

CEASE AND DESIST PROCEEDINGS

Section 11-51-606(1.5), C.R.S.

- (1.5) (a) Whenever it appears to the securities commissioner, based upon sufficient evidence as presented in a petition by an officer or employee of the division of securities, that a person has committed or may commit any of the acts or practices listed in paragraph (b) of this subsection (1.5), then, in addition to any specific powers granted under this article, the securities commissioner, in his or her discretion, may issue to such person an order to show cause why the securities commissioner should not enter a final order directing such person to cease and desist from the unlawful act or practice, or impose such other sanctions as provided in subparagraph (IV) of paragraph (d) of this subsection (1.5). The securities commissioner shall, within two calendar days, notify the chairperson of the securities board or an administrative law judge that an order to show cause has been issued, and the chairperson or an administrative law judge shall set a date for hearing on such order before the securities board or an administrative law judge as provided in paragraph (d) of this subsection (1.5).
- (b) The securities commissioner may take action pursuant to paragraph (a) of this subsection (1.5) with regard to any of the following acts or practices:
- (I) The sale of a security is subject to registration under this article and the security is being offered or has been offered or sold in violation of section 11-51-301, or any rule or order under said section;
 - (II) Any person has engaged or is about to engage in the offer or sale of a security or any other act or practice in violation of section 11-51-401 or any rule or order under said section;
 - (III) Any person has engaged or is about to engage in the offer or sale of a security or any other act or practice in violation of section 11-51-501 or any rule or order under said section;
 - (IV) Any person has engaged or is about to engage in any act or practice in violation of any provision of article 53 of this title; or
 - (V) Any person has violated or is about to violate any order previously entered by the securities commissioner.
- (c) Any person against whom an order to show cause has been entered pursuant to paragraph (a) of this subsection (1.5) shall be promptly notified by the securities division of the entry of the order, along with a copy of the order, the factual and legal basis for the order, and the date set by the chairperson of the securities board or an administrative law judge for hearing on such order. Such notice may be served by United States mail, postage prepaid, to the last-known address of such person, by personal service, facsimile transmission, or as may be practicable upon any person against whom such order is entered. Mailing or

facsimile transmission of an order or other documents under this subsection (1.5), or personal service of such orders or documents, shall constitute notice thereof to the person.

- (d) (I) The hearing on an order to show cause shall be commenced no sooner than ten nor later than twenty-one calendar days following the date of transmission or service of the notification by the securities division as provided in paragraph (c) of this subsection (1.5). The hearing may be continued by agreement of all of the parties based on the complexity of the matter, number of parties to the matter, and legal issues presented in the matter,, but in no event shall the hearing commence later than thirty-five calendar days following the date of transmission or service of the notification.
- (II) If a person against whom an order to show cause entered pursuant to paragraph (a) of this subsection (1.5) does not appear at the hearing, the securities division may present evidence that notification was properly sent or served upon such person pursuant to paragraph (c) of this subsection (1.5) and such other evidence related to the matter as the securities board or an administrative law judge deems appropriate. In the case where such person does not appear, the securities commissioner may not issue an order unless there is a finding by the securities board or an administrative law judge that there is a reasonable basis to believe such notification was actually received or served, or, after reasonable search by the securities division, the person against whom the order was entered cannot be located. The securities commissioner shall enter such order within ten days after his or her determination related to reasonable attempts of notification of the respondent, and the order shall become final as to that person by operation of law.
- (III) At any hearing pursuant to this paragraph (d), the securities board or an administrative law judge shall take evidence and hear arguments from the securities division and the person against whom the order to show cause has been entered, pursuant to such rules and procedures as may be adopted by the securities commissioner. Based on the evidence entered and arguments heard at the hearing, the securities board or an administrative law judge shall enter findings of fact, conclusions of law, and an initial decision recommending to the securities commissioner that a final order be entered affirming, denying, vacating, or otherwise modifying the order to show cause. The initial decision shall be issued within ten days after the conclusion of the hearing provided pursuant to this paragraph (d) and shall be promptly delivered to the securities commissioner.
- (IV) If the securities commissioner reasonably finds that the person against whom the order to show cause was entered has engaged, or is about to engage, in acts or practices constituting violations as set forth in paragraph (b) of this subsection (1.5) and makes the findings required by section 11-51-704 (2), he or she may

issue a final cease and desist order imposing one or more of the following sanctions:

