

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75820 / September 2, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4187 / September 2, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31804 / September 2, 2015

Admin. Proc. File No. 3-15215

In the Matter of

JAMES S. TAGLIAFERRI

ORDER GRANTING MOTION TO
AMEND ORDER INSTITUTING
PROCEEDINGS

The Division of Enforcement requests that we amend the order instituting proceedings in this case to add allegations regarding respondent James S. Tagliaferri's criminal conviction for, among other things, violating the securities laws, and to remove the OIP's directives to determine whether disgorgement and civil money penalties would be appropriate in the public interest. Tagliaferri asserts that the amendment would prejudice him and opposes the Division's motion. As explained below, we find that the amendment is appropriate and accordingly grant the Division's motion.

I. Background

On February 21, 2013, the Commission instituted proceedings against James S. Tagliaferri,¹ alleging that he willfully violated Sections 17(a)(1) and (3) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Securities Exchange Act of 1934, and Rules 10b-5(a) and (c) thereunder, as well as Sections 206(1), (2), and (3) of the Investment Advisers Act of 1940.² On March 11, 2013, an administrative law judge stayed the proceeding against Tagliaferri

¹ *James S. Tagliaferri*, Exchange Act Release No. 68963, 2013 WL 635053 (Feb. 21, 2013).

² 15 U.S.C. §§ 77q(a)(1) and (3), 78j(b), 78o(a), 80b-6(1), (2), and (3); 17 C.F.R. § 240.10b-5(a) and (c).

pending a parallel criminal action against him in the United States District Court for the Southern District of New York,³ and the law judge lifted that stay on June 1, 2015.⁴

On July 24, 2014, a jury convicted Tagliaferri of one count of investment adviser fraud, one count of securities fraud, four counts of wire fraud, and six counts of violations of the Travel Act. On February 13, 2015, Tagliaferri was sentenced to 72 months' incarceration and three years' supervised release, and he was ordered to forfeit \$2.5 million and certain real property. On July 2, 2015, Tagliaferri was further ordered to pay in excess of \$20 million in restitution.

On July 16, 2015, the Division moved to amend the order instituting proceedings in this proceeding in three principal respects. First, the proposed amended OIP, which the Division submitted with its motion, would add allegations regarding Tagliaferri's criminal conviction. The Division asserts that the conviction provides an independent basis for establishing the violations alleged in the OIP. Such convictions also provide an independent basis for imposing sanctions.⁵ Second, in light of the sentence of imprisonment and supervised release imposed on Tagliaferri, the amendment would remove the OIP's directive to determine whether civil money penalties would be appropriate in the public interest. Third, because the forfeiture and restitution orders entered in the criminal action require Tagliaferri to pay more than \$20 million, the amendment would remove the OIP's directive to determine whether disgorgement would be appropriate in the public interest. The proposed amended OIP also would make some conforming changes in light of Tagliaferri's current status.

II. Analysis

Under Rule of Practice 200(d)(1), we may, at any time, upon a motion by a party, amend an OIP to include new matters of fact or law.⁶ Such amendments to OIPs, which can reflect "subsequent developments" in a proceeding,⁷ "should be freely granted, subject only to the

³ *James S. Tagliaferri*, Admin. Proc. File No. 3-15215 (Mar. 11, 2013), available at <https://www.sec.gov/litigation/apdocuments/3-15215-event-6.pdf>.

⁴ *James S. Tagliaferri*, Admin. Proc. Release No. 2750 (June 1, 2015), available at <https://www.sec.gov/alj/aljorders/2015/ap-2750.pdf>.

⁵ *See, e.g.*, Advisers Act Section 203(f), 15 U.S.C. § 80b-3(f) (referencing convictions specified in Advisers Act Section 203(e)(2) and (3)); Exchange Act Section 15(b)(6)(A)(ii), 15 U.S.C. § 78o(b)(6)(A)(ii) (referencing convictions specified in Exchange Act Section 15(b)(4)(B)).

⁶ 17 C.F.R. § 201.200(d)(1).

