

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3364 / December 2, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16155

In the Matter of

NICHOLAS ROWE

ORDER ON MOTIONS TO QUASH

At the request of Respondent Nicholas Rowe, I issued documentary subpoenas directed to several individuals including Jeff Spill and Eric Forcier, the deputy securities director and a staff attorney, respectively, of the New Hampshire Bureau of Securities Regulation. The Division of Enforcement moves to quash the subpoenas. Separately, the Bureau moves to quash or alternatively modify the subpoenas directed to Spill and Forcier.

The Division's motion is DENIED; however, I modify the subpoenas on two grounds as specified below. The Bureau's motion to quash is DENIED; however, a modified procedure and schedule is implemented below as to the subpoenas directed to Spill and Forcier. Rowe shall serve a copy of this order on all subpoena recipients.

Summary

This follow-on proceeding, instituted under Section 203(f) of the Investment Advisers Act of 1940, is predicated on a consent order that the New Hampshire Bureau of Securities Regulation entered against Rowe in March 2013. The Commission remanded this matter for further proceedings in September 2015. In its ruling, the Commission concluded that the consent order's allegations were insufficient for it to determine whether barring Rowe from the securities industry would be in the public interest. Specifically, the Commission concluded that "Rowe's consent agreement specifically reserved his right 'to take contrary legal or factual positions in litigation or other legal proceedings in which the State of New Hampshire is not a party,'" and directed me to consider admitting additional evidence on remand, "subject to challenge by either party." *Nicholas Rowe*, Exchange Act Release No. 75982, 2015 SEC LEXIS 3928, at *16-18 (Sept. 24, 2015).

Accordingly, and consistent with the Commission's remand order, I determined that Rowe is permitted to put on a full defense, which includes contesting the factual and legal allegations (including any purported violations) in the consent order, as well as the credibility of any alleged victims. *Nicholas Rowe*, Admin. Proc. Rulings Release No. 3224, 2015 SEC LEXIS

4208 (Oct. 14, 2015). I also established a procedural schedule and set this matter for a hearing on February 1, 2016. *Id.*

The appropriateness of any sanction in this proceeding will be guided by the *Steadman* factors: 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. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). In making such determination, the Commission has directed that an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." *Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (internal quotation marks omitted).

Unless the Division narrows the scope of what it seeks to prove at the hearing, it is reasonable for Rowe to assume that all allegations from the underlying consent order will be at issue in determining whether a sanction may be appropriate, and for him to seek any evidence relating to, or that may undermine, those allegations and any alleged victims. In other words, any evidence regarding the truth of the consent order's allegations, and the credibility of the alleged victims, is highly material and relevant in this proceeding.

Division's Motion to Quash

Under Rule of Practice 232, a party may request subpoenas "requiring the production of documentary or other tangible evidence" 17 C.F.R. § 201.232(a). A subpoena may be quashed or modified "[i]f compliance with the subpoena would be unreasonable, oppressive or unduly burdensome." 17 C.F.R. § 201.232(e)(2). Also, I may "order return of the subpoena only upon specified conditions." *Id.*

The Division first seeks to quash the subpoenas on the basis that they would require witnesses to create new documents. It claims that "Rowe seeks to force the witnesses to compile a substantial amount of information and then assemble that information in 'lists' or 'logs' or 'summaries.'" Div. Motion at 2. In support, the Division cites a single order issued by another law judge in another proceeding, which in turn cites no further authority for the proposition that "a subpoena can only require production of a document already in existence." *Michael Bresner*, Admin. Proc. Rulings Release No. 731, 2012 SEC LEXIS 3599, at *3-4 (Nov. 20, 2012).

Rowe's subpoena requests were broadly worded to obtain, among other evidence, information regarding meetings had with his former clients in which claims about Rowe and his firm Focus Capital were discussed; what disputes or litigations they brought against other persons and specifically against other investment advisers and the result of such proceedings, including any settlements; and documents that certain individuals once had in their possession but no longer do. With some exceptions discussed below, this information would be highly

relevant to Rowe's defense and his ability to impeach the Division's witnesses and undermine their credibility.

The text of Rule 232 does not preclude data compilation, which is essentially what Rowe seeks. The Commission has not opined on the issue raised by the Division, so little guidance is available. Here, where the Respondent is *pro se*, I am hesitant to read a requirement into Rule 232 that may hamper his ability to meaningfully defend himself. Moreover, of all requests, providing a list or summary may be less burdensome than the production of underlying records or documents. To the extent that compliance with the subpoenas involves data compilation in a list or summary of existing evidence in documentary or other tangible format (including electronic records), I decline to quash the subpoenas on the first basis advanced by the Division.

However, I modify the subpoenas on two grounds:

1) To the extent that compliance with the subpoenas would require more than data compilation in the creation of lists or summaries—that is, the creation of new documents or tangible evidence where evidence does not already exist in some tangible format, or a compilation of individuals' memory or mental impressions—the subpoena recipients may indicate as such in their responses and are not required to provide such information.

2) To the extent that the subpoenas seek information regarding disputes, controversies, claims, complaints, or settlements with or against persons who are not in the securities industry, the subpoena recipients are not required to provide such information. Although it is probative to Rowe's defense whether certain former clients brought claims against other investment advisers and other securities industry participants, the scope of information regarding "any person you have had any controversy with," for example, is unreasonable.

