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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3894/June 6, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17210

In the Matter of PAUL LEON WHITE, II	ORDER DENYING ISSUANCE OF SUBPOENAS WITHOUT PREJUDICE

Respondent Paul Leon White, II, asks that I issue a series of subpoenas seeking various documents and information from named individuals. For the reasons discussed below, White's request is DENIED without prejudice to renewal.

Background

This is a follow-on proceeding brought under section 15(b) of the Securities Exchange Act of 1934 and section 203(f) of the Investment Advisers Act of 1940. In the order instituting proceedings (OIP), the Division of Enforcement alleges that during the relevant time period, White "was a registered representative associated with a broker-dealer" and "held himself out as an investment adviser." OIP at 1. The Division further alleges that White was convicted in New York state court of multiple counts of grand larceny and one count of a scheme to defraud and sentenced to imprisonment and to pay restitution in excess of $2.9 million. *Id*. at 2. The OIP provides that the purpose of this proceeding is to determine whether the foregoing allegations are true and "[w]hat, if any, remedial action is appropriate in the public interest." *Id*.

On May 13, 2016, following a telephonic prehearing conference, I granted White until May 27, 2016, to mail his answer to the OIP. *Paul Leon White, II*, Admin. Proc. Rulings Release No. 3841, 2016 SEC LEXIS 1732, at *3. I also issued an order setting a schedule for filing motions for summary disposition. *Id*. at *1. On May 31, 2016, White filed what purport to be a series of subpoenas duces tecum directed to a number of individuals. From these individuals, White seeks *all* records related to *any* real estate purchase by the individuals or companies with which they are associated that occurred between 2009 and 2015. White's request includes all communications with third parties concerning any real estate purchase during this period. He also seeks all real estate-related communications and documentation between the individuals and the Commission, the Department of Justice, the FBI, FINRA, Suffolk County law enforcement authorities, and "the Qualified Intermediary, if any, [the individuals] utilized in [their] company's tax deferred property exchange." Attached to each subpoena is what White has

styled as an "affidavit," which contains a series of questions directed to the individuals that White evidently expects to be answered under oath.

In an "affirmation in support" of his request, White asserts that he seeks relevant evidence and that his request is not unreasonable, oppressive, or unduly burdensome. Mot. at 1. He also opines that production of the documents he seeks "will help" the Division and "support" its argument, depending on what documents and information the subpoenaed individuals provide. *Id.* On the other hand, White asserts that the subpoenaed individuals' responses to his questions, together with "documents contained in" their tax returns,[1] could show that they and not White "actually committed fraud, tax evasion and perjury, [and] the SEC is barred . . . by the doctrine of 'unclean hands'" from proceeding against him. *Id.* at 3.

Discussion

Subpoenas are governed by Rule of Practice 232, which permits a party to "request the issuance of . . . subpoenas requiring the production of documentary or other tangible evidence." 17 C.F.R. § 201.232(a). If "it appears . . . that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome," an administrative law judge "may . . . require the person seeking the subpoena to show the general relevance and reasonable scope of the . . . evidence sought." 17 C.F.R. § 201.232(b). Implicitly, subsection (b) authorizes an administrative law judge to determine, at the threshold, whether a requested subpoena is "unreasonable, oppressive, excessive in scope, or unduly burdensome."[2]

As the OIP explains, the issues in this proceeding are three-fold: (1) did White act in a relevant capacity, *i.e.*, was he an investment adviser or associated with a broker-dealer; (2) was he convicted of an offense specified in section 15(b)(4) of the Exchange Act or section 203(e)(2) or (3) of the Advisers Act; and (3) is it in the public interest to bar him from the securities industry. OIP at 2; *see* 15 U.S.C. §§ 78*o*(b)(4)(B), (6)(A)(ii), 80b-3(e)(2), (3), (f). Relevant to the second issue, assuming the Division proves that White was convicted, I explained to White during the prehearing conference that he may not collaterally attack his conviction in this proceeding. Tr. 7; *see David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *5 & nn.22-23 (Mar. 21, 2016). And as to the third issue, in determining whether the public interest supports imposing a bar, I must consider:

> the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

David R. Wulf, 2016 WL 1085661, at *4.

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[1] White's request does not include the individuals' tax returns.

[2] "The burdensomeness test finds its genesis in the Fourth Amendment, which prescribes that disclosure shall not be unreasonable." *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982).

On its face, White's request for *all* records related to *any* real estate purchase by the subpoenaed individuals or companies with which they are associated, including *all* communications with anyone concerning *any* real estate purchase, is unreasonable, oppressive, excessive, and unduly burdensome. Although White claims otherwise, he provides nothing to support his conclusory assertions. And White does not claim that this evidence will reveal that he was not an investment adviser or associated with a broker-dealer. He also does not limit his request to records relating to evidence involving him or his companies. Nor does he claim that this evidence will implicate the public interest. Balancing the breadth of White's request against the likelihood that the evidence at issue would resolve the issues in dispute, White's request is "unreasonable, oppressive, excessive in scope, [and] unduly burdensome." 17 C.F.R. § 201.232(b); *cf. Dow Chem. Co.*, 672 F.2d at 1270 ("Whereas significant need might justify imposition of a very substantial burden, the same cannot easily be said where the information requested, although generally relevant to contested issues in the sense that it is somehow related, is wholly unlikely to resolve the question or dispute. In short, resolution of the issue of reasonableness requires juxtaposition of need and probative value against burden of compliance.").

Indeed, bearing in mind what is at issue in this proceeding, *see* OIP at 2, it is apparent that White seeks evidence that is irrelevant. As White says, he seeks evidence to show that other individuals, but "not Respondent, actually committed fraud, tax evasion and perjury." Mot. at 3. In other words, he is trying to "revisit the factual basis for, or legal defenses to, [his] conviction." *David R. Wulf*, 2016 WL 1085661, at *5 (internal quotation marks omitted). But White cannot collaterally attack his conviction in this proceeding. *Id*. The evidence he seeks is thus irrelevant.[3] *See FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) ("the relevancy of an adjudicative subpoena is measured against the charges specified in the complaint").

Finally, the rules of practice intentionally do not contemplate interrogatories. *See Rules of Practice*, Exchange Act Release No. 33163, 1993 WL 468594, at *47 (Nov. 5, 1993). Although White is free to ask the individuals he sought to subpoena to submit responses to his questions, he is not entitled to an order requiring them to do so. This is especially so where White is apparently seeking evidence to support an attack on his conviction.

Given the various factors relevant to the public interest analysis, I do not foreclose White from seeking potential mitigating evidence. *Cf. Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1110 (D.C. Cir. 1988). White may file a renewed subpoena request seeking evidence relating to the matters at issue in this proceeding. If White files a renewed request, he must explain the relevance and reasonable scope of the evidence sought, remembering that collateral attacks on his conviction are not permitted.

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James E. Grimes
Administrative Law Judge

[3] Without more, White's request for all communications with law enforcement and regulatory authorities related to the real estate transactions is similarly flawed. Because he cannot attack his conviction—because the conviction is "take[n] as a given," Tr. at 10—White has not shown that those communications are relevant.