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one or more persons participating by telephone or other remote means.

(c) *Subjects to be discussed.* At a prehearing conference consideration may be given and action taken with respect to any and all of the following:

- (1) Simplification and clarification of the issues;
- (2) Exchange of witness and exhibit lists and copies of exhibits;
- (3) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;
- (4) Matters of which official notice may be taken;
- (5) The schedule for exchanging prehearing motions or briefs, if any;
- (6) The method of service for papers other than Commission orders;
- (7) Summary disposition of any or all issues;
- (8) Settlement of any or all issues;
- (9) Determination of hearing dates;
- (10) Amendments to the order instituting proceedings or answers thereto;
- (11) Production of documents as set forth in § 201.230, and prehearing production of documents in response to subpoenas duces tecum as set forth in § 201.232;
- (12) Specification of procedures as set forth in § 201.202; and
- (13) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Required prehearing conference.* Except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, at least one prehearing conference should be held.

(e) *Prehearing orders.* At or following the conclusion of any conference held pursuant to this section, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

(f) *Failure to appear: default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through a representative, at a prehearing conference of which he or she has been duly notified may be deemed in default pursuant to § 201.155(a). A party may make a mo-

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tion to set aside a default pursuant to § 201.155(b).

[60 FR 32796, June 23, 1995, as amended at 63 FR 63405, Nov. 13, 1998]

§ 201.222 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 section, 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.

(c) *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 section, 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.

§ 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.

For purposes of this section, 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 section, 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:

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- (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 Office of Compliance Inspections and Examinations, 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 section, 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) through (b)(4) of this section 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 section 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 §201.510 or a temporary suspension of registration is sought pursuant to §201.520, 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 section 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 section 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.

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(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 that a document required to be made available to a respondent pursuant to this section is not made available by the Division of Enforcement, no rehearing or redecision 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 harmless error.

[60 FR 32796, June 23, 1995; 60 FR 46499, Sept. 7, 1995]

§ 201.231 Enforcement and disciplinary proceedings: Production of witness statements.

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required

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to be made available for inspection and copying by a respondent is not turned over by the Division of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

§ 201.232 Subpoenas.

(a) *Availability; procedure.* In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing and served on each party pursuant to § 201.150. A person whose request for a subpoena has been denied or modified may not request that any other person issue the subpoena.

(1) *Unavailability of hearing officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance from the first available of the following persons: The Chief Administrative Law Judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner.

(2) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

(b) *Standards for issuance.* Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable