

AGENDA DOCUMENT NO. 11-23



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

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AGENDA ITEM

MEMORANDUM

For Meeting of 5-5-11

TO: The Commission

FROM: Steven T. Walther
Commissioner

STW by ZEP

SUBMITTED LATE

DATE: May 4, 2011

SUBJECT: Agency Procedure for Disclosure of Documents and
Information in the Enforcement Process

I request that the attached draft Agency Procedure for Disclosure of Documents and Information in the Enforcement Process be placed on the agenda for May 5, 2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[NOTICE 2011-XX]

**Agency Procedure for Disclosure of Documents
and Information in the Enforcement Process**

AGENCY: Federal Election Commission

ACTION: Notice of Agency Procedure

SUMMARY: The Federal Election Commission (Commission) is establishing an agency procedure to formally define the scope of documents that will be provided to respondents by the agency, and to formalize the agency's process of disclosing such documents, during the Commission's investigation in enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (the Act).

DATES: Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: _____, Assistant General Counsel, or _____,
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-
1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

I. Recent Changes to the Commission's Enforcement Procedures

The Commission has, in recent years, adopted several changes to its enforcement process in an effort to provide complainants, respondents and the public with greater transparency with respect to the Commission's process.

On May 1, 2003, the Commission published a Notice of Public Hearing and Request for Public Comment concerning its enforcement procedures.¹ The Commission received comments from the public, many of which urged increased transparency in Commission procedures and expanded opportunities to contest allegations.² On June 11, 2003, the Commission held an open hearing on its enforcement procedures and in response to issues raised in written comments and at the hearing, the Commission issued new agency procedures.³

On December 8, 2008, the Commission issued a Notice of Public Hearing and Request for Public Comment regarding the compliance and enforcement aspects of its agency procedures.⁴ There were numerous written comments filed in response to the Notice and on January 14-15, 2009, the Commission received testimony at a public hearing.⁵

Some commenters proposed alternative procedures with respect to information and documents in the possession of the Commission. One commenter recommended instituting a program whereby potential respondents in internally generated matters⁶ would be given a written summary of the matter and an opportunity to respond in writing before the Commission makes a reason to believe (RTB) finding and to provide earlier notice to respondents about the Office of General Counsel's (OGC) recommendation to the Commission.⁷ Other commenters urged the Commission to adopt procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by the Commission's Office of General Counsel before the Commission considers such recommendation.⁸ Still others requested even more general access by respondents to documents and information held by the Commission.⁹

¹ See *Enforcement Procedures*, 68 Fed. Reg. 23311 (May 1, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-09/fr68n084p23311.pdf.

² Comments and statements for the record are available at www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml.

³ See *Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations*, 68 Fed. Reg. 50688 (Aug. 22, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf; *Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3 (Jan. 3, 2005), available at www.fec.gov/law/policy/2004/notice2004-20.pdf.

⁴ See *Agency Procedures*, 73 Fed. Reg. 74495 (Dec. 8, 2008), available at http://www.fec.gov/law/policy/enforcement/notice_2008-13.pdf.

⁵ The comments received by the Commission, as well as the transcript of the hearing are available at www.fec.gov/law/policy/enforcement/publichearing011409.shtml.

⁶ Enforcement matters may be internally generated based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g.

⁷ See Comment of Scott E. Thomas dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm15.pdf.

⁸ See Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf.

⁹ See Comments of Election Law and Government Ethics Practice Group of Wiley Rein LLP dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf; Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf; Comments of Laurence E. Gold dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm20.pdf; Comments of Robert K. Kelner dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm10.pdf.

The Commission has since updated and augmented several of its procedures including the adoption of: (1) a pilot program providing opportunity to persons requesting an advisory opinion to appear before the Commission to answer questions,¹⁰ (2) a pilot program providing audited committees with an opportunity to request a hearing before the Commission prior to the Commission's adoption of a Final Audit Report,¹¹ and (3) a procedure providing respondents with notice of a non-complaint generated referral¹² and an opportunity to respond prior to the Commission's consideration of whether it has reason to believe that a violation has occurred.¹³ Further, in December 2009, the Commission issued a Guidebook for Complainants and Respondents on the FEC Enforcement Process, which provides a step-by-step guide to assist and educate complainants, respondents and the public concerning the Commission enforcement process.¹⁴

The procedure set forth herein formalizes the Commission's policy on disclosure to respondents of relevant information gathered by the Commission in the investigative stage of its enforcement proceedings.

