



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 5-5-11

May 5, 2011

SUBMITTED LATE

MEMORANDUM

TO: Commission Secretary

FROM: Christopher Hughey *CH*
Acting General Counsel

Kathleen Guith *KG*
Acting Associate General Counsel for Enforcement

SUBJECT: Comments re: Disclosure and Exculpatory Evidence Procedures

Please have the attached document circulated to the Commission and placed on the May 5, 2011 agenda.

Attachment



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

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SUBJECT: Comments on Exculpatory Evidence and Evidence Production in the Enforcement Process

Below, the Office of General Counsel (“OGC”) analyzes the subject of disclosing exculpatory information during the enforcement process and examines draft agency policies proposed by different Commissioners that outline various procedures for the general disclosure of evidence in enforcement matters.

I. Exculpatory Evidence in the Enforcement Process

This section of the memorandum discusses the issue of sharing exculpatory or mitigating information with respondents in the Commission’s enforcement proceedings. In order to prepare this analysis, we contacted a number of different civil enforcement agencies to discuss various aspects of their own formal and informal disclosure policies. These discussions have helped inform our examination of the issue and our analysis of how the Commission could promote further transparency in our enforcement process yet retain the flexibility necessary to avoid frustrating ongoing investigations by the

1 Commission into other respondents, ongoing investigations by other government
2 agencies, our ability to receive information from other government agencies, and the
3 Commission’s confidentiality obligations. As discussed in further detail below, we
4 believe that there are a number of steps the Commission can take to achieve all of these
5 important goals.

7 **A. Disclosure of Exculpatory Evidence**

8
9 The Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87-8 (1963), held that the
10 Due Process Clause required the government to provide criminal defendants with
11 exculpatory evidence, i.e. “evidence favorable to an accused”, that is “material to guilt or
12 punishment.” Since *Brady*, the Supreme Court has addressed what types of evidence are
13 considered “material to guilt or punishment.” The standard of “materiality” has evolved
14 over time, but the Supreme Court’s most recent iteration of the standard requires post-
15 conviction relief for a defendant “when prejudice to the accused ensues . . . [and where]
16 the nondisclosure [is] so serious that there is a reasonable probability that the suppressed
17 evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. 263,
18 281-82 (1999).¹ Moreover, the purpose of *Brady* is “not to displace the adversary system
19 as the primary means by which truth is uncovered, but to ensure that a miscarriage of
20 justice does not occur” at trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

21
22 In applying the *Brady* doctrine, the Supreme Court has limited the scope of the
23 mandated disclosure to exculpatory, not mitigating, evidence and has not extended the
24 disclosure requirement to allow unfettered access to a prosecutor’s investigatory file.
25 The Supreme Court has stated that “[w]e have never held that the Constitution demands
26 an open file policy (however such a policy might work out in practice), and the rule in
27 *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards
28 for Criminal Justice, which call generally for prosecutorial disclosures of any evidence
29 tending to exculpate or mitigate.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), citing
30 ABA Model Rule of Professional Conduct 3.8(d) (1984).² See also *Pennsylvania v.*
31 *Ritchie*, 480 U.S. 39, 59 (1987) (“A defendant’s right to discover exculpatory evidence

¹ Throughout the evolution of *Brady*, the Supreme Court’s application of the “materiality” standard has taken a number of forms when used to determine whether a defendant is entitled to relief. These formulations include “if the omitted evidence creates a reasonable doubt that did not otherwise exist,” *United States v. Agurs*, 427 U.S. 97, 112 (1976), “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” *United States v. Bagley*, 473 U.S. at 682, if “disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable,” *Kyles v. Whitley*, 514 U.S. 419, 441 (1995), and if “the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. at 281.

² ABA Model Rule of Professional Conduct 3.8(d), which applies only to criminal prosecutors in jurisdictions that have adopted the rule, defines exculpatory evidence as “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.”

