

Rule 5411T—Modifications of Time, Postponements and Adjournments

Rule 5411T provides that the Board maintains discretion, except as otherwise provided by law, to adjust the time limits prescribed by the rules or to postpone or adjourn any hearing.

Rule 5420T—Leave to Participate To Request a Stay

Rule 5420T provides a procedure by which certain entities may seek a stay of a hearing. The entities that may seek such a stay would have been the Commission, the United States Department of Justice or any United States Attorney's Office, any criminal prosecutorial authority of a state or political subdivision of a state, and an appropriate state regulatory authority may seek a stay.

Under Rule 5420T, an authorized representative of any such entity may seek leave to participate on a limited basis to request a stay. Rule 5420T provides that a stay shall be granted upon a showing that a stay is necessary to protect an ongoing Commission investigation, and that a stay shall otherwise be favored upon a showing that it is in the public interest or for the protection of investors.

Rule 5421T—Answer to Allegations

Rule 5421T governs the filing of answers to orders instituting proceedings. A party may file an answer in any matter, but is not required to file an answer unless ordered to do so in the order instituting proceedings.

Rule 5422T—Availability of Documents for Inspection and Copying

Rule 5422T governs the obligations of Board staff to make documents available to a party for inspection and copying. Paragraphs (a) through (c) of Rule 5422T are the core provisions for determining what documents the staff must make available. Paragraph (a) describes generally the documents that the staff must make available to a respondent. Paragraph (b) limits paragraph (a) by describing categories of documents that the staff may withhold, subject to an overriding obligation not to withhold material exculpatory evidence. Paragraph (c) prescribes procedures the staff must follow when withholding certain categories of documents, and procedures for a hearing officer to determine whether withholding is appropriate.

Rule 5422T(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500T. Rule 5422T(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the

Division in connection with the registration application prior to the notice of hearing.

Rule 5422T(a) includes specific exceptions for, and must be read in conjunction with, Rule 5422T(b), which describes four categories of documents that the Division may withhold from a respondent even if Rule 5422T(a) would otherwise require the Division to make the document available. Moreover, withholding documents may trigger the procedural requirements of Rule 5422T(c). We therefore individually address each of the four categories of documents that may be withheld under Rule 5422T(b), and any Rule 5422T(c) procedures related to withholding those documents.

Under Rule 5422T(b)(1)(i), the Division need not make available any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration. Withholding such documents does not trigger any procedural requirements under Rule 5422T(c).

Under Rule 5422T(b)(1)(ii), the Division need not make available any other document that, while not encompassed within the first category, is nevertheless protected by a privilege or by the attorney work product doctrine. This category would include, for example, documents that were privileged in the hands of the person who supplied them to the Board, but who supplied them pursuant to an understanding that doing so would not otherwise waive the privilege. As to this category of withheld documents, Rule 5422T(c)(1) requires the Division to supply to the hearing officer and each respondent a log providing all of the same information that Rule 5106 requires a person to submit when asserting a privilege against production to the Board.¹

¹ Rule 5106, adopted by the Board on September 29, 2003, is currently pending before the Commission for approval and will not take effect unless the Commission approves it. If Rule 5422T(c)(1) takes effect on a temporary basis before Rule 5106 takes effect, the portions of Rule 5106 that are incorporated by reference in Rule 5422T(c)(1) shall be given effect as part of Rule 5422T(c)(1) as fully as if they were expressly restated therein. The Commission notes that Board staff has confirmed that the specific language of Rule 5106 that is intended to be given effect as part of Rule 5422T(c)(1) is the language in Rule 5106(a) that requires that,

(1) the person asserting the privilege, or his or her attorney, shall identify the nature of the privilege (including attorney work product) that is being

Under Rule 5422T(b)(1)(iii), the Division need not make available any document that would disclose the identity of a confidential source. The rule provides, however, that the staff may not withhold a document on this basis if doing so results in withholding material exculpatory evidence. Rule 5422T(c)(2) requires the Division to provide the hearing officer with a list of any documents withheld to protect the identity of a confidential informant. The rule requires the Division to provide the same list to each respondent, although the staff may redact as much information as necessary from that list (including, in appropriate circumstances, all information) to protect the interests related to the Division's reason for withholding the document. The hearing officer, in his or her discretion, may review any such document *in camera* to assess the grounds for withholding it and to assess whether it includes material exculpatory evidence.

Under Rule 5422T(b)(1)(iv), the Division need not make available any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown. For example, the staff might have documents supplied by a foreign regulator under a confidentiality agreement. If the staff does not intend to use them, the "good cause" exception allows the staff to withhold them to honor the confidentiality agreement. Again, however, the good cause exception does not allow the staff to withhold a document that contains material exculpatory evidence. Rule 5422T(c)'s

claimed and indicate the relevant jurisdiction's privilege rule being invoked; and

(2) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information—

(i) for documents: (A) the type of document, (e.g., letter or memorandum); (B) the general subject matter of the document; (C) the date of the document; and (D) such other information as is sufficient to identify the document for a Commission subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other; and

(ii) for oral communications: (A) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (B) the date and place of communication; and (C) the general subject matter of the communication. (Telephone conversation between Gordon Seymour, Acting General Counsel, PCAOB, and staff of the Commission's Office of the Chief Accountant, on November 4, 2003.)