

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application by filing a notice of appeal under § 3.52(a), or the Commission may decide to review the decision on its own initiative, in accordance with § 3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any party to the proceeding.

#### PART 4—MISCELLANEOUS RULES

Sec.

- 4.1 Appearances.
- 4.2 Requirements as to form, and filing of documents other than correspondence.
- 4.3 Time.
- 4.4 Service.
- 4.5 Fees.
- 4.6 Cooperation with other agencies.
- 4.7 Ex parte communications.
- 4.8 Costs for obtaining Commission records.
- 4.9 The public record.
- 4.10 Nonpublic material.
- 4.11 Disclosure requests.
- 4.12 Disposition of documents submitted to the Commission.
- 4.13 Privacy Act rules.
- 4.14 Conduct of business.
- 4.15 Commission meetings.
- 4.16 Privilege against self-incrimination.

4.17 Disqualification of Commissioners.

AUTHORITY: Sec. 6, 38 Stat. 721; 15 U.S.C. 46.

#### § 4.1 Appearances.

(a) *Qualifications—(1) Attorneys.* (i) U.S.-admitted. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) European Community (EC)-qualified. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

(2) *Others.* (i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(ii) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert witness to conduct all or a portion of the cross-examination of such witness.

(b) *Restrictions as to former members and employees—(1) General Prohibition.* Except as provided in this section, or otherwise specifically authorized by the Commission, no former member or employee ("former employee" or "employee") of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation<sup>1</sup> (except

<sup>1</sup>It is important to note that a new "proceeding or investigation" may be considered the same matter as a seemingly separate "proceeding or investigation" that was pending during the former employee's tenure.

*Continued*

#### § 4.1

#### 16 CFR Ch. I (1–199 Edition)

that a former employee who is disqualified solely under paragraph (b)(1)(iv) of this section, is not prohibited from assisting or advising behind-the-scenes) if:

(i) The former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate;

(ii) The participation would begin within two years after the termination of the former employee's service and, within a period of one year prior to the employee's termination, the proceeding or investigation was pending under the employee's official responsibility;

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), came to, or would be likely to have come to, the former employee's attention in the course of the employee's duties, and the employee left the Commission within the previous three years (unless Commission staff determines that the nature of the documents or information is such that no present advantage could thereby be derived); or

(iv) The former employee's participation would begin within one year after the employee's termination and, at the time of termination, the employee was a member of the Commission or a "senior employee" as defined in 18 U.S.C. 207(c).

This is because a "proceeding or investigation" may continue in another form or in part. In determining whether two matters are actually the same, the Commission will consider: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest. See 5 CFR 2637.201(c)(4). For example, where a former employee intends to participate in an investigation of compliance with a Commission order, submission of a request to reopen an order, or a proceeding with respect to reopening an order, the matter will be considered the same as the adjudicative proceeding or investigation that resulted in the order. A former employee who is uncertain whether the matter in which he seeks clearance to participate is wholly separate from any matter that was pending during his tenure should seek advice from the General Counsel or the General Counsel's designee before participating.

NOTE: Former Commissioners and certain former "senior" employees who were appointed to those positions on or after January 20, 1993 may be subject to a five year ban on participation in Commission matters pursuant to Executive Order 12834 (58 FR 5911-5916, January 22, 1993), 3 CFR 1993 Comp., p. 580).

(2) *Clearance Request Required.* Any former employee, before participating in a Commission proceeding or investigation (see footnote 1), whether through an appearance before a Commission official or behind-the-scenes assistance, shall file with the Secretary a request for clearance to participate, containing the information listed in § 4.1(b)(4) if:

(i) The proceeding or investigation was pending in the Commission while the former employee served;

(ii) A proceeding or investigation from which such proceeding or investigation directly resulted was pending during the former employee's service; or

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), came to or would likely have come to the former employee's attention in the course of the employee's duties, and the employee left the Commission within the previous three years.

NOTE: This requirement applies even to a proceeding or investigation that had not yet been initiated formally when the former employee terminated employment, if the employee had learned nonpublic information relating to the subsequently initiated proceeding or investigation.

