

that a document required to be made available to a respondent pursuant to this rule is not made available by the Division of Enforcement, no rehearing or redetermination of a proceeding already heard or decided shall be required, unless the respondent shall establish that the failure to make the document available was not a harmless error.

*Comment (a):* A respondent's right to inspect and copy documents under this rule is automatic; the respondent does not need to make a formal request for access through the hearing officer. Generally, the rule requires that the Division of Enforcement make available for inspection and copying documents obtained by the Division from persons not employed by the Commission during the course of its investigation prior to the institution of proceedings. Except for final inspection or examination reports prepared by the Division of Market Regulation or the Division of Investment Management, documents prepared by Commission staff are treated as attorney work product, and do not have to be made available pursuant to this rule.

Rule 230 is not the exclusive means by which a respondent may obtain access to or production of documents. Production of documents prepared by the staff may be required under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), or pursuant to Jencks Act requirements made applicable to the Commission pursuant to Rule 231, or may be sought by subpoena pursuant to Rule 232 or through other procedures. See, e.g., Freedom of Information Act, 5 U.S.C. 552.

The Rule states that the Division of Enforcement shall (1) make available for inspection and copying (2) documents (3) obtained by the Division (4) in connection with the investigation leading to the institution of proceedings.

(1) The Division of Enforcement is required to make documents available for inspection and copying. It is not required to produce a copy of the documents to each respondent. The definition of documents is based in part on Federal Rule of Civil Procedure 34.

(2) The definition of the term "documents" in paragraph (a) is modeled on the definition of documents in Rule 34 of the Federal Rules of Civil Procedure.

(3) The Division of Enforcement's obligation under this rule relates to documents obtained by the Division of Enforcement. Documents located only in the files of other divisions or offices are beyond the scope of the rule.

(4) The "investigation leading to the Division's recommendation to institute proceedings" ordinarily is delineated by

the investigation number or numbers under which requests for documents, testimony or other information were made. When an investigation is initiated by the Division of Enforcement it is assigned a number, often referred to as the "case" or "investigation" number. Each request for documents, testimony or other information from persons not employed by the Commission specifies the investigation or preliminary investigation number to which it relates. In turn, each written recommendation by the Division of Enforcement to institute proceedings identifies on its cover page, by investigation number, the source investigation or investigations to which it relates. Accordingly, the identity and content of the appropriate investigation file or files from which documents must be made available can be based on objective criteria.

*Comment (b):* Under paragraph (b), the Division can withhold documents under four exceptions. Exception (1) shields information subject to a claim of privilege. Exception (2) protects as attorney work product internal documents prepared by Commission employees, which will not be offered in evidence. Work product includes any notes, working papers, memoranda or other similar materials, prepared by an attorney in anticipation of litigation. See *Hickman v. Taylor*, 329 U.S. 495 (1947); see also Fed. R. Civ. P. 26(b)(3) and (b)(5). Accountants, paralegals and investigators who work on an investigation do so at the direction of the director, an associate director, an associate regional administrator or another supervisory attorney, and their work product is therefore shielded by the rule. An examination or inspection report prepared by the Division of Market Regulation or the Division of Investment Management is not prepared in anticipation of litigation, and is therefore explicitly excluded from the materials that may be withheld. A respondent's claim that work product should be turned over will necessarily be evaluated on a case-by-case basis.

Exception (3) protects the identity of a confidential source. See 5 U.S.C. 552(b)(7)(C) and (D). Exception (4) protects any other document or category of documents that the hearing officer determines may be withheld as not relevant to the subject matter of the proceeding, or otherwise for good cause shown. This exception provides a mechanism to address a situation where a single investigation involves a discrete segment or segments that are related only indirectly, or not at all, to the recommendations ultimately made to the Commission with respect to the particular respondents in a specific

proceeding. To require that documents not relevant to the subject matter of the proceeding be made available, simply because they were obtained as part of a broad investigation, burdens the respondent as well as the Division of Enforcement with unnecessary costs and delay.

For example, a single investigation may encompass inquiry into an issuer's allegedly false accounting disclosure and an unrelated manipulation of the issuer's securities by a third party. If the recommendation to the Commission and resulting administrative proceeding involve only the accounting disclosures, the Division could seek leave to withhold trading records, transcripts and other documents related to the manipulation investigation.

*Comment (c):* The hearing officer may, in his or her discretion, override any exception claimed by the Division and order the Division to produce withheld items.

*Comment (g):* In some circumstances, for example, where a temporary cease-and-desist order is sought, or where a single formal order is being used to investigate several distinct areas of potential violations, proceedings may be instituted prior to the end of all investigative activities. To allow the hearing officer to take appropriate steps to assure that investigative subpoenas are not used for the purpose of gathering information for use in the proceeding, paragraph (g) requires the Division of Enforcement to notify the hearing officer and each party if the Division is continuing to issue investigative subpoenas under the same investigation file number or order directing private investigation ("formal order") used in the investigation leading to the institution of proceedings.

*Revision Comment:* As stated in the proposing release, the intent of the Rule is to codify existing staff practice with respect to voluntarily making available documents for inspection or copying. See Comments to proposed Rules 20 and 21, 58 FR 61750-51 (Nov. 22, 1993). The staff practice reflected an informal policy of the Division of Enforcement staff in the Headquarters Office and certain Regional Offices to make available to respondents major portions of the Division's investigation file. The policy evolved over many years and was implemented differently by different offices. Rule 230 seeks to respond to the criticism of commenters without establishing document production requirements, suggested by several commenters, that are not a part of existing practice.

Proposed Rule 20 would have required the production of "all