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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ALPINE SECURITIES CORP. (CRD No. 14952), and SCOTTSDALE CAPITAL ADVISORS CORP. (CRD No. 118786), Respondents.	Expedited Proceeding Nos. FPI190001 FPI190002 STAR Nos. 20190622633 20190622637 Hearing Officer– RES

ORDER DENYING RESPONDENTS' MOTION TO CONDUCT HEARING IN-PERSON

I. The Principal Issue in this Proceeding

On March 19, 2019, FINRA sent Notices of Suspension ("Notices") to Respondents Alpine Securities Corporation ("Alpine") and Scottsdale Capital Advisors Corp. ("Scottsdale") (collectively, "Respondents") for alleged failure to file Continuing Membership Applications ("CMAs") under NASD Rule 1017. That Rule provides that a member shall file a CMA for FINRA's approval of, among other things, "a change in the equity ownership or partnership capital of the member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital."[1]

On April 9, 2019, and in response to the Notices, Respondents timely filed Requests for Hearing under FINRA Rules 9552 and 9559, contending that there has been no change in their equity ownership requiring the filing of CMAs. According to the Requests for Hearing, Alpine is wholly owned by an entity called SCA Clearing LLC ("SCA Clearing"), and Scottsdale is wholly owned by an entity called Scottsdale Capital Advisors Holding LLC ("SCA Holding").[2]

[1] NASD Rule 1017(a)(4). Effective May 8, 2019, NASD Rule 1017 will no longer be effective and will be superseded by SR-FINRA-2019-009.

[2] Respondents' Requests for Hearing at 1. The Requests for Hearing are virtually identical.

Before the events that led to this proceeding, SCA Clearing and SCA Holding were wholly owned by the Hurry Family Revocable Trust ("Hurry Trust"). When SCA Clearing acquired Alpine in 2011, the firm filed a CMA representing that the trustees of the Hurry Trust were John Hurry and his wife, Justine Hurry.[3]

The Requests for Hearing state that in 2017 trust counsel for John and Justine Hurry split the Hurry Trust into two trusts, each of which came to hold a 50 percent interest in SCA Clearing and SCA Holding.[4] In October of that year, trust counsel revised the trust structure to add four more trusts, resulting in six trusts ("Six Trusts").[5] Each of the Six Trusts holds a 16.7 percent interest in SCA Clearing and SCA Holding.[6] Respondents represent that there was no change in trustees, nor was there any change in the management or operation of the Six Trusts.[7]

FINRA's basis for issuing the Notices is that the changes in the trusts holding interests in SCA Clearing and SCA Holding triggered the operation of NASD Rule 1017 and required the filing of CMAs.[8] Because the share of each of the Six Trusts is 16.7 percent, FINRA reaches the 25 percent threshold of NASD Rule 1017 by relying on Notice to Members 00-73, in which NASD Regulation clarified that the word "entity" in the Rule is deemed to encompass any group of individuals acting in concert to obtain control of 25 percent or more of the equity capital of a member.[9] According to the Department of Enforcement, the Six Trusts are a group of individuals acting in concert to obtain control of 25 percent or more of SCA Clearing and SCA Holding.

Respondents counter that there has been no change in ownership because either the Six Trusts each holds only a 16.7 percent interest and no CMA is required, or else the Six Trusts are deemed to be a group and ownership has not changed since the time the Hurry Trust held ownership.[10] The latter part of Respondents' argument appears to rely on a principle of state trust

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[3] Alpine Request for Hearing at 1. On July 20, 2018, FINRA's National Adjudicatory Council ("NAC") barred John Hurry from associating with any FINRA member in any capacity because, the NAC found, Hurry had engaged in unethical conduct in violation of FINRA Rule 2010 in the creation, management, and control of a Cayman Islands entity in order to insulate Scottsdale from regulatory scrutiny. *Dep't of Enforcement v. Scottsdale Capital Advisors Corp.*, No. 2014041724601, 2018 FINRA Discip. LEXIS 16, at *258-59 (NAC July 20, 2018). Hurry appealed the bar and the NAC's findings to the Securities and Exchange Commission. On August 6, 2018, the SEC granted a stay of the bar pending Hurry's appeal. *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, 2018 SEC LEXIS 1946, at *1 (Aug. 6, 2018). The appeal is still pending.

[4] Respondents' Requests for Hearing at 2; FINRA Notices at 1. The Requests for Hearing include an attached affidavit of trust counsel which, in contrast to the Requests for Hearing, avers that trust counsel created the two trusts in 2013. Affidavit of Eric L. Johnson, sworn to April 8, 2019 ("Johnson Aff."), ¶ 3.

[5] Respondent's Requests for Hearing at 2.

[6] Respondents' Requests for Hearing at 2.

[7] Respondents' Requests for Hearing at 2. Similarly, trust counsel states that "John Hurry is and has been the current beneficiary of the Trusts at all times since their creation. John Hurry and Justine Hurry have been trustees of the Trusts at all times since their creation." Johnson Aff., ¶ 4.

[8] FINRA Notices at 2-3.

[9] Notice to Members 00-73 (Oct. 2000), 2000 NASD LEXIS 82, at *26.

