

conference was required. In accordance with comments received, the revised rule requires both an initial and a final prehearing conference, except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate.

Rule 222. Prehearing Submissions

(a) *Submissions Generally.* The hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate, including any or all of the following:

(1) an outline or narrative summary of its case or defense;

(2) the legal theories upon which it will rely;

(3) copies and a list of documents that it intends to introduce at the hearing; and

(4) a list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(b) *Expert Witnesses.* Each party who intends to call an expert witness shall submit, in addition to the information required by paragraph (a)(4) of this rule, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert.

Rule 230. Enforcement and Disciplinary Proceedings: Availability of Documents for Inspection and Copying

For purposes of this rule, the term *documents* shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

(a) *Documents to be Available for Inspection and Copying.*

(1) Unless otherwise provided by this rule, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:

(i) each subpoena issued;

(ii) every other written request to persons not employed by the Commission to provide documents or to be interviewed;

(iii) the documents turned over in response to any such subpoenas or other written requests;

(iv) all transcripts and transcript exhibits;

(v) any other documents obtained from persons not employed by the Commission; and

(vi) any final examination or inspection reports prepared by the Division of Market Regulation or the Division of Investment Management.

(2) Nothing in this paragraph (a) shall limit the right of the Division to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(b) *Documents That May Be Withheld.*

(1) The Division of Enforcement may withhold a document if:

(i) the document is privileged;

(ii) the document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence;

(iii) the document would disclose the identity of a confidential source; or

(iv) the hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

(c) *Withheld Document List.* The hearing officer may require the Division of Enforcement to submit for review a list of documents withheld pursuant to paragraphs (b)(1)–(b)(4) of this rule or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying.

(d) *Timing of Inspection and Copying.* Unless otherwise ordered by the Commission or the hearing officer, the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this rule no later than 14 days after the respondent files an answer. In a proceeding in which a temporary cease-and-desist order is sought pursuant to Rule 510 or a temporary suspension of registration is

sought pursuant to Rule 520, documents shall be made available no later than the day after service of the decision as to whether to issue a temporary cease-and-desist order or temporary suspension order.

(e) *Place of Inspection and Copying.*

Documents subject to inspection and copying pursuant to this rule shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this rule other than by written agreement of the Division of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying Costs and Procedures.* The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at the rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies. The respondent shall be given access to the documents at the Commission's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Issuance of Investigatory Subpoenas After Institution of Proceedings.* The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation ("formal order") under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

(h) *Failure to Make Documents Available—Harmless Error.* In the event