

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10970164
v.	:	
	:	Hearing Officer - EBC
	:	
Respondent.	:	

**PRE-HEARING SCHEDULING ORDER AND RULINGS
ON RESPONDENT’S DISCOVERY MOTION**

The Department of Enforcement commenced this disciplinary proceeding on August 22, 1997, by filing a Complaint with the Office of Hearing Officers. The Complaint alleges that Respondent _____, while a registered representative at _____, violated the NASD’s Free-Riding and Withholding Interpretation (IM -2110 -1(i)) and NASD Conduct Rule 2110, by allocating two “hot issues” to a restricted account. As his primary defense, _____ asserts that the Firm’s compliance officer and in-house counsel reviewed, and advised _____ to proceed with, the transactions at issue.

The Initial Pre-Hearing Conference in this proceeding was held on October 28, 1997, and an Initial Pre-Hearing Order was issued on November 3, 1997. Pursuant to the Initial Pre-Hearing Order and the Hearing Officer’s November 5, 1997 Order, the hearing had been scheduled for February 9 and 10, 1998.¹

¹ The Initial Pre-Hearing Order also set deadlines for: (1) the inspection and copying of non-privileged and otherwise discoverable documents in the Department of Enforcement’s investigative file; (2) the submission

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

An additional Pre-Hearing Conference (“Conference”) was held, by telephone conference call, on December 29, 1997. _____ appeared on behalf of the Department of Enforcement, and _____ appeared on behalf of the Respondent. The Hearing Officer elected to hold this Conference to expedite the resolution of certain discovery matters that had been raised by the Respondent, and to afford the Parties an opportunity to discuss the impact of Respondent’s counsel’s belated review of the Department of Enforcement’s documents on the pre-hearing and hearing schedule.²

This Pre-Hearing Order is issued pursuant to Code of Procedure Rule 9241(e) and recites all rulings made by the Hearing Officer during the Conference. This Order also sets forth the revised schedule that will govern this disciplinary proceeding.

Rulings on Motion

By letter dated December 23, 1997, Respondent _____, through his counsel, made two discovery requests. First, the Respondent requested that the Hearing Officer issue a subpoena duces tecum requiring _____ to produce all documents, including correspondence between the Respondent, and the Firm’s counsel and compliance department, and internal Firm memoranda, relating to the Firm’s initial public offering of the subject securities, and the sale and transfer of these securities. Second, the Respondent requested that the Hearing Officer issue an order requiring the Department of Enforcement to produce any correspondence between the Respondent, and the Firm’s counsel and compliance department, that the Department of

of non-dispositive and dispositive motions, and stipulations; (3) the designation of expert witnesses, if any; and (4) the exchange and filing of pre-hearing submissions.

² Given the limited nature of this conference, pursuant to Code of Procedure Rule 9265(a), the Hearing Officer, in the exercise of discretion, determined that it was unnecessary to require a court reporter to record and transcribe the Conference.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

Enforcement might have obtained in connection with its separate investigation of _____
_____.³ In connection with the foregoing requests, Respondent's counsel requested an extension of the discovery cut-off date until the end of January 1998. The Code of Procedure does not provide for the filing of letter submissions; however, the Hearing Officer decided to treat counsel's letter as a motion.⁴ The following summarizes the Hearing Officer's rulings on the Respondent's discovery motion that were made during the Conference.

As to the Respondent's first request, the NASD's Code of Procedure does not authorize the Hearing Officer to issue a subpoena to a member firm, or to any other entity or individual. Accordingly, Respondent's request for the issuance of a subpoena was denied summarily, without prejudice to the Respondent's right to file a motion pursuant to Code of Procedure Rule 9252.⁵ Under the Code of Procedure, the most analogous device to a subpoena for obtaining documents from non-party member firms (and associated persons) is through a Rule 9252 motion.

As to the Respondent's request for documents that the Department of Enforcement may have obtained in connection with the _____, during the Conference, counsel for the Department of Enforcement confirmed that he had checked the files in that investigation, but did not find any responsive documents. Accordingly, this portion of the Respondent's motion was denied as moot.