- (A) Directing such person to cease and desist from further unlawful acts or practices;
- (B) Censuring the person, if the person is a licensed broker-dealer, sales representative, investment adviser, or investment adviser representative; or
- (C) Requiring such person to undertake or comply with conditions or limitations placed upon the activities, functions, or operations of such person, within such reasonable time period as may be imposed by the securities commissioner.
- (V) The securities commissioner shall provide notice of the final order within ten calendar days after receiving the initial decision, in the manner set forth in paragraph (c) of this subsection (1.5), to each person against whom such order has been entered. The final order entered pursuant to subparagraph (IV) of this paragraph (d) shall be effective when issued, and shall be a final order for purposes of judicial review pursuant to section 11-51-607.

51-6.3 Hearings on Orders to Show Cause Why a Cease and Desist Order Should Not Enter.

A. Definitions. In addition to those terms defined in Rule 51-2.1, for purposes of this Rule 51-6.3, unless the context otherwise requires, the following are defined:

1. "Administrative Law Judge." An administrative law judge with the Division of Administrative Hearings appointed pursuant to section 24-30-1001, et seq., C.R.S.
2. "Authorized Representative". An attorney, or other person authorized by a Party to represent him/her/it in a cease and desist proceeding.
3. "Board". The Colorado Securities Board as created pursuant to section 11-51-702.5, C.R.S.
4. "Business Day". Any calendar day except Saturday or Sunday, New Year's day, Dr. Martin Luther King Jr. day, Washington-Lincoln day, Memorial day, Independence day, Labor day, Columbus day, Veteran's day, Thanksgiving, Christmas, or any other holiday upon which the Division is not open for business.

5. "Party". The Division and/or the specifically named Person(s) whose legal rights, duties or privileges are being determined in a cease and desist proceeding; any other Person(s) who, as a matter of constitutional right or by any provision of the law, is entitled to participate fully in the proceeding.

6. "Presiding Member". The member of the Board designated by the chairperson to preside over a cease and desist proceeding before the Board.

7. "Person". Those individuals, entities or organizations set forth in section 11-51-201(12), C.R.S.

8. "Respondent". Party(ies) who are named in the petition filed by the Division initiating the cease and desist proceeding.

B. Scope of this Rule

1. Pursuant to section 11-51-606(1.5)(d)(III), C.R.S., this Rule 51-6.3 shall govern cease and desist proceedings under section 11-51-606(1.5), C.R.S., and shall be supplemented by the Administrative Procedures Act as adopted in Colorado, and specifically section 24-4-105, C.R.S., the hearings provision of the State Administrative Procedures Act.

2. To the extent a specific provision of this Rule is in conflict with the State Administrative Procedures Act, the provision of this Rule shall govern.

3. To the extent a specific provision of this Rule is in conflict with the Rules of Procedure for the Division of Administrative Hearings, the provisions of this Rule shall govern.

C. Representation.

1. An individual may appear in his or her own behalf, or by an attorney authorized to engage in the practice of law in Colorado. Any other person who is a Party may be represented by an attorney, provided, however, that such attorney must be licensed or otherwise authorized to engage in the practice of law in Colorado. A Party that is a partnership, limited liability company, corporation, or other Person may

be represented by an Authorized Representative duly and lawfully designated by the entity Party.

2. An attorney representing a Respondent in a cease and desist proceeding shall enter his or her appearance with the Division, and as the case may be, with either the Division of Administrative Hearings or the Board prior to the time the written answer is due pursuant to Rule 51-6.3.E.7. The entry of appearance shall contain the attorney's name, address, telephone number, bar number, facsimile number, the firm name, if the attorney is a member of a law firm, and the name, address and telephone number of the Party represented.

