UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4495 / August 24, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32236 / August 24, 2016

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3796 / August 24, 2016

Admin. Proc. File No. 3-16462

In the Matter of

LYNN TILTON, PATRIARCH PARTNERS, LLC,
PATRIARCH PARTNERS VIII, LLC,
PATRIARCH PARTNERS XIV, LLC, and
PATRIARCH PARTNERS XV, LLC

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW AND PETITION TO APPLY THE COMMISSION'S AMENDED RULES OF PRACTICE

Petition filed: July 25, 2016
Last brief received: August 3, 2016

Lynn Tilton; Patriarch Partners, LLC; Patriarch Partners VII, LLC; Patriarch Partners XIV, LLC; and Patriarch Partners XV, LLC (collectively, "Respondents"), petition the Commission for interlocutory review of an administrative law judge's order that the hearing in this proceeding begin on October 24, 2016. Respondents also petition for interlocutory review of the law judge's refusal to seek an extension of the deadline for filing an initial decision (currently set to expire on November 12, 2016) under Commission Rule of Practice 360.[1] Respondents

[1] *See* 17 C.F.R. § 200.360(a)(2). Respondents style their filing as a "petition directly to the Commission" and, "in the alternative," as a petition for interlocutory review. Because interlocutory review under Rule of Practice 400 "is the exclusive remedy of a hearing officer's ruling prior to Commission consideration of the entire proceeding," we construe their request regarding the hearing date and initial decision deadline as a petition for interlocutory review. *See*

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further petition for an order that would apply the Commission's recent amendments to the Rules of Practice (the "Amended Rules")[2] to this proceeding. The Division of Enforcement (the "Division") opposes Respondents' petition.

Respondents' petition for interlocutory review is denied. The law judge's rulings regarding the hearing date and initial decision deadline are not appropriate for immediate Commission review. With respect to the Amended Rules, the Commission has already determined how the Amended Rules should apply to pending proceedings.

I. Background

The Commission instituted this proceeding on March 30, 2015, alleging that Respondents violated the antifraud provisions of the Investment Advisers Act of 1940.[3] Two days later, Respondents filed an injunctive action in federal district court on the ground that, among other things, the presiding administrative law judge's appointment violated the Appointments Clause of Article II of the U.S. Constitution.

As Respondents pursued their civil suit, this proceeding continued. Among other things, the parties exchanged witness and exhibit lists and expert reports. The law judge also conducted a prehearing conference on May 7, 2015, and scheduled a hearing to begin on October 13, 2015.

On June 30, 2015, the district court dismissed Respondents' civil suit for lack of subject-matter jurisdiction, concluding that Respondents must first raise their claims through the administrative remedial scheme established by Congress.[4] Respondents appealed to the court of appeals, which stayed the Commission's administrative proceeding on September 17, 2015, while it considered Respondents' appeal. The court of appeals affirmed the district court's dismissal of Respondents' suit on June 1, 2016, and ordered that its stay be vacated.[5]

On July 8, 2016, two days after the stay was ultimately lifted,[6] attorneys from Gibson, Dunn & Crutcher LLP filed notices of appearance on behalf of Respondents.[7] Respondents and

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17 C.F.R. § 201.400(a). Although the Commission retains the "right to review the action of any . . . administrative law judge . . . upon its own initiative," 15 U.S.C. § 78(d)-1(b), we find no basis for doing so for the same reasons we find interlocutory review inappropriate.

2 *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 78319, 2016 WL 3853756, at *32 (July 13, 2016).

3 Order Instituting Administrative and Cease-and-Desist Proceedings, *Lynn Tilton*, Investment Advisers Act Release No. 4053, 2015 WL 1407564 (Mar. 30, 2015).

4 *Tilton v. SEC*, No. 15-CV-2472 (RA), 2015 WL 4006165, at *13 (S.D.N.Y. June 30, 2015).

5 *See Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. June 1, 2016).

6 In response to a motion for clarification from the Commission, the court of appeals confirmed on June 28, 2016 that "the stay is vacated, subject, however, to a continuation of the

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the Division jointly proposed that the law judge schedule a hearing date for early December 2016. On July 15, 2016, the law judge declined to do so, stating that "a December 2016 hearing date [wa]s inconsistent with a timely resolution of this proceeding consistent with 17 C.F.R. § 201.360" and ordered the parties to propose a hearing date in September 2016.