³ Based on the representations of counsel for the Department of Enforcement, the Hearing Officer understands that the _____ Investigation is separate from, and bears a different investigative file number from that assigned to, the investigation that gave rise to the institution of this disciplinary proceeding.

⁴ The Hearing Officer also notes, that pursuant to the November 3 Initial Pre-Hearing Order, the Respondent was required to file this motion by December 11, 1997.

⁵ See discussion, at pp. 4-5.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

Having denied both of Respondent's discovery requests, there was no reason to extend the discovery cut-off date.

Pre-Hearing and Hearing Schedule

Much of the history necessitating the rescheduling of the hearing and certain pre-hearing activities is detailed in the Hearing Officer's December 16, 1997 Order and will not be repeated here. Suffice it to say that Respondent's counsel failed to inspect and copy the Department of Enforcement's documents by November 17, 1997 – the deadline set in the Initial Pre-Hearing Order. Pursuant to the December 16 Order, the Hearing Officer extended Respondent's time to complete inspection and copying of Department of Enforcement's documents until January 2, 1998.

Based on Respondent's counsel's oral and written representations, the Hearing Officer understands that the inspection and copying of the Department of Enforcement's documents was completed on December 23, 1997. However, because completion of the document review was a necessary predicate to the completion of other pre-hearing activities, e.g., the filing of discovery motions, Respondent's counsel's belated document review has affected other aspects of the schedule. Indeed, based on the review of the documents and the resolution of the Respondent's discovery motion, Respondent's counsel indicated, during the Conference, that he wishes to file a Rule 9252 motion, requesting that the Association compel the production of certain documents from _____ for use at the hearing.

Pursuant to the schedule set in the Initial Pre-Hearing Order, any motion pursuant to Rule 9252 was required to be filed by December 11, 1997. However, the need to adhere to that date and to the February 9 and February 10 hearing dates must be balanced against the Respondent's interest in pursuing available avenues to obtain documents that he believes are relevant to this

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

disciplinary proceeding. In this case, in the Hearing Officer's judgment, a balancing of these competing interests weighs in favor of a one-time adjournment of the hearing, for a period of less than 28 days, and the establishment of a new schedule for pre-hearing preparation, rather than precluding the Respondent from filing his Rule 9252 motion.

1. Hearing Dates and Additional Pre-Hearing Conference

(a) Hearing Dates and Location. The hearing is rescheduled to March 5 and March 6, 1998, in New York City. Counsel for both Parties have agreed on these dates. The Office of Hearing Officers shall arrange to reserve a hearing room at the offices of NASD Regulation, Inc., 33 Whitehall Street, New York, NY, or at another appropriate facility. Pursuant to Code of Procedure Rule 9221(d), a Notice of Hearing, including the location of the hearing room, will be served on the Parties at least 28 days in advance of the hearing.

(b) Additional Pre-Hearing Conferences. The next Pre-Hearing Conference in this proceeding will be held on January 30, 1998 at 11:00 a.m. Unless otherwise ordered by the Hearing Officer, this conference will be held by telephone. The call will be placed through an MCI conference operator; to participate in the call, the Parties are required to call (212) 547-0138 and advise the operator that the pass code is "Cohn." If needed, the confirmation number for the call is 4679403.

Additional pre-hearing conferences may be held at the determination of the Hearing Officer, or at the request of one or both of the Parties, if such conferences would aid in the orderly and expeditious disposition of the proceeding. The Hearing Officer anticipates that a Final Pre-Hearing Conference will be held approximately ten days before the hearing.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

2. Motions

(a) **Motions to Compel Production of Documents or Testimony.** Any motions pursuant to Code of Procedure Rule 9252 seeking an order requiring the Association to compel the production of documents or testimony at the hearing shall be served and filed by January 9, 1998. Any papers in opposition shall be served and filed by January 16, 1998. Respondent's failure to adhere to the January 9 deadline will be deemed a waiver of his right to file a motion pursuant to Code of Procedure Rule 9252.

