Confidential Commercial Documents in the SEC's Investigative Files: Caution to the Complacent

*By Michael G. Considine and Jeffrey Plotkin**

Financial services companies and other entities routinely produce non-privileged but highly confidential proprietary documents to the Securities and Exchange Commission (the "SEC") during enforcement investigations. Once entities produce these documents to the SEC, little protection exists against the SEC's indiscriminate disclosure of such information to third parties. While companies can request that the SEC accord the documents "confidential treatment" under the Freedom of Information Act ("FOIA"), that treatment merely provides limited protection in a narrow context.

This article discusses the ways the SEC shares confidential corporate documents with third parties, including defendants in SEC civil enforcement cases, and suggests various methods to mitigate the risk that the SEC will produce a company's confidential documents to private third parties without restriction.

The Cause of the Problem

The SEC is armed with broad investigative subpoena power and routinely demands production from financial services and other companies of a wide array of documents, some of which may contain highly-sensitive and confidential proprietary information. For example, in insider trading investigations, the SEC may compel production from investment banks of all their files and communications concerning merger and acquisition deals, including pending and aborted transactions as to which the public is unaware. The SEC may demand vast quantities of e-mails, memorandum, financial records, proprietary analysis and spreadsheets, and even personnel files containing highly sensitive nonpublic information. The only documents companies may properly withhold from the SEC are documents protected as attorney-client communications or attorney work product.

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*Michael G. Considine and Jeffrey Plotkin are partners in the New York City and Stamford CT offices of Day Pitney LLP, and practice in the area of White Collar Criminal Defense. Mr. Considine is a former supervisory federal prosecutor for the United States Attorney's Office for the Eastern District of New York, and Mr. Plotkin is a former Assistant Regional Administrator of the New York Regional Office of the Securities and Exchange Commission. The authors gratefully acknowledge the assistance of Day Pitney LLP associate Samuel Jennings in the preparation of this article.

After completing its investigation, the SEC may eventually file civil charges in federal court, which then triggers discovery obligations. In the exercise of its discretion, the SEC may produce its entire investigative file to the defendants, without providing any advance notice to the owners of the materials, and without requiring that defendants enter into protective orders limiting the use of such documents to the defense of the litigation. As such, disgruntled former employees, fraudsters, current and future competitors, and even the press may quickly gain access to a company's most sensitive documents before the company has time to raise an objection.

Unfortunately, as discussed below, at the time a company produces documents to the SEC pursuant to an investigative subpoena, it has no formal procedural mechanisms at its disposal to prevent this outcome.

The SEC's "Routine Uses" of Information

Once the SEC obtains documents during its investigations, it is empowered to use the materials collected in numerous ways, without notifying the producing party. The SEC's Forms 1661[1] and 1662,[2] which accompany SEC investigative requests, describe the SEC's "Routine Uses of Information" gathered during examinations and investigations, and detail the broad spectrum of third parties to whom the SEC is free to share the information.

Specifically, Form 1662 provides that the SEC may share the documents and information it secures via subpoena with:

- Federal, state, local or foreign law enforcement agencies;
- Securities self-regulatory organizations and foreign securities authorities;
- Bar associations, the American Institute of Certified Public Accountants, a state accountancy board or other federal, state, local or foreign licensing or oversight authority;
- A foreign securities authority, professional association or self-regulatory authority; the Municipal Securities Rulemaking Board;
- The Securities Investor Protection Corporation; federal banking authorities;
- A trustee, receiver, master, special counsel or other individual or entity appointed by a court; to any persons during the course of any inquiry of investigation conducted by the Commission's staff or in connection with civil litigation;
- Advisory committees created by the Commission or Congress, Congressional offices, and members of Congress; the press and the public;
- A trustee in bankruptcy, to any governmental agency, governmen-

tal or private collection agent, consumer reporting agency or commercial agency, governmental or private employer of a debtor or any other person for collection of amounts owed as a result of Commission proceedings; and

- Any party in response to subpoenas in any litigation or other proceeding.[3]

In essence, the SEC may freely produce a subpoenaed party's confidential records to countless persons without providing any advance notice to the subpoenaed party. There is one limited exception under the FOIA statute but this statutory exception provides little protection for companies who have produced documents to the SEC.