3. An attorney presenting a Party in a cease and desist proceeding may withdraw his or her appearance of the Party only upon notice of such withdrawal being filed no later than two (2) business days before the scheduled hearing, with such notice served upon the Party as provided in this Rule. Any such withdrawal shall not be effective unless approved by the Board or the Administrative Law Judge. The approved withdrawal shall not constitute grounds for continuance of the commencement of the hearing in the cease and desist proceeding.

D. Filings; Form of Pleadings; Signatures; Copies; Computation of Time; Service

1. Pleadings and other papers filed in a cease and desist proceeding shall contain the caption "BEFORE THE SECURITIES COMMISSIONER, STATE OF COLORADO," the title of the proceeding, designated as "IN THE MATTER OF (name of Respondent(s)), the docket number and the name of the pleading. Such pleadings and papers shall be submitted on 8 ½ -inch by 11-inch paper, with left-hand margins not less than 1 ½ inches wide and the other margins not less than 1 inch. The impression contained on such pleadings or papers shall be only on one side of the page.

2. Pleadings and papers filed in cease and desist proceedings shall be signed and dated by the Party on whose behalf the filing is made or by the Party's Authorized Representative, and also contain the address, telephone number and facsimile number of such Party or Authorized Representative. Signature constitutes a certification by the signer that he has read the document, knows the contents thereof, that such statements are true, that it is not interposed for delay, and that if

the document has been signed by an Authorized Representative, that such Representative has full power and authority to do so.

3. Each Party filing pleadings or papers in cases referred to the Board by the Commissioner will file the original and two copies, with the original and one copy filed with the Board, and one copy filed with the Division, unless otherwise directed by the Commissioner or the Board. Such pleadings and papers shall be filed by sending or delivering them to the Board, in care of the Division at its current address, and to the Division at its current address. In cases referred to an Administrative Law Judge by the Commissioner, each Party will file the original pleading or papers with the Division of Administrative Hearings and one copy filed with the Division.

4. Except when otherwise provided by this Rule, service of all pleadings and other papers by a Party shall be made by personal delivery, U.S. Mail (including express or overnight mail or delivery), or facsimile transmission as follows:

- a. Service of such pleadings or papers shall be deemed complete as of the date of delivery by hand, the date of deposit in the United States mails, postage prepaid, or the date a facsimile is transmitted and received. A Party who has served a pleading or paper shall attach proof of service to the original filed in accordance with this Rule, which proof of service shall be in affidavit form and specify the method of service, the identity of the server, the person served (if by personal service), the date and place of service, and the address to which the materials were mailed. If the service is made by certified or registered mail, the mailing receipt shall be attached to the affidavit of service. If service is made by facsimile transmission, a copy of the cover page indicating the documents transmitted, the date of transmission, the person transmitting the materials, the Party receiving the transmission, and successful transmission of the materials shall be attached to the affidavit of service.

b. In computing any period of time prescribed or allowed by this Rule, the provisions of Rule 6(e) of the Colorado Rules of Civil Procedure shall apply.

5. Unless otherwise specifically provided by law, computation of any time period referred to in this Rule 51-6.3 shall begin with the first day following the act that initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, legal holiday, or any other day on which the Division is closed, in which event the period shall run until the end of the next following business day. When the time period is less than seven (7) days, intervening days when the Division is closed shall be excluded in the computation.

6. In cases referred to the Board by the Commissioner, the Division will maintain all records of, and filings received by the Board in accordance with statutory requirements.

E. Commencement of Cease and Desist Proceedings

1. The Division may commence a cease and desist proceeding by filing with the Commissioner a Petition, signed by an officer or employee of the Division, requesting the Commissioner issue an order to the named Respondent(s) to show cause why the Commissioner should not enter a final order directing such person(s) to cease and desist from the unlawful act or practice specified, or impose such other sanctions as provided in section 11-51-606(1.5)(d)(IV), C.R.S.

