

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

Administrative Proceedings Rulings
Release No. 6763 / June 2, 2020

Administrative Proceeding
File No. 3-15755

In the Matter of
Mark Feathers

**Order for Additional Briefing
Regarding the SBA's Motion to
Quash**

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).

Following a prehearing conference and some adjustments to the subpoenas,² I issued them on April 15, 2020, returnable by May 22, 2020. The FDIC and the SBA both sent Feathers letters explaining that each agency intended not to comply with the subpoena directed to it. On May 13, a representative of my office e-mailed the SBA's counsel to determine whether the agency intended to move to quash the subpoena directed to it. Although SBA counsel initially responded that it did not intend to move to quash, it subsequently filed a motion to quash the subpoena directed to it.

The SBA initially argues that the subpoena is jurisdictionally defective because the SBA has not waived sovereign immunity.³ On the merits, it asserts

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

² See Prehearing Tr. 51–52 (Apr. 14, 2020).

³ Mot. at 2–3 (May 15, 2020).

that the subpoena requests materials that are protected by work-product and deliberative-process privileges.⁴ The SBA also argues that the subpoena is overbroad, unreasonable, and unduly burdensome.⁵

Discussion

Legal Principles

The Administrative Procedure Act gives administrative agencies the discretion to appoint administrative law judges to preside over hearings and gives appointed administrative law judges the authority to “issue subp[o]enas authorized by law.”⁶ In turn, the Exchange Act allows the Commission to delegate its adjudicatory functions to administrative law judges.⁷ The Exchange Act also provides 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.”⁸ Based on the above authority, the Commission has delegated to its administrative law judges the power to conduct and regulate hearings and to issue, revoke, quash, or modify subpoenas.⁹

Congress has given the Commission a method to seek to compel compliance with Commission subpoenas. Exchange Act Section 21(c) provides 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

⁴ *Id.* at 4.

⁵ *Id.* at 4–5.

⁶ 5 U.S.C. § 556(b)(3), (c)(2).

⁷ 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).

⁸ 15 U.S.C. § 78u(b).

⁹ 17 C.F.R. §§ 200.14(a), 201.111(b).

person to appear before the Commission or member or officer designated by the Commission, there to produce 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.¹⁰

For purposes of the Exchange Act, the emphasized term *person* includes, among other things, “a ... government, or political subdivision, agency, or instrumentality of a government.”¹¹ Courts have construed the Exchange Act’s amended definition of the term *person* to include federal administrative agencies.¹²

By rule, parties in Commission administrative proceedings may apply for the issuance of documentary subpoenas.¹³ Once an administrative law judge issues a subpoena, the subpoena’s recipient may move to quash or modify it.¹⁴

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

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

¹² *E.g.*, *SEC v. J.W. Barclay & Co.*, 442 F.3d 834, 842–43 (3d Cir. 2006); *see In re Wash. 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, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (holding that to overcome the presumption that the sovereign does not fall within the meaning of the term *person*, 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). Absent the interpretation that *person* in the Exchange Act includes federal administrative agencies, the Commission would be unable to bring a claim under Section 20 of the Exchange Act. *See J.W. Barclay*, 442 F.3d at 842. An amendment under the Dodd–Frank Wall Street Reform and Consumer Protection Act confirms this interpretation. *See SEC v. Daifotis*, No. 11-cv-137, 2011 WL 4714250, at *5 (N.D. Cal. Oct. 7, 2011).

¹³ 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).

¹⁴ 17 C.F.R. § 201.232(e).

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.”¹⁵ If the recipient moves to quash, the presiding administrative law judge must quash, modify, or order a response to the subpoena “[i]f compliance with [it] ... would be unreasonable, oppressive, unduly burdensome or would unduly delay the hearing.”¹⁶

The proceeding against Feathers

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.¹⁷ Precedent dictates that Feathers may “introduce evidence regarding the circumstances surrounding [the] allegations” against him,¹⁸ and that the Commission “must consider mitigating evidence” presented about those circumstances.¹⁹

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, and SBC Portfolio Fund, LLC, which were allegedly mortgage investment funds.²⁰ 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-5.²¹ The court allegedly found that Feathers induced investment through material misrepresentations and acted as an unregistered broker.²² Given the

¹⁵ 17 C.F.R. § 201.232(e)(1).

¹⁶ 17 C.F.R. § 201.232(e)(2).

¹⁷ See OIP at 1–2; 15 U.S.C. § 78o(b)(4)(C), (6)(A)(iii).

¹⁸ *Jose P. Zollino*, Exchange Act Release No. 55107, 2007 WL 98919, at *4 (Jan. 16, 2007) (internal quotation marks omitted).

¹⁹ *Siris v. SEC*, 773 F.3d 89, 95 (D.C. Cir. 2014).

²⁰ OIP at 1.

²¹ *Id.* at 2.