II. Disclosure of Exculpatory Information.

A. Criminal Proceedings: the Constitutional Obligation under *Brady* – the Government's Duty to Disclose.

The seminal Supreme Court case involving the Constitutional parameters required by, and imposed upon, the government, in the context of criminal proceedings, is *Brady v. Maryland*.¹⁵ *Brady* held that the Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to provide criminal defendants with exculpatory evidence – *i.e.*, “evidence favorable to an accused,” that is “material to guilt or punishment” – known to the government but unknown to the defendant.

As noted, the Supreme Court in *Brady* held that the Due Process Clause required the government to provide criminal defendants with exculpatory or potentially exculpatory evidence that is “material to guilt or punishment.” “The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the

¹⁰ See *Advisory Opinion Procedures*, 74 Fed. Reg. 32160 (July 7, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-11.pdf.

¹¹ See *Procedural Rules for Audit Hearings*, 74 Fed. Reg. 33140 (July 10, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf

¹² Non-complaint generated referrals, also referred to as “internally generated matters,” are based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g and note 6 above.

¹³ See *Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38617 (August 4, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf.

¹⁴ This Guidebook is available at http://www.fec.gov/em/respondent_guide.pdf.

¹⁵ *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (*Brady*).

Government.”¹⁶ *Brady* is a rule of disclosure, not of discovery.¹⁷ Therefore, *Brady* obligations apply even when a defendant does not request the evidence.¹⁸ The obligations also apply regardless of the good faith of the prosecutor.¹⁹ However, no duty exists under *Brady* to provide evidence already in the defendant’s possession or which can be obtained with reasonable diligence.²⁰

In *Giglio v. United States*, 405 U.S. 150, the Supreme Court went one step further by requiring disclosure in criminal proceedings “[w]hen the ‘reliability of a particular witness may well be determinative of guilt or innocence,’” and the prosecution has evidence that impeaches that witness’ testimony.²¹ “Such [impeachment] evidence is ‘evidence favorable to an accused’ so that if disclosed and used effectively, it may make the difference between conviction and acquittal.”²² For example, courts have held that impeachment evidence for a key testifying witness includes prior statements by a witness that are materially inconsistent with the witness’s trial testimony;²³ a conviction of perjury;²⁴ prosecutorial intimidation of a witness;²⁵ and plea bargains and informal statements by the prosecution that a witness would not be prosecuted in exchange for his testimony.²⁶

Because *Brady* disclosure in criminal proceedings is required under the Due Process Clause, legal privileges against discovery such as attorney-client, work-product, or deliberative process do not allow the government in criminal proceedings to avoid disclosure on these grounds.²⁷ However, courts have recognized that *Brady* does not apply to attorney strategies, legal theories, and evaluations of evidence because they are not “evidence.”²⁸

B. The Legal, Professional, and Ethical Duties to Disclose - the Lawyer’s Independent Obligations in Criminal Proceeding.

In addition to, and quite separate from, the Constitutional requirements in criminal cases, there is broad acceptance in the legal and judicial professions that there is also an ethical obligation to provide exculpatory or incriminating information to

¹⁶ *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1983) (citations omitted).

¹⁷ See *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (*Bagley*).

¹⁸ See *United States v. Agurs*, 427 U.S. 97, 107-10 (1976).

¹⁹ *Brady*, 373 U.S. at 87.

²⁰ See, e.g., *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir 1989); *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996); *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975).

²¹ *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (*Giglio*).

²² *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87).

²³ *Id.* at 677.

²⁴ *United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996).

²⁵ *Simmons v. Beard*, 581 F.3d 158, 169 (3rd Cir. 2009).

²⁶ *Giglio*, 405 U.S. at 154-55; *United States v. Edwards*, 191 F. Supp. 2d 88, 90 (D.D.C. 2002); *United States v. Buettner-Jamusch*, 500 F. Supp. 1287, 1288 (S.D.N.Y. 1980).

²⁷ See Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 254 (4th ed. 2009); *United States v. Goldman*, 439 F. Supp. 337, 350 (S.D.N.Y. 1977).

²⁸ *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *U.S. v. NYNEX Corp.*, 781 F. Supp. 19, 25-26 (D.D.C. 1991); see *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000).

respondents and litigants that, if not provided, may negatively impact the ability of a respondent or litigant to obtain a just result through a fair and impartial proceeding with the government.