1 does not include the unsupervised authority to search through the Commonwealth's
2 files.”); *Illinois v. Moore*, 408 U.S. 786, 795 (1972) (holding that there is “no
3 constitutional requirement that the prosecution make a complete and detailed accounting
4 to the defense of all police investigatory work on a case”).
5

6 In the criminal context, *Brady* material must be disclosed “in time for its effective
7 use at trial, . . . or at a plea proceeding.” (Internal citations omitted.) *U.S. v. Douglas*,
8 525 F.3d 225, 245 (2d. Cir. 2008). In addition, the requirement that *Brady* materials be
9 disclosed for use at trial becomes effective after the indictment. *See U.S. v. Coppa*, 267
10 F.3d. 132, 144 (2d. Cir. 2001). Finally, disclosure of information under Model Rule
11 3.8(d), which is only applicable to prosecutors in jurisdictions adopting this rule, “must
12 be made early enough that the information can be used effectively.” ABA Formal
13 Opinion 09-454. However, even the broader Model Rules provide limitations. For
14 instance, “[w]here early disclosure, or disclosure of too much information, may
15 undermine an ongoing investigation or jeopardize a witness, as may be the case when an
16 informant’s identity would be revealed, the prosecutor may seek a protective order.”
17 ABA Formal Opinion 09-454.
18

19 **B. Exculpatory Evidence in Administrative Enforcement**

20
21 We consulted eight federal administrative agencies regarding their disclosure
22 policies: Securities and Exchange Commission, Commodity Futures Trading
23 Commission, Federal Trade Commission, Federal Communications Commission,
24 Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear
25 Regulatory Commission, and the Office of the Comptroller of the Currency. While the
26 *Brady* requirements do not formally apply to administrative proceedings,³ a number of
27 those agencies have adopted disclosure practices in their formal administrative
28 enforcement actions that may include disclosure of *Brady* material. The federal
29 enforcement agencies we reviewed that have applied *Brady* tend to follow the Supreme
30 Court’s interpretation of *Brady*. While the scope of disclosure varies among the
31 agencies, all of them seem to limit disclosure to material *evidence*, not simply

³ *See, e.g., 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); *Zandford v. NASD*, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same). *See also* Federal Energy Regulatory Commission, Policy Statement on Disclosure of Exculpatory Materials, ¶ 6 Docket No. PL10-1-000 (Dec. 17, 2009) (“FERC Policy Statement”), available at <http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf>. The Commodity Futures Trading Commission has been required to comply with certain *Brady* requirements through its administrative adjudications. *See, e.g., In re First Nat’l Monetary Corp.*, Opinion and Order, CFTC No. 79-56, CFTC No. 79-57, 1981 WL 26049 (Nov. 13, 1981). But the Commodity Futures Trading Commission has declined to incorporate *Brady* requirements into its Rules of Practice. *See* Explanation and Justification: Commodity Futures Trading Commission Rules of Practice, 63 Fed. Reg. 55784, 55786 (Oct. 19, 1998) (“The issues potentially raised by consideration of the appropriate interpretation and application of an obligation to produce material exculpatory information are broad and complex. They have been addressed to date only to a very limited extent in Commission adjudicatory decisions. For these reasons, the Commission is adhering to its decision not to address those issues in these rule amendments.”).

1 information. As a result, even the agencies with the broadest disclosure policies exclude
2 the release of privileged information, internal deliberative memos, or information
3 obtained from a confidential source.⁴
4

5 Unlike the Commission, the investigations handled by the agencies we spoke with
6 typically lead to a formal hearing or other adjudicative process before a board or
7 administrative law judge (“ALJ”) who is able to impose penalties or other remedies.
8 With one exception, none of these agencies require disclosure of this evidence before its
9 formal adjudicatory process begins or is about to begin. For example, the Securities and
10 Exchange Commission’s (“SEC”) Rules of Practice provide that the Division of
11 Enforcement shall make available for inspection and copying “documents obtained by the
12 Division prior to the institution of proceedings, in connection with the investigation
13 leading to the Division's recommendation to institute proceedings.” Rule 230(a)(1). The
14 Commodity Futures Trading Commission (“CFTC”) is similar to the SEC in that it
15 provides for disclosure of certain information during the “discovery” phase of its formal
16 adjudications. *See* 17 C.F.R. § 10.42. The Environmental Protection Agency (“EPA”)
17 provides for some disclosure in its adjudications pursuant to its prehearing information
18 exchange. *See* 40 C.F.R. § 22.19(a). The Nuclear Regulatory Commission (“NRC”)
19 follows general disclosure requirements that apply to cases in all types of hearing tracts
20 that requires all parties to disclose documents within 30 days of the start of proceedings.
21 *See* 10 C.F.R. § 2.336.
22

