

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 689/December 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14581

In the Matter of	:	
	:	
CHINA-BIOTICS, INC.	:	ORDER

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP), pursuant to Section 12(j) of the Securities Exchange Act of 1934 (Exchange Act), on October 7, 2011. The OIP alleges that Respondent is a corporation with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act and has repeatedly failed to file required periodic reports. The Division of Enforcement (Division) is seeking to revoke the registration of Respondent’s securities.

17 C.F.R. § 201.230(a)

The parties filed pleadings, on November 22 and 29, 2011, concerning the Division’s obligation, pursuant to 17 C.F.R. § 201.230(a), to “make available for inspection and copying . . . documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.” The Division’s investigation, designated “B-02570,” leading to its recommendation to institute this proceeding is ongoing, into possible additional violations by Respondent. The Division maintains that it should only be required to make available documents that it deems relevant to Respondent’s filing, or non-filing, of periodic reports, while Respondent maintains that the Division should make available all non-privileged documents obtained by the Division in connection with B-02570.

As Respondent maintains, the Division must make available all non-privileged documents it obtained in connection with investigation B-02570 into possible violations by Respondent. See 17 C.F.R. § 201.230(a); Rules of Practice, 60 Fed. Reg. 32738, 32762 (June 23, 1995).¹ Whether or not any or all of the documents are relevant to issues in this proceeding

¹ In a ruling pertaining to production to respondents in one proceeding of documents obtained in investigations of different parties against whom proceedings related to the same or similar facts

does not bear on the Division's obligation. See Byron S. Rainer, Exchange Act Release No. 59040 (Dec. 2, 2008), 94 SEC Docket 12093 (remanding proceeding based on respondent's conviction for wire fraud to Administrative Law Judge (ALJ) for further consideration; Division had made available "copies of every document that provided the basis for the Division's case,"² but not its entire investigative file); José P. Zollino, Exchange Act Release No. 51632 (Apr. 29, 2005), 85 SEC Docket 1292 (remanding to ALJ proceeding based on respondent's conviction of conspiracy to commit fraud and money laundering and injunction against violating the antifraud provisions of the securities laws; incarcerated respondent had not had a reasonable opportunity to review the Division's entire investigative file). The Commission stated, "[w]hile it may be unlikely that the Investigative File contains the kind of 'extraordinary mitigative evidence' that would be relevant here, Zollino should have been given the opportunity to review it." Id. at 1296 (footnote omitted).

17 C.F.R. § 201.230(b)(1)(iv)

The Division seeks leave, pursuant to 17 C.F.R. § 201.230(b)(1)(iv), to withhold materials related to the ongoing investigation as not relevant to the subject matter of this proceeding. The Division discloses nothing about the investigation except that it concerns violations by Respondent of unspecified provisions of the securities laws.

The Division notes that proceedings like this, authorized pursuant to Exchange Act Section 12(j), are routinely resolved by summary disposition based on pleadings and the Commission's public official records concerning the issuer. Thus, concerning Respondent's contention that the investigative file might contain documents relevant to the Gateway factors,³ the Division states, without regard to the relevance of any documents in the file, "fair and full consideration of these factors can be achieved without invading the confidentiality of the Division's investigative file." This is not, however, the standard for making documents available under 17 C.F.R. § 201.230(b). See Rainer, Zollino, supra.

were brought, the Commission noted, in a footnote, that the "investigation" "ordinarily is delineated by the investigation number . . . under which requests for documents were made" and mused, "[t]his language suggests . . . that, in less ordinary circumstances a different rule might apply." Warren Lammert, Securities Act Release No. 8833 (Aug. 9, 2007), 91 SEC Docket 856, 862 n.14. The Commission did not elaborate on "less ordinary circumstances." In any event, footnotes are not the best source of authoritative rulings on a dispositive question. See McElroy Elecs. Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993); RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 729-31 (D.C. Cir. 1985).

² The documents made available were copies of the criminal indictment, the respondent's guilty plea, plea agreement, and judgment, his U4 and U5, and documents showing the status as broker-dealer and investment adviser of the entity with which he had been associated.

³ See Gateway Int'l Holdings, Inc., Exchange Act Release No. 53907 (May 31, 2006), 88 SEC Docket 430, 439.

