

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

Administrative Proceedings Rulings
Release No. 6479 / March 4, 2019

Administrative Proceeding
File No. 3-17352

In the Matter of

**Saving2Retire, LLC, and
Marian P. Young**

**Order Following
Prehearing Conference**

I held a telephonic prehearing conference on February 25, 2019. This order addresses the discovery dispute between Respondents and the Division of Enforcement and revises the briefing schedule I entered at the conference.

Respondents' Subpoena

On December 10, 2018, Respondent Marian P. Young, a pro se litigant, submitted seven discovery requests to the Division. At the prehearing conference, Respondent Young voiced dissatisfaction with the Division's response to her subpoena requests because the Division did not provide her any documents. At my direction, the Division filed its response to her subpoena following the conference.

As a general matter, it is difficult to adjudicate claims of privilege in a vacuum. Thus, where the Division is withholding documents based on a privilege, I ORDER that by March 12, 2019, the Division shall file a privilege log that includes for each responsive withheld document the date of the document, the author and recipient, the type of document, and the privilege claimed. The log should provide enough detail to enable me to evaluate the claim of privilege. *See United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996); *see also* 17 C.F.R. § 201.230(c).

I address each request for production (numbered 1-7) more specifically below.

#1: Respondent Young requests evidence supporting the willful nature of Respondents' violations including facts that are the basis of the willful violation claim.

In response, the Division states that all responsive materials have been produced and are listed on its exhibit sheet. In addition, the Division cites its response to Respondents' Petition for Review filed on June 20, 2018, for evidence supporting the willful nature of Respondents' violations (<https://www.sec.gov/litigation/apdocuments/3-17352-event-75.pdf>).¹

Ruling: The Division's response is sufficient. Evidence supporting the allegation, if it exists, would already have been made available when the Division provided Respondents with access to the investigative record. Moreover, further evidence would be found in the hearing record. Finally, I expect the Division's opening brief and proposed findings of fact and conclusions of law will cite evidence that it believes supports the allegations.

#2: Respondent Young asks for evidence on the number of proceedings "for licensing and books and records charges" instituted within the last five years and penalties recommended by the Division.

In response, the Division argues that the request is vague, not relevant to any claim or defense, and portions are protected by the attorney-client privilege, work product doctrine, and deliberative process privilege.

Ruling: The Division's response is sufficient. The order instituting proceedings alleges violations by Respondents. That is the only issue in this proceeding. And to the extent that Young is requesting publicly available information, it is available from information on the Commission's website. Unless the Division already has a non-privileged compilation document responsive to Young's request, it is not required to provide her with the number of proceedings instituted or the penalties publicly recommended in its filings. Further, if Young is requesting recommendations provided by the Division to the Commission, that information falls squarely within the deliberative process privilege and need not be disclosed. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (the deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" (internal quotation marks omitted)).

¹ My review of the filing shows that the term willful is mentioned many times.

#3 & #4: Respondent Young requests lists of any pending or closed investigations concerning the conduct of Division personnel and their interaction with Respondents, and any pending or closed investigations concerning Respondents.

In response, the Division objects, claiming the information sought is not relevant and is protected by the attorney-client privilege and work product doctrine, as well as the deliberative process and law enforcement privileges. Without waiving its privilege claims, the Division represents that it has no knowledge of any investigations by *any other* agency, division, or investigative body.

Ruling: If the Division is aware of an *internal* Division investigation and any documents generated because of that investigation not already made available to Young as part of the investigative file under Rule 230(a), it should list the documents in a privilege log.²

#5: Respondent Young asks for changes in the Division's examination team as a result of conduct during the examination that *would not be privileged*.

In response, the Division states, "There are none."

Ruling: Any documents *subject* to a privilege claim that were withheld must be listed on the privilege log as described above.

#6: Respondent Young asks for any directive or notice instructing the Division to target Respondents for examination.

In response, the Division objects, claiming the material is not relevant to any claim or defense and that Young explicitly calls for the production of information protected by the attorney-client privilege, work product doctrine, and deliberative process privilege.

Ruling: Again, if a responsive document exists for which a privilege is claimed, the Division must list it on the privilege log in the manner described above.

² Young has mentioned an investigative report by Marshall Gandy concerning her examination by the Division. *See Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 6327, 2018 SEC LEXIS 3222, at *1 (ALJ Nov. 15, 2018).

#7: Respondent Young requests any and all exculpatory material that the Division has withheld.

In response, the Division represents that there are no responsive documents.

Ruling: Given the lack of trust that exists between the parties, it would be best if the Division filed an affidavit or declaration regarding its compliance with Rule 230(b)(3) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This has been done in other situations. *Cf. Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 SEC LEXIS 1683, at *3 (June 17, 1996).

Proposed Audio Exhibit

At the conference, Young moved to admit an audio recording she submitted to my office and the Division on November 14, 2018. *See Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 6309, 2018 SEC LEXIS 3125, at *2 (ALJ Nov. 7, 2018). The Division had no objection.

Accordingly, the recording is ADMITTED to the existing hearing record as Respondents' Ex. 19. The parties shall maintain and preserve a genuine copy of the audio exhibit, in the event they are requested to resubmit such exhibit in any appeal from my initial decision.

Revised Briefing Schedule

At the February 25, 2019, prehearing conference, I set a briefing schedule. To allow additional time to resolve the discovery disputes, I ORDER the following revised schedule:

March 26, 2019: The Division will file an opening brief and proposed findings of fact and conclusions of law.

April 16, 2019: Respondents will file an opposing brief and proposed findings of fact and conclusions of law.

April 23, 2019: The Division will file a reply brief.

If a party wishes to rely on a prior brief or filing in whole or in part, it may do so, and notify my office to that effect. I ask the parties to email courtesy copies of their filings in PDF text-searchable format to alj@sec.gov.

Brenda P. Murray
Chief Administrative Law Judge