

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. CAF020041 Hearing Officer - AHP ORDER GRANTING THE DEPARTMENT OF ENFORCEMENT'S MOTION FOR A PROTECTIVE ORDER
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On December 24, 2002, Complainant, the Department of Enforcement ("the Department" or "Complainant"), orally moved for a protective order, pursuant to NASD Code of Procedure Rule 9146, preventing _____ ("Respondent") from making public a transcript of a regulatory conference call ("transcript"), as described below. After considering the arguments of counsel, Complainant's motion is GRANTED.

Creation of the Transcript

1. On November 19, 2002, the Department of Member Regulation of NASD ("Member Regulation") hosted a Municipal Transaction Reporting Workshop ("workshop") conducted via conference call. The workshop participants ("the panel") included individuals from Member Regulation, the Municipal Securities Rulemaking Board ("MSRB"), and the Depository Trust Clearing Corporation, a parent of the National Securities Clearing Corporation. The panel discussed municipal securities transaction reporting matters, including the reporting process and common reporting problems.

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2. Members of the securities industry were invited to listen to the panel discussion, but could not otherwise participate in the conference call. Among the listeners were representatives of _____, including _____, the firm's chief compliance officer.

3. A transcript of the conference call ("transcript") was created and provided to the Department of Enforcement. However, neither NASD nor the MSRB intended to create a public record of the conference call.

4. The Respondent has requested a copy of the transcript for use in its defense in this case, and the Department has agreed to produce the transcript to Respondent, provided that the transcript is not released to the public or published by the Respondent. The Respondent does not oppose the Department's request for a protective order.

Basis for Protective Order Pursuant to Rule 9146(k)

5. NASD Code of Procedure Rule 9146(k)(1), which governs protective orders, reads in part as follows,

A Party, a person who is the owner, subject, or creator of a Document subject to production under Rule 8210 or any other Rule which may be introduced as evidence in a disciplinary proceeding...may file a motion requesting a protective order to limit disclosure or prohibit from disclosure to Parties, witnesses or other persons...Documents or testimony that contain confidential information.

The rule continues,

A motion for a protective order shall be granted only upon a finding that disclosure of the Document or testimony would have a demonstrated adverse business effect on the movant or would involve an unreasonable breach of the movant's personal privacy.

6. The Department has represented that the MSRB did not request the transcript be made and does not want the transcript to be made public or posted on any website, because the MSRB has not approved the public release of the transcript. The Department of Enforcement has further

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represented that, if the transcript were made public, the MSRB may be less willing in the future to participate in similar workshop conference calls and otherwise assist NASD with regulatory initiatives.

7. The Hearing Officer finds that Complainant has shown that disclosure of the transcript would have a demonstrated adverse business effect on the MSRB and NASD.

8. The issuance of a protective order will not impair Respondent's ability to make whatever legitimate use can be made of such transcript in defense of this disciplinary proceeding.

Provisions of Protective Order

9. IT IS HEREBY ORDERED that, pursuant to NASD Code of Procedure Rule 9146(k), the transcript, without the necessity of further designation, shall be treated as confidential during the pendency of this action. The transcript shall be used by Respondent solely for the purposes of this disciplinary proceeding and not for any other purpose. In particular, the Respondent may not publish the transcript in any manner, including posting the transcript on an internet website. The Respondent also shall not give the transcript to any other individual or entity for such publication. Control and distribution of the transcript shall be the responsibility of the Respondent and its attorneys.

10. IT IS FURTHER ORDERED that Respondent shall not disclose the transcript or information derived from it to any person except as provided in this order. The Respondent and its attorneys may disclose the transcript and information derived from it to the following persons for the purpose of defending the Respondent of the charges in this disciplinary proceeding:

a. Any attorneys, and their employees, representing the Respondent in this disciplinary proceeding;

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b. Any person retained by counsel described in paragraph 10(a) to assist in the preparation and trial of this disciplinary proceeding, including experts and paralegals;

c. Any director, officer, or employee of the Respondent who is required by the Respondent or requested by counsel to work directly on this disciplinary proceeding;

d. Any witness in this disciplinary proceeding; provided, however, that the transcript and information derived from it can be disclosed to such persons only in preparation for, review of, or in the course of his or her testimony and that such person shall not retain the transcript, or any portion thereof, following completion of his or her testimony; and

f. Any court reporter in this proceeding.

11. IT IS FURTHER ORDERED that each person to whom disclosure of the transcript is permitted pursuant to paragraphs 10(a) through 10(d) above shall be given a copy of this order and shall agree to be bound by its terms before such person receives a copy of the transcript.

12. The admissibility, confidentiality, and use of the transcript and information derived from it at the hearing shall be subject to further order of the Hearing Officer.

13. IT IS FURTHER ORDERED that within 90 days of the conclusion of this disciplinary proceeding, the transcript, including all copies of such document and all excerpts or summaries of it, either shall be returned to the Department or destroyed at the Department's request.

14. The terms of this order are subject to modification, extension, or limitation as may be agreed to by Complainant or Respondent, or by order of the Hearing Officer.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

January 6, 2003