UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 669/March 17, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13847

In the Matter of	:	
	:	
MORGAN ASSET MANAGEMENT, INC.,	:	ORDER ON RESPONDENTS'
MORGAN KEEGAN & COMPANY, INC.,	:	MOTION TO COMPEL
JAMES C. KELSOE, JR., and	:	
JOSEPH THOMPSON WELLER, CPA	:	
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on April 7, 2010. On May 28, 2010, a subpoena was issued to the Commission's Office of Compliance Inspections and Examinations (OCIE) requesting four categories of documents. Of relevance here, the subpoena requested (1) the production of examination or inspection reports for Respondents and the Funds at issue in this proceeding from 2002 to the present (Request (1)); and (2) documents related to OCIE's examination or review of fair value procedures of these entities during the same period (Request (2)).

Procedural History

OCIE filed a motion to quash the entire subpoena, on the date that responsive documents were due—June 16, 2010, claiming that it was unduly burdensome and overbroad and unreasonably sought documents protected by claims of privilege including the deliberative process privilege and the attorney work product doctrine. With its motion to quash, OCIE filed a privilege log with respect to Request (1) and a Declaration of John H. Walsh, Associate Director and Chief Counsel of OCIE, describing the contents of documents OCIE determined to be responsive to Requests (1) and (2), asserting the internal nature of these documents, and noting that these documents reflect thoughts and deliberations that are protected by various privileges. On June 25, 2010, OCIE filed a supplemental memorandum in support of its motion, which included a second Declaration of John H. Walsh, outlining the types of actions taken and documents produced in the course of a typical OCIE examination. Several other briefs and motions were filed by OCIE and Respondents, providing extensive argument on the issue of quashing the subpoena to OCIE.

On July 20, 2010, the assigned administrative law judge quashed portions of the subpoena, but summarily rejected OCIE's privilege claims as related to Requests (1) and (2). On August 18, 2010, after an order denying reconsideration of the issue was entered, OCIE petitioned the Commission for interlocutory review of the July 20 Order; and, on December 8,

2010, the Commission denied the review. However, as relevant here, the Commission also noted that the administrative law judge failed to address issues raised by the privilege log filed as to Request (1) and required OCIE to assert specific objections to the production of documents responsive to Request (2). The Commission Order gave OCIE sixty days to produce responsive documents or assert objections.

On January 13, 2011, a prehearing conference was held with the parties and others affected by the Commission's December 8 Order, during which counsel for OCIE represented that it was reviewing documents responsive to Requests (1) and (2) and that, by the end of the sixty-day deadline, it would produce responsive documents, with any appropriate redactions or withholdings, and that a privilege log would be included with that production. (Jan. 13 Preh'g Tr. at 5-6.) At this time, I ordered that all documents to which OCIE was asserting privilege be submitted to me without redactions, so that I could review the documents *in camera* for the applicability of any asserted privileges. (Id. at 6-7.)

On February 7, 2011, OCIE produced certain documents responsive to the subpoena in full or in redacted form to Respondents, and provided privilege logs listing each document that was not produced to Respondents or was produced in redacted form and the corresponding privilege it was asserting for not producing. The next day another prehearing conference was held, during which counsel for Respondents noted their receipt of the OCIE documents and privilege logs, and stated their initial impression that the logs were deficient. (Feb. 9 Preh'g Tr. at 19-20, 22.)

Respondents filed a Motion to Compel Production, with an accompanying Memorandum in Support[1], on February 28, 2011, in which Respondents formalized their argument that the privilege logs do not "provide sufficient information for the court and the party seeking the documents to evaluate the claims of protection." (Mem. at 2, 4-7, 12-15.) Respondents also assert that the standards for applying the deliberative process privilege and attorney work product doctrine have not been met, and, even if they had been, Respondents' "compelling need" for the documents overcomes any claims of privilege. (Mem. at 7-12.)

On March 7, 2011, OCIE filed its Opposition to the Motion to Compel Production, and on March 15, 2011, Respondents submitted a Reply in Support.[2] OCIE included with its Opposition a third Declaration of John H. Walsh, and it produced, in full, over one hundred pages of documents in response to Request (2) that had previously been redacted. (Opp'n at 1, Ex. A.) In their Reply in Support, Respondents reiterate the arguments regarding the deficiency of the privilege logs and assert that OCIE's new production shows that it has inconsistently and inaccurately applied privileges to documents that should be produced. (Reply at 3-5.)