Confidential Treatment Under FOIA

The only statutory support currently available to subpoenaed parties to protect the confidentiality of information produced to the SEC during investigations is through FOIA. FOIA provides generally that individuals, private and public organizations (other than a federal agency) may request copies of the federal agency's records. "The broad legislative intent behind [FOIA] was to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information to be able, through the electoral process, to make intelligent, informed choices regarding the nature, scope, and procedure of federal government activities."[4]

While Title 5, United States Code, § 552 affords "confidential treatment" of the information produced, this protection is of limited utility. The statute requires only that subpoenaed parties who had requested confidential treatment of their documents be *notified* of third party requests for the documents pursuant to FOIA, if necessary,[5] and be given an opportunity to challenge release of the materials through the submission of a written statement.[6]

Even if such a challenge is successful, the benefits are usually short-lived, because if the SEC subsequently files a civil complaint in federal district court after its investigation, FOIA no longer protects the documents from disclosure during discovery.[7]

Subpoena Enforcement, Motions to Quash, and Protective Orders

Because Congress vested the SEC with broad discretion to investigate possible securities violations, subpoenaed parties generally are unsuccessful in their efforts to avoid compliance with or to quash SEC investigative subpoenas. The SEC need merely show that the subpoena was issued in conjunction with an investigation conducted pursuant to a legitimate purpose, that the inquiry was relevant to that purpose, that the information sought was not already within its

possession, and that all required administrative steps were followed.[8] Thus, courts simply do not quash validly issued SEC investigative subpoenas on the ground that the information sought was of a highly confidential business character.

The SEC's ability to share information as set forth in Forms 1661 and 1662 is permissive rather than mandatory.[9] Yet, during its investigations, the SEC will not enter into protective orders with subpoenaed parties to protect non-privileged confidential business information, as such measures clash with its policy to provide entities and persons enumerated in the Form 1661 and 1662 access to its investigative files.[10]

Unfortunately, the Courts have not been sympathetic to subpoenaed parties who have sought protective orders for their highly confidential business documents. For example, in *SEC v. R.J. Reynolds Tobacco Holdings, Inc. ("RJR")*,[11] RJR refused to produce documents concerning its "tobacco-related litigation costs" to the SEC pursuant to an investigative subpoena, because the SEC would not agree to accord the materials any confidentiality protections beyond the standard FOIA protocols. In response, the SEC filed a subpoena enforcement action against RJR to compel production of the documents; RJR, in turn, petitioned for a protective order, arguing that FOIA protections were insufficient to protect the documents from ultimate disclosure to potential third party litigants. RJR expressed concern that sensitive corporate information could fall in the hands of (1) RJR's litigation adversaries in thousands of tobacco-related suits, (2) RJR's competitors and joint defendants in a civil RICO case brought by the Department of Justice, and (3) the DOJ itself in connection with the RICO case.[12]

The SEC argued there was no authority to support RJR's contention that the SEC's "usual precautions" were inadequate and that a protective order was needed. It further argued that its enforcement functions would be seriously impeded if it were required to enter into any agreement restricting its Congressionally granted investigative powers.[13]

The court agreed with the SEC and ruled that the FOIA protections were sufficient to protect RJR from any harm flowing from disclosure of the materials requested by the subpoena to the SEC (and thereafter potentially to third parties).[14] The court did accommodate one of RJR's concerns, albeit in passing, by requiring the SEC to seek *ex parte* advance permission from the court before providing RJR documents to the DOJ.

Hunt v. SEC[15] further illuminates the SEC's general approach to requests for confidentiality that exceed those afforded by FOIA. There, the SEC issued investigative subpoenas and letter requests to banks

for records of the Hunt brothers' accounts. Both the banks and the Hunts sought assurances from the SEC that it would not disclose any of these bank records to third parties.

