

lawsuit either with the defendant or anyone else. In this context, discovery, including depositions, is a crucial adjunct to motions to dismiss, summary judgment, and other procedural mechanisms designed to allow an assessment by the judge whether the allegations of the complaint are sufficient to warrant trial.

By contrast, in administrative proceedings brought by the Commission, there is ordinarily a detailed pre-institution fact finding investigation and a rigorous pre-institution review process. At the close of the investigation, a respondent is usually told the general conclusions reached by the Division of Enforcement and is afforded an opportunity to submit a written "Wells" statement presenting arguments against commencement of an action. See Commission's decisions on advisory committee recommendations regarding commencement of enforcement proceedings and termination of staff investigations, Securities Act Release No. 5310, 38 FR 5457 (Mar. 1, 1973). No proceedings are instituted unless a majority of the Commission votes to authorize proceedings after reviewing both a report on the investigation's findings from the Division of Enforcement and any Wells statement that is submitted. If proceedings are authorized, the documents and transcripts obtained from persons not employed by the Commission in the investigation are shared with the respondent. The benefits from and need for oral depositions are therefore different and less important in the context of Commission administrative proceedings than they may be in litigation between private parties under the Federal Rules of Civil Procedure.

Finally, the revised Rules of Practice include two new provisions that address in significant part a respondent's interest in obtaining discovery prior to the start of the hearing. Rule 232 authorizes the issuance of subpoenas *duces tecum* for the production of documents returnable at any designated time or place. Rule 230 mandates that the Division of Enforcement generally make available documents and transcripts of testimony obtained from persons other than employees of the Commission in the investigation leading to the proceeding.

One commenter suggested that the opportunity to review transcripts of investigative depositions was not sufficient. The commenter noted that knowledge gained during an investigation is cumulative. Division of Enforcement staff are unable to question each witness as thoroughly during the

course of an investigation, particularly in the early stages, as can be done in a post-investigation deposition. Further, an investigator on the Division of Enforcement staff will not necessarily ask the same questions as would a respondent. Moreover, even where investigative testimony is complete, the transcript provided to respondents is not a full substitute for the opportunity during live testimony to observe a witness's demeanor as well as to hear the content of a witness's answers.

These reasons establish support for an opportunity after the investigation for both the respondent and the Division of Enforcement to subpoena witnesses and question them under oath—an opportunity available at the hearing. They do not establish the need for prehearing depositions as well. Permitting post-investigation, prehearing depositions would afford a respondent information that may be useful in advance of hearing. However, given the newly established right to subpoena documents prior to hearing, the marginal benefits of prehearing depositions are not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.

Rule 233. Depositions Upon Oral Examination

(a) *Procedure.* Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

(b) *Required Finding When Ordering a Deposition.* In the discretion of the Commission or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, and that the taking of a deposition will serve the interests of justice.

(c) *Contents of Order.* An order for deposition shall designate by name a deposition officer. The designated officer may be the hearing officer or any other person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. An order for deposition also shall state:

(1) the name of the witness whose deposition is to be taken;

(2) the scope of the testimony to be taken;

(3) the time and place of the deposition;

(4) the manner of recording, preserving and filing the deposition; and

(5) the number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

(d) *Procedure at Depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(e) *Objections to Questions or Evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(f) *Filing of Depositions.* The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(g) *Payment.* The cost of the transcript shall be paid by the party requesting the deposition.

Comment: Depositions under the Rules of Practice are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not allowed for purposes of discovery. See *In the Matter of Central and South West Corp.*, Admin. Proc. Rulings Release No. 184 (July 14, 1976), 52 SEC Docket 375 (Aug. 18, 1992) (citing *L.M. Rosenthal & Co., Inc.*, Admin. Proc. File No. 3-4330 (Jan. 30, 1974)); see also *In the Matter of Gail G. Griseuk*, Admin. Proc. Rulings Release 440 (Aug. 31, 1994), 57 SEC Docket 1488 (Sept. 27, 1994) (formal