On July 20, 2016, Respondents requested that the law judge reconsider and vacate her July 15 order. Respondents also requested, in the alternative, that the law judge certify her July 15 order for interlocutory review. That same day, Respondents also requested that the law judge ask the chief administrative law judge to submit a motion to the Commission requesting an extension of time for filing an initial decision.[8]

Later that day, the law judge rescheduled the hearing for October 24, 2016, but denied Respondents' request for a December 2016 hearing date. The law judge explained:

> This case involves a single individual respondent and four related entities, charged with violations of Advisers Act Sections 206(1), 206(2), and 206(4)[9] and Rule 206(4)-8.[10] More than five months elapsed from the institution of this proceeding until the time this proceeding was stayed in September 2015, with the hearing originally scheduled to commence on October 13, 2015. Most of the prehearing steps had already been completed, as noted in the July 15 Order. The Second Circuit vacated its stay order on June 1, 2016, thus making the parties aware that this proceeding would soon continue.
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> Respondents' hiring new counsel and intent to file a large number of prehearing motions are not an adequate basis for substantial delay. It is also unnecessary for Respondents to file numerous motions simply to preserve issues, such as constitutional issues, for appeal; they may simply note such objections for the record. As to Respondents' concerns about

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stay until July 6, 2016, to permit Tilton to file a motion seeking a stay from the Supreme Court." Respondents declined to file such a motion, and the stay expired on July 6, 2016.

[7] Attorneys from Skadden, Arps, Slate, Meagher & Flom LLP noticed their withdrawal on the same day. Attorneys from Brune Law P.C. noticed their appearance as Respondents' counsel on April 13, 2015, and have remained Respondents' counsel of record since that date.

[8] *See* 17 C.F.R. § 201.360(a)(3) (allowing a presiding law judge to seek an extension of time in which to file an initial decision if that request is supported by a motion from the Chief Administrative Law Judge and if the Commission determines that "additional time is necessary or appropriate in the public interest").

[9] 15 U.S.C. § 80b-6(1), (2), and (4).

[10] 17 C.F.R. § 275.206(4)-8.

> the schedules of hearing participants, the parties can use available means, including use of subpoenas, to compel attendance of witnesses, or can make arrangements for expert witnesses to appear by video conference if necessary.

The law judge also declined to certify her July 15 order for interlocutory review, finding that Respondents' request "patently fails to meet the standards of 17 C.F.R. § 201.400(c) and must be denied." Finally, the law judge did not grant their request for an extension of the initial decision deadline and did not certify that ruling for interlocutory review.

II. Analysis

A. Respondents' petition does not raise issues appropriate for interlocutory review.

The Commission's "emphatic preference—which embodies the 'general rule' disfavoring piecemeal, interlocutory appeals—is that claims should be presented in a single petition for review after 'the entire record [has been] developed' and 'after issuance by the law judge of an initial decision.'"[11] A party's disagreement with a law judge's determination "does not make a ruling 'appropriate for interlocutory review.'"[12] Interlocutory review is appropriate "only in a truly unusual case, where serious and prejudicial error [is] plainly apparent upon even a cursory review of the record, and where deferring review until issuance of an initial decision might well postpone an inevitable later vacatur and remand."[13] Indeed, Rule 400 provides that petitions for interlocutory review are "disfavored" and will be granted only in "extraordinary circumstances" to "make clear that petitions for interlocutory review . . . rarely will be granted."[14] We do not find such extraordinary circumstances to be present here.

The law judge decided to set the hearing for October 2016 rather than December 2016 and did not request an extension of the initial decision deadline.[15] Setting a hearing date and deciding whether to seek an extension of time to file an initial decision fits squarely within the law judge's authority under Rule of Practice 111 to "regulat[e] the course of a proceeding."[16]

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[11] *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 71021, 2013 WL 6384275, at *2 (Dec. 6, 2013) (footnotes omitted).

[12] *Id.* (citation omitted).

[13] *Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513, at *5 (June 14, 2016) (internal quotation marks and citation omitted).

[14] *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *3 (Aug. 9, 2007) (quoting *Adoption of Amendments to the Rules of Practice*, Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)).

[15] We note that the law judge remains free to seek an extension of the deadline for the initial decision at any time under Rule 360 if she determines circumstances warrant doing so.

[16] *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *17 (Nov. 4, 2013) (quoting Rule of Practice 111, 17 C.F.R. § 201.111).

That rule is "'broadly worded' to accommodate a law judge's discretion to manage a case plan within the limits of our Rules of Practice and governing statutes."[17] The Commission has repeatedly emphasized that it will not grant petitions for interlocutory review of such "fact-bound, discretionary procedural rulings."[18] Moreover, the law judge's decisions about when to hold the hearing and whether to request an extension of time in which to issue an initial decision involve quintessentially mixed questions of law and fact that are inappropriate for interlocutory review.[19]

These decisions also do not satisfy the standards for obtaining certification of a ruling for interlocutory review from the law judge—that (1) the ruling "involves controlling questions of law as to which there is a substantial ground for difference of opinion" and (2) an "immediate review of the order may materially advance completion of the proceeding."[20] As the law judge recognized, the rulings that Respondents seek to challenge "fail[] to meet the[se]

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[17] *China-Biotics*, 2013 WL 5883342, at *17 (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *6 (Sept. 26, 2007)).