Discussion and Conclusions

As a preliminary matter before addressing the privilege issues raised, twenty-three of the thirty-six reports listed in OCIE's Request (1) privilege log do not discuss pricing or valuation, a

[1] This document will be cited as "(Mem. at __.)" within this Order.
[2] These documents will be cited as "(Opp'n at __.)" and "(Reply at __.)," respectively.

fact which my *in camera* inspection has confirmed. In support of their claim that documents responsive to Requests (1) and (2) are relevant to this proceeding, Respondents assert that the documents "would reflect OCIE's knowledge of the Funds' pricing and valuation procedures." (Mem. at 3.) Given that the twenty-three reports do not contain such information, these reports are not relevant to this proceeding and are excluded from production on that basis.[3] Furthermore, two of the reports are outside the scope of the subpoena, since the examinations with which they are associated were not completed until after the subpoena was issued.[4] The remaining eleven reports will be the only ones evaluated for the applicability of the deliberative process privilege and work product doctrine.[5]

As noted above, Respondents spend a significant portion of their arguments in both their Memorandum in Support and their Reply noting the deficiency of the privilege logs produced by OCIE. However, even the cases Respondents cite in support of this position concede that an "index with short descriptions because a combination of declarations and *in camera* review [can] provide[]sufficient information for the court to review the claimed exemptions." Judicial Watch, Inc. v. FDA, 449 F.3d 141, 146 (D.C. Cir. 2006) (citing Tax Analysts v. IRS, 410 F.3d 715, 719-20 (D.C. Cir. 2005)). In this instance, the logs, the Walsh declarations, and an *in camera* review have been sufficient to determine whether OCIE has made legitimate claims for protection of these documents under the deliberative process privilege and attorney work product doctrine.

Inherent in the deliberative process privilege is the policy of protecting the decision making processes of government agencies, allowing the government to withhold documents that "reflect[] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)) (discussing exemptions to disclosure of documents found in Freedom of Information Act (FOIA) Exemption 5). The Court held that the deliberative process privilege necessarily draws a distinction between pre-decisional and post-decisional communications, with the former being protected and the latter not. See Id. at 151-52 (citations omitted). Where documents constitute "final dispositions of matters by an agency," the deliberative process privilege would not apply. Id. at 153-54. Like pre-decisional communications protected by the deliberative process privilege, the attorney work product doctrine "clearly applies to memoranda prepared by an attorney in contemplation of litigation." Id. at 154. Applying these principles, the Court held that they do not exempt from disclosure "[m]emoranda which conclude that no complaint should be filed and which have the effect of finally denying relief [but] does protect from disclosure those[m]emoranda which direct the filing of a complaint and the commencement of litigation." Id. at 155.

With regard to the eleven remaining reports responsive to Request (1) that OCIE has sought to protect, all but three were created as a result of a "for cause" examination.[6] For the eight reports created as a result of "for cause" examinations, OCIE invokes both the deliberative

[3] Entries 1-2, 4-6, 8-10, 12-18, 20, 22, 28, and 30-34.
[4] Entries 35 and 36.
[5] Entries 3, 7, 11, 19, 21, 23-27, and 29.
[6] Entries 3, 7, and 29.

process privilege and work product doctrine. Each of these reports was prepared by or with the assistance of an attorney, and each recommends the issuance of a deficiency letter and (a) advises referral to the Division of Enforcement for review of federal securities law violations, (b) lists additional follow-up reports and actions to be conducted, or (c) discusses relevance to on-going investigations. Under the standards set forth by the Court in Sears, Roebuck, these facts establish that these eight reports are exempt from disclosure. See also, SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1203 (D.C. Cir. 1991) ("[W]here an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product."); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 902 (D.D.C. 1980) ("[S]ince investigations by the SEC are conducted with an eye towards litigation those documents prepared by SEC attorneys or professionals working under attorney supervision are exempt from disclosure.").

As to the last three reports, OCIE asserts the deliberative process privilege as grounds for non-production. The *in camera* review of Entry 3 revealed that the report does not contain information that "reflect[s] OCIE's knowledge of the Funds' pricing and valuation procedures." The portion of Entry 29 that was not previously quashed by the July 20 Order, is an expressly non-public, preliminary report of findings relating to an industry-wide examination of money market funds, in which Respondents are not directly named. Both reports are pre-decisional, contain deliberations of OCIE staff, and are not relevant to the allegations in this proceeding. Entry 7 also contains deliberations of OCIE staff, however some these deliberations directly discuss Respondent James C. Kelsoe, Jr., and OCIE's understanding of the pricing procedures for the Morgan Keegan High Income Select Fund.

