

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

Administrative Proceedings Rulings
Release No. 6762 / May 29, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

**Order Certifying Subpoena to
the Commission for
Enforcement, Denying Motion
for Stay to Challenge
Constitutionality of
Proceeding, and Setting
Prehearing Schedule**

The Securities and Exchange Commission initiated this proceeding under Section 15(b) of the Securities Exchange Act of 1934 to determine whether Respondent Mark Feathers should be barred or suspended from the securities industry after he was enjoined from violating several provisions of the securities laws.¹ In the course of the proceeding, Feathers sought the issuance of document subpoenas to the Federal Deposit Insurance Corporation (FDIC) and the Small Business Administration (SBA).

During a telephonic prehearing conference held in April 2020, I discussed Feathers's subpoena request with Feathers and counsel for the Division of Enforcement. Division counsel explained that although it believed Feathers was seeking irrelevant information, it had not objected to the request "because ... these third-party agencies can speak for themselves."² Following some

¹ See Order Instituting Proceedings (OIP) at 1–2.

² Prehearing Tr. 49–50 (Apr. 14, 2020); see *id.* at 51 ("We certainly plan to object to the admissibility as to any of these documents, because they are irrelevant to the action. But as far as issuing subpoenas, ... we're not going to object to that.").

adjustments,³ I issued the subpoenas on April 15, 2020, returnable by May 22, 2020. The face of the subpoenas contain the admonition:

The U.S. Securities and Exchange Commission’s Rules of Practice require that any application to quash or modify a subpoena comply with Commission Rule of Practice 232(e)(1). 17 C.F.R. § 201.232(e)(1).

The FDIC did not move to quash. Instead, on April 24, the FDIC sent Feathers a letter in which it asserted that the subpoena directed to it was ineffective because (1) “[a] federal agency that is not a party to an administrative proceeding is not subject to a subpoena issued by a *state* court unless the agency has waived sovereign immunity,” and (2) it had not waived sovereign immunity.⁴

This and a similar letter from the SBA prompted Feathers to move for a 90-day stay so that he could pursue an action in district court to obtain the materials he sought from these agencies.⁵ The Division opposed Feathers’s motion because he could provide his own declaration asserting the facts that the agencies’ documents would reveal and because the stay he is seeking is essentially open-ended, dependent on adjudication by a different court.⁶ Feathers subsequently withdrew his request for a stay to pursue enforcement of the subpoenas, but he still seeks a stay to challenge the constitutionality of this administrative proceeding in federal court.⁷

On May 13, a representative of my office e-mailed the FDIC’s counsel to determine whether the agency intended to move to quash the subpoena directed to it. The e-mail referenced 15 U.S.C. §§ 78c(a)(9) and 78u(c) and 17 C.F.R. § 201.232(e), the import of which is discussed below. FDIC counsel

³ See Prehearing Tr. 51–52.

⁴ Letter from Barbara Katron, FDIC Senior Counsel, to Mark Feathers (Apr. 24, 2020) (emphasis added).

⁵ Stay Mot. at 1 (May 2, 2020).

⁶ Opp’n at 6 (May 11, 2020).

⁷ Reply & Mot. to Withdraw (May 22, 2020).

responded that “[w]ithout waiving any defenses, the FDIC does not intend to move to quash the subpoena.”⁸

FDIC subpoena

Legal Principles

As a general matter, administrative agencies may appoint administrative law judges to preside over hearings, and an administrative law judge assigned to preside over a hearing may “issue subpoenas authorized by law.”⁹ In the Exchange Act, Congress gave the Commission the authority to delegate its adjudicatory functions to its administrative law judges.¹⁰ Congress also provided that “[f]or the purpose of ... any ... proceeding under [the Exchange Act], ... any officer designated by [the Commission] is empowered to ... require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry.”¹¹ Based on the above authority, the Commission has delegated to its administrative law judges the power to, among other things, conduct and regulate hearings and to issue, revoke, quash, or modify subpoenas.¹²

Congress has provided a method to compel compliance with Commission subpoenas. In Exchange Act Section 21(c), Congress provided that:

In case of ... refusal to obey a subpoena issued to ... *any person*, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such ... proceeding is carried on, or where such person resides or carries on business, in requiring ... the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such *person* to appear before the Commission or member or officer designated by the Commission, there to produce

⁸ Since the SBA belatedly moved on May 15, 2020, to quash the subpoena it was issued, its motion will be separately adjudicated.

⁹ 5 U.S.C. § 556(b)(3), (c)(2).

¹⁰ 15 U.S.C. § 78d-1(a); *see Bandimere v. SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 2706 (2018).