[18] *Nat. Blue Res., Inc.*, Exchange Act Release No. 74215, 2015 WL 470453, at *3 (Feb. 5, 2015); *accord Harding Advisory LLC*, Exchange Act Release No. 9561, 2014 WL 988532, at *4–5 (Mar. 14, 2014); *see also, e.g.*, *Gregory M. Dearlove*, Admin. Proc. Release No. 3-12064, 2006 SEC LEXIS 3191, at *6 (Jan. 6, 2006) (holding that the law judge's decision not to postpone a hearing date was "one of several that the hearing officer must make as part of his regulation of the course of the proceeding and, absent extraordinary circumstances, should not be immediately appealable to the Commission"); *accord Underhill Sec. Corp.*, Exchange Act Release No. 7668, 1965 WL 87065, at *8 (Aug. 3, 1965) (stating that "[t]he determination whether to grant a continuance was a matter resting in the sound discretion of the [hearing] examiner").

[19] *See, e.g.*, *Nat. Blue Res.*, 2015 WL 470453, at *3 (finding that law judge's decision not to postpone the hearing date presented a mixed question of law and fact that was inappropriate for interlocutory review).

[20] 17 C.F.R. 201.400(c).

standards."[21] And "issues that do not satisfy Rule 400(c) will almost never be appropriate for interlocutory consideration by the Commission."[22]

Respondents argue that interlocutory review is appropriate because the present hearing schedule denies them "the opportunity to fully and fairly litigate their defense" and violates their "right to counsel of [their] choice by effectively punishing Respondents for changing counsel recently." But the Supreme Court has made clear that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."[23] This is not a case in which there are "extraordinary circumstances" warranting postponement, such as when respondents are left without assistance of counsel at or near the hearing date through no fault of their own.[24] Although Respondents recently replaced

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[21] We do not believe that granting interlocutory review will materially advance completion of the proceeding. To the contrary, immediate Commission review of the law judge's pre-hearing decisions is more likely to delay the proceedings further. If the law judge's pre-hearing decisions are later determined to be incorrect, those decisions can "'be effectively reviewed post-judgment'" by vacatur and remand. *Nat. Blue Res.*, 2015 WL 470453, at *4 (quoting *Dearlove*, 2006 SEC LEXIS 3191, at *6 n.7) (finding that review of law judge's refusal to postpone hearing date was likely to delay proceeding further and could be effectively reviewed on appeal); *accord Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (determining that, even though a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal," that possibility "has never sufficed" to warrant immediate interlocutory review (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994))); *United States v. Breeden*, 366 F.3d 369, 375 (4th Cir. 2004) (finding a trial court's order granting or denying a continuance not subject to interlocutory review because the order could be "effectively reviewed post-judgment"); *Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 699–700 (6th Cir. 1964) (stating that "[t]he denial of a motion for a continuance is not a final decision from which an appeal will lie" but that "the propriety of such an order is subject to review by the Court of Appeals if and when the case is properly before the court on a later appeal from the final decision in the case").

[22] *McDuff*, 2016 WL 3254513, at *5.

[23] *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (finding that the trial court did not abuse its discretion or deny defendant's right to counsel when the court denied his motion for a continuance to allow better preparation by his attorney, who had been appointed to represent petitioner six days before trial when his original appointed counsel had taken ill).

[24] *See, e.g.*, *Philip L. Pascale, CPA*, Admin. Proc. File No. 3-11194 (Nov. 24, 2003) (finding that a short postponement of the hearing was warranted where respondent's counsel became incapacitated due to illness, and counsel learned about this condition so close to the hearing that substitute counsel could not be obtained); *Carleton Wade Fleming, Jr.*, Exchange Act Release No. 36215, 1995 SEC LEXIS 2326, at *16–17 (Sept. 11, 1995) (holding that NASD's refusal to grant a continuance was improper where counsel had withdrawn and petitioner was required to proceed and present his case without counsel for three days of the hearing); *James Elderidge Cartwright*, Exchange Act Release No. 31087, 1992 WL 216695, at *3–4 (Aug. 25, 1992)

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some of their attorneys, they have been represented by other attorneys from Brune Law P.C. throughout this proceeding.

Nor are we persuaded by Respondents' claim that their new counsel will have insufficient time to review what they describe as a voluminous and complex record. When the court of appeals initially stayed this proceeding, the hearing was set to begin in three weeks and, as the Division notes, many phases of the proceeding had been completed, including the exchange of witness and exhibit lists and expert reports. Once the court of appeals lifted that stay on July 6, the law judge essentially granted the parties an additional 13 weeks in which to prepare by rescheduling the hearing for October 24.[25] The Commission has consistently declined to grant interlocutory review based on similar claims of insufficient time to review large or complex records.[26] Moreover, Respondents' claims about their alleged inability to prepare adequately, the Division's alleged failure to produce documents and information, and key witnesses' alleged

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(holding that NASD's refusal to grant a continuance was unreasonable where petitioner was ill on the hearing date and demonstrated his inability to proceed).