(3) *Exceptions.* (i) Paragraphs (b) (1) and (2) of this section do not apply to:

(A) Making a pro se filing of any kind;

(B) Submitting a request or appeal under the Freedom of Information Act, the Privacy Act, or the Government in the Sunshine Act;

(C) Testifying under oath (except that a former employee who is subject to the restrictions contained in paragraph (b)(1)(i) of this section with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any person other than the United States in that same matter);

(D) Submitting a statement required to be made under penalty of perjury; or

(E) Appearing on behalf of the United States.

(ii) With the exception of subparagraph (b)(1)(iv), paragraphs (b) (1) and (2) of this section do not apply to participating in a Commission rulemaking proceeding, including submitting comments on a matter on which the Commission has invited public comment.

(iii) Paragraph (b)(1)(iv) of this section does not apply to submitting a statement based on the former employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by § 4.5 for witnesses.

(iv) Paragraph (b)(2) of this section does not apply to filing a premerger notification form or participating in subsequent events concerning compliance or noncompliance with Section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulation issued under that section.

(4) *Request Contents.* Clearance requests filed pursuant to § 4.1(b)(2) shall contain:

(i) The name and matter number (if known) of the proceeding or investigation in question;

(ii) A description of the contemplated participation;

(iii) The name of the Commission office(s) or division(s) in which the former employee was employed and the position(s) the employee occupied;

(iv) A statement whether, while employed by the Commission, the former employee participated in any proceeding or investigation concerning the same company, individual, or industry currently involved in the matter in question;

(v) A certification that while employed by the Commission, the employee never participated personally and substantially in the same matter or proceeding;

(vi) If the employee's Commission employment terminated within the past two years, a certification that the matter was not pending under the employee's official responsibility during any part of the one year before the employee's termination;

(vii) If the employee's Commission employment terminated within the past three years, either a declaration that nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), never came to the employee's attention, or a description of why the employee believes that such nonpublic documents or information could not confer a present advantage to the employee or to the employee's client in the proceeding or investigation in question; and

(viii) A certification that the employee has read, and understands, both the criminal conflict of interest law on post-employment activities (18 U.S.C. 207) and this Rule in their entirety.

(5) *Definitions.* The following definitions apply for purposes of this section:

(i) *Behind-the-scenes* participation includes any form of professional consultation, assistance, or advice to anyone about the proceeding or investigation in question, whether formal or informal, oral or written, direct or indirect.

(ii) *Communicate to or appear before* means making any oral or written communication to, or any formal or informal appearance before, the Commission or any of its members or employees on behalf of any person (except the United States) with the intent to influence.

(iii) *Directly resulted from* means that the proceeding or investigation in question emanated from an earlier phase of the same proceeding or investigation or from a directly linked, antecedent investigation. The existence of some attenuated connection between a proceeding or investigation that was pending during the requester's tenure and the proceeding or investigation in question does not constitute a direct result.

(iv) *Pending under the employee's official responsibility* means that the former employee had the direct administrative or operating authority to approve, disapprove, or otherwise direct official actions in the proceeding or investigation, irrespective of whether the employee's authority was intermediate or final, and whether it was exercisable alone or only in conjunction with others.

(v) *Personal and substantial participation.* A former employee participated in the proceeding or investigation personally if the employee either participated directly or directed a subordinate in doing so. The employee participated substantially if the involvement was significant to the matter or reasonably appeared to be significant. A series of peripheral involvements may be considered insubstantial, while a single act of approving or participating in a critical step may be considered substantial.

(vi) *Present advantage.* Whether exposure to nonpublic information about the proceeding or investigation could confer a present advantage to a former employee will be analyzed and determined on a case-by-case basis. Relevant factors include, *inter alia*, the nature and age of the information, its relation and current importance to the proceeding or investigation in question, and the amount of time that has passed since the employee left the Commission.