The Court succinctly summarized the SEC's wholesale dismissal of this request:

> Not surprisingly, the SEC . . . responded to these confidentiality requests in its usual fashion with a form letter. The letter state[d] that the issue of confidentiality can only be resolved each time a request for disclosure is made under the Freedom of Information Act . . . It goes on to state that, nonetheless, the SEC would give the request careful consideration, and attempt to keep the applicant apprised of any requests for information under FOIA . . ..[16]

The Court added:

> In addition to the multitude of requests for confidentiality, Plaintiffs proposed a confidentiality stipulation with the SEC, which was rejected. To date, the only assurance the SEC has provided Plaintiffs concerning the financial information they have gathered is that the SEC will attempt to notify Plaintiffs of any FOIA request for the information.[17]

While the Court ruled in favor of the Hunts, it did so for reasons unrelated to the confidentiality of the information.[18]

Notwithstanding the courts' aversion to assisting entities facing such predicaments, there have been a few instances where subpoenaed parties in SEC investigations secured protective orders over non-privileged documents. However, these cases were exceptional, and for example, involved confidential commercial business information that arguably implicated United States' foreign policy. For example, in *SEC v. The Boeing Co.*, the SEC petitioned the court to enforce a subpoena served on Boeing which, in response, cross-moved for a protective order.[19] The court ruled that the SEC's subpoena should be enforced because it was part of a legal investigation and the information sought was relevant to the investigation. The Court noted, however, "that the United States has an interest in preventing untimely disclosures of information contained in documents covered by this order, since said information could have an impact on the foreign policy of the United States; that respondents also have an interest in preventing untimely disclosures; and that said interests can be protected without hampering the investigation being conducted by the Commission."[20]

As such, the court entered a limited protective order prohibiting the SEC from producing Boeing's documents to any third party, except a duly authorized grand jury, until (i) the SEC first afforded interested agencies of the United States or Boeing ten days prior notice to permit them an opportunity to apply to the court for relief, and (ii) the court ruled upon such request for relief. The protective order specifically did

not affect the SEC's ability to (i) use the documents in connection with its investigation; (ii) refer the documents to agencies of the government with law enforcement responsibilities who agreed to subject themselves to the jurisdiction of the court and the terms of the order; (iii) "initiate, prosecute, or respond to an appropriate request by the [DOJ] to initiate or prosecute, any civil action, administrative proceeding, referral of information to the [DOJ], or, report of investigation, provided for under the [federal securities laws] . . . arising out of its investigation of the Respondents, as the [SEC] deems appropriate."[21]

It would be the rare case indeed where a financial institution could use *Boeing* as precedent, and obtain a protective order concerning its production to the SEC on the grounds of national defense. In fact, in a case related to *Boeing*, the court ruled that "workpapers" and "workpaper analyses" of Boeing's auditing firm were not subject to the *Boeing* protective order, because the record did not support a finding that such a protective order was justified either by considerations of foreign policy or by the business interests of Boeing in protecting "confidential and proprietary information."[22]

These decisions illustrate that, until the SEC overhauls its policies concerning protective orders covering investigative materials, corporations should not expect to secure any protections from the SEC covering their confidential commercial documents, beyond the limited protections afforded by FOIA, which, as shown above, are limited.

Protecting Confidentiality During the Litigation Phase Protective Orders

Once it has filed civil charges arising from its investigation, the SEC, like any other plaintiff in federal district court, must provide discovery to defendants. In document intensive cases, where the SEC has collected thousands of pages of files, and emails, it may initially be unwilling to parse out its investigative file to provide tailored responses to discovery requests. In order to avoid motion practice and potential sanctions, and to ensure that inadvertent errors do not occur in identifying material that should be produced to defendants, the SEC is inclined to simply "turn over everything" in its non-privileged investigative file to defendants. The SEC will err on the side of disclosure, rather than attempt to determine which documents in the investigative file should be produced, *i.e.*, documents which may be used to support its claims,[23] or that may be responsive to any particular provision of any particular document or interrogatory request,[24] and which it would otherwise object to producing.[25]