[25] *See, e.g., Falcon Trading Grp., Ltd.*, Exchange Act Release No. 36619, 1995 WL 757798, at *5 (Dec. 21, 1995) (finding no abuse of discretion in NASD's denial of applicants' motions for continuance and adherence to the previously scheduled hearing date where applicants were given six weeks' notice of the hearing date and had sufficient time to obtain new counsel after discovering that joint counsel had potential conflict of interest), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996); *Alexander V. Stein*, Advisers Act Release No. 1497, 1995 WL 358127, at *3 (June 8, 1995) (finding that it was not unreasonable or arbitrary for the law judge not to postpone proceedings where respondent "had well over a month to prepare any defense" and had not asked for a postponement until less than a week before the hearing).

[26] *See, e.g., Nat. Blue Res.*, 2015 WL 470453, at *3 (finding respondent's claim that he had insufficient time to review the Division's "voluminous" investigatory file to be unpersuasive for purposes of granting interlocutory review); *Harding Advisory*, 2014 WL 988532, at *5 (declining to grant interlocutory review of law judge's decision not to postpone the proceeding where respondents alleged that they would be deprived of due process if forced to go forward given the "voluminous investigatory files"); *Kevin Hall, CPA*, Exchange Act Release No. 55987, 2007 WL 1892136, at *1–2 (June 29, 2007) (declining to grant interlocutory review of law judge's decision not to postpone the proceeding where respondents alleged that they needed additional time to review "late-produced documents"); *Dearlove*, 2006 SEC LEXIS 3191, at *2, 6 (denying application for interlocutory review of law judge's decision not to postpone proceeding where respondent claimed that he had inadequate time to review "the massive investigative file," noting that respondent's "argument about the legal and factual complexities of his case is one that potentially many respondents in Commission cases could make")

unavailability are, at this point, too speculative to interrupt the proceedings and order immediate review.[27]

B. The Commission has specified how the Amended Rules apply to pending proceedings.

The Commission has already considered how the Amended Rules should apply to pending proceedings, and many of the Amended Rules *will* apply to this proceeding. For example, in adopting the Amended Rules, the Commission concluded that it would be "just and practicable" for the amendments to Rules 180 (Sanctions), 232 (Subpoenas), 235 (Prior Sworn Statements), and 320 (Evidence Admissibility) to apply to proceedings where, as here, the hearing will begin after the effective date (which is September 27, 2016).[28] The Commission similarly concluded that rules concerning appellate procedure (*e.g.*, Rule 410) will apply to appeals filed on or after the Amended Rules' effective date.[29]

Nonetheless, Respondents request that the Commission order that the Amended Rules concerning the timing of proceedings, depositions and expert discovery, and dispositive motions also apply to this proceeding. The Commission has already determined that this is not "just and practicable."[30] The Amended Rules apply to pending proceedings "depending on the stage of the proceeding."[31] This is a case that was stayed on the eve of a final hearing, after discovery had virtually been completed and the parties had made pre-trial disclosures of witness lists and expert reports. Applying these Amended Rules to such a case—which would, among other things, entail the parties' conducting depositions—runs counter to the Commission's determination that for cases in a sufficiently advanced posture, application of these Amended Rules would delay resolution and "unduly disrupt pending proceedings."[32] Respondents provide no compelling reasons why we should treat their case uniquely from all the other pending cases in our administrative tribunals, and deviate from our decision that the availability of the Amended Rules for litigants in pending proceedings should depend on the stage of their proceeding.

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[27] *See, e.g.*, *Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603, 622 (D.C. Cir. 1978) (finding that parties' "alleged injury falls far short of what is required to overcome the Court's interest in denying consideration until the issues are more sharply defined"). We note, however, that such issues rarely, if ever, would be appropriate for interlocutory review by the Commission.

[28] *Amendments to the Commission's Rules of Practice*, 2016 WL 3853756, at *31.

[29] *Id.* at *32.

[30] *Id.* at *31 ("[T]he tables below reflect the Commission's determinations of what is just and practicable.").

[31] *Id.* at *30.

[32] *Id.*

Accordingly, it is ORDERED that Respondents' petition for an order extending the time for the law judge to file an initial decision in this proceeding and setting a December 2016 hearing date; for interlocutory review of the law judge's July 15 and July 20 Orders; and for an order applying recent amendments to the Rules of Practice to this proceeding is denied.

By the Commission.

Brent J. Fields
Secretary