(vii) *Proceeding or investigation* shall be interpreted broadly and includes an adjudicative or other proceeding; the consideration of an application; a request for a ruling or other determination; a contract; a claim; a controversy; an investigation; or an interpretive ruling. Proceeding or investigation does not include a rulemaking proceeding.

(6) *Advice as to Whether Clearance Request is Required.* A former employee may ask the General Counsel, either orally or in writing, whether the employee is required to file a request for clearance to participate in a Commission matter pursuant to paragraph (b)(2) of this section. The General Counsel, or the General Counsel's designee, will make any such determination within three business days.

(7) *Deadline for Determining Clearance Requests.* By the close of the tenth business day after the date on which the clearance request is filed, the General Counsel, or the General Counsel's designee, will notify the requester either that:

- (i) the request for clearance has been granted;
- (ii) the General Counsel or the General Counsel's designee has decided to

recommend that the Commission prohibit the requester's participation; or

(iii) the General Counsel or the General Counsel's designee is, for good cause, extending the period for reaching a determination on the request by up to an additional ten business days.

(8) *Participation of Partners or Associates of Former Employees.* (i) If a former employee is prohibited from participating in a proceeding or investigation by virtue of having worked on the matter personally and substantially while a Commission employee, no partner or legal or business associate of that individual may participate except after filing with the Secretary of the Commission an affidavit attesting that:

(A) The former employee will not participate in the proceeding or investigation in any way, directly or indirectly (and describing how the former employee will be screened from participating);

(B) The former employee will not share in any fees resulting from the participation;

(C) Everyone who intends to participate is aware of the requirement that the former employee be screened;

(D) The client(s) have been informed; and

(E) The matter was not brought to the participant(s) through the active solicitation of the former employee.

(ii) If the Commission finds that the screening measures being taken are unsatisfactory or that the matter was brought to the participant(s) through the active solicitation of the former employee, the Commission will notify the participant(s) to cease the representation immediately.

(9) *Effect on Other Standards.* The restrictions and procedures in this section are intended to apply in lieu of restrictions and procedures that may be adopted by any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations. Nothing in this section supersedes other standards of conduct applicable under paragraph (e) of this section. Requests for advice about this section, or about any matter related to other applicable rules and standards of ethical conduct, shall be directed to the Office of the General Counsel.

(c) *Public Disclosure.* Any request for clearance filed by a former member or employee pursuant to this section, as well as any written response, are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter. Information identifying the subject of a nonpublic Commission investigation will be redacted from any request for clearance or other document before it is placed on the public record.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written notice of appearance, stating the basis for eligibility under this section and including the attorney's jurisdiction of admission/qualification, attorney identification number, if applicable, and a statement by the appearing attorney attesting to his/her good standing within the legal profession. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

(e) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[32 FR 8456, June 13, 1967, as amended at 40 FR 15235, Apr. 4, 1975; 41 FR 16453, Apr. 19, 1976; 46 FR 26295, May 12, 1981; 48 FR 44767, Sept. 30, 1983; 50 FR 50781, Dec. 12, 1985; 50 FR 53306, Dec. 31, 1985; 56 FR 44139, Sept. 27, 1991; 58 FR 40737, July 30, 1993; 63 FR 15758, Apr. 1, 1998]

#### **§4.2 Requirements as to form, and filing of documents other than correspondence.**

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided, however,* That in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the appropriate Director, Deputy Director, Associate Director in the Bureau of Consumer Protection, or Assistant Director in the Bureau of Competition or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings shall, at or before the time of filing, be served by the party filing the documents or person acting for that party on all other parties pursuant to §4.4.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Copies.* An original and twenty (20) copies of all documents before the Commission and motions for an Administrative Law Judge's certification of an interlocutory appeal pursuant to §3.23(b) shall be filed; an original and ten (10) copies of all other documents before the Administrative Law Judge shall be filed; and an original and one (1) copy of compliance reports shall be filed. Only one (1) copy of admissions and answers thereto must be filed with the Secretary, the originals to be served on the opposing party as specified by §3.32. With respect to motions under §3.22, the moving party shall provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(d) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from