23 There are some agencies with formal adjudicative processes that do not apply
24 *Brady* disclosure requirements at all. For instance, the Federal Trade Commission’s
25 (“FTC”) rules allow for parties to make requests to inspect documents in their possession,
26 16 C.F.R. § 3.37, but the FTC does not apply the *Brady* disclosure requirements to its
27 adjudicative proceedings. *See Allied Chemical Corp. et al.*, 75 F.T.C. 1055 (Jan. 30,
28 1969) (declining to apply *Brady* obligations to FTC staff, but requiring compliance with
29 Jencks Act, which deals only with materials that must be disclosed to a defendant at trial
30 in order to effectively cross-examine a witness). Similarly, while the parties to a
31 proceeding before the Federal Communications Commission (“FCC”) may request that
32 any other party produce and permit inspection of records or other documents, the FCC
33 itself is excluded from such disclosure obligations. 47 C.F.R. § 1.325. In addition, these
34 discovery rules only apply once formal proceedings have commenced. Likewise, the
35 Office of the Comptroller of the Currency (“OCC”) provides for some discovery during
36 adjudications, although it appears to be limited to relevant, non-privileged information
37 and the agency has not implemented an exculpatory evidence disclosure policy for
38 adjudications. 12 C.F.R. § 19.25. Also, the OCC has not implemented any *Brady*-like
39 disclosure policies for its investigations, formal or otherwise. *See* 12 C.F.R. § 19.1
40 *et seq.*
41

⁴ *See* FERC Policy Statement, *supra* note 3, ¶ 7; 17 C.F.R. § 201.230 (SEC Rules of Practice); *In re First Nat’l Monetary Corp.*, *supra* note 3.

1 The Federal Energy Regulatory Commission (“FERC”) is the only agency
2 consulted that has a policy on exculpatory evidence covering both informal agency
3 investigations and formal adjudications. See FERC Policy Statement, *supra* note 3, ¶ 7.
4 Because the agency adopted the policy only in December 2009, it has had limited
5 experience with implementation. Further, because FERC’s ongoing cases are non-public
6 and there are no closed cases on the public record involving the policy, we were unable to
7 obtain specific details about cases in which the policy has been applied.

8
9 Disclosing exculpatory material during an administrative investigation appears to
10 have posed a variety of concerns for the other agencies we consulted. Agencies not
11 applying a *Brady*-like disclosure policy have expressed that protecting the confidentiality
12 of their investigations is of particular importance in not adopting such a policy. Other
13 concerns include the agencies’ ability to conduct investigations effectively and
14 efficiently, prevent the disclosure of confidential information, avoid collusion between
15 witnesses or parties, and prevent the source of complaints and informants from
16 dwindling. Early disclosure of such information may also negatively impact a parallel
17 criminal investigation or proceeding.

18 19 **C. Exculpatory Evidence in the Commission’s Enforcement Process**

20
21 While other agencies’ enforcement processes lead to adjudicative proceedings
22 before a commission, board, or administrative law judge, the Commission’s enforcement
23 process ultimately leads to federal court. As a result, while these other agencies are
24 subject to various regulatory discovery and disclosure obligations during their
25 adjudicative proceedings, the Commission is only subject to such obligations after it files
26 a civil enforcement action in district court. We are not aware of any civil enforcement
27 agency that lacks authority to impose penalties or fines that also imposes broad disclosure
28 or discovery obligations. Likewise, in researching agency disclosure practices during
29 non-adjudicative proceedings, we found only limited examples relevant to our non-
30 adjudicative enforcement process.⁵

