

§ 203.7 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding shall, upon request, be shown the Commission's order of investigation. Copies of formal orders of investigation shall not be furnished, for their retention, to such persons requesting the same except with the express approval of officials in the Regional or District Offices at the level of Assistant Regional Director or District Administrator or higher, or officials in the Division or Divisions conducting or supervising the investigation at the level of Assistant Director or higher. Such approval shall not be given unless the person granting such approval, in his or her discretion, is satisfied that there exist reasons consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.

(b) Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel, as defined in §201.101(a) of this chapter (Rule 101(a) of the Commission's rules of practice): *Provided*, however, That all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

(c) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (1) advise such person before, during and after the conclusion of such examination, (2) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (3) make summary notes during such examination solely for the use of such person.

(d) Unless otherwise ordered by the Commission, in any public formal investigative proceeding, if the record shall contain implications of wrong-

doing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence. *Reasonable* shall mean permitting persons as full an opportunity to assert their position as may be granted consistent with administrative efficiency and with avoidance of undue delay. The determination of reasonableness in each instance shall be made in the discretion of the officer conducting the investigation.

(e) The officer conducting the investigation may report to the Commission any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of these rules. The Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it, in accordance with §201.2(e) of this chapter (Rule 2(e) of the Commission's rules of practice), or exclusion from further participation in the particular investigation.

[29 FR 3620, Mar. 21, 1964, as amended at 52 FR 12148, Apr. 15, 1987; 59 FR 5945, Feb. 9, 1994; 60 FR 32823, June 23, 1995]

§ 203.8 Service of subpoenas.

Service of subpoenas issued in formal investigative proceedings shall be effected in the manner prescribed by Rule 232(c) of the Commission's Rules of Practice, §201.232(c) of this chapter.

[29 FR 3620, Mar. 21, 1964, as amended at 60 FR 32823, June 23, 1995]

PART 204—RULES RELATING TO DEBT COLLECTION

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Subpart A—Administrative Offset

AUTHORITY: 31 U.S.C. 3716, 4 CFR 102.

SOURCE: 58 FR 64370, Dec. 7, 1993, unless otherwise noted.

§ 204.1 Applicability and scope.

(a) The procedures authorized for administrative offset are contained in Section 10 of the Debt Collection Act (codified at 31 U.S.C. 3716). The Act requires that notice procedures be observed by the agency. The debtor is also afforded an opportunity to inspect and copy government records pertaining to the claim, enter into an

agreement for repayment, and to a review of the claim (if requested). Like salary offset, agencies may cooperate with one another in order to effectuate recovery of the claim.

(b) The provisions of this subpart apply to the collection of debts owed to the United States arising from transactions with the Securities and Exchange Commission (Commission). Administrative offset is authorized under Section 5 of the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 (31 U.S.C. 3716). These regulations are consistent with the Federal Claims Collection Standards on administrative offset issued jointly by the Department of Justice and the General Accounting Office (4 CFR part 102).

§ 204.2 Definitions.

(a) *Administrative offset* as defined in 31 U.S.C. 3701(a)(1) means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(b) *Person* includes a natural person or persons, profit or nonprofit corporation, partnership, association, trust, estate, consortium, or other entity which is capable of owing a debt to the United States Government except that agencies of the United States, or of any State or local government shall be excluded.

§ 204.3 General.

(a) The Chairperson of the Commission (or designee) will determine the feasibility of collection by administrative offset on a case-by-case basis for each claim established. The Chairperson (or designee) will consider the following issues in making a determination to collect a claim by administrative offset:

(1) Can administrative offset be accomplished?

(2) Is administrative offset practical and legal?

(3) Does administrative offset best serve and protect the interest of the U.S. Government?

(4) Is administrative offset appropriate given the debtor's financial condition?

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(b) The Chairperson (or designee) may initiate administrative offset with regard to debts owed by a person to another agency of the United States Government, upon receipt of a request from the head of another agency or his or her designee, and a certification that the debt exists and that the person has been afforded the necessary due process rights.

(c) The Chairperson (or designee) may request another agency which holds funds payable to a Commission debtor to offset that debt against the funds held and will provide certification that:

(1) The debt exists; and

(2) The person has been afforded the necessary due process rights.

(d) No collection by administrative offset shall be made on any debt that has been outstanding for more than 10 years unless facts material to the Government's right to collect the debt were not known, and reasonably could not have been known, by the official or officials responsible for discovering the debt.

(e) Administrative offset under this subpart may not be initiated against:

(1) A debt in which administrative offset of the type of debt involved is explicitly provided for or prohibited by another statute;

(2) Debts owed by other agencies of the United States or by any State or local Government; or

(3) Debts arising under the Internal Revenue Code of 1954; the Social Security Act; or the tariff laws of the United States.