²² *Id.*

allegations, Feathers is entitled to present evidence about the circumstances surrounding his involvement with SBCC and any other mitigating evidence relevant to the allegations.²³

SBA subpoena

Feathers’s requested subpoena to the SBA seeks seven categories of materials “produced by SBA agents, employees, and/or contractors *which were their work product*, and which SBA relied upon in part, or in full” when (1) approving Small Business Capital LLC’s participation in loan programs (first and second categories), (2) allowing Small Business Capital LLC “to engage in loan participations and/or loan, or partial loan, sales to California Business Bank” (third category), (3) approving the sale of a license Small Business Capital LLC held (fourth category), (4) submitting claims against the receivership estate in the underlying injunctive action (fifth and sixth categories), and (5) providing assistance to the Department of Justice in relation to Feathers’s indictment (seventh category).²⁴

In light of the SBA’s motion to quash, the threshold question is whether the subpoena is jurisdictionally defective due to sovereign immunity. As I explained when ruling on Feathers’s FDIC subpoena, the federal sovereign is a party to this action; it was initiated by a federal agency in a federal forum.²⁵ And the Commission’s subpoena enforcement authority is found in Section

²³ 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 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)).

²⁴ Subpoena to SBA, Attachment (emphasis added). Confusingly, Small Business Capital LLC is apparently a similarly named, but separate entity from SBCC. See Complaint ¶ 9, *SEC v. Small Business Capital Corp.*, No. 5:12-cv-3237 (N.D. Cal.), ECF No. 1.

²⁵ 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))).

21(c) of the Exchange Act. For purposes of that Act, Congress specifically defined the term *person* to include a “government, or political subdivision, agency, or instrumentality of a government.”²⁶ This definition includes federal “government agencies.”²⁷ Given that the SBA, as a federal agency, falls within this definition, sovereign immunity does not shield the SBA from complying with its subpoena.²⁸ Indeed, if sovereign immunity does not protect a congressional committee from a Commission subpoena, it is difficult to understand how it could protect a federal agency from a Commission subpoena.²⁹

The next question is what do about the fact that the SBA appears to have filed its motion more than 15 days after it was served, in violation of the requirement in Rule 232(e)(1). In district court, the failure to timely object to a subpoena can result in the “waiver of [any] objections.”³⁰ Courts may decline to find waiver, however, particularly if the delay in filing is brief, the subpoenaed party is a non-party acting in good faith, or the subpoena seeks materials that are protected by privilege.³¹

²⁶ 15 U.S.C. § 78c(a)(9).

²⁷ *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996); see *J.W. Barclay*, 442 F.3d at 842–43.

²⁸ 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 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”).

²⁹ 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). Section 21 of the Exchange Act deals with both investigative and adjudicative subpoenas. 15 U.S.C. § 78u(b).

³⁰ *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D.N.Y. 1996).

³¹ See *id.*; *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996).

It is not clear when Feathers served the SBA with its subpoena. At most however, the SBA's motion was two weeks late. And it was served before the deadline for compliance. The SBA is also a third-party, relied in good faith on a mistaken defense, and promptly notified Feathers of its objections by letter. Further, Feathers's subpoena partially seeks privileged materials. It is thus appropriate to reach the merits of the SBA's motion to quash.

Feathers says he wants materials "produced by SBA agents, employees, and/or contractors *which were their work product*." But work product is ordinarily protected from disclosure.³² The work-product privilege applies to materials "prepared in anticipation of litigation."³³ On its face, this describes Feathers's request for "work product" related to claims against the receivership estate in the underlying litigation and to assistance given the Department of Justice in relation to Feathers's indictment (categories five through seven). Because Feathers can only obtain fact work product on a showing of "a substantial need for the materials and an undue hardship in acquiring the information any other way,"³⁴ I will give him an opportunity to demonstrate he is entitled to these materials.

On its face, however, *work product* does not describe Feathers's request for materials related to (1) the approval of Small Business Capital LLC's participation in loan programs (first and second categories), (2) the SBA decision to allow Small Business Capital LLC "to engage in loan participations and/or loan, or partial loan, sales to California Business Bank" (third category), or (3) the SBA's approval of the sale of a license Small Business Capital LLC held (fourth category).³⁵ Other than saying it, the SBA provides nothing to

³² *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015); *Clarke T. Blizzard*, Advisers Act Release No. 2030, 2002 WL 662783, at *3–5 (Apr. 23, 2002) (considering the work product doctrine in the context of a Commission administrative proceeding).

³³ *Boehringer Ingelheim*, 778 F.3d at 149.

³⁴ *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). Fact work product—for example, "purely factual material embedded in attorney notes," *id.* at 1308—is distinguished from opinion work product—materials that "reveal [an] attorney[s] mental processes in evaluating" a case, *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981)—which "is virtually undiscoverable." *Director, Office of Thrift Supervision*, 124 F.3d at 1307.