For example, Rule 3.8(d) of the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), imposes an ethical duty on criminal prosecutors that is separate and independent from the Constitutional disclosure obligations addressed in *Brady*. The ABA Model Rules are in force in most State courts and many Federal Courts. Specifically, Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense in a criminal case to disclose it in a timely manner so that the defense can make meaningful use of the evidence and information in making such decisions as whether to plead guilty and how to conduct its defense.²⁹

Both Constitutional issues and ethical issues must be considered when a procedure such as the one enunciated here today is formulated and adopted.

C. Disclosure in Governmental Civil Proceedings.

Courts have held that the Due Process Clause does not require application of *Brady* in administrative proceedings.³⁰ The Court has also referred to the status of a U.S. Attorney in the "federal system" as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."³¹

Some Federal agencies recently have applied *Brady* principles to their civil administrative proceedings. For example, the Federal Energy Regulatory Commission (FERC) recently issued a policy statement that provides respondents with access to certain exculpatory evidence during that agency's investigations and adjudications.³² Under FERC's regulations, FERC can conduct either an informal or formal investigation. The new FERC Policy Statement provides, in relevant part that "[d]uring the course of an investigation . . . , Enforcement staff will scrutinize materials it receives from sources other than the investigative subject(s) for material that would be required to be disclosed

²⁹ See American Bar Association, Model Rules of Professional Conduct, Rule 3.8, Special Responsibilities of a Prosecutor, available at www.abanet.org/cpr/mrpc/rule_3_8.html. See also Formal Opinion 09-454, Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, American Bar Association, Standing Committee on Ethics and Professional Responsibility, available at [www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/\\$FILE/09-454.pdf](http://www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/$FILE/09-454.pdf).

³⁰ *Mister Discount Stockbrokers v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (no right to exculpatory evidence in National Association of Securities Dealers (NASD) proceedings which are treated the same as administrative agency action); *Sanford v. NASD*, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) ("[W]e find *Brady* inapposite and hold that the ALJ properly denied Nueva's demand for exculpatory materials.").

³¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

³² See FERC Policy Statement on Disclosure of Exculpatory Materials, Docket No. PL10-1-000, 129 FERC ¶ 61,248 (Dec. 17, 2009) (FERC Policy Statement), available at <http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf>.

under *Brady*. Any such materials or information that are not known to be in the subject's possession shall be provided to the subject.”³³

Similarly, the Securities and Exchange Commission (SEC) has adopted a rule of practice whereby its Division of Enforcement shall make available for inspection and copying “documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings.”³⁴ The SEC rule permits certain documents to be withheld by the agency, including those documents that are privileged, pre-decisional or work product, a document that would identify a confidential source, or documents identified to a hearing officer as being properly withheld for good cause.³⁵

However, SEC rule 201.230(b)(2) specifically states that nothing in the rule authorizes the SEC's Division of Enforcement to withhold, contrary to *Brady*, documents containing materially exculpatory evidence.³⁶ Although the SEC has limited the application of rule 201.230 to require the “production of examination and inspection reports to circumstances where the Division of Enforcement intends to introduce the report into evidence, either in reliance on the report to prove its case, or to refresh the recollection of any witness,” this limitation “does not alter the requirement that the Division produce documents containing material exculpatory evidence as required by *Brady v. Maryland*.”³⁷

As with FERC and the SEC, the Commodity Futures Trading Commission (CFTC) also provides for disclosure of certain information during the “discovery” phase of its formal adjudications.³⁸ In addition to a prehearing exchange of documents, identities of witnesses, and an outline of its case, the CFTC's Division of Enforcement “shall make available for inspection and copying by the respondents” certain documents.³⁹ These documents include all documents subpoenaed by the CFTC and all transcripts of investigative testimony and exhibits to those transcripts.⁴⁰ However, the Division of Enforcement may withhold, for example, the identity of a confidential source, confidential investigatory techniques, and other confidential information, such as trade

³³ See FERC Policy Statement at ¶ 9.

³⁴ See 17 C.F.R. § 201.230(a)(1) (2010), available at http://edocket.access.gpo.gov/cfr_2010/aprqr/pdf/17cfr201.230.pdf

³⁵ 17 C.F.R. § 201.230(b)(1).

³⁶ 17 C.F.R. § 201.230(b)(2).