While, at first blush, this approach appears to be a laudable one for defendants charged, it concomitantly subjects non-parties to having their most confidential proprietary information exposed to those

charged with violating the securities laws. This potentially detrimental impact to third parties is exacerbated by the fact that the SEC is under no legal compulsion to provide notice to financial institutions that it intends to produce (or has produced) its investigative file to such defendants. In fact, even if the non-party learns of the contemplated production — through the SEC or otherwise — it lacks standing to object to the production of the materials, absent formal intervention in the case, as further discussed below.

Moreover, the SEC has little motivation to enter into protective orders that protect the confidentiality of documents in its investigative file obtained from non-parties to the litigation. The SEC has no proprietary interest in the documents contained in its investigative files, and would suffer no commercial or reputational harm if a non-party's confidential materials were produced in discovery to the defendants.

Further, the SEC maintains that its policy regarding the "routine uses" of information gathered during its investigations limits its ability to enter into protective orders in civil litigation that would somehow curtail its use of its investigative files outside of the litigation. For instance, a typically broad protective order might prohibit the SEC from sharing its pre-existing investigative files with any third parties, including, among other entities, other civil and criminal law enforcement agencies, including the DOJ.

A simple and logical solution to this dilemma is for the parties to enter into a protective order that limits the defendants' ability to disclose the documents to third parties, but preserves the SEC's right to disseminate the documents in accordance with its routine uses. This approach was taken in a recent SEC options backdating enforcement action against an Apple Inc. in-house attorney, where the SEC was a signatory to a Protective Order with defendants that preserved the SEC's right to "routine uses" of its investigative files:

> Nothing in this stipulation and order shall be construed to limit or otherwise abrogate the [SEC's] . . . ability to make[] its files available to other governmental agencies as described in the "Routine Uses of Information" section of [ ] SEC Form 1662. The Commission is free to disclose [confidential] Information or Items in a manner consistent with the "Routine Uses of Information" [referenced in] Form 1662 without notifying or seeking permission from the Designating Party.[26]

However, the SEC is not always willing to be a signatory to a protective order in its civil cases, and may place the burden on the non-party who produced confidential documents to the SEC during the investigation to negotiate the terms of a Protective Order directly with the defendants. In such instances, a non-party to the SEC enforcement action may enter into a Stipulated Protective Order with

the defendants that limits the defendants' use of the third party's documents in the SEC's investigative files solely to their defense of the SEC charges. As the SEC is not a signatory to the protective order, it remains free to utilize the company's documents in any manner it deems fit.

Protective orders between defendants and non-parties in SEC civil actions, where the SEC itself is not a signatory, have drawbacks. In *SEC v. Thestreet.com*[27] the defendants in an SEC enforcement action, in an unusual move, filed third party claims against the New York Stock Exchange and its officers. The defendants and the third party defendants entered into a protective order concerning any discovery exchanged among them. The SEC was not a signatory to that agreement. That protective order proved problematic, because the trial judge ruled that the SEC's presence during depositions when confidential information was disclosed constituted a breach and waiver of the protections afforded by the Protective Order. The District Court granted the motion of Thestreet.com, an online newspaper, to modify the protective order to allow it access to the deposition transcripts. The Second Circuit upheld the decision, but on different grounds, ruling that it did not have to reach the issue of whether there was a waiver of the protective order; instead it ruled that the depositions had been taken prior to the entry of the relevant protective order so that the depositions could not have been given in reasonable reliance on that order.[28]

Reducing the Risks of Indiscriminate Disclosure of Highly Confidential Commercial Documents

While currently an uphill battle, counsel for subpoenaed third parties should consider advocacy at every stage of the production process to reduce the likelihood of harm befalling its clients as a result of the Government's disclosure of confidential proprietary information. A proactive approach to limiting production through early stage advocacy may well prove to be the most effective tactic to protect client interests.