2. The Petition shall state clearly and concisely the facts which are the grounds for the unlawful act or practice in question as set forth in section 11-51-606(1.5)(b), C.R.S., the relief sought, and any other additional information or documents in support of the grounds in the Petition.

3. The Commissioner, upon issuance of the order to show cause, may refer, in his or her sole discretion, the matter for conduct of the hearing either to an Administrative Law Judge or the Board, based upon the complexity of the matter, number of parties to the matter, and legal issues presented in the matter.

4. Within two calendar days of issuance of an order to show cause pursuant to section 11-51-606(1.5)(a), C.R.S., the Commissioner shall notify the Board or the Division of Administrative Hearings, and obtain a date, time, and place for a hearing on the Order to Show Cause. The hearing shall commence no sooner than ten (10), nor later than twenty-one (21) calendar days following service or transmission of the Notice, the Order to Show Cause, and other information as required by section 11-51-606(1.5)(c), C.R.S. The hearing may be continued by agreement of all of the Parties based upon the complexity of the matter, number of parties to the matter, and legal issues presented in the matter, but in no event shall the hearing commence later than thirty-five (35) calendar days following the service or transmission of the Notice as required by section 11-51-606(1.5)(c), C.R.S.

5. The Notice shall be delivered, transmitted or served as required by section 11-51-606(1.5)(c), C.R.S., and contain a certificate by an employee or officer of the Division that the statutory requirements for providing notice have been met. Such certificate shall be deemed competent evidence of service of the Notice.

6. In cases referred to the Board by the commissioner, the chairperson of the Board shall designate no less than three (3) members of the Board to serve as the Hearing Panel to conduct the hearing on the Order to Show Cause. The Board chairperson shall also designate the Presiding Member for purposes of the hearing. The Hearing Panel, through the Presiding Member, shall have the authority to do all things necessary and appropriate to discharge their duties, including, but not limited to, the following:

- a. Administering oaths and affirmations;
- b. Signing and issuing subpoenas as authorized by law, subject to the provisions of subparagraph E.9., below;
- c. Regulating the course of the proceeding and the conduct of the Parties and their counsel;
- d. Allowing the appearance or participation of Hearing Panel members, witnesses, or Parties by telephone, as the Panel, in its sole discretion, deems appropriate;
- e. Conducting such prehearing conferences or proceedings as the Hearing Panel deems appropriate, and issuing appropriate orders that shall control the subsequent course of the proceedings;

- f. Allowing recusal of any Hearing Panel member from participating in the proceedings or hearing, in which case the remaining panel members shall conduct the hearing and issue findings of fact, conclusions of law, and the Hearing Panel's initial decision;
- g. Requiring the filing of briefs and proposed findings of fact and conclusions of law by the Parties in preparation for the initial decision;
- h. Disposing of motions made during the course of the hearing; and
- i. Preparing and transmitting the initial decision to the Commissioner as required in section 11-51-606(1.5)(d)(III), C.R.S.

7. No later than three (3) business days prior to the hearing date, the Respondent(s) shall file a written answer to the Order to Show Cause admitting, denying, or otherwise specifically responding to the allegations and assertions in the Order and Petition, and raising any defenses that the Respondent(s) believes are applicable. A copy of the answer shall be filed in accordance with Rule 51-6.3.D.3., and served on the other Parties to the proceeding.

8. No later than three (3) business days prior to the hearing date, the Parties shall file a written statement in accordance with Rule 51-6.3.D.3., with service on the other Parties, setting forth the name, address, telephone number, and a brief statement of the substance of the testimony for each witness the Party intends to call at the hearing, including any expert witness. The Hearing Panel or the Administrative Law Judge, in their discretion, may permit modification of, or divergence from the written statement prior to or during the hearing, for good cause shown.