Respondents point out that some courts have ordered the production of purely factual information that can be segregated from deliberative information and production of portions of documents containing opinions that were ultimately included in deficiency letters. (Mem. at 7-8 (citing SEC v. Sentinel Mgmt Group, Inc., No. 1:07-cv-04684, 2010 WL 4977220, at *5 (N.D. Ill. Dec. 2, 2010)).) However, the Commission has recognized that it may be advisable to withhold a report in its entirety "because to release the nonexempt material would leave only meaningless words and phrases." FOIA Request Appeal of Steven Shirley, FOIA Release No. 187, 59 SEC Docket 2153, 2153 (June 28, 1995). Accordingly, there is no need to require that OCIE to produce the sections of these reports which are purely factual in nature, such as the "Description and History of the Registrant" section, or portions that were ultimately included in deficiency letters, since they would not provide any information that Respondents do not already have.

Respondents fault OCIE for its new production under Request (2), claiming that the production includes factual notations, compilations of data, and verbatim notes, which Respondents contend implicitly concedes that the privilege log was inaccurate or inadequate. (Reply at 2.) The deliberative process privilege does not "protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) (citing Sears, Roebuck, 421 U.S. at 150-54; EPA v. Mink, 410 U.S. 73, 87-91 (1973); Wolfe v. Dept. of Health and Human Servs., 839 F.2d 768, 774 (D.C. Cir.

1988)). It appears that rather than making the argument that the factual information here was not separable from the deliberation, as OCIE may have been able to successfully do, it chose to make a good faith effort to reevaluate and release as much information as possible.

The *in camera* review of the remaining documents and redactions from Request (2), for which OCIE is claiming privilege, revealed that these documents contain internal deliberations which are clearly pre-decisional, several were prepared in anticipation of litigation by or with the assistance of attorneys, and many of the pages are of preliminary reports and findings of the respective examinations with recommendations for referrals to the Division of Enforcement (i.e. Entry 252 of OCIE privilege log for Request (2)). Hence, like the reports responsive to Request (1), the redactions made to items responsive to Request (2) are protected by the deliberative process privilege and, in some instances, attorney work product doctrine.

Having established that OCIE's privilege claims are applicable to the documents responsive to Requests (1) and (2), discussed above, both OCIE and Respondents properly note that the privilege may be "overcome by a sufficient showing of need." (Opp'n at 7 (quoting In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)); Mem. at 9.) In their attempt to demonstrate a compelling need for the documents, Respondents ask that the following factors be considered:

> (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

(Mem. at 9 (quoting Scott Paper Co. v. United States, 943 F. Supp. 489, 496 (E.D. Pa. 1996)).)

Respondents rely on the Commission's normally broad interpretation of relevance in support of the first factor. (Mem. at 3, 9.) As discussed above, several of the requested documents are not relevant to the allegations in this proceeding; and, furthermore, it is appropriate that a greater showing of relevance be made when attempting to overrule a showing of privilege to withhold. In fact, the *in camera* review of the redactions and withheld documents revealed that much of the information excluded from production does not "reflect OCIE's knowledge of the Funds' pricing and valuation procedures." Second, the Division of Enforcement, OCIE, and others have already supplied a large quantity of documents to Respondents, and Respondents are in possession of the deficiency letters that resulted from the examinations associated with these documents. Respondents' argument that "documents relating to OCIE's knowledge of the Funds' procedures . . . are not located elsewhere" (Mem. at 9) is not convincing except as to Entry 7 of the privilege log for Request (1). As such, no additional value can be garnered from the release of the other entries in the privilege logs. While the allegations in this proceeding are serious and the government is party to the litigation, these facts do outweigh the future timidity that would result, as adequately argued in the third Declaration of John H. Walsh (Opp'n Ex. D at 2-3).

Order

IT IS ORDERED THAT Respondents' Motion to Compel is granted as to Entry 7 of OCIE's privilege log for Request (1) of the May 28 subpoena;

IT IS FURTHER ORDERED THAT Respondents' Motion to Compel is denied as to the remaining entries listed in OCIE's privilege log for Request (1) of the May 28 subpoena; and

IT IS FURTHER ORDERED THAT Respondents' Motion to Compel is denied as to the remaining redactions covered in OCIE's privilege log for Request (2) of the May 28 subpoena.

Robert G. Mahony
Administrative Law Judge