First, and most importantly, during the investigative phase, counsel should develop a working relationship with the SEC's enforcement counsel to explain fully the client's concerns. Dialogues concerning limiting production to relevant e-mails through utilizing search terms and date restrictions should be considered, as should limiting production of documents (such as Excel spreadsheets containing confidential client proprietary information) having no bearing on the precise matters under investigation. Although first-level enforcement attorneys may reflexively deny such requests, more senior attorneys may be receptive to a limited initial production. Senior enforcement attorneys may be receptive to such offers if coupled with the caveat that enforce-

ment counsel may return for further production after reviewing the initial batch of disclosure. This tactic reins in production that can be both unnecessarily overbroad and potentially damaging, but, moreover, establishes a working relationship with the enforcement staff based on trust and practicality. Preserving, but not producing, such confidential proprietary information from the outset, could mitigate the scramble for protection afterwards.

Second, when producing documents to the SEC, counsel should consider adding a paragraph to the standard FOIA Confidentiality Request language requesting that the SEC inform the company of any prospective litigation-related demand for the materials and allow it appropriate time to take action (*i.e.*, negotiate or move for a protective order).[29] The courts should view such advance requests as reasonable, and take a dim view of the SEC if it does not extend this minimum courtesy to companies safeguarding their highly sensitive trade secrets and commercial information.

Third, counsel should regularly review the docket sheet once SEC formally files charges. At that point, discovery obligations will be triggered and strategic determinations must be made by non-parties regarding how best to protect the clients' information. This includes, for example, moving to intervene and seeking judicial relief.

Fourth, counsel should attempt to persuade the SEC to enter into a protective order with the defendant that "carves out" the SEC's rights to disseminate documents outside of the litigation to entities and persons enumerated in its Routine List of Uses. Alternatively, if the SEC refuses to enter into a protective order with the defendants affecting its investigative file, company counsel should try to structure a stipulated protective order between the defendants and the company limiting the defendants' use of the company's documents to the defense of the case.

Fifth, to the extent one cannot forge an agreement with the SEC and defense counsel, it may be essential for third parties to seek a protective order pursuant to Federal Rule of Civil Procedure 26(c) in order to protect from inadvertent disclosure their highly confidential materials contained in the SEC investigative file.[30] A few courts, in non-SEC actions, have recently granted motions to intervene and for a protective order, particularly where the highly confidential materials sought to be protected are utterly irrelevant to the lawsuit.[31]

CONCLUSION

One would hope that where a company has requested heightened confidentiality protection beyond FOIA over documents produced during an investigation, that the SEC will put that company on notice that it has received a request in civil enforcement proceedings to pro-

duce those confidential materials, and give the company sufficient opportunity to work out a protective order or take appropriate legal action.

Until the SEC adopts a uniform approach to protective orders in its enforcement proceedings in federal district court, attorneys representing financial services companies and other entities must be vigilant in attempting to protect the confidentiality of highly sensitive and proprietary materials and information produced to the SEC during enforcement investigations.

NOTES:

[1]Supplemental Information for Regulated Entities Directed to Supply Information Other Than Pursuant to a Commission Subpoena, Form SEC 1661 (5-04).

[2]Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, SEC Form 1662 (5-04).

[3]While there have been efforts in the criminal arena to protect victims' confidentiality rights during discovery, *see, e.g.*, Fed. R. Crim. P. 17(c)(3) (subpoenas in criminal actions seeking production of personal or confidential information about a victim may be served on third parties only by court order, and, absent exceptional circumstances, prior notice must be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object), the SEC affords no special confidentiality consideration to subpoenaed financial institutions that may be victims of federal securities laws violations.

[4]*Frankel v. Securities and Exchange Commission*, 460 F.2d 813, 816, Fed. Sec. L. Rep. (CCH) P 93463 (2d Cir. 1972).