³⁷ See Securities and Exchange Commission, Explanation and Justification: Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission, 69 Fed. Reg. 13166, 13170 (Mar. 19, 2004), available at www.sec.gov/rules/final/34-49412.htm.

³⁸ See 17 C.F.R. § 10.42 (2010), available at http://edocket.access.gpo.gov/cfr_2010/aprqr/pdf/17cfr10.42.pdf.

³⁹ See 17 C.F.R. § 10.42(a)(1) & (2); 17 C.F.R. § 10.42(b)(1).

⁴⁰ *Id.* See also *In re First National Monetary Corp.*, Opinion and Order, CFTC No. 79-56, CFTC No. 79-57 (Nov. 13, 1981) (Any material . . . known to the Division of Enforcement, or which by the exercise of due diligence may become known to the Division, that is arguably exculpatory and material to guilt or punishment within the meaning of *Brady* [and its progeny] should be either provided to respondent directly, or provided to the [ALJ], for his determination as to whether it is producible [sic] or not).

secrets.⁴¹ Privileged documents and information may also be withheld by CFTC's Division of Enforcement.⁴²

In the case of this Commission, as a Federal agency engaged in proceedings to find liability of persons under Federal laws, whose conduct can lead to civil penalties and potentially has the reach of the criminal system, it has been the Commission's practice to provide certain types of information to respondents. The Commission is formalizing its practice to ensure effective and fair enforcement of the Act.

The Commission recognizes that *Brady* was decided in the context of a criminal proceeding and the holding, therefore, does not extend to a civil enforcement agency proceeding. However, the Commission is empowered (a) to civilly pursue matters that may have potential criminal consequences, and (b) to engage respondents in the enforcement process, and possibly in litigation if the Commission and respondents are unable to reach a mutually acceptable voluntary conciliation agreement, where a Court may impose a civil monetary penalty, injunctive, or other relief. *See* 2 U.S.C. § 437g(a)(6)(A). The Commission has also entered into a Memorandum of Understanding with the Department of Justice whereby the Commission will refer certain matters to the Department of Justice for criminal prosecution review.⁴³ Accordingly, the Constitutional and ethical principles of fairness and due process in *Brady* inform the Commission's adoption of the procedure announced today in its civil administrative enforcement process.

In summary, while the Commission does not believe that the Constitution requires the agency to institute a procedure requiring disclosure of documents and information, including exculpatory information, to respondents in its civil enforcement process, the Commission's enforcement proceedings may inform potential or concurrent criminal proceedings. Accordingly, adopting a procedure requiring disclosure of information to respondents will (1) eliminate uncertainty regarding the Commission's position on this issue, (2) serve the Commission's goal of providing fairness to respondents, and (3) set forth a procedural framework within which disclosures are made.

III. Current Disclosure Process.

Before the Commission may determine that there is probable cause to believe a violation of the Act has occurred or is about to occur, the Act permits respondents to present directly to the Commission their interests and positions on the matter under review. The Commission's General Counsel must notify respondents prior to any recommendation by OGC to the Commission to proceed to a vote on probable cause. Included in this notification is a written brief stating the position of the General Counsel

⁴¹ 17 C.F.R. § 10.42(b)(2).

⁴² 17 C.F.R. § 10.42(b)(3).

⁴³ *See* Department of Justice and Federal Election Commission, *Memorandum of Understanding*, 43 Fed. Reg. 5,441 (Feb.8, 1978).

on the legal and factual issues of the case to which respondents may reply.⁴⁴ This allows the Commission to be informed not only by the recommendations of its General Counsel, but also by the arguments of respondents. By requirement of the Act, or by its discretion, the Commission has similar procedures at various stages of the enforcement process to keep informed both by its staff and by respondents.

In addition, while the Commission may attempt to conciliate matters with respondents at any time, the Act requires the Commission to attempt conciliation after it finds probable cause.⁴⁵ If the Commission determines that there is probable cause, the Act requires that, for a period of at least 30 day (or at least 15 days, if the probable cause determination occurs within 45 days of an election), the Commission must attempt to correct or prevent the violation through conference, conciliation, and persuasion.⁴⁶