The Division next seeks to preclude Rowe from obtaining evidence relating to former clients' disputes or litigations with others, including their claims against other investment advisers. To the extent Rowe seeks information about their claims against other securities industry participants, the Division is mistaken in its assertion that such material is irrelevant to Rowe's defense and unrelated to this proceeding. Rowe is entitled to gather impeachment material on witnesses who may testify against him. Whether these individuals were involved in such disputes or litigations—and the basis and result of such actions—goes to their credibility in making allegations against Rowe. Rowe has affirmatively identified certain advisers who had claims brought against them, so his contention does not appear unsupported.

The Division also seeks to quash Rowe's subpoenas on the basis that his request for certain documents is unduly broad and unreasonable. Contrary to the Division's suggestion, Rowe's use of the term "any" in the subpoenas (e.g., "any concern or complaint made by you") is not, standing alone, indicative of an unduly broad or unreasonable request; it is a term that frequently accompanies subpoenas so as not to leave out relevant information. As already discussed, evidence regarding Rowe's former clients' disputes or litigations with other securities industry participants is material to his defense. It is not Rowe's burden to guess what the universe of those disputes or litigations might be. As provided above, I modified the subpoenas

to exclude information about disputes or litigations unrelated to such industry participants. Further, the records sought from the Bureau—including essentially any Bureau record regarding any person making any statement about Rowe, including any statements made by such person—are relevant to testing the truth of the allegations of the consent order and credibility of the alleged victims.

Lastly, I reject the Division’s point that Rowe is on a “fishing expedition” and seeking evidence with little or marginal relevance. The Division concedes that the subpoenas were issued to: Rowe’s former clients, several of whom brought claims against him; individuals who were advisers to at least one of Rowe’s former clients, who Rowe asserts is a serial complainer and sought to extort money from him; and Bureau employees responsible for the Bureau’s records on Rowe. The information sought largely appears, in some way, to relate to the consent order’s allegations or to Rowe’s attempt to dispute the truth of those allegations and the credibility of those who made allegations against him. The Division cannot expect Rowe to narrow the evidence he seeks for his defense where it has made no attempt to narrow what it will seek to prove at the hearing. As far as Rowe is concerned, every allegation from the underlying consent order is at issue, and he has the right to seek material in order to defend against those allegations and impeach the Division’s witnesses.

The Bureau’s Motion to Quash

In its motion, the New Hampshire Bureau of Securities Regulation argues that Rowe’s subpoenas directed to Spill and Forcier are “nothing more than a fishing expedition” and that Rowe “is essentially requesting the bureau’s entire investigative file.” Bureau Motion at 3. It also contends that producing the Bureau’s investigative file and conducting privilege review by the December 4, 2015, return date would be unduly burdensome.

In mounting his defense, Rowe is entitled to material regarding the evidentiary basis for the Bureau’s allegations, and any evidence that the Bureau has that relates to those allegations, whether supporting or contradictory. As such, it is no fishing expedition for Rowe to seek the Bureau’s investigative file. To deny Rowe access to records from that file is essentially to deny him an opportunity to properly prepare a defense. Rowe’s defense should not depend on the Bureau’s selective determination of what it will and will not disclose to him, absent a legitimate privilege.

Regarding the Bureau’s assertion that turning over certain documents could undermine some unspecified, ongoing third-party investigation, it fails to identify any authority supporting the notion that such documents should be withheld on this basis and has submitted no support to establish that any privilege may apply.

However, I modify the subpoenas and implement the following procedure.

By December 9, 2015, the Bureau shall provide Rowe, and email to my office at alj@sec.gov, a comprehensive index outlining its records pertaining to him, along the lines of the records sought by the subpoenas, and the accessibility of those records. The index must outline, with sufficient clarity, the records or category of records in its possession, with descriptions,

authors if applicable, and dates. It must note whether any such records are privileged in whole or in part, the nature of the privilege asserted, and whether the records can be redacted. It must further note whether the records were documents obtained from Rowe or Focus Capital. If any records relate to Rowe's former clients, the index must identify the individuals by their full name. The index may outline documents by category rather than itemize each document (e.g., "Focus Capital bank statements 2002 to 2007").

By December 15, 2015, the Bureau and Rowe shall confer and strive in good faith to narrow the scope of the subpoena, with resulting documents and a privilege log being delivered to Rowe no later than January 6, 2016. This may include, for example, the Bureau seeking a protective order or claw-back agreement before turning over records to Rowe, which would save considerable time in its privilege review process. If the parties cannot agree to this modified schedule and are unable to confer and come to a mutual agreement, they shall notify my Office at alj@sec.gov and I will promptly schedule a prehearing conference.¹

Rowe should be aware that under the Rules of Practice, the Bureau may seek an order requiring him to reimburse them for the cost of copying and transporting evidence to the place for return of the subpoena. *See* 17 C.F.R. § 201.232(e)(2). Rowe should also be aware that I will not postpone the hearing on the basis that he has received too many documents to review. Postponements are generally disfavored in Commission proceedings. *See* 17 C.F.R. § 201.161(b). Thus, Rowe should consider the volume of documents he seeks and the amount of time it will take him to review them. In the interest of time, Rowe may wish to narrow the scope of the evidence sought from the Bureau, and strive to obtain the most relevant evidence for his defense.

Jason S. Patil
Administrative Law Judge

¹ Per my October 14 order, Rowe shall furnish the Division with, but not file, pre-marked exhibits by December 18, 2015. *See Nicholas Rowe*, 2015 SEC LEXIS 4208. If Rowe obtains records from the Bureau after that date that he wishes to offer into evidence at the hearing, he must promptly identify those additional exhibits and furnish them to the Division.