



**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15945**

**In the Matter of**

**THOMAS A. NEELY, JR.,**

**Respondent.**

**DIVISION'S OPPOSITION TO MOTION REQUESTING ISSUANCE OF SUBPOENA**

Pursuant to Commission Rule of Practice 232(b), the Division of Enforcement ("the Division") respectfully submits this memorandum opposing Respondent's motion seeking a subpoena directing Regions to produce personnel files of potential witnesses who may testify at the hearing. The documents sought are irrelevant and Respondent's request should be denied.

Rule 232(b) sets the standard for issuing subpoenas. It states that the Court may refuse to issue a subpoena if the party seeking the subpoena cannot show "the general relevance and reasonable scope of the . . . evidence sought." Rule 320 governs admissible evidence in administrative proceedings. It states that at hearing, the Court "may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." Under the Rules of Practice, the production of irrelevant documents is unduly burdensome and subpoenas seeking such documents should be denied. *Egan-Jones Ratings Co, et al.*, 2012 WL 8718379 at

\*2 (Oct. 10, 2102; *Barr Financial Group*, 2003 WL 22258489 at \*6 (Oct. 2, 2003) (refusal to issue subpoena on grounds that evidence sought was irrelevant “consistent with Rule 232 and [the law judge’s] own reasoned interpretation of that standard”).

Although Respondent has had the Division’s witness list since December 10, he waited until just over a week before the hearing is to begin before seeking a subpoena for almost 50 personnel files at Regions.<sup>1</sup> Thirteen of the individuals for which Respondent seeks personnel files are not even on the Division’s witness list. Respondent contends these files may be relevant because they “will aid in the determination of credibility by providing an unbiased evaluation of employee performance and reveal whether any disciplinary action against the employee was necessary.” Neely Motion at 2. But Respondent offers no explanation of how performance ratings or disciplinary actions might impact on any particular witness’s credibility. For example, he makes no claim that any file might contain evidence of false statements. Thus, in essence, Respondent has cast a broad net hoping to uncover something useful.

The Commission has frowned upon such broad subpoenas, viewing them as improper fishing expeditions. *Scott Epstein*, 2009 WL 223611 at \*18 n.54 (Jan 30, 2009) (noting that respondent “is not ‘entitled to conduct a fishing expedition ... in an effort to discover something that might assist him in his defense’ ... or ‘in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.’” (Internal citations omitted); *Eric J. Brown*, 2012 WL 625874 at \*22 & n.77 (Feb. 27, 2012). See also, *Fair Housing Center of the Greater Palm Beaches v. High Point of Delray Condo. Assoc.*, 2006 WL 8066685 at \* 3 (S.D. Fla 2006) (in rejecting defendant’s subpoena for a witness’s entire personnel file, the court opined “It is clear

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<sup>1</sup> The Division’s amended witness list only added two witnesses that were employed with Regions.

to this Court that Defendants seek [the witness's] personnel record in order to go on a fishing expedition for information with which to impeach him as a witness, and have no factual basis for believing that such impeachment evidence will be found in his file.") This Court should reach a similar conclusion with this request. If Respondent truly thought the personnel files contained relevant information, he would have requested it much earlier.

Moreover, even if there were evidence of poor performance or disciplinary actions against a particular witness, such evidence would not necessarily be relevant to assessing a witness's credibility. Applying Fed R. Evid. 608(b), courts have realized that only misconduct that is "clearly probative of truthfulness, such as perjury, fraud swindling, forgery, bribery and embezzlement" should be admissible. *See, e.g., U.S. v. Heard*, 709 F. 3d 413, 433 (5<sup>th</sup> Cir. 2013) Respondent has not limited his request to such evidence, but instead has requested the entire personnel file of each witness. While the Federal Rules of Evidence are not binding on this proceeding, this Court should adopt a similar approach in this matter, and deny the request for the personnel files.

For these reasons, the Court should deny Respondent's motion for a subpoena for Regions' personnel files.

Dated: February 13, 2015

Respectfully submitted,



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