

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 720/August 23, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14848

In the Matter of	:	
	:	SECOND 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. On August 20, 2012, optionsXpress, Inc. (optionsXpress), filed a Motion for the Issuance of Subpoena (Subpoena Duces Tecum) to the Financial Industry Regulatory Authority, Inc. (FINRA), for all:

1. [D]ocuments relating to FINRA's examination of any trading accounts held by [Jonathan and/or Judith Feldman; Mark Zelezny, Jennifer Zelezny and/or Betty Zelezny; Blake Gentry; Bradley Nielson and/or Joann Nielson; Dean (or "Constantine") Kolocouris] (Customers) or of optionsXpress's compliance with Reg. SHO during [January 1, 2009, through March 18, 2010] (Relevant Period).
2. [C]ommunications with employees of the Securities and Exchange Commission, including personnel in Trading & Markets or Enforcement; the CBOE; or any other regulator relating to the Customers or the trading in any accounts held by the Customers or to optionsXpress's compliance with Reg. SHO during the Relevant Period.
3. [D]ocuments, including memoranda and any internal or external communications, regarding the application of Reg. SHO to buy-writes, [box spreads, reverse conversions, three-ways, and similar hedged option trading strategies] or the assignment of calls sold as part of a buy-write.

On August 20, 2012, optionsXpress also filed a Motion for the Issuance of Subpoenas (Subpoenas Ad Testificandum) to the following employees of FINRA: Gene Demaio, Jocelyn Mello-Gibbon, Yvonne Huber, and Christina Aylward (FINRA Employees).

optionsXpress states that it needs the documents sought and the testimony of the FINRA Employees to defend against the allegations in the OIP.

On August 21, 2012, the Division of Enforcement (Division) filed its Opposition to the Subpoena Duces Tecum (Opposition). The Division argues that the Subpoena Duces Tecum is: (1) unduly burdensome just two weeks before the hearing is scheduled to begin; (2) if granted, the hearing would have to be delayed as the parties would need time to process, review, and analyze the materials; (3) an attempt to obtain materials that are protected from discovery by the regulators' investigatory privilege, citing SEC v. Thrasher, 1995 WL 46681, at *12 (S.D.N.Y. Feb. 7, 1995) and 15 U.S.C. § 78x(f); and (4) the Division has produced notes by FINRA personnel of calls with representatives of the Commission's Trading and Markets Division and the CBOE. The Division takes no position on the portions of the Subpoena Duces Tecum covering FINRA's communications with regulators other than the Commission and other FINRA investigative files, communications, and memoranda. Opposition at 2 n.1.

optionsXpress filed its Reply to the Opposition on August 22, 2012. It argues that the burdens of the subpoena will fall on FINRA and not the Division; it made the subpoena request at "the earliest possible time" after reviewing the investigative file it received from the Division in mid-May 2012; it needs to know whether FINRA has other relevant documents that fell outside the Division's request to FINRA and therefore were not included in the investigative file; it needs to obtain any existing, additional unprivileged relevant documents in FINRA's possession relating to communications with any Commission employees, not just Division employees; and the Division's reliance on 15 U.S.C. § 78x(f) is irrelevant in that optionsXpress seeks only non-privileged materials and an accounting of documents claimed as privileged.

Ruling

The criteria for issuance of a subpoena are that it not be unreasonable, oppressive, excessive in scope, or unduly burdensome. 17 C.F.R. § 201.232(b).

I DENY the Subpoena Duces Tecum to FINRA for several reasons. First, it is unreasonable, oppressive, and unduly burdensome to inform FINRA on Thursday, August 23, that it must produce considerable materials by Monday, August 27, and for the Division to have to digest new information five business days before the start of the hearing. Second, it is unreasonable for optionsXpress to have taken from mid-May until August 20, 2012, to determine that it needed to request additional materials to supplement what it had received from the Division. Third, the Division's assertion that granting the Subpoena Duces Tecum would likely delay the hearing because it would need to review the materials produced appears reasonable. Opposition at 1. At the prehearing conference on May 15, 2012, I made it clear that the hearing should begin in August. Tr. 26, 32-35. Beginning the hearing on September 5 was a concession to the parties. That date is firm. Finally, I will GRANT the Subpoenas Ad Testificandum so that optionsXpress will have certain FINRA witnesses available for examination.

Brenda P. Murray
Chief Administrative Law Judge