¹¹ 15 U.S.C. § 78u(b).

¹² 17 C.F.R. §§ 200.14(a), 201.111(b).

records, if so ordered, or to give testimony touching the matter ... in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.¹³

Absent “statutory intent to the contrary,” courts ordinarily do not interpret the word *person* to include the federal government or one of its agencies.¹⁴ For purposes of the Exchange Act, however, Congress amended the definition of the term *person* in 1975 to include, among other things, “a ... government, or political subdivision, agency, or instrumentality of a government.”¹⁵ Courts have thus construed the Exchange Act’s amended definition of the term *person* to include federal administrative agencies.¹⁶

By rule, the Commission gives parties in Commission administrative proceedings the ability to apply to the presiding administrative law judge for the issuance of documentary subpoenas.¹⁷ If it “appears” that the requested subpoena “may be unreasonable, oppressive, excessive in scope, or unduly burdensome,” the administrative law judge has the discretion to require the

¹³ 15 U.S.C. § 78u(c) (emphasis added).

¹⁴ *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1862 (2019).

¹⁵ 15 U.S.C. § 78c(a)(9); see Securities Acts Amendments of 1975, Pub. L. 94-29, § 3, 89 Stat 97.

¹⁶ *E.g.*, *SEC v. J.W. Barclay & Co.*, 442 F.3d 834, 842–43 (3d Cir. 2006); see *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 623 F. Supp. 1466, 1479 (W.D. Wash. 1985) (Congress “intended that governments were to be treated the same as other ‘persons’ under the Act except where specifically exempted”), *aff’d*, 823 F.2d 1349 (9th Cir. 1987); see also *Return Mail*, 139 S. Ct. at 1863 (holding that to overcome the presumption, a litigant “must point to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government” in the definition of the term *person*). Absent the 1975 amendment and the interpretation that *person* in the Exchange Act includes federal administrative agencies, the Commission would be unable to bring allegations under Section 20 of the Exchange Act. See *J.W. Barclay*, 442 F.3d at 842.

¹⁷ 17 C.F.R. § 201.232(a) (providing that “[i]n connection with *any* hearing ordered by the Commission ... a party may request the issuance of ... subpoenas requiring the production of documentary or other tangible evidence”) (emphasis added).

applicant “to show the general relevance and reasonable scope of the ... evidence sought.”¹⁸ By implication, if a requested subpoena is not facially unreasonable, oppressive, excessive, or unduly burdensome, the administrative law judge may issue it without requiring the applicant to show the general relevance or reasonable scope of the evidence sought.

Once an administrative law judge issues a subpoena, the recipient of the subpoena may move to quash or modify it.¹⁹ But a recipient who moves to quash must do so (1) within 15 days after service of the subpoena, and (2) “by application filed with the Secretary and served on all parties pursuant to Rule [of Practice] 150.”²⁰

The Commission has traditionally disfavored delay in Commission proceedings.²¹ It has more recently directed that, during the current pandemic, extension requests should no longer be disfavored.²² It has also granted the administrative law judge presiding in this proceeding greater authority to extend deadlines.²³

Application

The purpose of this proceeding is to determine whether (1) Feathers has been enjoined from “engaging in or continuing any conduct or practice ... in connection with the purchase or sale of any security,” (2) Feathers was associated with or seeking to be associated with a broker or dealer at the time of his alleged misconduct, and, if so, (3) the public interest supports suspending or barring Feathers from the securities industry.²⁴ Among other matters, the public-interest inquiry is informed by the egregiousness of a respondent’s

¹⁸ 17 C.F.R. § 201.232(b).

¹⁹ 17 C.F.R. § 201.232(e).

²⁰ 17 C.F.R. § 201.232(e)(1).

²¹ 17 C.F.R. § 201.161(b)(1).

²² *Pending Admin. Proc.*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020).

²³ *Mark Feathers*, Exchange Act Release No. 87226, 2019 WL 4916615, at *2 n.9 (Oct. 4, 2019).