9. Discovery, either by deposition or in writing, shall not be allowed in cease and desist proceedings.

10. In cases referred to the Division of Administrative Hearings by the Commissioner, Rule 18 of Division of Administrative Hearings' Rules of Procedure shall apply as to subpoenas.

11. In a matter referred to the Board by the Commissioner, the Hearing Panel, through the Presiding Member, as identified below in this Rule,

may issue subpoenas requiring the attendance and testimony of witnesses in accordance with the following provisions:

- a. A Party may make a written application to the Hearing Panel no later than three (3) business days prior to the hearing date. The Hearing Panel may issue the subpoena requested in the name of the Commissioner, and the Presiding Member for the Hearing Panel may sign the subpoena. Where it appears to the Hearing Panel that the subpoena sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, or may result in undue delay in the proceedings, the Presiding Member may, in his or her discretion, require the Party requesting the subpoena to show the general relevance and reasonable scope of the testimony or evidence sought. In the event the Hearing Panel and Presiding Member, after consideration of all the circumstances, determine that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, unduly burdensome, or will result in undue delay, they may refuse to issue the subpoena, or issue the subpoena only upon such terms and conditions as fairness requires.
- b. Every subpoena shall show on its face the name and address of the requesting Party. Notice to the other Parties shall not be required for issuance of a subpoena. The form of the subpoena shall adhere to the form used in administrative hearings before the Division Administrative Hearings in the Department of General Support Services.
- c. Any Person to whom a subpoena is directed may, no later than three (3) calendar days prior to the date set for the hearing, file in writing a motion that the subpoena be vacated or modified. The Presiding Member shall give prompt notice to the Party who requested issuance of the subpoena of the motion. The Hearing Panel, through the Presiding Member, may grant the petition in whole, or in part, upon a finding that the testimony or evidence requested does not relate with reasonable directness to any matter in question, or upon a finding that the subpoena is unreasonable, oppressive, excessive in scope, unduly burdensome, or will cause undue delay in the proceedings, or has not been served with forty-

eight (48) hours of the commencement of hearing, as required by Rule 45 of the Colorado Rules of Civil Procedure.

- d. A subpoena issued under this Rule shall be delivered to the Party requesting the subpoena and served by such Party in the same manner as a subpoena issued by a district court in Colorado.
- e. Except for witnesses subpoenaed by the Division, witnesses subpoenaed pursuant to this Rule shall be paid by the requesting Party the same fees for attendance and mileage at the time of service, as are paid witnesses in the district courts of the state of Colorado.
- f. Upon the failure or refusal of any witness to comply with a subpoena issued and served upon them under this Rule, the Board, through the Division, may petition the District Court for the City and County of Denver for an order citing such witness in contempt for such failure or refusal. The procedure for such contempt proceedings shall be governed pursuant to section 24-4-105(5), C.R.S.

F. Conduct of the Hearing

1. The sole issues for determination at the hearing shall be whether Respondents have engaged, or are about to engage in any of the acts or practices specified in section 11-51-606(1.5)(b), C.R.S. so as to warrant the imposition of sanctions as provided in section 11-51-606(1.5)(d)(IV), C.R.S.
2. The burden of proof at the hearing shall be on the Division to establish that the Respondent(s) have or are about to commit any of the acts or practices set forth in section 11-51-606(1.5)(b), C.R.S. by a preponderance of the evidence. Any Party asserting an affirmative defense, including any exemption, exception or exclusion, shall have the burden of proof to establish such defense, exemption, exception or exclusion by a preponderance of the evidence.
3. In the event the Respondent(s) does not appear at the date and time of the hearing, the Division shall present evidence as follows:

- a. That notification was properly sent or served upon such Respondent(s) as required by section 11-51-606(1.5)(c), C.R.S.; and
- b. To establish there is a reasonable basis to believe the Respondent(s) either received the notification, or, after reasonable search by the Division, cannot be located.
- c. 4. In the event the Respondent(s) fails to file an answer as provided in this Rule, in addition to the Division presenting the evidence as set forth in clauses (a) and (b) of this subparagraph F.3., the Division shall present evidence, or request the Hearing Panel or the Administrative Law Judge to take Administrative Notice, that the Respondent(s) failed to file an answer as provided in this Rule.

