

## SEC Confidentiality Order Yields Dividend in Procedural Fairness

Contributed by George Brunelle  
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A recent decision by the Commission adjudicating an application for a Confidentiality Order highlighted a rarely invoked provision of the SEC's Rules of Procedure. In so doing, the Commission signaled its intention to place a higher priority on substantive fairness over procedural technicalities. In *Matter of Thomas C. Bridge, et al.*, SEC Rel. No. 34-58329 (August 7, 2008), individuals in an SEC administrative enforcement proceeding sought Commission review of an administrative law judge's Initial Decision. In the course of that proceeding, they requested that the Commission issue a Confidentiality Order under SEC Rule of Practice 322, to exclude their tax returns from the public record. Rule 322 allows any party to "file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information."

The Commission granted the protective order, holding that, at that stage of the proceeding, the potential harm from public disclosure outweighed the potential benefits. In a footnote to the Opinion (footnote 3), the Commission also made an important statement about fairness.

On the merits of the application, the staff of the SEC's Division of Enforcement had not opposed the issuance of a Confidentiality Order. Nevertheless, one of the applicants' submissions had been filed late, and the Division contended that the submission should therefore be disregarded, to the detriment of the application. To make its point, the Division asked the Commission for leave to submit a "sur-reply memorandum."

The Commission refused. It pointed out that the Division's application itself conflicted with a provision of the Rules, one limiting them to a single brief, and it added that Rule 103(a) of the SEC's Rules of Practice, 17 C.F.R. § 201.103(a), requires that the Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding." "The Division," said the opinion, "in making its motion, offers no strong justification for deviating from these directives."

Despite the appearance of this ruling in a mere footnote, it represents an important statement of purpose -- that the Commission will not allow procedural technicalities, or the inequality of resources, to trump fair decision-making.