31
32 Nevertheless, the Commission’s administrative enforcement process provides
33 ample opportunity for OGC to disclose exculpatory information at various points.
34 However, in doing so we must maintain an appropriate balance between notifying the
35 respondent of any exculpatory evidence, fulfilling the Commission’s obligation to
36 comply with the confidentiality provisions set forth in Section 437g(a)(12)(A) of the Act,

⁵ The CFTC, FTC, and SEC provide respondents the opportunity to review and copy materials from those agencies’ investigatory files. See 17 C.F.R. 10.42(b) (CFTC); 16 C.F.R. Parts 0-5 (FTC); 17 C.F.R. § 201.230(SEC). However, those exchanges are done during the discovery phase of the agencies’ formal adjudicative procedures. At the discretion of its staff, the SEC informs potential respondents of the possible violations for which they may be charged prior to the beginning of formal adjudications. See SEC Division of Enforcement, Enforcement Manual, at 27-34, available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. Occasionally, recipients of these “Wells” notices may request to review portions of the staff’s investigative file and such access may be granted on a case-by-case basis.

1 and protecting the integrity of the Commission’s investigations.⁶ Although we believe
2 that notice of exculpatory evidence is most crucial when the General Counsel’s Briefs are
3 served, as explained below, exculpatory evidence may play a role in the Commission’s
4 enforcement process at various stages, including during the reason to believe stage,
5 investigations, and pre-probable cause conciliation. For instance, at the First General
6 Counsel’s Report stage, the Commission may find no reason to believe or dismiss based
7 on exculpatory information presented in the General Counsel’s report. At the pre-
8 probable cause conciliation stage, the Commission may take no further action or mitigate
9 the civil penalty based on such information. Finally, the discovery of exculpatory
10 information also impacts the Commission’s determination of whether it should find
11 probable cause or whether to make knowing and willful findings. We discuss each of
12 these stages further below.

13 14 **1. Reason to Believe**

15
16 At the First General Counsel’s Report stage, before an investigation has begun,
17 the First General Counsel’s Report provides information relevant to a Commission
18 decision on whether to find reason to believe or dismiss a matter, including exculpatory
19 and mitigating information. Any such information that is known at this stage will likely
20 already be known to a respondent, may have even been provided to the Commission by
21 the respondents themselves, and would therefore not even be disclosed under the stricter
22 *Brady* doctrine applicable to criminal trials.⁷ Either way, any such information is
23 presented to and analyzed for the Commission in the General Counsel’s report and
24 typically shared with the respondent in the Commission’s Factual and Legal Analysis.

25 26 **2. Investigation**

27
28 Disclosing exculpatory material to respondents during an administrative
29 investigation causes OGC the same types of concerns expressed by each of the agencies
30 contacted. *See supra* at p. 5. Based on our experience, the Commission appears to face
31 similar risks and concerns about disclosing exculpatory evidence before or during an
32 investigation. Particularly worrisome are the potential for compromising a Commission
33 investigation and the potential conflict that such a disclosure would have with the
34 Commission’s confidentiality provision at Section 437g(a)(12)(A). Like other agencies,
35 we believe that disclosing evidence during an investigation has the potential to
36 compromise that investigation because such information could be used to coordinate
37 testimony by witnesses or to discern the Commission’s investigatory strategy at a point
38 when the Commission is still trying to ascertain the exact nature of the violation(s). It

⁶ By “integrity of the Commission’s investigation” we mean the ability of the Commission’s investigation to bring about truthful and complete information concerning the facts at issue.

⁷ Under *Brady* and its progeny, the government is not required to disclose information to a criminal defendant that is already in his or her possession. *See, e.g.,* FERC Policy Statement, *supra* note 3, ¶ 3, n. 6; *see also In re First National Monetary Corp., supra* note 3.