²⁴ *See* OIP at 1–2; 15 U.S.C. § 78o(b)(4)(C), (6)(A)(iii).

actions.²⁵ In contesting the allegations in a follow-on proceeding based on an underlying injunction, a respondent is permitted to “introduce evidence regarding the circumstances surrounding [the] allegations” against him,²⁶ and the Commission “must consider mitigating evidence” presented about those circumstances.²⁷

The OIP alleges that Feathers was the CEO and a director of Small Business Capital Corp. (SBCC), an entity through which he offered and sold securities in Investors Prime Fund, LLC (IPF) and SBC Portfolio Fund, LLC (SPF), which were allegedly mortgage investment funds.²⁸ According to the OIP, Feathers was enjoined by United States District Court for the Northern District of California from violating Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15 of the Exchange Act, and Exchange Act Rule 10b-5.²⁹ The court allegedly found that Feathers induced investment through material misrepresentations and acted as an unregistered broker.³⁰ Precedent dictates that in responding to the allegations, Feathers is entitled to present evidence about the circumstances surrounding his involvement with SBCC and any other mitigating evidence relevant to the allegations.³¹

Feathers’s requested subpoena to the FDIC seeks information “related to FDIC examinations, audits, reviews, and applications” concerning the

²⁵ See *David R. Wulf*, Exchange Act Release No. 77411, 2016 WL 1085661, at *4 (Mar. 21, 2016).

²⁶ *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *4 (Jan. 16, 2007) (internal quotation marks omitted).

²⁷ *Siris v. SEC*, 773 F.3d 89, 95 (D.C. Cir. 2014).

²⁸ OIP at 1.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ See *Zollino*, 2007 WL 98919, at *4. As previously noted, however, Feathers cannot attack in this proceeding the district court’s injunction or material factual findings or the propriety of the Division’s conduct in the underlying an injunctive action. See *Feathers*, Admin. Proc. Release No. 6752, 2020 SEC LEXIS 1066, at nn.1–2, 13 (ALJ Apr. 17, 2020) (citing *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1108 (D.C. Cir. 1988), *Sherwin Brown*, Investment Advisers Act of 1940 Release No. 3217, 2011 WL 2433279, at *4 (June 17, 2011), and *Harold F. Harris*, Exchange Act Release No. 53122A, 2006 WL 307856, at *6 (Jan. 13, 2006)).

approval of (1) Feathers as “bank director,” and (2) “investments in FDIC insured financial institutions of” SBCC, IPF, SPF, and Small Business Capital, LLC. On its face, this request does not “appear[] to ... be unreasonable, oppressive, excessive in scope, or unduly burdensome.” Indeed, the information sought seemingly bears a direct relationship to the circumstances of the allegations against Feathers. And absent objection by the FDIC, there is little basis to conclude the subpoenas are oppressive, excessive, or burdensome. So there was no need to require Feathers “to show the general relevance and reasonable scope of the ... evidence” he seeks.

Moreover, the Division has declined to object to Feathers’s third-party subpoenas and the FDIC has not entered an appearance, moved to quash, or provided any reason to think this subpoena meets the criteria for declining issuance. And if a counseled third-party offers no reason to think the criteria in Rule 232(e) have been met, there is no reason for me to come up with reasons for it.³²

Because no one has objected to the subpoena directed to the FDIC and the FDIC has declined to appear or move to quash, it bears highlighting that there is neither a pending motion to quash nor any reason to quash. The question is thus whether to certify this matter to the Commission so that it can decide whether to exercise its authority under Exchange Act Section 21(c) to invoke the aid of a district court to enforce the subpoena.³³ For the reasons that follow, I determine this is the appropriate course of action.

First, the Commission’s rules of practice entitle respondents “in *any* hearing ordered by the Commission” to apply for subpoenas.³⁴ The Commission ordered that a hearing take place in this proceeding.³⁵ So Feathers is entitled to apply for subpoenas.

³² Cf. *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) (“[I]t is not the obligation of [a] court to research and construct legal arguments open to parties, especially when they are represented by counsel”); *Phillips v. Beck*, No. 06-cv-628, 2007 WL 4547569, at *1 (D. Haw. Dec. 27, 2007) (“If a party chooses not to participate in [the adversarial] system, then the other party will, in all likelihood, prevail. Judges cannot stand in a nonparticipant’s shoes and invent arguments or search out evidence for that nonparticipant.”).

³³ See 15 U.S.C. § 78u(c).

³⁴ 17 C.F.R. § 201.232(a) (emphasis added).

³⁵ OIP at 3.

Second, Feathers followed the Commission’s rules and applied for subpoenas. I’ve already determined that the FDIC subpoena does not, on its face, “appear[] to ... be unreasonable, oppressive, excessive in scope, or unduly burdensome.”

Third, no one has objected to the FDIC subpoena and the FDIC has not moved to quash it. Indeed, the FDIC specifically declined to participate after receiving an e-mail inquiry from my office that referenced the provisions governing the Commission’s ability to invoke the aid of a district court and the Exchange Act’s definition of the term *person*.

Fourth, by declining to appear and move to quash, the FDIC has given up the opportunity to object and has necessarily waived any objection to the enforcement of the subpoenas.

