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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3385/ December 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16729

In the Matter of

MILLER ENERGY RESOURCES, INC.,
PAUL W. BOYD, CPA,
DAVID M. HALL, and
CARLTON W. VOGT, III, CPA

ORDER

At the request of Respondent Carlton W. Vogt, III, I issued a subpoena to the Public Company Accounting Oversight Board (PCAOB or Board). Relying on the privilege granted by 15 U.S.C. § 7215(b)(5)(A), the Board moved to quash the subpoena. For the reasons discussed below, the Board's motion is granted in part and I defer ruling on the remainder of the Board's motion until after December 23, 2015.

Background

According to the Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), Vogt was the engagement partner for Sherb & Co. when it served as the outside auditor for Respondent Miller Energy Resources, Inc. OIP at 3-4. The allegations relating to Vogt concern Sherb's audit of Miller Energy's financial statements for 2009 and 2010. *Id.* at 11-12. Through his subpoena directed to the Board, Vogt seeks:

> All documents relating to the PCAOB's review in or about 2011 of the work papers of Sherb & Co. concerning its audit of the financial statements of Miller Petroleum, Inc. for the fiscal year ended April 30, 2010, including but not limited to any: (a) reports, memoranda, work papers, notes and internal communications relating to that review; and (b) documents reflecting any communications between the PCAOB and Sherb & Co., the SEC, or any other third party relating to that review.

The Board moved to quash, arguing that under 15 U.S.C. § 7215(b)(5)(A), everything Vogt seeks "is privileged and immune from discovery." Mot. at 4. In opposing the Board's motion, Vogt first argues that it would be unreasonable to shield from disclosure the evidence he seeks. Opp. at 4-5. According to Vogt, Section 7215(b)(5)(A) is designed to protect evidence

from disclosure to "'outside' third parties," not from disclosure to a party that was the subject of a Board inspection. *Id.* Second, Vogt argues that even if Section 7215(b)(5)(A) generally shields documents in the Board's possession, it should not shield from disclosure evidence that consists merely of documents he and Sherb submitted to the Board or communications between Sherb and the Board concerning the Board's review of those documents. *Id*. at 6.

Discussion

In response to the Enron and WorldCom accounting scandals, Congress enacted the Sarbanes-Oxley Act[1] and established the Board "to provide for more effective oversight of the part of the nation's accounting industry that audits public companies." S. Rep. No. 107-205, at 4, 2002 WL 1443523 (2002); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*., 537 F.3d 667, 669 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010). An accounting firm that audits publicly traded companies must register with the Board. 15 U.S.C. § 7212. In turn, the Board must perform regular inspections of registered public accounting firms. 15 U.S.C. § 7214. The Board may also investigate "any act or practice, or omission . . . that may violate" the Act. 15 U.S.C. § 7215(b)(1).

In conducting an investigation, the Board may require testimony from a registered public accounting firm or associated person or "require the production of audit work papers and any other document or information in the [firm's] possession." 15 U.S.C. § 7215(b)(2)(A), (B). Documents the Board acquires during an investigation are subject to a broad privilege from disclosure. With certain listed exceptions, 15 U.S.C. § 7215(b)(5)(A) provides that:

> all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under [15 U.S.C. §] 7214 . . . or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c) of this section.

The question presented here is whether subsection (b)(5)(A) protects from disclosure the documents Vogt seeks from the Board.

Three principles bear noting in considering this question. An "agency[] must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984). "[S]tatutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Pierce Cty. v. Guillen*, 537 U.S. 129, 144 (2003); *see also United States v. Nixon*, 418 U.S. 683, 709-710 & n.18 (1974). Finally, "interpretations of a statute which would produce absurd results are to be avoided if

[1] Pub. L. 107-204, 116 Stat. 745 (2002).

alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982).

