

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

Administrative Proceedings Rulings
Release No. 6518 / March 26, 2019

Administrative Proceeding
File No. 3-17352

In the Matter of

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

**Order Following
In Camera Submission**

This proceeding began with an order instituting proceedings on July 19, 2016. Because of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the proceeding has begun anew. See *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *1-2, *4 (ALJ Sept. 12, 2018).

Respondent Marian P. Young has voiced concern about discovery, specifically the Division of Enforcement's response to her requests for production. Following a discussion at the February 25, 2019, prehearing conference, I ordered the Division to file a privilege log that included for each responsive withheld document the date of the document, the author and recipient, the type of document, and the privilege claimed. *Saving2Retire*, Admin. Proc. Ruling Release No. 6479, 2019 SEC LEXIS 302, at *1-2 (ALJ Mar. 4, 2019). In a response filed March 6, 2019, the Division stated that it withheld one document that it identified as a referral memorandum from the Office of Compliance Inspections and Examinations (OCIE) to the Division for violations found during OCIE's examination. The Division withheld it claiming it is attorney work product and subject to the deliberative process privilege.

Out of an abundance of caution and because Respondent Young is pro se, I ordered the Division to submit the document to my office for in camera review, which it did in full on March 18, 2019. The document refers to several attachments. The Division states that all of the attachments have already been produced to Respondent Young, save a spreadsheet prepared by a Commission attorney. I have reviewed the referral memorandum.

Ruling

The Securities and Exchange Commission’s Rule of Practice 230(b)(1)(ii) provides that a document may be withheld from Respondents if it is “an internal memorandum . . . prepared by a Commission employee” or if it is “attorney work product and will not be offered in evidence.” 17 C.F.R. § 201.230(b)(1)(ii).¹ The referral memorandum is an internal memorandum prepared by Commission employees. It is also attorney work product because it was prepared by Commission attorneys during an investigation focusing on Respondents’ alleged violations for the explicit purpose of recommending that an enforcement action be brought. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) (holding that “where an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently ‘in mind’ for that document to qualify as attorney work product”). Therefore, the Division is entitled to withhold it from Respondents.²

A party can gain access to work product only by showing a substantial need for the materials in order to prepare its case and that it cannot obtain their equivalent without undue hardship. *Accord* Fed. R. Civ. P. 26(b)(3)(A)(ii). And even if disclosure of work product is warranted, a court must be careful that only factual information, and not an attorney’s mental impressions or legal theories, is disclosed. *Accord* Fed. R. Civ. P. 26(b)(3)(B). Here, Respondent Young cannot show a substantial need for the referral memorandum: it contains no factual information that she does not already possess.

To assuage her concerns, I will say the following about the document. The allegations in it are nearly identical to the ones identified in the deficiency letter that is part of the current record and was sent to Respondent Young on February 4, 2015. *See* Div. Ex. 8. Further, it does not disclose any

¹ Rule 230(a)(1)(vi) requires the Division to turn over a final examination report produced by OCIE to a respondent as part of the investigative file *if* the Division intends to introduce it into evidence or use it to refresh the recollection of a witness. 17 C.F.R. § 201.230(a)(1)(vi). However, even if the referral memorandum is the final inspection report discussed in this rule, the record reflects that the Division has not entered the report in evidence and did not rely on it at the hearing held in May 2017. And by withholding it, the Division implies that it does not intend to introduce it now.

² The spreadsheet attached to the document is work product for the same reason the memorandum itself is work product.

ill will on the part of the Commission toward Respondents. It simply reports the results of the examination to the Division and alleges violations of the securities laws. It does not indicate that Respondents were singled out or targeted for an investigation when similarly situated persons were not. At the May 2017 hearing, the examiner testified that the Commission's examination of Respondents was part of an initiative to determine if internet investment advisers were properly qualified for the exemption allowing registration. Hr'g Tr. 26-27. Some sentences in the referral memorandum support the examiner's testimony at the hearing.

Respondents' request for production is DENIED.

Brenda P. Murray
Chief Administrative Law Judge