(b) **Motions for Production of Witness Statements.** Any motions pursuant to Code of Procedure Rule 9253 seeking an order for the production of witness statements shall be served and filed by February 10, 1998. Any papers in opposition shall be served and filed by February, 17, 1998.

(c) **Other Motions.** All other motions, including motions to exclude evidence and motions to exclude witnesses from attending the hearing before and after they have testified, shall be served and filed by February 10, 1998. Any papers in opposition shall be served and filed by February 17, 1998.

3. Pre-Hearing Submissions

The Parties shall exchange and file their Pre-Hearing Submissions on February 3, 1998. The Parties must ensure that copies of all these materials also are received by the Office of Hearing Officers by that date. Any objections to listed witnesses and proposed exhibits shall be filed and served by February 10, 1998. Objections that are not filed timely will be deemed waived.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

4. Transcripts of Prior Testimony

Any Party who seeks to offer the prior testimony of a witness, in lieu of, or in addition to, calling the witness to testify at the hearing, shall serve and file a list of transcript designations and other material, as required by and prepared in accordance with the Standing Pre-Hearing Order, by February 3, 1998. Any counter-designations and objections to designations of prior witness testimony shall be served and filed by February 10, 1998. Objections that are not filed timely will be deemed waived.

5. The Use of Expert Witnesses

Although Respondent's counsel previously indicated that he intended to offer expert testimony at the hearing, during the Conference, Respondent's counsel stated that he has decided to forgo the use of an expert witness in this proceeding. Counsel for the Department of Enforcement has indicated that he would seek to offer expert witness testimony only if the Respondent proffered such testimony, and that the Department of Enforcement has no independent interest in offering expert witness testimony. Accordingly, because this proceeding will not involve the use of expert witness testimony, there is no need to set a revised schedule pertaining to the disclosure of expert witness information.

6. Stipulations

Stipulations as to the authenticity, content and admissibility of the Parties' proposed exhibits and stipulations as to relevant, undisputed facts shall be filed by February 17, 1998. As directed in the Standing Pre-Hearing Order, the Parties shall confer in order to stipulate to these matters.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

7. **Summary of Pre-Hearing and Hearing Schedule**

Except as expressly modified by this Order, all directions to the Parties regarding pre-hearing preparation and the deadlines established in the Initial Pre-Hearing Order, dated November 3, 1997, remain in effect.

As set forth in the November 3 Initial Pre-Hearing Order, and as amended by this Order, the following schedule is established for this proceeding:

- 1/9/98 Deadline for filing any motions under Rule 9252.
- 1/13/98 Deadline for filing papers in opposition to the Department of Enforcement's motion for summary disposition.
- 1/16/98 Deadline for filing papers in opposition to Rule 9252 motions.
- 1/30/98 Pre-Hearing Conference at 11:00 a.m.
- 2/3/98 Deadline for (i) filing and exchanging Pre-Hearing Submissions, as required by and prepared in accordance with the November 3 Initial Pre-Hearing Order; and (ii) filing designations of prior witness testimony, prepared in accordance with the November 3 Initial Pre-Hearing Order.
- 2/10/98 Deadline for filing (i) any objections to witnesses or exhibits of another party, and counter-designations and objections to designations of prior witness testimony (objections that are not timely filed will be deemed waived); (ii) motions for production of witness statements pursuant to Rule 9253; and (iii) filing any motions relating to the conduct of the Hearing, such as motions in limine and motions for sequestration of witnesses.

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-1 (C10970164).

2/17/98 Deadline for filing (i) stipulations as to relevant, undisputed facts and stipulations as to the authenticity, content and admissibility of the Parties' proposed exhibits; and (ii) papers in opposition to Rule 9253 motions and motions relating to the conduct of the Hearing.

3/5/98-3/6/98 Hearing.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: Washington, DC
January 2, 1998