Concerning the actual relevance of documents in its file, the Division argues that nothing in its file could render Respondent's delinquent filings trivial or inconsequential and notes that scienter is not an element of the violation with which Respondent is charged.⁴ In essence, the Division asks for permission to withhold documents based on its own determination of their irrelevance. However, the Commission explicitly rejected relevancy determinations by the Division and stated that, with specified exceptions, the "rule requires that documents obtained from persons outside the Commission as part of the investigation leading to the institution of proceedings be made available." Rules of Practice, 60 Fed. Reg. at 32763. Additionally, based on the Division's generalized description of its investigative file, it does not meet the test for withholding in 17 C.F.R. § 201.230(b)(1)(iv), which provides an exception "where a single investigation involves a discrete segment or segments that are related only indirectly, or not at all, to the recommendations ultimately made to the Commission with respect to the particular respondents in a specific proceeding" as exemplified by "a single investigation . . . into an issuer's allegedly false accounting disclosure and an unrelated manipulation of the issuer's securities by a third party." Rules of Practice, 60 Fed. Reg. at 32762. "If the recommendation to the Commission and resulting administrative proceeding involve only the accounting disclosures, the Division could seek leave to withhold . . . documents related to the manipulation investigation." Ibid. In contrast, this instance involves investigation of unspecified violations by the identical respondent in addition to the reporting violations charged in this proceeding.

17 C.F.R. § 201.230(g)

The parties also address the applicability of 17 C.F.R. § 201.230(g) to this proceeding, inasmuch as the Division's B-02570 investigation is continuing. That rule requires the Division to "promptly inform the [ALJ] and each party if investigatory subpoenas are issued under the same investigation file number"⁵ and requires the ALJ to take steps to assure that "any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent . . . on a timely basis."

Respondent requests that documents that the Division has continued to obtain be made available to it under 17 C.F.R. § 201.230(g) and that Division staff participating in this proceeding not work on the continuing investigation. The Division, essentially, maintains that the new material is not relevant to this proceeding and also represents that it will not use such material in this proceeding. The Division's relevance argument is rejected for the same reason

⁴ Despite the implications of the Division's argument, in a few instances, 12(j) proceedings have been resolved favorably to respondents that violated the reporting provisions. See Diatect Int'l Corp., Initial Decision Release No. 344 (A.L.J. Jan. 30, 2008), 92 SEC Docket 1975; Info. Architects Corp., Initial Decision Release No. 299 (A.L.J. Oct. 25, 2005), 86 SEC Docket 1846; e-Smart Techs., Inc., Initial Decision Release No. 272 (A.L.J. Feb. 3, 2005), 84 SEC Docket 2979.

⁵ The undersigned was made aware of the existence of such an investigatory subpoena (issued on October 11, 2011, a few days after the OIP) at the November 17, 2011 prehearing conference by Respondent. The Division had not complied with 17 C.F.R. § 201.230(g).

discussed above in reference to 17 C.F.R. §§ 201.230(a), (b)(1)(iv). Accordingly, the Division must make available to Respondent documents that it has continued to obtain through the use of investigatory subpoenas in investigation B-02570. In view of this, it is not necessary to place any restrictions on staff participating in this proceeding and the continuation of the B-02570 investigation.

Confidentiality Agreement

Under the circumstances, production of the material pursuant to this Order will be subject to Respondent's entering a confidentiality agreement with the Division, limiting its use to this proceeding. This will address the Division's concern that the material may be subject to discovery in other litigation involving Respondent.

17 C.F.R. § 201.230(c)

Respondent asks that, to the extent that the Division is permitted to withhold any documents on the basis of relevance, privilege, or otherwise, the Division be ordered to provide a descriptive list of such documents in accordance with 17 C.F.R. § 201.230(c). As discussed above, the Division's own determination that its documents are not relevant cannot be accepted, and it has not otherwise demonstrated that any document that it seeks to withhold is not relevant. Accordingly, the Division will make available non-privileged documents, pursuant to 17 C.F.R. §§ 201.230(a), (g), as soon as possible and will provide by December 16, 2011, a list of documents withheld on the basis of privilege or otherwise pursuant to 17 C.F.R. §§ 201.230(b)(1)(i)-(iii).

If the Division wishes to renew its request for leave to withhold documents on the basis of relevance, pursuant to 17 C.F.R. § 201.230(b)(1)(iv), it will provide by December 16, 2011, a list that that describes with particularity any document it proposes to withhold.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge