be considered in determining sanctions, <u>the fact that respondent entity is defunct</u>**

> **means that "the likelihood that [its] occupation will present opportunities for future violations" is nil.** (RAHFCO Management Group, LLC, Admin. Proc. Rulings, Release No. 3903 (Jun. 8, 2016) (emphasis added))

Judge Foelak concluded dismissal was appropriate under the Steadman factors and and urged for dismissal of the proceeding.

As applied by Judge Foelak, these Steadman factors which must be considered in determining sanctions, do not compel any sanction in this matter involving a defunct entity Strategic Consulting, but instead are grounds for dismissal since the fact that respondent entity is defunct means that the likelihood that its occupation will present opportunities for future violations is nil. Moreover, the Steadman factors when applied indicate that no sanction is justified or warranted under these facts in any event where firm management appears to have abdicated and/or attempted to avoid any responsibility for filing the firm's Form ADV.

C. There Is No Basis For Asserting Claims Against Strategic Consulting As A Chief Compliance Officer

It is Respondent's understanding that the Division is contending that because Strategic Consulting entered into a compliance consulting contract with Aegis/Circle One, Strategic Consulting can be held liable for providing services as part of the "office of Chief Compliance Officer" and therefore could be held liable based on such status for aiding or abetting or causing Aegis or Circle One to violate the Advisors Act. Strategic Consulting, however, could not have been acting as Chief Compliance Officer for Aegis or Circle One because [as outlined above], Rule 206(4)-7(c) provides that a **Chief Compliance Officer must be a supervised individual**. Strategic Consulting as an entity by definition is not an individual nor a "supervised individual". In addition, [as set forth above], compliance officers are not supervisors of or legally responsible for a firm's business operations or compliance with the law. CCO FAQ, p. 2-3. Nor are we aware of any basis upon which the Commission or Division could assert standing to step into the shoes of Aegis or Circle One and bring an action against Strategic Consulting based on the existence of a contractual relationship between either Aegis or Circle One or parent company and non-registrant Capital L and one of its third-party service providers such as Strategic Consulting.

In so far as Strategic Consulting was not and could not be the CCO, to the extent the Division's

conclusions regarding Strategic Consulting's conduct is simply derivative of Respondent Osunkwo's conduct, Strategic Consulting cannot be liable as Osunkwo's "CCO alter-ego." On this additional ground, therefore, no claims can and should be warranted and sustained against Strategic Consulting on any bases.

D. An Investment Adviser Firm's Management and Senior Executives Are Clearly Responsible For Supervision And Compliance By Their Firm With The Securities Laws, Including The Filing Of Accurate Form ADVs, Not A Compliance Services Firm Which Only Acts as a Third-Party Service Provider As Opposed To Supervising The RIA Firm

As a predicate matter, responsibility for compliance resides with a firm's chief executive officer and its senior management or executive officers who actually operate and supervise the firm's business. CCO FAQ, p. 2. This includes with respect to providing and verifying the accuracy of information a firm includes in its Form ADV. See SEC v. Moran, 922 F.Supp. 867, 900 (S.D.N.Y. 1996) (firm's president willfully aided and abetted firm's failure to file proper Forms ADV and BD because he had an obligation to ensure that the firm filed current, accurate and complete Forms, including of material information which the evidence indicated was or must have been known to him, which obligation included a duty by president to make reasonable inquiry to ensure that the information was correct). This is particularly true for senior executives who sign the firm's filing, thereby certifying that the information contained in the Form is accurate and complete. Id. (instructing same and rejecting president's explanation that he made an oversight). Consistent with the foregoing, advisory firm personnel may not interfere with a compliance officer's work by providing false or inaccurate information or certifications, nor is a compliance officer required to assume that such persons are withholding or providing inaccurate information. See, e.g., In the Matter of Carl D. Johns, SEC Rel. No. 3655, 2013 WL 4521777 (Aug. 27, 2013) (sanctioning portfolio manager for inter alia filing false certifications and failing to disclose personal trading activity to and thereby interfering with compliance officer's review). As such, there is no basis under the law for shifting Aegis' and Circle One's senior management responsibility for ensuring and verifying the accuracy of the information they provided for inclusion in the firm's Forms ADV, which information was within their knowledge and control based on their actual operation of Aegis' advisory business, to Strategic Consulting.

