UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 50039 / July 20, 2004

Admin. Proc. File No. 3-11317

In the Matter of PUTNAM INVESTMENT MANAGEMENT, LLC

ORDER DENYING MOTION TO VACATE ADMINISTRATIVE ORDERS

By motion dated April 21, 2004, the Office of Compliance Inspections and Examinations ("OCIE") of the Commission has moved for vacatur of two Orders, dated March 26 and April 7, 2004, (the "Subpoena Orders" or the "Orders") issued by a law judge in response to a subpoena for Commission documents. On April 8, 2004, we approved a settlement of the underlying proceeding.1

We instituted these proceedings against Putnam Investment Management, LLC ("Putnam") charging Putnam employees with engaging in excessive short-term trading of Putnam mutual funds in their personal accounts.2 In November 2003, we reached a partial settlement with Putnam in which Putnam agreed to certain findings as well as to the imposition of a censure and a cease-and-desist order.3 The partial settlement left the issues of a civil money penalty and disgorgement of ill-gotten gains to be decided after a hearing.

On March 9, 2004, Putnam served on the Commission a subpoena requesting, among other things, Commission documents evidencing communications between the Commission and other persons concerning whether such persons are obligated to make any disclosure in public filings concerning "market timing" trading or "excessive short term trading." By a motion dated March 15, 2004, OCIE moved to quash in part the subpoena insofar as it sought communications related to examinations performed by Commission staff, arguing that such documents are subject to an "SEC examination privilege."

The law judge, by Subpoena Order dated March 26, 2004, required OCIE to file a Vaughn-type index4 of the documents OCIE claimed were privileged, as well as an affidavit providing a document-by-document explanation for the assertion of the examination privilege. The law judge held in abeyance a ruling on the motion to quash until these filings were made. On March 31, 2004, OCIE made the filings required by the law judge.

On April 7, 2004, the law judge issued the second Subpoena Order at issue here finding that the examination privilege did not exist and that, if the privilege did exist, it was qualified, not absolute; denying OCIE's motion to quash; and requiring OCIE to produce the responsive documents. Although OCIE asserts that it intended to seek Commission review of the Subpoena Orders, we and Putnam reached a final settlement of this matter on April 8, the day after the Subpoena Order was issued.5 The order reflecting this final settlement did not address the issue of the outstanding Subpoena Orders.

OCIE now moves to vacate the Orders, because the final settlement prevented OCIE from obtaining Commission review of the Orders.6 OCIE argues that the Subpoena Orders suggest that there is no privilege protecting examination documents. OCIE contends that the existence of the Subpoena Orders could adversely affect the Commission's examination program, because regulated entities may not be as open and forthcoming during the examination process if they believe examination documents are subject to production in administrative proceedings. OCIE represents that Putnam takes no position with respect to this motion. The Division of Enforcement filed a one-page memorandum supporting OCIE's position.7

As an initial matter, the Commission accepted Putnam's offer of settlement that waived all post-hearing procedures. We further note that this motion is not authorized by our Rules of Practice. Rule of Practice 470 provides that a person aggrieved by a determination in a proceeding may file a motion for reconsideration of an order issued by the Commission.8 However, a motion to reconsider must be filed within ten days after service of the order at issue. OCIE filed its motion on April 21, after the expiration of the allotted ten-day period.

Rule of Practice 400(a) authorizes our discretionary review of hearing officer rulings on an interlocutory basis.9 Rule of Practice 400(c) further provides that a hearing officer may certify an interlocutory ruling that compels the production of documentary evidence in the possession of the staff.10 However, because the proceeding is concluded, interlocutory review is no longer available. In any event, OCIE is not compelled to produce documents in response to the Subpoena Orders.

The Commission has a strong interest in its settlement orders being final.11 We should not reopen proceedings for issues that could have been resolved in the settlement. The Supreme Court, in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 24-25 (1994), has counseled that vacatur is inappropriate where the parties settled the underlying proceedings. The Court observed that the principal consideration in determining to grant vacatur "is whether the party seeking relief from the judgment below caused the mootness by voluntary action." The Court held that, "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." The Court explained that a settlement reflects the party's own choice that the judgment is "unreviewed."

OCIE suggests that it should not be bound by the reasoning in U.S. Bancorp because it did not participate in the negotiation or acceptance of the settlement, which was handled by the Division of Enforcement. This suggestion is without merit because, as OCIE recognizes in its brief before us, "OCIE is, of course, part of the Commission, which accepted Putnam's Offer of Settlement." OCIE cannot claim a third-party status that should entitle it to seek to vacate an order in a settled Commission proceeding. Once the Commission has determined to settle proceedings, the settlement is not subject to challenge by the Commission's staff, which must defer to the Commission's judgment.

Our determination should not be construed as taking a position with respect to the Orders, including their discussion of the matter of an examination privilege. The Orders are unreviewed actions in a settled administrative proceeding, and thus we do not view them as having significant precedential weight. The existence and scope of a privilege relating to the conduct of Commission examinations raise serious issues and present a wide range of public interest factors which must be considered and weighed carefully. We believe that such issues .should be reviewed in a litigated context in which two parties offer competing views. The development of a full and complete evidentiary record is necessary to reach a correct legal conclusion.

Accordingly, the motion of OCIE to vacate the Subpoena Orders issued on March 26, 2004, and April 7, 2004, is denied.

By the Commission.

Jonathan G. Katz
Secretary

Endnotes

1 Order Making Findings and Imposing Supplemental Remedial Sanctions Pursuant to Section 203(e) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940, Investment Advisers Act Rel. No. 2226 (Apr. 8, 2004), __ SEC Docket __.

2 Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Investment Advisers Act Rel. No. 2185 (Oct. 28, 2003), 81 SEC Docket 1952.

3 Order Making Findings and Imposing Partial Relief, Including a Final Censure, Remedial Undertakings and a Cease-and-Desist Order Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Investment Advisers Act Rel. No. 2192 (Nov. 13, 2003), 81 SEC Docket 2476.

4 The term "Vaughn index" is derived from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). A Vaughn index is an itemization of the documents claimed to be privileged together with an assertion of the privilege or privileges claimed for each document.

5 See n.1 supra.

6 See Atlanta Gas Light Co. V. Federal Energy Regulatory Comm'n, 140 F.3d 1392 (11th Cir. 1998) (finding vacatur of mooted administrative orders to be proper).

7 Both OCIE and the Division of Enforcement filed superceding memoranda in support of the motion for vacatur. The memoranda raised additional concerns regarding the detrimental effect the Subpoena Orders may have on litigation and the discovery process.

8 17 C.F.R. § 201.470.

9 17 C.F.R. § 201.400(a).

10 17 C.F.R. § 201.400(c).

11 Cf. Lance E. Van Alstyne, 53 S.E.C. 1093, 1098 n.10 (1998) ("'Parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance may be placed.'") (quoting Nequoia Association, Inc. v. U.S. Dept. Of Interior, 626 F. Supp. 827, 836 (D. Utah 1985).