1 appears that the potential to disrupt an agency's investigation is the primary reason why
2 all other agencies contacted, except FERC, do not release exculpatory evidence until the
3 completion of an investigation. Further, depending on the source of the information and
4 whether the matter involves multiple respondents, and other factors, our ability to provide
5 respondents access to certain information is simply hampered by the Act's confidentiality
6 provisions. Other agencies that have similar confidentiality concerns either do not
7 disclose exculpatory evidence, thereby eliminating any potential conflict with their
8 confidentiality obligations, or resolve these conflicts before ALJs on a case-by-case basis,
9 as is the practice at FERC. Similarly, there are concerns over the impact of disclosure on
10 a pending criminal investigation as well as potential negative consequences that such
11 disclosure might have on our relationship with criminal law enforcement agencies such as
12 the Department of Justice.

13
14 Providing exculpatory evidence during an investigation is also impractical
15 because the exact nature and scope of the violation is not always known until the
16 completion of the investigation. Since exculpatory evidence under *Brady* must lead to a
17 reasonable probability that the evidence would make a difference in the verdict, it is
18 impractical for the Commission to make that decision before it has even gathered and
19 analyzed the evidence in a comprehensive matter. Further, when OGC does discover
20 evidence during its investigation that completely exculpates a respondent, or mitigates a
21 violation, our General Counsel's Reports and Factual and Legal Analyses reflect the state
22 of the evidence at a point when that information can be properly weighed by the
23 Commission.

24
25 Further, in some cases, disclosure of exculpatory information during our
26 investigations will jeopardize parallel criminal investigations that may not yet be at the
27 stage of requiring the release of *Brady* material. Disclosure may frustrate our
28 relationships with criminal law enforcement agencies such as the Department of Justice
29 and their willingness to share information with the Commission from their own
30 investigative files.

32 **3. Pre-Probable Cause Conciliation**

33
34 Pre-probable cause conciliation can occur either before or after a Commission
35 investigation. In the Commission's determination of whether to authorize pre-probable
36 cause conciliation, which violations to pursue, and the extent of the civil penalty, the
37 Commission always examines the exculpatory and mitigating evidence gathered during
38 the investigation. As a result, it may be appropriate to inform a respondent at this point
39 that the Commission has taken exculpatory and mitigating evidence into account. Any
40 exculpatory or mitigating evidence that is material to the violations at issue in the
41 conciliation inherently will be presented to the respondent through the Factual and Legal
42 Analysis, but in order to be more explicit, the Commission can also inform respondents
43 that it considered such information in the letter notifying respondents that the
44 Commission has authorized conciliation. In instances where the Commission enters pre-
45 probable cause conciliation prior to an investigation, it would be unlikely that the

1 Commission would be in possession of mitigating information that is not already in the
2 possession of the respondent. Most of the other agencies researched also indicated that at
3 this stage, such exculpatory or mitigating evidence would already likely be in the
4 possession of the respondent, and would not have been required to be disclosed pursuant
5 to the *Brady* doctrine. *See supra* note 7.

6 7 **4. Probable Cause**

8
9 At the probable cause stage, we address the evidence obtained during the
10 investigation in the General Counsel's Report circulated to the Commission, including
11 evidence that might have some tendency to negate culpability or mitigate the civil
12 penalty. Because a probable cause finding is a pre-requisite for triggering formal
13 adjudicative proceedings in federal court, the review of the evidence in the General
14 Counsel's Brief and Report, along with a respondent's reply brief, provides the
15 Commission a full opportunity to weigh the merits of the case before finding probable
16 cause and later filing a judicial complaint.

17
18 We believe that it is appropriate to detail any exculpatory evidence assembled
19 during an investigation in the General Counsel's Brief that is served on the respondent.
20 Despite the Act's lack of formal adjudication, we believe that the General Counsel's
21 Brief is the appropriate document to disclose such evidence because the service of this
22 brief marks the beginning of the probable cause phase and a finding of probable cause
23 can trigger certain legal consequences for respondents. For example, the Commission
24 may refer a potential criminal violation to the Attorney General of the United States if it
25 determines that there is probable cause to believe the respondent committed a knowing
26 and willful violation. 2 U.S.C. § 437g(5)(C). In addition, a finding of probable cause to
27 believe requires the Commission to attempt, for a period of at least 30 days, to correct or
28 prevent such violation through methods such as conciliation. 2 U.S.C. § 437g(4)(A)(i).