[5]The SEC may withhold records or information sought by a FOIA request on the ground that they are records or information compiled for law enforcement purposes, to the extent that the production of those records or information could, *inter alia*, "reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.A. § 552(b)(7)(A). However, if the SEC cannot make such a determination, and the only grounds upon which the SEC may withhold the records is a request for confidential treatment from the person who supplied the information, the SEC's FOIA officer must inform the person requesting confidential treatment and require that substantiation of the request for confidential treatment be submitted in ten calendar days. Failure to timely submit such written substantiation may be deemed a waiver of the confidentiality treatment request and the right to appeal an initial decision denying confidential treatment to the SEC's General Counsel. 17 C.F.R. § 200.83(d). Recent statistics show that the SEC exempted records from FOIA requests on the grounds that the information constituted "trade secrets and other confidential business information" in 160 instances during a one year period. *See* SEC Freedom of Information Act Annual Report for Fiscal Year 2008, *available at* http://www.sec.gov/foia/arfoia08.pdf.

[6]For companies claiming confidential treatment of records because they contain highly confidential commercial information, the written statement must substantiate the adverse consequences to the business enterprise that would result from disclosure; the measures taken by the business to protect the confidentiality of the information

in question and of similar information; the ease or difficulty of a competitor's obtaining or compiling the information; whether the information was voluntarily submitted to the Commission and, if so, whether the disclosure of the information would tend to impede the availability of similar information to the Commission. 17 C.F.R. § 200.83(d)(2) (iv to vii).

[7]FOIA "does not affect the Commission's right, authority, or obligation to disclose information in another context" outside of the FOIA process. 17 C.F.R. § 200.83(a). *See generally Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344, Fed. Sec. L. Rep. (CCH) P 91563, 39 Fed. R. Serv. 2d 764 (D.C. Cir. 1984) ("FOIA offers refuge from publication but not from court-supervised discovery"); *Frankel v. Securities and Exchange Commission*, 460 F.2d 813, 818, Fed. Sec. L. Rep. (CCH) P 93463 (2d Cir. 1972) (although persons may be barred from obtaining the SEC's investigative files pursuant to FOIA, if they are otherwise parties to civil proceedings in federal district court, they are "entitled to the usual remedy of discovery under the discovery provisions of the Federal rules of Civil Procedure. In the discovery procedure a district judge will be able to balance the need for the documents with the need for confidentiality").

[8]*See, e.g., RNR Enterprises, Inc. v. S.E.C.*, 122 F.3d 93, 97, Fed. Sec. L. Rep. (CCH) P 99524 (2d Cir. 1997); *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053, Fed. Sec. L. Rep. (CCH) P 94017 (2d Cir. 1973).

[9]*See, e.g.*, *SEC v. Merrill Scott Associates*, 2010 U.S. App. LEXIS 6017, at *23 (10th Cir. March 23, 2010).

[10]The SEC will, however, agree to enter into a confidentiality agreement with a company during an investigation for the purpose of enticing the company to produce materials otherwise protected under the attorney-client privilege or the attorney work product doctrine. See SEC Enforcement Manual, Section 4.3.1. at 102 (March 3, 2010), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf ("A confidentiality agreement is an agreement between the staff of the Division of Enforcement and, typically, a company subject to investigation pursuant to which the company agrees to produce materials that it considers to be privileged (such as reports of internal investigations, interview memoranda, and investigative working papers). For its part, the staff agrees not to assert that the entity has waived any privileges or attorney work-product protection by producing the documents. The staff also agrees to maintain the confidentiality of the materials, except to the extent that the staff determines that disclosure is required by law or that disclosure would be in furtherance of the SEC's discharge of its duties and responsibilities. The basis for the agreement is the interest of the staff in determining whether violations of the federal securities laws have occurred, and the company's interest in investigating and analyzing the circumstances and people involved in the events at issue").

[11]*SEC v. R.J. Reynolds Tobacco Holdings, Inc. ("RJR") 2004 WL 3168281 (D.D.C. June 29, 2004)*.

[12]*See* 2004 WL 3168281, at *8 to 10.

[13]*See* 2004 WL 3168281, at *10.

[14]2004 WL 3168281*.,* at *12.