[10] Respondents' Requests for Hearing at 3.

law whereby a trust cannot be an "owner" of property separate and apart from the trustees.[11] Respondents represent that, although the trusts have changed, there has been no change in the trustees, and the restructuring of the trusts altered nothing in relation to the beneficial ownership or control of the trusts, SCA Clearing, or SCA Holding.[12]

On April 10, 2019—and without waiving their objection to the putative filing requirement—Respondents each filed a CMA. FINRA notified Respondents that these CMAs were not substantially complete because they did not include the actual trust agreements and related documents for the Six Trusts.[13] On April 25, 2019, Respondents submitted a letter disputing the need for FINRA to review the complete trust documents. This letter is under review by FINRA.[14]

The foregoing shows that the principal issue in this proceeding is whether the replacement of the Hurry Trust by the Six Trusts with regard to SCA Clearing and SCA Holding constituted a change in the equity ownership of Respondents such that Respondents were required to file CMAs. Or, as Respondents put it, "did the administrative restructuring of the trust entities necessitate the filing of a CMA?"[15]

II. Respondents' Motion to Conduct Hearing In-Person

On April 11, 2019, the predecessor Hearing Officer issued an order providing that the hearing would be heard by a Hearing Panel by telephone conference call. The expected length of the hearing is one day, scheduled for June 18, 2019. Respondents have filed a motion ("Motion") requesting that the hearing be held in-person rather than by telephone. In the Motion, Respondents contend that an in-person hearing will ensure that the Hearing Panel has the opportunity to observe the witnesses and assess their credibility. Respondents state they expect to present testimony on the issues of whether there has been a change in the management or control of Respondents, and whether there has been a change in ownership of the Six Trusts. Respondents argue that the Hearing Panel could benefit from in-person presentations of counsel in opening and closing statements.[16]

Enforcement opposes the Motion. Enforcement contends that the ultimate issues in the proceeding are legal in nature: whether Respondents were required to file CMAs under NASD

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[11] Respondents' Requests for Hearing at 3 n.2. I do not reach a decision as to whether this is an accurate statement of state trust law.

[12] Respondents' Requests for Hearing at 2, 3.

[13] Enforcement's Response in Opposition to Respondents' Motion to Conduct an In-Person Hearing ("Enforcement Response"), at 3 n.2.

[14] Enforcement Response at 3 n.2.

[15] Respondents' Requests for Hearing at 1.

[16] Respondents also reiterate that they filed the Requests for Hearing on the "issue of whether the restructuring of trust entities, where there is no change in the identity of the trustees, constituted a change in ownership such that a CMA must be filed." Motion at 2.

Rule 1017(a) based on the changes in the trusts holding interests in SCA Clearing and SCA Holding, and whether the CMAs that Respondents filed on April 10, 2019 were substantially complete. Enforcement states that there is nothing to set this proceeding apart from other expedited proceedings with regard to the benefits of assessing the witnesses or the severity of the potential sanction.

After considering the arguments of each side, I deny the Motion for the reasons stated below.

III. Discussion

Expedited proceedings are governed by the Rule 9500 Series of FINRA Rules. FINRA Rule 9559 provides that "[h]earings under the Rule 9550 Series shall be held by telephone conference, unless the Hearing Officer orders otherwise for good cause shown."[17] The purpose of telephonic hearings is to promote an efficient and expedited process.[18]

Respondents have not shown any special or unique circumstances that would constitute good cause for holding the hearing in person. First, most facts are not in dispute. The principal issue is a legal one: whether the change in the trusts holding interests in SCA Clearing and SCA Holding constituted a change in the equity ownership of Respondents requiring them to file CMAs.

Second, Respondents are incorrect in their assertion that an in-person hearing is necessary for the Hearing Panel to assess the credibility of witnesses. Persuasive case authority allows FINRA hearings to include the testimony of witnesses participating by telephone. Such testimony is an accepted practice in FINRA proceedings and has been upheld by the Securities and Exchange Commission.[19] "While the ability to observe a witness's demeanor is helpful in assessing credibility, experience shows that the credibility of witnesses who testify by telephone can be evaluated based on other factors, such as the manner in which the witness responds to questions, and whether the testimony is internally consistent and consistent with the testimony of other witnesses and contemporaneous documentary evidence."[20] In addition, the possible benefit of seeing the witnesses in-person is present in every expedited proceeding, and thus cannot be the basis for deviating from the norm of FINRA Rule 9559 that the great majority of hearings will be held by telephone.

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[17] FINRA Rule 9559(d)(5).

[18] OHO Order 06-39 (ARB060023) (Sept. 15, 2006), at 1 ("Under Procedural Rule 9559, hearings in expedited proceedings … are generally held by telephone conference to conserve time and resources."), www.finra.org/sites/default/files/OHODecision/p018465_0_0_0.pdf.

[19] *Dep't of Enforcement v. Respondents 1-6*, OHO Order 15-14 (201203564701) (Oct. 22, 2015), at 1, www.finra.org/sites/default/files/OHO_Order15-14_201203564701_0.pdf.

[20] *Id*. at 3.

Third, the possibility that this proceeding could result in the suspension or termination of Respondents' operations is not a valid ground for holding an in-person hearing, because suspension is the standard sanction under the Rule 9500 Series.[21]

Fourth, it is not practicable to hold the hearing in person. Notably, Respondents do not propose a specific location for an in-person hearing. Alpine's office is located in Salt Lake City, Utah. Scottsdale's office and trust counsel for John and Justine Hurry are in Maricopa County, Arizona. Enforcement's likely witnesses and Respondent's trial counsel are in New York. Enforcement's trial counsel is in Washington, D.C. Thus, wherever an in-person hearing were held, it would require significant travel by the great majority of participants.

IV. Conclusion

For the above reasons, the Motion is **DENIED**. The hearing will be held by telephone conference call.

SO ORDERED.

Richard E. Simpson
Hearing Officer

Dated: May 3, 2019

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[21] *See, e.g.*, FINRA Rule 9552(a).