The responsibility for filing Form ADV remains with the firm and firm management as they have and retain responsibility for authorizing or approving such filing under ADV instructions and SEC standards. And while an RIA firm may certainly outsource or use

different third-party service providers, the SEC has been very clear that RIA firms and their management cannot outsource the responsibility and still retain that responsibility. As noted in ADV express instructions, a management person (familiar with the affairs and business of the RIA) is required as to signatory and neither Strategic Consulting nor any of its principals or agents was an employee of any of the RIAs or eligible to be signatory. To further clarify, Strategic Consulting was not engaged as a "filing service" or "service bureau" for IARD filings of which there are/were compliance or regulatory consulting firms that offer and provide that kind of service (and the SEC used to maintain a list in prior years of such "IARD filing service bureaus"). It was to assist and support firm management who have to provide Strategic Consulting information to prepare and then have RIA firm management approve/signoff on the ADV filing by authorizing Strategic Consulting to file on behalf of management. In fact, the Commission and its Investment Management Division in its prior guide to IARD E-Filings and usage of regulatory and compliance consultant "filing service bureaus" – which consist of regulatory-compliance consultants, consulting firms and law firms – expressly notes the following as a reminder and disclaimer for investment advisers that use such "compliance and regulatory service bureaus":

> **Remember: Electing to use a service bureau does not relieve an investment adviser of its legal and regulatory responsibilities under the federal securities laws, including the timely submission of complete and accurate filings.**

(SEC-Division of Investment Management, ***Electronic Filing for Investment Advisers on IARD – List of Service Bureaus for IARD Filings***, available at www.sec.gov/divisions/investment/iard.shtml as of Dec. 2008 (last viewed))

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III.A of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

E. There Is No Basis For Asserting Claims Against Strategic Consulting As a Mere Third-Party Outside Compliance Consultant and Advisor For a Compliance Client's Own Violations Of Advisers Act Sections 207, 204 Or Other Provisions Of The Advisers Act

Consistent with the foregoing, it is remarkably uncommon to hold a chief compliance officer liable for a violation of section 207 or 204 where, as here, the compliance officer was not a principal of the advisor and did not knowingly or actively participate in the underlying violation—here, the erroneous miscalculations of the firm's AUM and number of accounts by its management and senior executives. It is doubly remarkable and simply unheard of to hold an outside compliance consulting and advisory firm liable or responsible for violations of section 207 or 204 of the

Advisers Act where such compliance firm is only acting in a consulting and advisory role pursuant to simple third-party service provider agreement. See In the Matter of J.S. Oliver Capital Mgmt., L.P., Ian O. Mausner, and Douglas Drennan, Release No. 649 (2014) (holding the firm's co-founder, "chief executive officer, portfolio manager, and ultimate decision maker during the time at issue" and compliance officer directly liable for a 207 violation); Compare with In the Matter of Shelton Fin. Grp., Inc. & Jeffrey Shelton, Respondents., Release No. 3993 (Jan. 13, 2015) (only charging the CEO, and not the CCO who relied on prior statements by the CEO, with a violation of section 207). Here, the chief compliance office relationship with the advisor is not one of control over the entity, so the liability of the investment advisor cannot be imputed on the compliance officer. See In the Matter of Warwick Capital Mgmt., Inc., and: Carl Lawrence, Release No. 327 (Feb. 15, 2007) ("An associated person may be charged as a primary violator, where, as here, the investment adviser is an alter ego of the associated person."); see also In the Matter of Montford and Co., Inc. d/b/a Montford Associates, and Ernest V. Montford, Sr., Release No. 457 (2012) ("As 100 percent owner, president, chief executive officer, and chief compliance officer, Montford has always controlled Montford Associates, and his actions can be attributed to the investment advisor.").

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III.B of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein. It is a widely held principle that "ultimately the responsibility for a broker-dealer's compliance resides with its chief executive officer and senior management." (Frequently Asked Questions about Liability of Compliance and Legal Personnel at Broker-Dealers under Sections 15(b)(4) and 15(b)(6) of the Exchange Act, by the Division of Trading and Markets (September 30, 2013), quoting Sheldon v. SEC, 45 F.3d 1515, 1517 (11th Cir. 1995) ("The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient."), quoting Universal Heritage Investments Corp., 47 S.E.C. 839, 845 (1982) (finding securities firm's president had properly delegated duties).) The same is true for RIAs and other registered entities. As recently as April 2016, when the Commission adopted a new rule requiring CCOs for Security-Based Swap Dealers, which role was "designed to be generally consistent with the current compliance obligations applicable to CCOs of other Commission-regulated entities," including RIAs, the Commission

emphatically responded to industry concerns that the language in its proposing release could make COOs liable for compliance or supervisory failures. In reassuring the commenters that this is not the intent of the Commission at all, it repeated the following assertion three times. "[t]he Commission agrees with a commenter that it is the responsibility of the SBS Entity, not the ceo in his or her personal capacity, to establish and enforce required policies and procedures." The Commission further noted that **"the CCO cannot be a guarantor of the SBS Entity's conduct."** (Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Final Rule, Rel. No. 34-77617 (April 14, 2016; emphasis added) ("Business Conduct Standards Release"), p. 391 and n. 1196 and pgs. 398, 400, 401, 405.)

