INITIAL DECISION RELEASE NO. 426
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14190

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

In the Matter of	:	
	:	INITIAL DECISION
EVELYN LITWOK	:	August 4, 2011

APPEARANCES: Cynthia A. Matthews and Howard A. Fischer for the Division of Enforcement, Securities and Exchange Commission

Evelyn Litwok, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Evelyn Litwok (Litwok) from association with an investment adviser. It is based on her 2010 conviction for mail fraud and tax evasion arising from misconduct while associated with an unregistered investment adviser.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission or SEC) initiated this proceeding with an Order Instituting Proceedings (OIP) on January 14, 2011, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). Pursuant to leave granted at the February 23, 2011, prehearing conference and 17 C.F.R. § 201.250, the Division of Enforcement (Division) filed a Motion for Summary Disposition on June 1, 2011, and Litwok filed responsive pleadings.

This Initial Decision is based on (1) the Division's Motion for Summary Disposition, including those attachments admitted into evidence, infra.; (2) Litwok's letter, dated May 29, 2011, outlining her arguments; (3) Litwok's pleading, mailed in installments on June 27 and July 8, 2011, and titled Motion to Dismiss; Motion to File Claim Against SEC for Filing a Fraudulent Claim Against Litwok (Litwok's Motion); (4) the Division's July 21, 2011, letter responding to Litwok's Motion; (5) Litwok's Opposition to Motion for Summary Disposition, dated July 14, 2011; and (6) Litwok's Answer to the OIP (Answer), dated February 11, 2011. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for

which Litwok was convicted were decided against her in the criminal case on which this proceeding is based. Any other facts in her pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Litwok was convicted after a jury trial of one count of mail fraud in violation of 18 U.S.C. §§ 1341, 1342 and three counts of tax evasion in violation of 26 U.S.C. § 7201 in United States v. Litwok, No. 2:02-cr-00427 (E.D.N.Y. May 11, 2010). The Division urges that she be barred from association with an investment adviser and also receive a collateral bar under the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

Litwok argues that her conviction was based on perjured testimony and that a conviction for mail fraud and tax fraud cannot form the basis for a bar under the Advisers Act. Thus, she urges that the charges against her be dismissed. Additionally she alleges that Commission staff engaged in misconduct.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items included in the Division's Motion for Summary Disposition, at Exhibits 1, 2, 3, 11, 13, and 14 are admitted as Division Exhibits 1, 2, 3, 11, 13, and 14:

June 28, 1994, Certificate of Incorporation of Kohn Investment Management, Inc. (Div. Ex. 1);

June 28, 1994, Certificate of Limited Partnership of Kohn Investment Partnership, L.P. - 1[1] (Div. Ex. 2);

July 14, 1994, Confidential Private Placement Memorandum, Kohn Investment L.P. – 1 (Div. Ex. 3);

March 19, 2003, Superseding Indictment, United States v. Litwok (Div. Ex. 11);

May 11, 2010, Judgment, United States v. Litwok (Div. Ex. 13); and

[1] The entity is referred to elsewhere as "Kohn Investment L.P. -1." Div. Ex. 3; Litwok's Motion at 3. The website of the Delaware Department of State, where the certificate of limited partnership was filed, also displays this version.

May 10, 2010, Transcript of Sentence, United States v. Litwok (Div. Ex. 14).

2. Collateral Estoppel

Litwok argues that her conviction was based on perjured testimony. Nonetheless, as found below in the Findings of Fact, Litwok was found guilty of mail fraud and tax evasion in violation of 18 U.S.C. §§ 1341, 1342 and 26 U.S.C. § 7201. Litwok is foreclosed from arguing that the facts concerning her involvement in the criminal wrongdoing are not proven. It is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, Advisers Act Release No. 1752 (Sept. 15, 1998), 53 S.E.C. 862, 866; William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56.[2] Additionally, the pendency of Litwok's appeal in United States v. Litwok does not preclude "follow-on" action based on the conviction. Joseph P. Galluzzi, Exchange Act Release No. 46405 (Aug. 23, 2002), 55 S.E.C. 1110, 1116 n.21; John Francis D'Acquisto, Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444 n.9.

II. FINDINGS OF FACT

Litwok was convicted after a jury trial of one count of mail fraud in violation of 18 U.S.C. §§ 1341, 1342 and three counts of tax evasion, for calendar years 1995-1997, in violation of 26 U.S.C. § 7201 in United States v. Litwok, No. 2:02-cr-00427 (E.D.N.Y. May 11, 2010). Div. Exs. 11, 13, 14. She was sentenced to two years of imprisonment, followed by five years of supervised release, and ordered to pay $23,551 in restitution. Div. Ex. 13. It is undisputed that Litwok was associated with Kohn Investment Management, Inc., the general partner of Kohn Investment L.-P. 1 (LP 1), during the events underlying her conviction.[3] Div. Exs. 1, 2, 3; Litwok's Motion, passim. LP 1 was an investment fund in which interests were sold to investors. Div. Ex. 3; Litwok's Motion

[2] Similarly, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent. See Michael J. Markowski, Exchange Act Release No. 44086 (Mar. 20, 2001), 55 S.E.C. 21, 26-27, pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D'Acquisto, Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444; Demitrios Julius Shiva, Exchange Act Release No. 38389 (Mar. 12, 1997), 52 S.E.C. 1247, 1249 & nn.6-7. See also Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 697-700, 709-13.

