

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 9448 / September 3, 2013

SECURITIES EXCHANGE ACT OF 1934  
Release No. 70305 / September 3, 2013

Admin. Proc. File No. 3-14630

In the Matter of  
  
DANIEL J. GALLAGHER

ORDER GRANTING  
MOTION TO AMEND ORDER  
INSTITUTING PROCEEDINGS

On November 16, 2011, the Commission instituted proceedings against Daniel J. Gallagher, alleging that he willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.<sup>1</sup> The Order Instituting Proceedings ("OIP") alleges that Gallagher fraudulently offered securities of Nano Acquisition Group, LLC ("NAG") from October 2009 through July 2010. The OIP also alleges that Gallagher raised at least \$427,000 from twelve investors by falsely representing that their funds would be used by NAG to acquire or develop certain nanotechnology assets when, in reality, he withdrew approximately \$392,000 (92% of the funds raised) for his personal use. The OIP directs the institution of proceedings to determine what, if any, remedial action is appropriate in the public interest, including, but not limited to, disgorgement, prejudgment interest, and civil penalties pursuant to Securities Act Section 8A and Exchange Act Sections 15(b), 21B, and 21C.<sup>2</sup>

On December 2, 2011, an administrative law judge stayed the proceeding against Gallagher, at the request of the United States Attorney for the Eastern District of New York, "during the pendency of a criminal investigation arising out of the same facts at issue." On December 1, 2011, the U.S. Attorney had filed a criminal action against Gallagher, alleging misconduct virtually identical to that set forth in the OIP. On April 9, 2012, a jury convicted Gallagher of one count of securities fraud and two counts of wire fraud. On May 9, 2012, the United States District Court for the Eastern District of New York filed a judgment against

<sup>1</sup> 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

<sup>2</sup> 15 U.S.C. §§ 77h-1, 78o(b), 78u-2, 78u-3.

Gallagher, sentencing him to thirty-one months of incarceration and three years of supervised release,<sup>3</sup> and deferring the determination of restitution until a later date.<sup>4</sup>

On May 22, 2013, the law judge lifted the stay in the case. She also granted the Division's request for leave to seek to amend the OIP to add or substitute Gallagher's conviction as a separate basis for the administrative proceeding. On May 31, 2013, the Division filed such a motion. In that motion, the Division also sought to withdraw its original request for civil penalties "because Gallagher has already been sufficiently penalized for his conduct" in connection with the terms of imprisonment and supervised release.<sup>5</sup>

Under Rule of Practice 200(d)(1), we may, at any time, upon motion by a party, amend an OIP to include new matters of fact or law.<sup>6</sup> We have stated that such amendments to OIPs, which can as here reflect "subsequent developments"<sup>7</sup> in a proceeding, "should be freely granted, subject only to the consideration that other parties should not be surprised nor their rights prejudiced."<sup>8</sup> The Division's proposed amendment of the OIP to add Gallagher's criminal conviction for securities fraud and wire fraud as a basis for relief in this action satisfies this standard.<sup>9</sup> The criminal proceeding against Gallagher was based on the same facts as the

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<sup>3</sup> As a condition of supervised release, the district court ordered that Gallagher "shall not engage in employment, directly or indirectly, which involves securities or solicitation of funds from investors and shall assist the US Probation Department in verifying the job description of any employment [Gallagher] secures while under supervision."

<sup>4</sup> Gallagher later filed separate notices of appeal from that judgment and a subsequent amended judgment entered against him on July 10, 2013. *United States v. Gallagher, appeal docketed*, No. 13-1956 (2d Cir. May 17, 2013), *appeal docketed*, No. 13-2661 (2d Cir. July 12, 2013).

<sup>5</sup> Gallagher did not file an opposition to the Division's motion but instead filed, before the presiding law judge, a "Motion to stay order to amend OIP and Summary Judgment" in which he requested that she stay "the order to amend the OIP, the Summary Judgment and all other motions regarding th[e] matter" until Gallagher's appeal of his conviction was finally determined.

<sup>6</sup> 17 C.F.R. § 201.200(d)(1).

<sup>7</sup> *Carl L. Shipley*, Securities Exchange Act Rel. No. 10870, 1974 WL 161761, at \*4 (June 21, 1974) (finding that amendments to OIPs should be freely granted to, among other things, take into account subsequent developments).

<sup>8</sup> *Robert David Beauchene*, Exchange Act Rel. No. 68974, 2013 WL 661619, at \*2 (Feb. 25, 2013) (quoting *Charles K. Seavey*, Investment Advisers Act Rel. No. 1925A, 2001 WL 228030, at \*2 (Mar. 9, 2001)).

<sup>9</sup> *See, e.g., Beauchene*, 2013 WL 661619, at \*2 (finding that adding to the OIP respondent's criminal conviction for securities fraud and wire fraud as a basis for relief could "neither surprise nor prejudice" respondent where the criminal proceeding was based on the same facts as the Commission's allegations in the OIP). We have found that amending an OIP is not prejudicial where, as here, "the fullness of [a respondent's] opportunity to defend on the merits" is

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Commission's allegations in the OIP.<sup>10</sup> Further, Gallagher's criminal conviction provides an independent basis for remedial sanctions, and it is more efficient to resolve all issues related to this conduct in a single proceeding.<sup>11</sup> We additionally have determined, as an exercise of our discretion, to grant the Division's request to withdraw the OIP's civil penalty claim, given Gallagher's prison sentence and period of supervised release.<sup>12</sup>

Accordingly, IT IS ORDERED that the Division of Enforcement's motion to amend the Order Instituting Proceedings against Daniel J. Gallagher is granted.

By the Commission.

Elizabeth M. Murphy  
Secretary

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"unimpaired." *First Minneapolis Inv. Corp.*, Exchange Act Rel. No. 10644, 1974 WL 161422, at \*2 (Feb. 14, 1974); *see also Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) (finding that amending an OIP was not prejudicial because respondent did not "suggest that anything stopped him from reorienting his defense" during the remainder of the administrative proceeding).

<sup>10</sup> *See Beauchene*, 2013 WL 661619, at \*2.

<sup>11</sup> *See id.* We find Gallagher's request to stay the amendment of the OIP pending the completion of his criminal appeal, *see supra* note 5, to be without merit. Our precedent holds that an administrative proceeding may go forward notwithstanding the appeal of a related court case. *See, e.g., James E. Franklin*, Exchange Act Rel. No. 56649, 2007 WL 2974200, at \*8 n.15 (Oct. 12, 2007) (rejecting request for stay of administrative proceeding based on pending appeal of injunctive action), *petition denied*, 285 F. App'x 761 (2008); *Joseph P. Galluzzi*, Exchange Act Rel. No. 46405, 55 SEC 1110, 2002 WL 1941502, at \*5 n.21 (Aug. 23, 2002) (finding that "the pendency of an appeal does not preclude us from acting to protect the public interest" where respondent relied on purported appeal of criminal sentencing).

<sup>12</sup> We do not suggest any view as to the outcome of these proceedings.