Moreover, to impose liability and/or sanctions on Strategic Consulting as a non-SEC registered third party consultant which is not expressly subject to Rule 102(e) would represent and support a massive regulatory overreach by the SEC beyond Congressional intent. The SEC is using its "causing liability jurisdiction" to go beyond its intended parameters and impose new liability for compliance consultants in the vein of 102(e) but without putting the compliance industry notice and absent the "professional advisor's" protections under 102(e). The SEC has no regulatory jurisdiction over compliance consultants and is attempting to use its "causing liability jurisdiction" as an end run to attempt to indirectly regulate the compliance advisory and services industry.

F. There Is No Basis For Asserting A Claim That Strategic Consulting Aided And Abetted Aegis' or Circle One's Filing Of Form ADVs With Inaccurate AUM As It Neither Knew That Aegis or Circle One Miscalculated Its AUM or Number of Accounts, Nor Were There Any Red Flags That Would Have Put It On Notice Of The Same

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III.C of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

G. Similarly, There Is No Basis For Asserting A Claim That Strategic Consulting Caused Circle One or Aegis To File Form ADVs With Inaccurate AUM or Number of Accounts Information

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III.D and III.E of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

H. Aegis Had No Obligation to File a Form ADV Pursuant to Rule 204-1(a)(1) Once Circle One Claimed All its Assets In Connection with the Acquisition and Subsequent Internal Merger-Consolidation Reorganization into Circle One, But Rather Was Required to File a Form ADV-W Which Circle One / Aegis Management Repeatedly Delayed Filing Despite Osunkwo Having Prepared it and Directing Them To Do So

Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section III.F of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

IV. CONCLUSION

The underlying facts of this case do not support the claims by the Division against Strategic Consulting. While the allegations of wrongdoing against Aegis and Circle One give rise to serious concerns, Osunkwo took on the engagement of CCO with adequate support and assistance from Strategic Consulting to fulfill the primary responsibilities of a CCO – to administer the firm's policies and procedures. The role of compliance advisor and consultant is not and was not in this case that of an auditor that must verify and reconcile every assumption underlying the business nor can the Division shift the duties of senior officers, including the Chief Operating Officer and Chief Investment Officer, to the outside consultant to inform them of how to calculate AUM where, as here, the compliance consultant is relying on them to provide it with the calculations of AUM and number of accounts since such firm executive officers have sole access to and control over such underlying firm internal information. In sum, there is no policy objective consistent with the SEC's Compliance Rule (Rule 206(4)-7) to be achieved by holding Strategic Consulting liable or responsible here for firm management's wrongdoing or lack of supervision, much less the possible sanctions sought by the Division in its claims.

Given the efforts undertaken by Osunkwo and Strategic Consulting to file properly the Form ADV for Aegis in March 2010 based on information from Aegis' principal and COO (Lamm), the same was true for purposes of the March 2011 Form ADV for Circle One: Osunkwo corresponded with and obtained information for the Circle One ADV from the CIO (Blau), to whom Osunkwo reported directly, and Blau obtained that information from the Operations Director of Aegis and principals of Circle One. To the extent Osunkwo had no knowledge of any errors in the calculations of either Aegis' or Circle One's AUM at that time, his reliance in the March 2011 time frame was no less reasonable. Nor given the SEC interpretive guidance did Aegis have an obligation to file a Form ADV for March 2011 (for 2010) in that Circle One had assumed Aegis' business. Aegis had

only an obligation to file a Form ADV-W, which was not timely filed, but which Osunkwo repeatedly ensured that it was identified to, and prepared for, Aegis' management to submit. For whatever reason, Aegis and its holding company, Capital L chose not to file the Form ADV-W prior to Osunkwo's termination. As discussed in detail herein, the Division's theories of liability against Osunkwo and derivatively against Strategic Consulting do not warrant holding Osunkwo liable (much less Strategic Consulting) as Chief Compliance Officer for Circle One's and Aegis' firm management decisions and shortcomings. Lastly, Respondent Strategic Consulting hereby incorporates by reference and adopts in its entirety Section IV of Respondent Osunkwo's Pre-Hearing Brief as if set forth fully herein.

The underlying facts and circumstance outlined herein do not warrant liability and/or sanctions, and the evidence at the hearing will bear this out. Accordingly Respondent Strategic Consulting requests the following:

1) An Order dismissing it from this proceeding or, in the alternative, an order granting summary disposition based upon the grounds set forth in Section III.A, III.B and III.C above;
2) To the extent dismissal or summary disposition cannot be granted based upon this submission, permission to make a motion for summary disposition or dismissal;
3) A determination of no liability or responsibility as to the Division's 2 claims under Section 207 and 204 of the Advisers Act; and/or
4) To the extent any liability is found, a determination of no sanctions to be imposed based on the Steadman factors as discussed above.

Dated: July 18, 2016

Respectfully submitted,

A. Moffatt (Principal)

Strategic Consulting Advisors, LLC

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DAVID I. OSUNKWO

Respondents.

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CERTIFICATE OF SERVICE

I, on behalf of Strategic Consulting Advisors, LLC, certify that on July 18, 2016, I caused true and correct copies of the attached Pre-Hearing Brief of Strategic Consulting to be filed and served on the following as follows:

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