⁷ *See Carl L. Shipley*, Exchange Act Release No. 10870, 45 SEC 589, 1974 WL 161761, at *4 (June 21, 1974).

consideration that other parties should not be surprised nor their rights prejudiced."⁸ We grant the Division's motion to add the allegations specified above because Tagliaferri's criminal conviction in the parallel criminal proceeding is such a subsequent development.⁹ In addition, the conviction may provide an independent basis for remedial sanctions,¹⁰ and it is more efficient to resolve all issues related to Tagliaferri's conduct in a single proceeding.¹¹ We also have determined, as an exercise of our discretion, to grant the Division's motion to remove the OIP's directives to determine whether civil penalties and disgorgement are appropriate in the public interest, given Tagliaferri's prison sentence and period of supervised release, as well as the monetary obligations imposed on him in the criminal proceeding.¹²

We reject Tagliaferri's argument that the motion should be denied because his rights would be prejudiced by the amendment.¹³ Tagliaferri objects to the amendment because it "would allow the Division to argue at trial [that] the criminal conviction is sufficient to find" him liable even though, in his view, the allegations of the original OIP and superseding criminal indictment "differ substantially." Tagliaferri asserts that his objection could be resolved by omitting from the amended OIP language stating that he was criminally convicted "on substantially the same allegations alleged in this case." Tagliaferri does not otherwise oppose the amendment.

⁸ *Robert David Beauchene*, Exchange Act Release No. 68974, 2013 WL 661619, at *2 (Feb. 25, 2013) (quoting *Charles K. Seavey*, Advisers Act Release No. 1925A, 2001 WL 228030, at *2 (Mar. 9, 2001)).

⁹ *See Daniel J. Gallagher*, Exchange Act Release No. 70305, 2013 WL 4716026, at *2 (Sept. 3, 2013) (granting motion for leave to amend OIP to add respondent's conviction in parallel criminal proceeding); *Beauchene*, 2013 WL 661619, at *2 (same); *cf. Shipley*, 1974 WL 161761, at *4 n.17 (noting that motions to amend "are granted routinely" to add allegations regarding injunctions entered against respondents following issuance of the OIP given that "the public interest requires that the injunction and its implications be considered in the administrative proceeding").

¹⁰ *See supra* note 5 and associated text.

¹¹ *Gallagher*, 2013 WL 4716026, at *1; *Beauchene*, 2013 WL 661619, at *2.

¹² *Gallagher*, 2013 WL 4716026, at *1 (granting Division's request to withdraw OIP's civil money penalty claim given respondent's prison sentence and period of supervised release); *Beauchene*, 2013 WL 661619, at *2 (amending OIP to withdraw disgorgement request in light of restitution order); *A.S. Goldman & Co., Inc.*, Exchange Act Release No. 48091, 2003 WL 21468605, at *2 (June 26, 2003) (same).

¹³ Tagliaferri does not argue that he was surprised by the amendment. He learned of the criminal indictment no later than the date the OIP was issued. *See* <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-arrest-virgin-islands-based-investment-adviser-multi>. The law judge stayed this proceeding soon thereafter.

We find no undue prejudice to Tagliaferri. The Division's allegation that he is liable based on the criminal conviction does not establish prejudice sufficient to deny the amendment.¹⁴ The OIP does not establish facts, it alleges them; Tagliaferri will have an opportunity to contest these allegations and their legal effect.¹⁵ And to the extent that Tagliaferri's conviction provides an independent basis for sanctions, it is irrelevant whether he was convicted of the same conduct alleged in the OIP.¹⁶

Accordingly, IT IS ORDERED that the Division of Enforcement's motion to amend the Order Instituting Proceedings against James S. Tagliaferri is granted.¹⁷

By the Commission.

Brent J. Fields
Secretary

¹⁴ Federal courts have held that leave to amend under Federal Rule of Civil Procedure 15 should not be denied simply because a defendant might be subject to greater liability as a result of an amendment. *See, e.g., Bush v. Ruth's Chris Steak House, Inc.*, 277 F.R.D. 214, 216 (D.D.C. 2011) (holding that "[u]ndue prejudice is not implicated merely because the proposed amendment would 'increase defendant's potential liability'" (quoting 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487, at 723 (3d ed. 2010)); *see also Maiaro v. Alarm Specialists, Inc.*, No. 13-cv-08658 (NSR), 2014 WL 5285695, at *3 (S.D.N.Y. Oct. 15, 2014) (holding that "increased potential liability is 'not the type of prejudice that warrant[s] denial of leave to amend the complaint'" (quoting *In re Osage Exploration Co.*, 104 F.R.D. 45, 49 (S.D.N.Y. 1984))). In construing our rules, "we have been guided by the liberal spirit of the Federal Rules of Civil Procedure" with respect to amendment. *Shiple*, 1974 WL 161761, at *4 n.16.

¹⁵ 5 U.S.C. § 556(d) (providing for opportunity to present case in formal adjudication); *see also Jethro J. Barlow, CPA*, Exchange Act Release No. 42109, 1999 WL 1000890, at *1 (Nov. 5, 1999) (finding that "the procedural posture of the case," where hearing would not be held for two months, "ensure[d] that respondents will suffer no prejudice from the requested amendment").

¹⁶ *See supra* note 5 and associated text.

¹⁷ We do not suggest any view as to the outcome of these proceedings.