

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

Administrative Proceedings Rulings
Release No. 5070 / September 20, 2017

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order Granting in Part
Motion for Protective Order**

Respondent David Pruitt, CPA, moves for a protective order covering third-party productions. The Division of Enforcement does not oppose Pruitt's motion. As is explained below, Pruitt's motion is granted in part and denied in part without prejudice to renewal.

Pruitt asserts that certain third-party recipients of his subpoenas have stated that their responsive documents "are confidential, sensitive, and/or proprietary in nature and require protections from public disclosure." Mot. at 1. He observes that these third parties "may have statutory, regulatory, professional, and/or contractual obligations to protect certain information about their clients or their businesses." *Id.* Pruitt adds that certain records from an entity's external auditor "may . . . contain . . . trade secrets or other confidential research, commercially sensitive information, and personal identifying information." *Id.* at 2.

With the Division's assent, Pruitt proposes that I enter a protective order permitting third parties who receive subpoenas to designate as confidential the documents the third party believes should be protected from public disclosure. *See* Mot. Ex. A at 1-2. Pruitt's proposed order includes a description of various procedures for designating, accessing, and disclosing putatively confidential evidence and for challenging a third party's designation of confidential information. *See id.* at 2-7.

In his proposed order, Pruitt does not identify the third parties to whom the proposed order might apply. He also does not clearly identify what information any third party might deem confidential or why.

Commission Rule of Practice 322(a) permits anyone “who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence” to “file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information.” 17 C.F.R. § 201.322(a). Under this rule, the party seeking a protective order must submit “for in camera inspection a sealed copy of the documents as to which the order is sought.” *Id.*

Under Commission Rule of Practice 322(b), “[d]ocuments and testimony *introduced in a public hearing* are presumed to be public.” 17 C.F.R. § 201.322(b) (emphasis added). By focusing on evidence introduced in a public hearing, Rule 322(b) implicitly distinguishes between evidence disclosed during discovery and evidence presented during an administrative hearing or in support of a dispositive motion. *Cf. United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (distinguishing between documents “passed between the parties in discovery,” which “lie entirely beyond the . . . reach” of the public-access presumption, and evidence presented in court). Rule 322(b) also provides that a motion for a protective order may be granted “only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.” 17 C.F.R. § 201.322(b). Rule 322 does not otherwise explain whether this standard is intended to apply only to subsection (b) and evidence introduced in a public hearing or more generally to any application for a protective order.

As to personally identifiable or sensitive personal information, as defined in paragraph 1 of the active protective order in this proceeding, *David Pruitt, CPA*, Admin. Proc. Rulings Release No. 4828, 2017 SEC LEXIS 1563, at *1–2 (ALJ May 25, 2017), contained in evidence submitted by third parties, Pruitt’s motion is GRANTED. Even assuming the subsection (b) standard applies to subsection (a) and evidence disclosed during discovery, the harm resulting from public disclosure of such information would outweigh the benefits of its release. The parties are ORDERED to submit a new proposed protective order with provisions governing the production and handling of third-party documents containing sensitive personal information. Insofar as possible, the proposed third-party protective order should mirror the structure of the existing protective order that applies to information disclosed by the Division.

In other respects, Pruitt’s motion is DENIED WITHOUT PREJUDICE to renewal by any third party that believes it is entitled to a protective order. Even if a lesser showing of harm is necessary to warrant a protective order at this stage of the proceeding, *cf. Amodeo*, 71 F.3d at 1050 (“Where testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than

a prediction of public access absent a countervailing reason.”), Pruitt’s proposal is overly broad. His general assertions that third parties have what they believe to be confidential information, which they “may” be obligated to protect, do not suffice to warrant a protective order. Instead, Pruitt implicitly suggests that I should delegate the responsibility for weighing the public interest against the possible harm of disclosure. But such delegation is impermissible. *Cf. Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).”).

Any third-party recipient of a subpoena in this proceeding may move for a protective order by submitting “for in camera inspection a sealed copy of the documents as to which the order is sought.” 17 C.F.R. § 201.322(a). A third party that moves for a protective order should address whether or how the standard in Rule 322(b) will apply to the party’s motion.

James E. Grimes
Administrative Law Judge