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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2254/January 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of THOMAS R. DELANEY II and CHARLES W. YANCEY	ORDER

The Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on May 19, 2014, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940. A hearing was held from October 27, 2014, through November 10, 2014.

Respondent Thomas R. Delaney II (Delaney) contends in his responsive post-hearing brief that because the OIP alleges that his misconduct was intentional, the Division of Enforcement (Division) is barred from prevailing on a theory of recklessness or negligence liability. Resp. Br. at 2-4. A key question is whether Delaney had sufficient notice to defend himself against violations based on recklessness and negligence rather than intentional conduct. *See John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *131 (Dec. 15, 2014) ("In administrative proceedings, the standard for determining whether notice is adequate is whether 'the respondent understood the issue and was afforded full opportunity to justify [his] conduct during the course of the litigation.'") (citing *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979)).

There are at least two paragraphs in the OIP in which recklessness is explicitly alleged. *See* OIP at 11, 13. In addition, Delaney's prehearing brief notes that "[i]t is also anticipated that the Division may alternatively attempt to establish that Delaney substantially assisted the purported scheme through recklessness." First Amended Prehearing Br. at 34. Delaney then articulates the legal standard for recklessness and why the Division will not meet it. *Id.* at 34-35. Thus, Delaney was not blindsided by the Division's argument in its post-hearing brief that Delaney may be liable on a theory of recklessness.

The issue is somewhat less clear with respect to negligence, which was never mentioned in the OIP, nor argued in the Division's prehearing brief. However, Delaney's prehearing brief notes that

> even if this Court were to permit the Division to proceed on a pure negligence theory at hearing—to which Delaney would strongly object as contrary to his due process rights to notice since the OIP did not identify a negligence theory—there will be no credible evidence adduced at trial to support such a theory. Rather, the same evidence detailed above in the background section and with respect to recklessness also would preclude a finding that Delaney acted negligently or otherwise caused or contributed to any violations of Rule 204T(a)/204(a).

First Amended Prehearing Br. at 36. Thus, notwithstanding the lack of reference to negligence in the OIP and the Division's prehearing brief, Delaney apparently had the opportunity to present and argue the evidence that he believes would have disproven negligence liability.

In rejecting the respondent's argument that the OIP failed to provide proper notice, the Commission in *Flannery* noted that the respondent had not identified "any additional evidence or defenses he would have proffered had he better understood the charges against him." *John P. Flannery*, 2014 SEC LEXIS 4981, at *132 n.173. Here, Delaney contends that he "focused his efforts at the hearing on defeating the Division's allegations that he was a willful and knowing participant in a scheme, for profit, to violate Rule 204T/204." Resp. Br. at 4. However, Delaney apparently has enough evidence to go on to argue in his responsive brief that he did not act recklessly for various reasons. *Id.* at 14-18. Because, as represented in Delaney's prehearing brief, this same evidence would disprove negligence liability, it is unclear what, if any, additional evidence Delaney would have presented on the issue of negligence.

By January 27, 2015, Delaney is permitted to identify, with specificity, any and all additional evidence that he would have otherwise presented to defend himself on the issue of negligence. That filing is limited to ten pages, and may be accompanied by evidence not previously made part of the record. By January 30, 2015, the Division and Respondent Charles W. Yancey may file a response, not to exceed ten pages in length.

SO ORDERED.

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Jason S. Patil
Administrative Law Judge