The Commission's current practice at the probable cause stage is to provide respondents, upon request, with copies of any document cited or relied upon (whether or not cited) in the General Counsel's probable cause brief, *i.e.* documents containing the information upon which OGC is relying to support its recommendation to the Commission that there is probable cause to believe a violation of the Act has occurred. This production of documents is subject to all applicable privileges and confidentiality provisions. Where such privileges or provisions apply, OGC generally provides only the relevant information derived from the document, and not the document itself. Examples of the types of documents provided at this stage are full deposition transcripts, responses to formal discovery, and documents obtained in response to requests for documents. In instances where OGC obtains factual evidence from a source other than the respondent that tends to exculpate the respondent, OGC will generally note the existence of the evidence in its brief, particularly if OGC does not know whether a respondent is already aware of the evidence. Therefore, in instances where such mitigating or exculpatory information exists, OGC provides any documents cited to in connection with that information, subject to the same privilege and confidentiality concerns noted above. The probable cause brief provided to respondent also addresses any exculpatory evidence and presents OGC's analysis of the information.

In two limited instances, OGC may provide information to respondents earlier than the probable cause stage in the enforcement process. First, pursuant to the Commission's Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, all deponents, including respondent deponents, may obtain a copy of the transcript of their own deposition, including any exhibits.⁴⁷ Those deposition exhibits may contain documents that were obtained from sources other than the respondent. Second, OGC may share information, including documents, with respondents during post-investigative pre-probable cause conciliation process to assist in explaining the

⁴⁴ See 2 U.S.C. 437g(a)(3).

⁴⁵ See 2 U.S.C. 437g(a)(4).

⁴⁶ *Id.*

⁴⁷ See *Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations*, 68 Fed. Reg. 50688 (Aug. 22, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf.

factual basis for a violation. That information may include documents not already in the respondent's possession. This practice is used solely for the purpose of facilitating conciliation.

As the current practice has demonstrated, the Commission's probable cause considerations and conciliation efforts are furthered when, in presenting their respective positions, respondents have the greatest practicable access to documents and information gathered by the agency, including certain information that might be favorable to the respondent. This allows both the Commission's Office of General Counsel and the respondents that are under investigation to present fully informed submissions and frame legal issues for the Commission's consideration.

At the same time, however, the Act and other laws restrict information that the Commission may make public without the consent of persons under investigation.⁴⁸ Investigations that involve multiple respondents, each of whom may be at different stages of the enforcement process, raise questions as to what documents and information the Commission may disclose to any given respondent before determining probable cause.

In order to reconcile the Commission's interests in permitting respondents to present fully their positions without compromising the Commission's confidentiality obligations, the Commission is formalizing its procedure. This agency procedure clarifies how the Commission will, consistent with the confidentiality provisions of 2 U.S.C. 437g(A)(12), enhance its enforcement process by permitting increased access to documents and information held by the Commission.

This procedure will allow efficient, fair and just resolution of issues regarding disclosure of exculpatory information and avoid unnecessary consumption of respondent and Commission staff resources in future proceedings.

IV. The Updated Formal Procedure.

The Commission is formalizing its agency procedure to provide respondents in enforcement proceedings with relevant information ascertained by the Commission as the result of an investigation. The Commission believes that, while not mandated by the Constitution, the principle of *Brady*, and its judicial progeny, should apply following investigations conducted under Section 437g of the Act and Subpart A of Part 111 of the Commission's regulations.⁴⁹

The Commission believes that formalizing the procedure will promote fairness in the Commission's Section 437g enforcement process. The Commission also believes the procedure articulated in this Notice will promote administrative efficiency and certainty, and will contribute to the Commission's goal of open, fair and just investigations and enforcement proceedings.

⁴⁸ See, e.g., 2 U.S.C. 437g(a)(4)(B)(i) and (a)(12).

⁴⁹ See generally 2 U.S.C. 437g and 11 C.F.R. Part 111.

For purposes of this procedure, the term “documents” shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

For purposes of this procedure, the term “exculpatory information” means information in the possession of the Commission, not reasonably knowable by the respondent, that is relevant to a possible violation of the Act and that may tend to favor the respondent in defense of violations alleged or which would be relevant to the mitigation of the amount of any civil penalty resulting from a finding of such a violation by a court.

The procedure is as follows:

(a) Documents to be Produced or Made Available.