[15]*Hunt v. U. S. Securities & Exchange Commission*, 520 F. Supp. 580, Fed. Sec. L. Rep. (CCH) P 98219 (N.D. Tex. 1981).

[16]520 F. Supp. at 598.

[17]520 F. Supp. at 598.

[18]The Hunts sought injunctive relief, claiming that the SEC violated the Right to Financial Privacy Act, which governs the notice requirements related to the SEC's requests to banks for personal banking information. The Court granted the Hunts' motion for preliminary injunction. *See* 520 F. Supp. at 598.

[19]*SEC v. The Boeing Co.*, 1976 U.S. Dist. LEXIS 16538 at *2 (D.D.C. Feb. 20, 1976).

[20]1976 U.S. Dist. LEXIS 16538, at *2.

[21]1976 U.S. Dist. LEXIS 16538, at * 3–4.

[22]*SEC v. Touche Ross & Co.*, 1976 U.S. Dist. LEXIS 14485 at * 4 — 5 (D.D.C. June 22, 1976).

[23]Fed. R. Civ. P. 26(a)(1)(a)(iii).

[24]Fed. R. Civ. P. 34; Fed. R. Civ. P. 33.

[25]Fed. R. Civ. P. 34(b)(2)(B) and (C). If the SEC shares its investigative files to the DOJ, the DOJ will take a similar approach to discovery during its criminal proceedings. The recent January 4, 2010 Memorandum for Department Prosecutors issued by the Department of Justice adopts a "methodical approach to consideration of discovery obligations" that encourages prosecutors to "err on the side of inclusiveness." Prosecutors are instructed to adhere to this policy in addition to the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM § 9-5.100.

[26]*See* Stipulated Protective Order (Modified by the Court), *SEC v. Heinin, C-07-2214-JF (N.D. Cal., Nov. 13, 2007)*, *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/5:2007cv02214/191487/25/.

[27]*S.E.C. v. TheStreet.Com*, 273 F.3d 222, 51 Fed. R. Serv. 3d 319 (2d Cir. 2001).

[28]273 F.3d at 234.

[29]It should be noted that in SEC administrative proceedings, "any person who is the owner, subject or creator of a document . . . which may be introduced as evidence, . . . may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents . . . that contain confidential information." SEC Rule of Practice 322, 17 C.F.R. § 201.322. This provision does not apply to SEC civil actions filed in federal district court seeking injunctive and other relief. However, this provision may serve as a legitimate basis for company counsel, when producing confidential commercial documents to the SEC during investigations, to request in writing that, to the extent the SEC intends to produce the company's confidential commercial documents in administrative proceedings, the SEC must put the company on notice of such production so that it may exercise its rights under Rule 322 to take appropriate action to limit disclosure of those documents.

[30]*See SEC v. Dowdell*, 2005 U.S. App. LEXIS 16105, at *14 (10th Cir. 2005) (non-party lacked standing to move for a protective order in SEC enforcement matter because he had not moved to intervene; court also noted that even if non-party had properly moved to intervene his motion would have been denied because he failed to demonstrate "good cause").

[31]*See generally Bancorp Services, L.L.C. v. Sun Life Assurance Co.*, 2006 U.S. Dist. LEXIS 81000 (E.D. Mo. Sept. 11, 2006) (where non-party moved to intervene and for a protective order preventing production of its confidential proprietary information, the court ruled, *inter alia*, that the defendant could withhold from production to the plaintiff six specific documents it had received in confidence from the non-party

on the ground that they were "irrelevant to the parties' dispute"); *Blum v. Schlegel*, 150 F.R.D. 38, 85 Ed. Law Rep. 883, 27 Fed. R. Serv. 3d 469 (W.D. N.Y. 1993) (where non-party professor moved to intervene for the limited purpose of protecting her confidentiality interest in her tenure review files, the court ruled that none of the identified documents was relevant to the claims in the case, and that disclosure or use of the documents would cause annoyance, embarrassment, oppression and undue burden and expense within the meaning of Rule 26(c)).