In relation to an inspection or investigation, the statute protects all: (1) "deliberations of the Board and its employees and agents"; (2) "documents and information prepared . . . specifically for the Board"; and (3) "documents and information . . . received by . . . the Board." 15 U.S.C. § 7215(b)(5)(A). As to the first category, it is apparent that Congress intended to create a broad protection akin to the governmental deliberative process privilege. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Even construing the privilege narrowly, it applies to the Board's internal "reports, memoranda, work papers, notes and internal communications relating to" its review of Sherb's audit of Miller Energy's financial statements. The Board's motion to quash the subpoena as it relates to these internal documents is GRANTED.

The second and third categories are another matter, however. As to these categories, determining Congress's intent requires considering the context of the enactment of Section 7215(b)(5)(A). The Board's predecessor, the Public Oversight Board, was hindered by the fact that accounting firms did not trust it to maintain the confidentiality of documents that firms might provide to it. *See* Jeremy S. Blocher, *Inspection and Investigation of Public Accounting Firms Under the Sarbanes-Oxley Act: Real Reform?*, 110 Penn St. L. Rev. 741, 755-56 & nn.113-14 (2006). By shielding from disclosure the documents firms provide to the Board, Congress has given the firms an assurance that the documents will not find their way into the hands of a would-be adversary in litigation, thereby increasing firms' willingness to turn over relevant documents. *See id*. at 756. As Vogt suggests, Congress's intent with respect to these latter two categories was therefore to shield documents disclosed to the Board from "'outside' third parties." Opp. at 4-5.

Interpreting the privilege narrowly in accordance with its purpose, I construe Section 7215(b)(5)(A), *insofar as it relates to a firm that was the subject of an investigation or inspection*, as being inapplicable to documents the firm provides to the Board if the firm seeks disclosure. "[D]ocuments reflecting [Sherb's] own documents and work papers, and documents reflecting any communications between the [Board] and [Sherb] concerning its review of those work papers" are thus not protected from disclosure *to Sherb*. Opp. at 6. They would, however, be protected from disclosure to third parties.

This interpretation is consistent with statute as a whole. Section 7215(b)(5)(A) provides that the documents in Board's possession lose their protected status when "presented in connection with a public proceeding." 15 U.S.C. § 7215(b)(5)(A). The statute does not identify who might do the "present[ing] in connection with a public proceeding." *See SEC v. Goldstone*, 301 F.R.D. 593, 672 (D.N.M. 2014). When confronted with this issue, the court in *Goldstone* concluded that, among others, "the accounting firm that the [Board] inspects or investigates, may present the materials in federal or state court cases or administrative hearings." *Id*. But in order to present the materials, the firm must have access to them.

Relatedly, the above interpretation also avoids an absurd result. Both Sherb and the Board hold the privilege as it relates to documents Sherb disclosed to the Board. *Goldstone*, 301

F.R.D. at 671. Indeed, the statutory language contemplates that an entity or person subject to a Board inspection or investigation would possess such documents in the first place. *See* 15 U.S.C. § 7215(b)(5)(A) (privilege applicable to documents "prepared . . . specifically for the Board" and documents "received by . . . the Board"). Suppose Sherb had retained all documents it submitted to the Board. If the documents were covered by the privilege as it relates to Sherb, the Board would be able to invoke the privilege to prevent Sherb from presenting retained copies *of its own working papers* as evidence in a later administrative or judicial proceeding. This result would make little sense.

That Sherb might be entitled to documents that it disclosed the Board does not, however, answer the question of whether Vogt is similarly entitled to those documents.

The Board's motion to quash is granted in part. In light of the fact that Sherb is now defunct, Vogt shall have until December 17, 2015, to demonstrate that he stands in Sherb's shoes and is entitled to documents Sherb disclosed to the Board, if any, concerning Sherb's audit of Miller Energy's financial statements. The Board has until December 23, 2015, to respond. Thereafter, I will decide the remainder of the Board's motion concerning such documents.

_____

James E. Grimes
Administrative Law Judge