29
30 Evidence that completely vindicates a respondent would not appear in a General
31 Counsel's Brief because such evidence would have led to a recommendation to take no
32 further action rather than to find probable cause, but the General Counsel's Brief may
33 contain evidence that has a tendency to negate culpability or mitigate damages.
34 However, this practice of including such information in the brief can be evaluated on a
35 case-by-case basis because in some matters with multiple respondents, this practice may
36 pose a risk of divulging information that is confidential under Section 437g(a)(12)(A) of
37 the Act. Similarly, the benefits of disclosure would need to be balanced with the
38 potential of divulging information that affects a criminal prosecution. Moreover, since
39 most agencies contacted indicate that they disclose exculpatory evidence informally, we
40 believe that the most appropriate manner by which the Commission can disclose such
41 evidence would be by explicitly including language in the form letter used in serving
42 General Counsel's Briefs to reflect that the information contained therein includes
43 exculpatory evidence. The respondents would then receive a copy of such information as
44 part of the service of the briefs.
45

1 **D. Conclusion**
2

3 As detailed above, although the Commission differs from other civil enforcement
4 agencies because it lacks a formal adjudicatory process, we believe that the disclosure of
5 exculpatory evidence can be implemented at appropriate times in our enforcement
6 process, and in many phases of enforcement, it already is. While OGC already strives to
7 disclose such information in Factual and Legal Analyses and General Counsel’s Briefs
8 served on respondents, pursuant to the general guidelines contained in this memorandum,
9 we can begin to make our practice more consistent and explicit through our notification
10 letters at the pre-probable cause conciliation stage and at the time the brief is provided to
11 a respondent.
12

13 **II. Comments on Proposed “Agency Procedure for Disclosure of Documents
14 and Information in the Enforcement Process”**
15

16 This section of the memorandum provides comments from OGC concerning the
17 proposed “Agency Procedure for Disclosure of Documents and Information in the
18 Enforcement Process” (“Procedure”) proposed in Agenda Document X11-23.
19

20 The purpose of this section is to explain the legal and policy concerns we have
21 identified in the draft. Where appropriate, we also suggest changes to the approach taken
22 in the draft Procedure that would address our concerns. We also reiterate our agreement
23 with and appreciation for the benefits derived from providing exculpatory evidence to
24 respondents, and we remain focused on ensuring that respondents have access to relevant
25 exculpatory information. The Commission should have an opportunity to hear
26 respondents’ arguments about such information as it makes decisions in the enforcement
27 process, as long as the applicable procedure does not violate the Act’s confidentiality
28 provisions, unnecessarily waive important privileges, or hinder the Commission’s
29 enforcement efforts.
30

31 **A. Scope of Disclosure**
32

33 The primary concern of the proposed Procedure appears to be applying “the
34 principle of *Brady*, and its judicial progeny,” to information obtained in Commission
35 investigations. *See generally* Procedure, Section II. In order to accomplish this goal,
36 section IV of the Procedure broadly defines “exculpatory information” as “information in
37 the possession of the agency, not reasonably knowable by the respondent, that is relevant
38 to a possible violation of the Act and that may tend to favor the respondent in defense of
39 violations alleged or which would be relevant to the mitigation of the amount of any civil
40 penalty resulting from a finding of such a violation by a court.” However, the scope of
41 the disclosure required pursuant to the proposed Procedure appears to extend beyond that
42 necessary to provide respondents with exculpatory information, as defined therein.
43 Specifically, Section IV(a)(1) requires the production of “all documents obtained by the
44 Office of General Counsel, not publicly available and not already in the possession of the
45 respondent, in connection with its investigation.” If the Commission’s primary concern

1 is to ensure fairness for respondents in their ability to present an appropriate defense in
2 the enforcement process, we believe that limiting the Procedure to the disclosure of
3 exculpatory information, in conjunction with our current practice of providing to
4 respondents any documents or information on which the Commission relies, would
5 achieve that end. A procedure focused on exculpatory information rather than a broader
6 disclosure process that may prove administratively burdensome and time consuming
7 would also harmonize with the Commission's goal of ensuring the timely resolution of
8 enforcement matters.

