

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 718/ August 20, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of	:	
	:	ORDER ON SUBPOENAS
OPTIONSXPRESS, INC.,	:	
THOMAS E. STERN, and	:	
JONATHAN I. FELDMAN	:	

On April 16, 2012, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). The hearing is scheduled to begin on September 5, 2012.

Feldman's First Subpoena

On August 13, 2012, Jonathan I. Feldman (Feldman) filed a Motion for Issuance of Subpoena (Feldman's First Subpoena) to the Custodian of Records of the Division of Enforcement (Division) to produce by August 16, 2012:

1. Documents sufficient to determine the date on which a determination to file an action against [Feldman] was made by the Division's Staff, the Director of the Division, or the Director's designee.
2. Documents sufficient to determine the date on which the Director of the Division, or the Director's designee, provided notice to and received approval of the Commission to extend for a second time the 180-day period under Section 4E of the Exchange Act concerning the determination of whether to file an action against [Feldman].
3. Documents sufficient to determine the date on which an Action Memorandum was submitted to the Securities and Exchange Commission recommending that the Commission institute administrative proceedings against [Feldman].
4. The cover page of the Action Memorandum submitted by the Division concerning recommendation to institute proceedings against [Feldman] fully redacted to reveal only (1) the date it was signed and by whom (2) the date it was submitted to the Commission.

Feldman cites Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), now Section 4E of the Securities Exchange Act of 1934 (Exchange Act), as permitting “the Division Director to extend the 180-day deadline for complex cases if, and only if, a determination cannot be made to either file or give notice of intent not to file.” Feldman’s First Subpoena at 1. As a basis for the subpoena, Feldman states that he seeks to demonstrate that the Division made a determination to file this action “within the second 180-day period and before the third 180-day period was approved.”¹ Id. at 2. Feldman claims that the Affidavit that the Division provided in its Opposition to Feldman’s Motion for Summary Disposition does not disclose when the determination to file the action was made. Id. at 1.

The Division filed its Opposition to Feldman’s First Subpoena on August 14, 2012 (Opposition). The Division insists that I have already rejected Feldman’s argument and, even if I did not, his argument lacks merit. Opposition at 1. In support of its position, the Division cites the Declaration of the Assistant Division Director it submitted in opposing Feldman’s Motion for Summary Disposition which states specifically that: (1) on October 13, 2011, the Division Director received approval from the Commission to extend the filing deadline from October 21, 2011, to April 17, 2012; and (2) on October 20, 2011, the Commission decided to institute this proceeding. Id. at 2.

The Division argues at some length that Feldman’s First Subpoena is unreasonable because Feldman’s legal position is invalid. The Division contends that Section 4E of the Exchange Act imposes internal timing requirements on the Division’s staff; it does not specify consequences for noncompliance and does not create a limitations period or divest the Commission of its authority to act. Id. at 3 (citing United States v. James Daniel Good Real Property, 510 U.S. 43, 62-65 (1993); Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003); Brook v. Pierce County, 476 U.S. 253, 266 (1986); United States v. Barberis, 887 F. Supp. 110, 115-16 (D. Md. 1995); SEC v. Scammell, No. 11-cv-6597, Order Denying Motion to Dismiss (C.D. Cal., Nov. 15, 2011); Gualario & Co., Admin. Proc. Rulings Rel. No. 680, 2011 LEXIS 2806 at *2 (Aug. 11, 2011)). In addition, the Division contends it would be very odd to interpret the statute so as to prematurely cut off the Commission’s authority to bring fraud actions when one of the primary purposes of Dodd-Frank is to expand the Commission’s powers to curb securities fraud. Id. at 4. Finally, the Division maintains that the nature and purpose of the Wells notices suggest that Section 4E was not intended to be a statute of limitations. To hold otherwise could theoretically result in fewer Wells notices, which are discretionary; thus, hindering Section 4E’s policy of encouraging efficient resolution of investigations. Id. at 5.

¹ At least one publication has noted problems with a practical application of Section 4E because of “given certain definitional uncertainties: It is the commissioners, not the staff, who make the ultimate determination whether to authorize an action. It is the Commission not the staff, that files any such action. And the director of the Division of Enforcement is a member of the staff.” David S. Frankel et al., “Dodd-Frank’s Impact on Securities Enforcement and Litigation,” *The Metropolitan Corporate Counsel*, Oct. 2010, at 12.