Fifth, even considering the FDIC’s sovereign-immunity argument that the FDIC recited to Feathers, there is no reason not to certify this matter to the Commission. Although both the FDIC and the SBA rely on sovereign immunity as a basis not to participate in this matter, the federal sovereign is a party to this action; a federal agency instituted it in a federal forum.³⁶ And Congress specifically included a “government, or political subdivision, agency, or instrumentality of a government,” within the definition of a *person* under the Exchange Act, which includes the Commission’s subpoena enforcement authority in Section 21(c).³⁷ This definition includes federal agencies.³⁸ Sovereign immunity thus does not shield the FDIC from complying with its subpoena.³⁹ Indeed, if sovereign immunity does not protect a congressional

³⁶ Cf. *In re Vioux Prod. Liab. Litig.*, 235 F.R.D. 334, 338 (E.D. La. 2006) (“When the government is a party to litigation, it is subject to the rules of discovery.”) (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)).

³⁷ 15 U.S.C. § 78c(a)(9).

³⁸ *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996) (“[T]he 1934 Act includes government agencies in the definition of ‘person’”); see *J.W. Barclay*, 442 F.3d at 842–43.

³⁹ See *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (holding that to show that Congress has waived sovereign immunity, a litigant “must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States”); cf. *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 778 (9th Cir. 1994) (holding that neither federal sovereign immunity nor

committee from a Commission subpoena, it is difficult to understand how it could protect a federal agency from a Commission subpoena.⁴⁰

In short, the FDIC received a valid subpoena and has declined to avail itself of the chance to move to quash that subpoena. It has therefore waived any defense or objection to the subpoena. As a result, it is appropriate to certify this matter to the Commission so that it may decide whether to exercise its authority to invoke the aid of a district court to enforce the subpoena.⁴¹

Motions for a Stay

Feathers has submitted four motions to stay this proceeding. One motion, which he has withdrawn, was for a stay to pursue the third-party subpoenas. Another, which I denied, sought a stay while he challenges in federal court the constitutionality of this administrative proceeding based on claims my rulings demonstrate an unconstitutional bias in favor of the Division.⁴² That leaves two remaining motions in which Feathers asks for a stay while he challenges the proceeding in federal court. One is on the grounds that this forum is not neutral,⁴³ and the other claims, among other things, that the proceeding “goes well beyond double jeopardy.”⁴⁴ These motions are DENIED. A federal district court lacks jurisdiction to consider collateral constitutional attacks on a

the Supremacy Clause are implicated “when a *federal* court exercises its subpoena power against federal officials”); *Connaught Labs., Inc. v. SmithKline Beecham P.L.C.*, 7 F. Supp. 2d 477, 479 (D. Del. 1998) (“[I]n an action in federal court, sovereign immunity does not bar the federal court from enforcing a federal subpoena against the federal government.”).

⁴⁰ See *SEC v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 216–19 (S.D.N.Y. 2015).

⁴¹ It might normally be appropriate to order a reluctant subpoena recipient to show cause before certifying a matter to the Commission. But given the FDIC’s refusal to even move to quash, this step would be pointless. See *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (“The law does not require the doing of a futile act.”), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

⁴² *Feathers*, Admin. Proc. Rulings Release No. 6755, 2020 SEC LEXIS 1192 (ALJ Apr. 28, 2020).

⁴³ Mot. for Stay (May 13, 2020).

⁴⁴ Mot. for Stay (May 15, 2020).

Commission administrative proceeding.⁴⁵ Feathers must raise his constitutional objections in this proceeding. After the Commission issues its decision, he may seek review in an appropriate court of appeals.⁴⁶

Procedural Schedule

Since the pending stay motions have been resolved and open-ended postponements are disfavored, I will set a schedule for summary disposition briefing. Because the FDIC and SBA subpoenas are still pending, I find good cause to order a briefing schedule longer than the schedule provided by Rule 250.⁴⁷ Motions for summary disposition will be due June 30, 2020; responses will be due July 21, 2020; and replies will be due July 31, 2020. This schedule may be modified depending on the Commission's response to this certification.

James E. Grimes
Administrative Law Judge

Served by e-mail on all parties with a courtesy copy to FDIC counsel.

⁴⁵ *Tilton v. SEC*, 824 F.3d 276, 278–79 (2d Cir. 2016); *Bennett v. SEC*, 844 F.3d 174, 186 (4th Cir. 2016); *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015); *Hill v. SEC*, 825 F.3d 1236, 1252 (11th Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 30 (D.C. Cir. 2015).

⁴⁶ 15 U.S.C. § 78y(a).

⁴⁷ See 17 C.F.R. § 201.250(f)(2)(i).