9
10 The proposed Procedure recognizes that the Act and other laws restrict
11 information that the Commission may make public without the consent of persons under
12 investigation, and also contemplates the ability to withhold documents provided by other
13 agencies and confidential sources. *See* Procedure, Section IV(b). However, the
14 Procedure does not explicitly detail these limitations. We recommend making such
15 limitations explicit and mandatory. We also interpret the Procedure to allow the initial
16 withholding of attorney-client privilege and work-product protected documents,
17 including documents (such as Commission staff statements, memoranda, and transcripts
18 that encompass informal communications) that we normally withhold as privileged in
19 litigation. We support this aspect of the Procedure and believe it is necessary to carry out
20 investigations timely and successfully.

21 **B. Scope of Policy**

22
23
24 Based on the procedures set forth at Section IV(g)(1), the scope of the proposed
25 Procedure includes both the probable cause and pre-probable cause conciliation stages of
26 the enforcement process, including pre-probable cause conciliation conducted prior to the
27 completion of an investigation. For a variety of reasons we favor limiting the disclosure
28 requirements to the probable cause stage. Because of the potential delay in the
29 enforcement process, the additional Commission resources to be expended in the
30 production of documents to respondents and the complexity of matters involving multiple
31 respondents, it seems more appropriate to limit application of the proposed Procedure to
32 those matters at the probable cause stage and not to those respondents engaged in pre-
33 probable cause conciliation. Further, a finding of probable cause is a statutory pre-
34 requisite to both civil litigation and referral to the Department of Justice, and as such the
35 need for the Respondent to obtain such documents is greater at probable cause than pre-
36 probable cause conciliation. This notion is further supported by provisions in the Act that
37 appears to contemplate disclosure of evidence, through a brief, to respondents at the
38 probable cause stage. *See* 2 U.S.C. § 437g(a)(3).

39 **C. The Act's Confidentiality Provision**

40
41
42 The Act provides: "Any notification or investigation made under this section
43 shall not be made public by the Commission or any person without the written consent of
44 the person receiving such notification or the person with respect to whom such
45 investigation is made." 2 U.S.C. § 437g(a)(12)(A). Section IV(e)(1) of the proposed

1 Procedure appears to satisfy the requirements of 437g(a)(12) by requiring that any co-
2 respondent from whom documents were received sign a confidentiality waiver
3 authorizing the Commission to provide such documents to other respondents. Section
4 IV(e)(1) further protects the confidentiality of a Commission investigation by stating that
5 the respondent receiving such documents “may be required to sign a nondisclosure
6 agreement to keep confidential any document or information it obtains from the
7 Commission.” However, the proposed Procedure also indicates that, if the respondent
8 providing the documents does not sign a waiver, the Commission may, nevertheless,
9 determine that those documents should still be disclosed to co-respondents. In so doing,
10 Section IV(e)(3) appears internally inconsistent with Section IV(b)(1)(iii), which allows
11 the withholding of documents if providing the document is “prevented by law, regulation,
12 or upon agreement with the source of the information or document from disclosing
13 information, document or category of documents.” Further, and perhaps most important,
14 this section explicitly creates the potential for a scenario where the Commission is
15 providing information subject to 437g(a)(12)(A) despite the explicit refusal by a
16 respondent to waive confidentiality.

17
18 This issue is most likely to present itself in matters where respondents have
19 interests that are adverse to one another, and will therefore be reluctant to sign a
20 confidentiality waiver, e.g., in corporate reimbursement cases where the corporate entity
21 reports corporate reimbursements made from its accounts, but points the finger at
22 individual officers or employees and claims that it was unaware of the scheme. There are
23 also matters where co-respondents not only have adverse interests generally, but are in
24 civil litigation with each other over issues related to the subject matter of the MUR and
25 have attempted to use the Commission process to obtain documents for use in the civil
26 litigation.