Feldman's Second Subpoena

On August 15, 2012, Feldman requested subpoenas requiring the following thirteen witnesses to testify at the hearing: (1) several individuals with optionsXpress, Inc. (optionsXpress): Peter Bottini, Jeremy Alex Coronado, Scott Tortorella, Phillip Hoeh, Kevin Strine, Ron Molnar, Terrence Gallery, and Robert Kurzatkowski; (2) August Payne with Beacon Financial Group; (3) Mark Zelezny; (4) Andrew Wallin; (5) Thomas Gemmell; and (6) an "Entity Designee/Representative Division of Enforcement," (Feldman's Second Subpoena). The areas of inquiry for the Division's representative are the same issues covered in documents sought by Feldman's First Subpoena, a subpoena duces tecum.

On August 17, 2012, the Division filed its Opposition to Feldman's Second Subpoena opposing testimony from a Division representative for the same reasons set out in its Opposition to Feldman's First Subpoena.

optionsXpress Subpoena

On August 16, 2012, optionsXpress filed a Motion for Issuance of Subpoena to TD Ameritrade, Inc., (TD Ameritrade) returnable August 27, 2012, for the following materials (optionsXpress Subpoena):

1. All documents relating to TD Ameritrade's communication with employees of the Securities and Exchange Commission, including personnel in Trading & Markets or Enforcement; FINRA; the CBOE; or any other regulator relating to the Feldman Accounts, any accounts at TD Ameritrade held by Other Customers, or the trading in those accounts.
2. All documents reflecting any investigation, inspection or other inquiry by the Securities and Exchange Commission, FINRA, CBOE, or any other regulator or their employees as to whether trading in the Feldman accounts, or any accounts at TD Ameritrade held by the Other Customers, was in compliance with Reg. SHO.
3. All communications or correspondence between TD Ameritrade and [Feldman] regarding activity in the Feldman Accounts, including but not limited to any complaints made by Feldman regarding the handling of his accounts.
4. Documents sufficient to establish whether TD Ameritrade charged additional fees to customers who placed trades involving short positions in securities that were deemed Hard to Borrow.
5. All documents from March 1, 2010 to the present relating to any trading accounts held at TD Ameritrade by the Other Customers, including account statements, buy-in notices, and electronic trading records.

optionsXpress states in support of the subpoena that it needs the requested information to defend against the allegations in the OIP. optionsXpress Subpoena at 1.

Rulings

Commission Rule of Practice 232(b) provides that a subpoena should be issued if it is not unreasonable, oppressive, excessive in scope, or unduly burdensome.

Feldman's First Subpoena

Feldman's First Subpoena request is unreasonable, excessive in scope, and unduly burdensome at this late date. The hearing in this matter begins in less than three weeks, and the intervening time period includes a major holiday weekend. The subpoena would require a party to undertake data collection just as it is preparing to submit a prehearing brief due August 31, 2012, and is preparing its case in chief, which at one time was to include thirty witnesses, including two experts. The proceeding has been in pre-hearing status for almost four months. It is too late for Feldman to initiate a subpoena duces tecum on the Division. Moreover, Feldman gave no notice that he was going to file the motion at the August 6, 2012, prehearing conference.

Finally, on July 11, 2012, I rejected Feldman's argument that the Commission was compelled to institute the action by October 21, 2011, even though on October 13, 2011, the Division received Commission approval for an extension until April 17, 2012. optionsXpress, Inc., Admin. Proc. Rulings Rel. No. 710 (July 11, 2012).

For the reasons stated, I DENY the Motion for Issuance of Subpoena.

Feldman's Second Subpoena

I have issued all subpoena ad testificandum except the one directed to the Division Designee/Representative, which I DENY for the same reasons that I denied Feldman's First Subpoena.

optionsXpress Subpoena

I GRANT the subpoena to TD Ameritrade except for request 5, which is so broad as to be unreasonable and excessive in scope.

Brenda P. Murray
Chief Administrative Law Judge