- (1) Subject to sections (b) through (e) of this procedure, and unless otherwise directed by the Commission, by an affirmative vote of four or more Commissioners, the Office of General Counsel shall make available to a respondent all relevant documents obtained by the Office of General Counsel, not publicly available and not already in the possession of the respondent, in connection with its investigation. This includes any documents that contain exculpatory information, as defined herein. This shall be done either by producing copies in electronic format or permitting inspection and copying of such documents. The documents covered by this procedure shall include:
 - (i) Documents, not in possession of a respondent, turned over in response to any subpoenas or other requests, written or otherwise;
 - (ii) all deposition transcripts and deposition transcript exhibits; and
 - (iii) any other documents, not otherwise publicly available and not in possession of a respondent, obtained by the Commission from sources outside the Commission.
- (2) Nothing in this paragraph (a) shall limit the authority of the Commission, by an affirmative vote of four or more Commissioners, to make available or withhold any other document, or shall limit the capacity of a respondent to seek access to, or production of, a document through timely written requests to the Commission subsequent to the production of documents pursuant to paragraph (d) below. If respondent submits such a written request, respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.
- (3) Nothing in this policy shall require the Office of General Counsel to conduct any search for materials outside those it receives in the course of

its investigatory activities. This policy does not require staff to conduct any search for exculpatory materials that may be found in the offices of other agencies.

(b) Documents that May Be Withheld.

- (1) Unless otherwise determined by the Commission, as provided in subparagraph (2) below, the Office of General Counsel shall withhold a document or a category of documents from a respondent if:
 - (i) the document contains privileged information, such as, but not limited to, attorney-client communications, attorney-work product, or the deliberative process privilege; provided, however, if the document contains only a portion of material that may not be disclosed, the Office of General Counsel shall excise or redact from such documents such information that prevents disclosure if the remaining portion is informative and otherwise qualifies for disclosure as provided herein, and the remaining portion shall then be disclosed;
 - (ii) the document or category of documents is determined by the General Counsel to be not relevant to the subject matter of the proceeding;
 - (iii) the Commission is prevented by law or regulation from disclosing the information or documents;⁵⁰
 - (iv) the document contains information only a portion of which prevents disclosure as provided herein, and that portion cannot be excised or redacted without affecting the main import of the document; or
 - (v) the Commission obtained the information or documents from another government entity pursuant to an agreement not to disclose the information, documents or category of documents .
- (2) For any document withheld by the General Counsel pursuant to subparagraphs (1)(i)-(1)(iv) above, the Commission may, pursuant to a timely written request by the respondent or otherwise, consider whether to make available such document and, after consideration of relevant law and regulation, by an affirmative vote of four or more Commissioners, may determine, consistent with relevant law and regulation, whether or not it is appropriate to produce such document. If respondent submits such a written request, respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.

⁵⁰ Subparagraph IV(e) of this procedure addresses issues regarding documents and information that may be subject to confidentiality pursuant to sections 437g(a)(4)(B)(i) and 437g(a)(12) of the Act. 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12).

(c) Withheld Document List.

- (1) Within ten business days of completing its inspection of documents disclosed pursuant to paragraph (d) below, a respondent may request in writing that the Commission direct the General Counsel to produce to the respondent a list of documents or categories of documents withheld pursuant to paragraph (b)(1) of this procedure. If respondent submits such a written request, respondent must, if requested to do so by the Commission, by an affirmative vote of four or more Commissioners, sign a tolling agreement for the time necessary to resolve the request. Requests for a list of documents or categories of documents shall be granted, unless the Commission, by an affirmative vote of four or more Commissioners, denies the request, in whole or in part. Once the Commission has voted upon the written request, respondent may not seek rehearing or reconsideration of that decision.**
- (2) When similar documents are withheld pursuant to paragraph (b)(1), those documents may be identified by category instead of by individual document.**

(d) Timing of Production or Inspection and Copying.

- (1) Pursuant to a timely written request by the respondent, and subject to paragraph (e), or unless otherwise determined by the Commission by an affirmative vote of four or more Commissioners, the General Counsel shall produce in electronic format, or commence making documents available to a respondent for inspection and copying pursuant to this procedure, at the earlier of the following:
 - (i) the date of the General Counsel's notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause; or**
 - (ii) no later than seven days after certification of a vote by the Commission to conciliate with a respondent.****

(e) Issues Respecting Documents provided by, or relating to, Co-respondents.

- (1) If there is more than one respondent that is under investigation in the same matter, or in related matters, before the General Counsel may produce documents, other than exculpatory information or documents cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause, to one co-respondent that either (a) have been provided to the Commission by another co-respondent or (b) that relate to another co-respondent, the General Counsel must obtain a confidentiality waiver from the co-respondent who provided the**

document or about whom the document relates. Additionally, the respondent receiving such documents may be required to sign a nondisclosure agreement to keep confidential any document or information it obtains from the Commission.