27
28 Although the Procedure attempts to remedy the problem by requiring the
29 respondent viewing the documents to sign a nondisclosure agreement, that protection
30 may not suffice under 2 U.S.C. § 437g(a)(12) in all circumstances. Section
31 437g(a)(12)(A) has been interpreted by federal courts to prevent the Commission from
32 disclosing information concerning an ongoing investigation and even the existence of an
33 investigation, without the consent of the target of the investigation. *In re: Sealed Case*,
34 237 F.3d 657, 666-67 (D.C. Cir. 2001) (“[B]oth 2 U.S.C. § 437g(a)(12)(A) and
35 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning
36 ongoing investigations under any circumstances without the written consent of the
37 subject of the investigation.”); *AFL-CIO v. Federal Election Commission*, 333 F.3d 168,
38 175 (D.C. Cir. 2003) (“[R]espondents [in an ongoing Commission investigation] have a
39 ‘strong confidentiality interest’ analogous to the interest of targets of grand jury
40 investigations.”). Similar concerns exist for the confidentiality provisions that cover
41 information derived in connection with conciliation. *See* 2 U.S.C. § 437g(a)(4)(B)(i);
42 11 C.F.R. § 111.20.

43
44 The existence of the “Nondisclosure Agreement” pursuant to paragraph (e)(1) in
45 the proposed Procedure may adequately remedy the Procedure’s apparent conflict with

1 the Act's confidentiality provisions, but this is not assured. *See* Procedure, Section
2 IV(e)(1). Certainly, we have in previous instances provided material to *complainants*
3 pursuant to courts' protective orders. For instance, in defending delay suits under
4 2 U.S.C. § 437g(a)(8), we have provided complainants with chronologies of actions taken
5 in open MURs under protective orders, and the theory there has been that with an
6 appropriate confidentiality agreement or protective order nothing is being made "public"
7 that would require the assent of any respondent. However, it is not clear that this
8 argument would be successful in all cases. First, providing material to a complainant is
9 not the same as providing it to a respondent; a complainant usually will know the
10 identities of those about whom he or she has complained (although the Commission does
11 have the ability to add additional respondents based on additional information). Second,
12 it is conceivable that in a given case there could be so many respondents that even with
13 confidentiality agreements, releases of information come closer to the line of a "public"
14 release; we are currently defending a 437g(a)(8) dismissal suit challenging, among other
15 things, our failure to notify well over 100 persons whom that complainant wished to be
16 "respondents." Third, and most significantly, even assuming the "Nondisclosure
17 Agreement" section prevents any violation of the letter of Section 437g(a)(12), there will
18 from time to time be cases where identification of Respondent Jones as a Respondent to
19 Respondent Smith would violate the statute's spirit. Jones and Smith may have
20 conflicting interests and might be able to take advantage of confidential information even
21 without "going public" with it; for instance, Jones may not wish Smith to know the
22 degree to which Jones is or is not cooperating with us. Therefore, limiting the scope of
23 the proposed disclosure and retaining the ability to withhold certain documents may be
24 the more appropriate way for the Commission to reconcile disclosing exculpatory
25 evidence to respondents and complying with the Act's confidentiality provision.
26

27 Finally, the agency's deliberate disclosure of the existence of another respondent
28 in a multi-respondent matter would appear to be a new interpretation of the Act's
29 confidentiality provisions. This may be best achieved after providing an opportunity for
30 public notice and comment. Specifically, the Commission may wish to consider input
31 from the public (especially from counsel representing respondents who may have the
32 existence of their Commission investigations disclosed to other respondents) on how the
33 Commission should interpret the Act's confidentiality provisions. Alternatively, if the
34 Commission were interested in altering the confidentiality provisions of the
35 Commission's regulations, it could pursue a rulemaking to that effect. *See, e.g.,*
36 18 C.F.R. § 1b.9 (FERC enacted a formal regulation concerning the confidentiality of its
37 investigations setting forth instances where information obtained during the course of an
38 investigation can be made public).
39

40 **D. Implementation of Pilot Program**

41
42 Finally, we suggest that, if the Commission adopts a new disclosure process, it
43 should do so initially as a pilot program. This would allow the agency time to identify
44 and address any unforeseen needs or considerations before a procedure becomes
45 permanent.