

## § 12.8

## 17 CFR Ch. I (4–1–98 Edition)

who makes or knowingly causes to be made, an *ex parte* communication prohibited by paragraph (a) of this section shall:

(1) Place on the public record of the proceeding:

- (i) All such written communications;
- (ii) Memoranda stating the substance of all such oral communications; and
- (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (b)(1) (i) and (ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(c) *Sanctions.* (1) Upon receipt of an *ex parte* communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (a)(1) of this section, the Commission, Administrative Law Judge, or Judgment Officer may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge, or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an *ex parte* communication which violates the prohibitions contained in paragraph (a) of this section may be deemed to have engaged in conduct of the type proscribed by 5 CFR 2635.101(b).

(d) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this sec-

tion against *ex parte* communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review by the Commission or to appellate review by a court.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9636, Mar. 1, 1994]

### § 12.8 Separation of functions.

(a) A Judgment Officer, or Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of a Judgment Officer, or Administrative Law Judge, except as a witness in the proceeding, without the express written consent of the parties to the proceeding. This provision shall not apply to the Commissioners.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

### § 12.9 Practice before the Commission.

(a) *Practice—(1) By non-attorneys.* An individual may appear *pro se* (on his own behalf); a general partner may represent the partnership; a *bona fide* officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the

Commission in accordance with provisions of part 14 of this chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Debarment of counsel or representative during the course of a proceeding.* (1) Whenever, while a proceeding is pending before him, a Judgment Officer or an Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, such official may order that such person be precluded from further acting as counsel or representative in the proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of §12.309, but the proceeding shall not be delayed or suspended pending disposition of the appeal; *Provided*, That the official may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Judgment Officer or Administrative Law Judge has issued an order precluding a person from further acting as counsel or representative in a proceeding, such official, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

(c) *Withdrawal of representation.* Withdrawal from representation of a party shall be only by leave of the decision-making official (or the Commission) before whom the proceeding is then pending. Such leave to withdraw may be conditioned on the attorney's (or representative's) submission of an affidavit averring that the party represented has actual knowledge of the withdrawal, and such affidavit shall include the name and address of a successor counsel (or representative) or a statement that the represented party has determined to proceed *pro se*, in which case, the statement shall include the address where that party can thereafter be served.

#### § 12.10 Service.

(a) *General requirements—(1) When service is required; number of copies.* One copy of all motions, petitions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions (to the extent permitted by these rules), all notices of appeal, all briefs, and letters to the Commission, an employee thereof, or an Administrative Law Judge, shall be served by a party upon all other parties to the proceeding. This rule does not apply to a complaint filed pursuant to §12.13 of these rules, which shall only be filed with the Commission.

(2) *Filing with the Proceedings Clerk; proof of service.* All documents which are required to be served upon a party shall be filed concurrently with the Proceedings Clerk, and shall meet the requirements as to form prescribed by §§12.11 and 12.12 of these rules. Unless otherwise provided in these rules a document shall be filed by delivering it in person or by mailing it, by first-class mail, post-paid, addressed to: Proceedings Clerk, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. To be timely filed a document must be delivered, or mailed, by first-class mail, to the Proceedings Clerk within the time prescribed for filing. Proof of filing shall be made by attaching to the document for filing an affidavit certifying that the attached document was deposited in the mail, with first-class postage prepaid, addressed to the Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, on the date specified in the affidavit. Proof of service of a document shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the required document, an affidavit of service executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.