5. Unless otherwise provided by law, the Hearing Panel and the Administrative Law Judge shall observe a relaxed standard in applying the Colorado Rules of Evidence. The Hearing Panel and the Administrative Law Judge shall, however, observe the rules of privilege as provided by law. Evidence admissible at the hearing includes, but shall not be limited to, such evidence as may be admissible in a civil non-jury case in Colorado under the Colorado Rules of Evidence; hearsay evidence, unless the Hearing Panel or Administrative Law Judge determines that the potential prejudice of such evidence clearly outweighs its probative value; certified or self-authenticated documents, orders, or other papers; and any record, investigative report, document and stipulation which is offered and is not determined to be irrelevant or immaterial by the Hearing Panel or Administrative Law Judge. The Hearing Panel or Administrative Law Judge may take notice of any fact that may be judicially noticed by the courts of Colorado, or of general, technical or scientific facts within the Panel's specialized knowledge, and which is specified in the record. The Hearing Panel or Administrative Law Judge will notify the Parties of the material so noticed and provide the Parties an opportunity to contest the facts so noticed.

6. Evidence objected to may be received by the Hearing Panel or Administrative Law Judge, and rulings on the admissibility or exclusion of such evidence, if not made at the hearing, shall be made as part of

the findings of fact, conclusions of law, and initial decision. 7. The Hearing Panel or Administrative Law Judge shall be authorized to impose limits on the number of witnesses and documentary or other evidence on any issue to prevent undue delay, waste of time, or the needless presentation of cumulative evidence. This authority shall include the power to limit or preclude the testimony of any expert witness called by any Party.

7. The weight to be attached to any evidence on the record will rest within the sound discretion of the Hearing Panel or Administrative Law Judge. The Hearing Panel or Administrative Law Judge may require any Party, with appropriate notice to the other Parties, to submit additional evidence on any matter relevant to the issues in the hearing.

8. The proceedings conducted in connection with the hearing shall be electronically or stenographically recorded. Transcripts of the proceedings shall be supplied to any Party, upon reasonable request, at the expense of the requesting Party. In such event, a copy of the transcript and the record, as defined herein, shall be provided to the Board, through the Division, at no expense to the Board, and upon such other terms as the Commissioner shall order. The record of the hearing shall include, in addition to the transcript, all pleadings, motions, papers and filings; all evidence received or considered, including a statement of matters officially noted; questions or offers of proof, objections, and rulings on such objections; findings of fact, conclusions of law, and initial decision; and the final order entered by the Commissioner.

G. Initial Decision; Final Order

1. After the conclusion of the hearing, the Hearing Panel or Administrative Law Judge shall enter written findings of fact, conclusions of law, and its initial decision based on the record of the hearing, recommending to the Commissioner that a final order be issued affirming, denying, vacating, or otherwise modifying the Order to Show Cause. These findings of fact, conclusions of law and initial decision shall be issued within ten calendar days after the conclusion of the hearing and shall be promptly submitted to the Commissioner, with courtesy copies served on the Parties by the Division.

2. If, after reviewing the findings of fact, conclusions of law, and initial decision, and the record of the hearing, the Commissioner reasonably finds that the Respondent(s) has engaged, or is about to engage, in any of the acts or practices set forth in section 11-51-606(1.5)(b), C.R.S., and upon making the findings required by section 11-51-704(2), C.R.S., the Commissioner may issue a final cease and desist order imposing one or more of the sanctions set forth in section 11-51-606(1.5)(d)(IV), C.R.S. The Commissioner shall provide notice of the final order within ten calendar days after receiving the initial decision.

3. The Division shall promptly provide notice of the final order to all the Parties and each Party against whom such order has been entered pursuant to section 11-51-606(1.5)(c), C.R.S.