- (2) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver, the General Counsel shall, if it is possible to do so effectively, summarize or redact those portions of the document or documents that are subject to confidentiality, or deemed necessary to remain confidential under paragraph (a) and 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12), in order to remove that portion of material that may not be disclosed.
 - (3) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver and it is not possible to effectively summarize or redact those positions of the document or documents that are subject to confidentiality, the General Counsel may obtain direction from the Commission, by an affirmative vote of four or more Commissioners, regarding how to balance the competing concerns of disclosure and confidentiality. In any event, the General Counsel shall produce complete copies of those documents cited or relied on in the brief that accompanies its notice of a recommendation to vote on probable cause.
 - (4) If the confidentiality issue cannot be resolved with respect to a co-respondent (*e.g.*, lack of waiver, ineffective redaction, etc.), the General Counsel may, in an appropriate case make a recommendation to the Commission for segregation of the matters under review.
 - (5) If any document or information provided to the Commission by a one co-respondent is exculpatory information, or is cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause for another co-respondent, that information or document will be provided to the other co-respondent, which shall be subject to the same redactions described in paragraph (b)(1)(i).
- (f) Place of Inspection and Copying Costs and Procedures.
- (1) Documents subject to inspection and copying pursuant to this procedure shall be made available to the respondent for inspection and copying at the Commission's office, or at such other place as the Commission, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this procedure unless formal written approval is provided by an affirmative vote of four or more Commissioners.

- (2) The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for all costs related to photocopying of any documents.

(g) Continuing Obligation to Produce During Conciliation.

- (1) If prior to the completion of an investigation, the Commission votes to enter into conciliation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation related to that respondent, so long as the respondent enters into a tolling agreement of the applicable statute of limitation. If there is no such tolling agreement, the formal investigation and conciliation may take place simultaneously. The tolling agreement must have a specific time for its duration approved by the Commission, by an affirmative vote of four or more Commissioners, and shall not be open-ended. If there is more than one respondent under investigation in the same matter, or in related matters, and the Commission votes to enter into conciliation with one or more respondents prior to the completion of a formal investigation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation as to those respondents in conciliation, so long as the respondents enter into a tolling agreement of the applicable statute of limitation. If the Commission receives documents in the course of the formal investigation as to respondents not in conciliation that would otherwise be required to be produced under this procedure during such investigation, the Commission shall promptly produce them to the respondent in conciliation pursuant to this procedure.
- (2) If the Commission receives documents during such conciliation, from whatever source, the General Counsel shall promptly inform the respondent of any documents obtained that would otherwise be required to be produced under this procedure, and as to such documents, the General Counsel shall timely produce them to the respondent, without violating the statutory confidentiality provision preventing disclosure of any information derived in connection with conciliation attempts. 2 U.S.C. 437g(a)(4)(B).

V. Failure to Produce Documents as Required Herein – Remedies and Consequences.

In the event that a document required to be made available to a respondent pursuant to this procedure is not made available, no rehearing or reconsideration by the Commission shall be required, unless the Commission concludes, by an affirmative vote of four or more Commissioners, that there is a reasonable likelihood that the decision of the Commission or result of the conciliation would have been different than the one made had such disclosure taken place. Any failure by the Commission to make a document available does not create any rights for a defendant in litigation to request or receive a

dismissal or remand or any other judicial remedy. A respondent may not request a rehearing or reconsideration by the Commission more than ten days after the conclusion of conciliation.

VI. Consequences of Disclosure

Disclosure of documents pursuant to this procedure is not an admission by the Commission that the information or document exculpates or mitigates respondent's liability for potential violations of the Act.

VII. Applicability During Civil Litigation.

In any civil litigation with the respondent, the discovery rules of the court in which the matter is pending, and any order made by that court, shall govern the obligations of the Commission. The intentions of the Commission pursuant to this procedure do not create any rights that are reviewable or enforceable in any court.

VIII. Conclusion.

Failure to adhere to this procedure does not create a jurisdictional bar for the Commission to pursue all remedies to correct or prevent a violation as provided by statute.

This notice establishes an agency procedure for disclosing to respondents documents and information acquired by the agency during its investigations in the enforcement process. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers. Consequently, this procedure does not bind the Commission or any member of the general public. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.