

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2757/June 2, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of

CHARLES L. HILL, JR.

ORDER DENYING IN PART SUBPOENA
REQUEST

On May 13, 2015, Respondent Charles L. Hill, Jr., submitted a request that I issue a subpoena to the Commission. His request covered ten categories of “documents and communications.” By separate order, I previously granted Mr. Hill’s request as it pertained to what he identified as items five and eight. *Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2706, 2015 SEC LEXIS 2016 (May 21, 2015). This Order addresses the remaining eight items.

Broadly speaking, Mr. Hill seeks information about how the Commission chooses forums for its cases against “unregulated individual[s]” and how it chose the forum for his case specifically. Request at 3-4. He would also like to know who among the Commission’s staff is involved in those decisions. *Id.* at 4. Mr. Hill would additionally like to see evidence related to the decision to pursue this matter and the “action memorandum” given to the Commission concerning his case. *Id.* at 5. Finally, he seeks information related to the decision not to bring an action against two individuals allegedly involved in this matter. *Id.*

After the Office of General Counsel objected to Mr. Hill’s request, Mr. Hill filed a response, in which he explained that he seeks evidence in relation to his due process and equal protection defenses. Response at 3-4. He says that his due process claim is based on “the lack of procedural safeguards for adjudicating a complex case like this one compared to those available in a federal court, such as the right to a trial by jury.” *Id.* at 3. And his equal protection argument is that he is the only unregulated person of whom he is aware who has been “accused of violating only § 14(e)” whose case has been pursued administratively rather than in district court. *Id.* at 3-4. As to this latter point, Mr. Hill asserts that the decision to proceed against him was arbitrary because the Commission has “no meaningful guidance” for selecting the forum in which it pursues cases. *Id.* at 4.

The procedural differences between cases adjudicated in federal court and those adjudicated administratively are unrelated to the information Mr. Hill seeks. The differences result from the differences between the various statutes and regulations that govern those proceedings and will exist no matter what forum is selected or who is involved in the decision to select the forum. Obtaining the information Mr. Hill seeks does not help his due process argument.

Mr. Hill's subpoena request therefore concerns only his equal protection argument. In his response, he says:

Concerning the Equal Protection challenge, Mr. Hill appears to be the only unregulated person sued by the SEC in the administrative system following the passage of the Dodd-Frank Act for civil penalties solely under § 14(e). There is no reason that Mr. Hill's case is different from all the others or any meaningful guidance that explains the SEC's forum selection here. Those facts show that the SEC is acting arbitrarily.

Response at 6. Based on the foregoing, which is the most Mr. Hill says about the issue, it appears he is attempting to raise a class of one equal protection claim.

Class of one claims generally come in two flavors. The first type concerns claims that a governmental agency acted arbitrarily or irrationally in regulating an individual as compared to other individuals. The second type concerns governmental action directed toward an individual based on invidious discrimination. Mr. Hill's subpoena request concerns the first type of case. He does not assert that the Commission was motivated by invidious discrimination.

In order to bring a class of one claim, Mr. Hill must show that he was treated differently from individuals who are similarly situated to him and that there was no rational basis for doing so. "To be 'similarly situated,' the comparators must be '*prima facie* identical in all relevant respects.'" *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir. 2010) (citation omitted); *see United States v. Moore*, 543 F.3d 891, 896-97 (7th Cir. 2008).

The closest Mr. Hill comes to saying that he is similarly situated to anyone else is his argument that "[t]here is no reason that [his] case is different from *all* the other[]" section 14(e) cases that he appears to believe have been brought against unregulated individuals in district courts since 2010 when the Commission was granted the authority to pursue such cases administratively. Response at 6 (emphasis added). This argument appears to proceed from the premise that there are a large number of section 14(e) cases that the Commission is currently pursuing in district courts. Perhaps this is so, but Mr. Hill has not pointed to a single section 14(e) case that was brought in a district court after the Dodd-Frank Wall Street Reform and

Consumer Protection Act¹ was passed or explained how he is “*prima facie* identical in all relevant respects” to the defendants in those cases.²

Mr. Hill’s failure to make a threshold showing matters because in its decision to bring an action, whether administratively or in district court, the Commission, and by extension the Division of Enforcement, enjoys a presumption of regularity. *See United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); *Lockheed Martin Corp. v. Admin. Review Bd., DOL*, 717 F.3d 1121, 1129 (10th Cir. 2013); *cf. United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) (“Once made, [a prosecutor’s] decisions enjoy a presumption of regularity.”). That presumption can be overcome only through “clear evidence” that the Commission acted impermissibly. *Chem. Found.*, 272 U.S. at 14-15; *see Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); *Lewis*, 517 F.3d at 25. The burden to overcome that presumption rests with Mr. Hill. *See Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).

To the extent Mr. Hill attempts to overcome this burden, *showing* selective enforcement is one way to do so. *See Lewis*, 517 F.3d at 25. But this is where the problem lies for Mr. Hill. Before he can obtain discovery to support his claim, he bears the threshold burden to show that the Commission pursued the case of “similarly situated individuals” in district court rather than administratively. *Cf. id.* (concerning a claim of selective prosecution); *United States v. Goulding*, 26 F.3d 656, 662 (7th Cir. 1994) (same).³ Because Mr. Hill has not attempted to shoulder this burden, he cannot obtain the discovery he seeks. His request is therefore DENIED as it relates to items one through four, six, seven, nine, and ten.

In light of the foregoing, the request by the Office of the General Counsel for leave to file a reply to Mr. Hill’s response is DENIED as moot.

James E. Grimes
Administrative Law Judge

¹ *See* Pub. L. 111-203, 124 Stat. 1376 (2010).

² I was able to locate three section 14(e) cases brought by the Commission in district court after the passage of the Dodd-Frank Act that resulted in written decisions. *See SEC v. Schvacho*, 991 F. Supp. 2d 1284 (N.D. Ga. 2014); *SEC v. Clay Capital Mgmt.*, 2013 U.S. Dist. LEXIS 159130 (D. N.J. Nov. 6, 2013); *SEC v. Garcia*, 2011 U.S. Dist. LEXIS 148623 (N.D. Ill. Dec. 28, 2011).

³ Whether bringing a claim of selective enforcement or prosecution or a class of one equal protection violation, Mr. Hill must show that he was treated differently from similarly situated individuals. *See Grider*, 618 F.3d at 1263-64; *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006).