

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1817/September 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15918

In the Matter of

DENNIS J. MALOUF

ORDER QUASHING IN PART AND
MODIFYING SUBPOENA REQUEST TO
ACA COMPLIANCE GROUP HOLDINGS,
LLC

The Securities and Exchange Commission (Commission) commenced this proceeding on June 9, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933 (Securities Act); Sections 15(b), 15C(c), and 21C of the Securities Exchange Act of 1934; Sections 203(f) and 203(k) of the Investment Advisers Act of 1940; and Section 9(b) of the Investment Company Act of 1940. The hearing is scheduled to commence on November 3, 2014.

On August 28, 2014, this Office received Respondent Dennis J. Malouf's (Malouf) Motion for Issuance of Subpoenas Duces Tecum Without Deposition (Motion for Issuance) pursuant to the Commission's Rules of Practice (Rule) 154 and 232. *See* 17 C.F.R. §§ 201.154, .232. The Motion for Issuance included a request for issuance of subpoenas to ACA Compliance Group Holdings, LLC (ACA Holdings), and was not opposed by the Division of Enforcement (Division). Motion for Issuance at Ex. G. On August 28, 2014, I granted the Motion for Issuance as to ACA Holdings and issued the requested subpoena (Subpoena). *Dennis J. Malouf*, Admin. Proc. Rulings Release No. 1740, 2014 SEC LEXIS 3087.

The Subpoena requests production of eighteen categories of documents. Subpoena at Ex. A. On September 9, 2014, ACA Holdings filed an Application to Quash Subpoena (Application), objecting to the temporal scope of the subpoena and representing that it produced documents regarding all consulting work it performed for UASNM, Inc. (UASNM) from January 1, 2007, through December 2012 to the Division. Application at 1.

On September 15, 2014, this Office received Malouf's Opposition to ACA Compliance Group Holdings, LLC's Application to Quash Subpoena (Opposition), arguing that the requests for the 2004-2006 and 2013-2014 time periods are relevant and not overbroad, and that his need for the documents outweighs the burden of production on ACA Holdings.

A. Legal Standard

A party may request the issuance of subpoenas requiring the production of documentary or other tangible evidence. 17 C.F.R. § 201.232(a). However, a subpoena may be quashed or modified “[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome,” or excessive in scope. 17 C.F.R. § 201.232(b), (e)(2). Although the Commission sometimes looks to them for general guidance, the Federal Rules of Civil Procedure (FRCPs) do not apply in Commission administrative proceedings. *John Thomas Capital Mgmt. Grp. LLC*, Securities Act Release No. 9492, 2013 SEC LEXIS 3860, at *26 (Dec. 6, 2013); *Clarke T. Blizzard*, 55 S.E.C. 754, 761 n.17 (2002); *Putnam Inv. Mgmt., LLC*, Admin. Proc. Rulings Release No. 614, 2004 SEC LEXIS 865, at *3-4 (Apr. 7, 2004). FRCP 26 permits discovery as to any matter, not privileged, that is “reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). No such standard appears in Rule 232. *See* 17 C.F.R. § 201.232. FRCP 45 establishes no standard for issuance of a subpoena, and although it permits quashing or modifying a subpoena on the basis of “undue burden,” it also permits quashing or modifying a subpoena on bases not found in the Rules. *Compare* FRCP 45(d)(3)(A)(iv) *with* 17 C.F.R. § 201.232(b), (e)(2). Indeed, Rule 232 does not even use the term “discovery.” *See* 17 C.F.R. § 201.232. In short, the central issue here – whether and how to modify or quash the Subpoena – is governed by a standard entirely unlike the standards in the FRCPs, and the FRCPs are generally not helpful in resolving it.

B. Relevance

ACA Holdings argues that the subpoena is unreasonably broad because the work performed during the 2004 through 2006 time period occurred years before the conduct alleged in the OIP, the work performed during the period of January 2013 through the present occurred after Malouf left UASNM, his former employer, and the Federal Rules of Evidence generally prohibit introduction of evidence of subsequent events such as remedial measures. Application at 2. It argues that compliance would be unduly burdensome because locating documents of current and former employees would be time consuming and would require redacting UASNM clients’ personal identifying information. *Id.*

Malouf argues that the documents from the 2004 through 2007 time period will show that UASNM’s bond trading practices remained unchanged after the sale of the broker-dealer “branch office,” that ACA Holdings did not advise Malouf or UASNM to modify its practices after the sale, and that others, such as ACA Holdings, Kopczynski, and Hudson, were responsible for monitoring and assuring UASNM’s compliance with its practices and procedures and the securities regulations. Opposition at 6-7. Malouf also believes that documents from this period will show that the “secret oral agreement” alleged in the OIP was known to Kopczynski, Hudson, and ACA Holdings, and that Malouf was never informed the arrangement was not compliant. Opposition at 7; OIP at 2. Malouf believes that documents dating from January 2013 through the present are relevant to show the role ACA Holdings played in UASNM’s cooperation with the SEC, eventual settlement, and remedial undertakings. Opposition at 8.

It is reasonable to limit the temporal scope of Malouf’s subpoena to the same temporal scope as the Commission’s subpoena, the response to which presumably became part of the

investigative file. Documents from 2004 through 2006 and from 2013 through the present are not clearly relevant because the OIP covers only Malouf's actions from 2008 through 2011. It is unclear what bearing ACA Holdings' compliance work and evaluations before Malouf sold the branch office have on Malouf's actions thereafter, because the branch office sale was a significant changed circumstance, and no violations predating the branch office sale are alleged. It is possible that some relevant documents might predate January 1, 2007, or postdate December 31, 2012, but I am not yet persuaded that what Malouf seeks will be found in such documents. Malouf should know precisely what he seeks from the documents predating 2007, because he presumably retained ACA Holdings and was familiar with its consulting work. If Malouf seeks certain specific documents predating 2007, he should submit another subpoena request. Although ACA Holdings might have relevant documents postdating 2012, other subpoena recipients (such as UASNM) are clearly more likely to possess them, and it is unreasonable to require production of them from ACA Holdings.

The temporal scope of the subpoena will be modified accordingly. Also, ACA Holdings need not produce any material already provided to the Division. If any newly responsive documents are privileged or attorney work product, ACA Holdings should produce a privilege log.¹ ACA Holdings' January 16, 2013, production to the Division does not appear to be particularly voluminous. *See* Application at Ex. 2. It should not be unduly burdensome for ACA Holdings to produce any additional documents, and therefore Malouf need not pay costs.

Order

It is ORDERED that ACA Compliance Group Holdings, LLC's Application to Quash Subpoena Issued August 28, 2014 to ACA Compliance Group Holdings, LLC is GRANTED IN PART as set forth above.

It is further ORDERED that Respondent's Subpoena Duces Tecum Without Deposition, issued to ACA Compliance Group Holdings, LLC, is MODIFIED as follows and otherwise QUASHED: the time period covered by the subpoena will be limited to January 1, 2007, to December 31, 2012, and ACA Compliance Group Holdings, LLC, need not produced privileged documents, attorney work product, or documents already produced to the Division of Enforcement. Documents shall be produced no later than close of business on September 26, 2014. Respondent shall promptly make available to the Division the produced documents for inspection and copying.

Cameron Elliot
Administrative Law Judge

¹ ACA Holdings should consult with UASNM and UASNM's counsel on this issue.