[3] The certificates of incorporation or limited partnership of the entities were dated June 28, 1994. Div. Exs. 1, 2. Additionally, Litwok discusses earnings of LP 1 during 1995 and her actions then concerning LP 1. Litwok's Motion, passim. Litwok disputes the degree of her association with another entity, Kohn Capital L.P. – 33 (LP 33), the general partner of which is Kohn Capital Management, Inc. – 33. Id. In light of the provisions of 17 C.F.R. § 201.250(a) and the Division's burden of proof, it cannot be found that Litwok had any association with LP 33 that bears on the outcome of this proceeding.

at 2-3. Litwok received compensation derived from LP 1 as a result of her association with the general partner. Litwok's Motion at 9, 15.

At Litwok's sentencing the court stated, "Everywhere she's gone she committed fraud, lied, cheated. Hasn't stopped. Even to this day she claims she filed her income tax. She never did." Div. Ex. 14 at 14.

III. CONCLUSIONS OF LAW

Litwok has been convicted, within ten years of the commencement of this proceeding, of a felony that "involves the violation of section 1341, 1342 . . . of title 18, United States Code" and of a "crime that is punishable by imprisonment for 1 or more years" within the meaning of Sections 203(e)(2) and 203(f) of the Advisers Act.

The OIP was authorized pursuant to Section 203(f) of the Advisers Act. Litwok argues that this statute is inapplicable because she was not associated with a registered investment adviser. This argument fails. She was associated with Kohn Investment Management, Inc., the general partner of LP 1, an investment fund, and received compensation for managing the fund. Thus she was associated with an investment adviser and, indeed, was an investment adviser herself within the meaning of the Advisers Act. See Section 202(a)(11) of the Advisers Act.[4] See also Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006) (holding that the general partner of a hedge fund is an investment adviser within the meaning of the Advisers Act). Further, the registration status of Kohn Investment Management, Inc., is irrelevant. It cannot be questioned that the Commission has authority to bar persons from association with registered or unregistered investment advisers or otherwise sanction them under Section 203 of the Advisers Act. Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

Finally, Litwok alleges that Commission staff engaged in misconduct in United States v. Litwok and SEC v. Litwok, No. 2:0-cv-07626-DLI (E.D.N.Y.). However, the issues in the OIP in this proceeding concern Litwok, not the Commission, and thus, her allegation of misconduct by Commission staff in SEC v. Litwok and United States v. Litwok is not relevant to the issues in this proceeding. Any challenge to the propriety of the staff's conduct should have been brought before the courts in which those cases were heard. See Harold F. Harris, Exchange Act Release No. 53122A (Jan. 13, 2006), 87 SEC Docket 350, 359.

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[4] Section 202(a)(11) provides:

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

IV. SANCTION

The Division requests that Litwok be barred from association with an investment adviser.[5] This sanction will serve the public interest and the protection of investors, pursuant to Section 203 of the Advisers Act and accords with Commission precedent and sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). When the Commission determines administrative sanctions, it considers:

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

Id. (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978), aff'd on other grounds, 450 U.S. 91 (1981)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 698. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46. As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, Advisers Act Release No. 2052 (Aug. 30, 2002), 55 S.E.C. 1133, 1145, aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

The unlawful conduct for which Litwok was convicted was egregious and recurrent during a period of at least three years. A high degree of scienter is indicated by her conviction for mail fraud and tax evasion. Litwok has not given assurances against future violations or acknowledged the wrongful nature of her conduct. Litwok's previous occupation, if she were allowed to continue it, would present opportunities for future misconduct involving dishonesty. Her violations are neither recent nor distant in time. It is not possible to quantify the degree of harm to the marketplace and investors caused by Litwok's mail fraud and tax evasion, but such conduct inherently harms the public. An investment adviser bar is essential to avoid the possibility of future violations of law. A conviction involving dishonesty requires a bar.

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[5] The Division also requests a collateral bar pursuant to the Dodd-Frank Act. However, Litwok's conviction and underlying misconduct antedate the July 22, 2010, effective date of the Dodd-Frank Act. Neither the Commission nor the courts have approved such retroactive application of its provisions in any litigated case, and the undersigned declines to impose the new sanction retroactively. See Koch v. SEC, 177 F.3d 784 (9th Cir. 1999); see also Sacks v. SEC, 635 F.3d 1121(9th Cir. 2011).

Litwok argues that her conviction for mail fraud and tax fraud cannot form the basis for a bar under the Advisers Act because it was not securities-related. To the contrary, the Commission has long barred individuals based on convictions involving dishonesty that are not securities-related. See Kornman v. SEC, 592 F.3d 173, 180 (D.C. Cir. 2010) (citing with approval the Commission's policy that "the importance of honesty for a securities professional is so paramount that [the Commission has] barred individuals even when [a respondent's] conviction was based on dishonest conduct unrelated to securities transactions or securities business") (quoting Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14256); Don Warner Reinhard, Exchange Act Release No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36948-49 & n.27 (holding conviction for tax violation relevant to determine whether an individual is fit to work in an industry where honesty and rectitude concerning financial matters is critical); Ahmed Mohamed Soliman, 52 S.E.C. 227, 227-31 (1995) (revoking registration and imposing broker-dealer and investment adviser bars based on a misdemeanor conviction for submitting false documents to the Internal Revenue Service,); Bruce Paul, 48 S.E.C. 126, 128-29 (1985) (imposing broker-dealer bar with right to reapply for conviction of making false statements on income tax returns); Benjamin Levy Sec., Inc., 46 S.E.C. 1145, 1146-47 (1978) (imposing broker-dealer and investment adviser bars and other sanctions based on conviction for making false statements in a loan application). The securities business is "a field where opportunities for dishonesty recur constantly." Soliman, 52 S.E.C. at 231.

V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), EVELYN LITWOK IS BARRED from association with an investment adviser.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The 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 a 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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Carol Fox Foelak
Administrative Law Judge