³⁵ Feathers, who is not an attorney, is unrepresented. I take his use of the term *work product*, as it applies to materials that were not prepared in

show that these materials were produced in anticipation of litigation.³⁶ And while these materials may be covered by the deliberative-process privilege, as the SBA briefly suggests,³⁷ the SBA has not attempted to meet the requirements for invoking this privilege.³⁸

The SBA additionally claims the subpoena for these materials is overbroad because it does not specify a time-frame and could date back to 2009.³⁹ The SBA also offers that it might not have retained the subject documents.⁴⁰ But the four categories in Feathers’s request apparently seek material related to single events: approving Small Business Capital LLC’s participation in a loan program, allowing Small Business Capital LLC to participate in sales to another entity, and approving the sale of a license Small Business Capital LLC held. Without more, it is not apparent how the subpoena for these materials could be overbroad. And if the SBA no longer possesses these materials, it must affirmatively state as much.

Citing *Exxon Shipping*, the SBA says that “multiple courts” have recognized the “Government’s serious and legitimate concern that its resources ‘not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.’”⁴¹ But the court in *Exxon*

anticipation of litigation, to more colloquially reference any materials prepared in the course of the SBA’s work, *i.e.*, the product of its work.

³⁶ Mot. at 4.

³⁷ *See id.* The deliberative-process privilege covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (citation omitted). It “protects government documents that are both ‘predecisional’ and ‘deliberative.’” *Judicial Watch, Inc. v. United States Dep’t of Defense*, 847 F.3d 735, 739 (D.C. Cir. 2017) (quoting *Pub. Citizen v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010)). “[T]he deliberative process privilege,” however, “does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must.” *Loving v. Dep’t of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008).

³⁸ *See Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

³⁹ Mot. at 4–5.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* (quoting *Exxon Shipping*, 34 F.3d at 779).

Shipping explained that although this is a legitimate concern, the concern did not outweigh “the fundamental principle that ‘the public ... has a right to every man’s evidence.’”⁴² The court held that these competing issues could be balanced by taking account of the discovery requirements in the rules of civil procedure and the government’s privilege claims.⁴³ So too here, where the SBA is able to raise privilege claims and Feathers’s request must be judged by the requirements of Rule 232.⁴⁴

Based on certain of Feathers’s assertions, the SBA suggests that Feathers is improperly seeking evidence to attack the conduct of Commission employees in the underlying district court action.⁴⁵ This is a legitimate concern; Feathers has sought to do this during this proceeding and during the underlying action. Indeed, in replying to the Division’s response to the SBA’s motion, Feathers implies that the SBA also engaged in misconduct in the underlying district court action. If Feathers’s purpose in seeking evidence from the SBA is to attack the conduct of any government attorney or agency in any underlying or related district court action, his subpoena would be unreasonable and would unduly delay the hearing because this sort of evidence has no possible relevance to this proceeding.⁴⁶

Given the foregoing, I order the following.

By June 12, 2020, Feathers must file a brief:

1. Explaining the relevance of the materials encompassed in the first four categories in his subpoena to the SBA. He must also explain why

⁴² *Exxon Shipping*, 34 F.3d at 779 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

⁴³ *Id.* at 779–80.

⁴⁴ See 17 C.F.R. § 201.232(e); *Blizzard*, 2002 WL 662783, at *3–4 (considering attorney-client and work-product privilege claims as to a third-party subpoena).

⁴⁵ Mot. at 5.

⁴⁶ See *James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *4 (Oct. 12, 2007) (holding that a follow-on proceeding “is not the appropriate forum for challenging the propriety of the Division’s conduct in [an underlying] injunctive action”); *Frederick W. Wall*, Exchange Act Release No. 52467, 2005 WL 2291407, at *3 (Sept. 19, 2005) (refusing in a follow-on proceeding to consider claims that the prosecution in an underlying criminal proceeding “engaged in ‘evidence obstruction and witness tampering’”).

the subpoena for these materials is not unreasonable. Feathers should note that evidence that might support an attack on the district court's injunction and material findings or on the Division's or SBA's conduct during any district court action is not relevant to this proceeding and seeking it is not reasonable.⁴⁷

2. Explaining why he has a substantial need for the work-product in his fifth and sixth categories—for materials related to claims against the receivership estate in the underlying litigation—and his seventh category—for materials related to the SBA's assistance given the Department of Justice in relation to Feathers's indictment.⁴⁸ He must also explain why he would suffer an undue hardship in acquiring the information any other way.⁴⁹ As explained, Feathers does not have a substantial need for evidence that might support an attack on the district court's injunction and material findings or on the Division's or SBA's conduct during the underlying or related district court actions.⁵⁰

The SBA may respond by June 22, 2020.

If the SBA wishes to rely on the deliberative-process privilege as to the first four categories in Feathers's subpoena, it must file by June 12, 2020, a declaration consistent with the requirements outlined in *Landry*.⁵¹ Feathers may respond by June 22, 2020.

James E. Grimes
Administrative Law Judge

Served by e-mail on all participants.

⁴⁷ See *Feathers*, Admin. Proc. Release No. 6752, 2020 SEC LEXIS 1066, nn.1–2, 13 (ALJ Apr. 17, 2020).

⁴⁸ See *Director, Office of Thrift Supervision*, 124 F.3d at 1307.

⁴⁹ See *id.*

⁵⁰ *Feathers*, 2020 SEC LEXIS 1066, nn.1–2, 13.

⁵¹ See 204 F.3d at 1135.