(f) The procedures for administrative offset in this subpart do not apply to the offset of Federal salaries under 5 U.S.C. 5514.

§ 204.4 Demand for payment—notice.

(a) Whenever possible, the Commission will seek written consent from the debtor to initiate immediate collection before starting the formal notification process.

(b) In cases where written agreement to collect cannot be obtained from the debtor, a formal notification process shall be followed, (4 CFR 102.2). Prior to collecting a claim by administrative offset, the Commission shall send to the debtor, by certified or registered

mail with return receipt, a written demand for payment in terms which inform the debtor of the consequences of failure to cooperate. A total of three progressively stronger written demands at not more than 30 day intervals will normally be made unless a response to the first or second demand indicates that a further demand would be futile or the debtor's response does not require rebuttal, or other pertinent information indicates that additional written demands would be unnecessary. In determining the timing of the demand letters, the Commission should give due regard to the need to act promptly so that, as a general rule, if necessary to refer the debt to the Department of Justice for litigation, such referral can be made within one year of the final determination of the fact and the amount of the debt. When appropriate to protect the Government's interests (for example, to prevent the statute of limitations from expiring), written demand may be preceded by other appropriate actions, including immediate referral for litigation.

(c) Before offset is made, a written notice will be sent to the debtor. This notice will include:

(1) The nature and amount of the debt;

(2) The date when payment is due (not less than thirty days from the date of mailing or hand delivery of the notice);

(3) The agency's intention to collect the debt by administrative offset, including asking the assistance of other Federal agencies to help in the offset whenever possible, if the debtor has not made payment by the payment due date or has not made an arrangement for payment by the payment due date;

(4) Any provision for interest, late payment penalties and administrative charges, if payment is not received by the due date;

(5) The possible reporting of the claim to consumer reporting agencies and the possibility that the Commission will forward the claim to a collection agency;

(6) The right of the debtor to inspect and copy the Commission's records related to the claim;

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(7) The right of the debtor to request a review of the determination of indebtedness and, in the circumstances described below, to request an oral hearing from the Commission's designee;

(8) The right of the debtor to enter into a written agreement with the agency to repay the debt in some other way; and

(9) In appropriate cases, the right of the debtor to request a waiver.

(d) Claims for payment of travel advances and employee training expenses require notification prior to administrative offset as described in this section. Because no oral hearing is required, notice of the right to a hearing need not be included in the notification.

§ 204.5 Debtor's failure to respond.

If the debtor fails to respond to the notice described in § 204.4 (c) by the proposed effective date specified in the notice, the Commission may take further action under this section or under the Federal Claims Collection Standards (4 CFR parts 101 through 105). The Commission may collect by administrative offset if the debtor:

(a) Has not made payment by the payment due date;

(b) Has not requested a review of the claim within the agency as set out in § 204.6; or

(c) Has not made an arrangement for payment by the payment due date.

§ 204.6 Agency review.

(a) A debtor may dispute the existence of the debt, the amount of the debt, or the terms of repayment. A request to review a disputed debt must be submitted to the Commission official who provided notification within 30 calendar days of the receipt of the written notice described in § 204.4(c).

(b) The Commission will provide a copy of the record to the debtor and advise him/her to furnish available evidence to support his or her position. Upon receipt of the evidence, the written record of indebtedness will be reviewed and the debtor will be informed of the results of that review.

(c) Pending the resolution of a dispute by the debtor, transactions in any of the debtor's accounts maintained by

the Commission may be temporarily suspended. Depending on the type of transaction, the suspension could preclude its payment, removal, or transfer, as well as prevent the payment of interest or discount due thereon. Should the dispute be resolved in the debtor's favor, the suspension will be immediately lifted.

(d) During the review period, interest, penalties, and administrative costs authorized under the Federal Claims Collection Act of 1966, as amended, will continue to accrue.

§ 204.7 Hearing.

(a) A debtor will be provided a reasonable opportunity for an oral hearing by the Commission's designee when:

(1) (i) By statute, consideration must be given to a request to waive the indebtedness;

(ii) The debtor requests waiver of the indebtedness; and

(iii) The waiver determination rests on an issue of creditability or veracity; or

(2) The debtor requests reconsideration and the Commission's designee determines that the question of indebtedness cannot be resolved by reviewing the documentary evidence.

(b) In cases where an oral hearing is provided to the debtor, the Commission's designee will conduct the hearing, and provide the debtor with a written decision 30 days after the hearing.

§ 204.8 Written agreement for repayment.

If the debtor requests a repayment agreement in place of offset, the Commission has discretion and should use sound judgment to determine whether to accept a repayment agreement in place of offset. If the debt is delinquent and the debtor has not disputed its existence or amount, the Commission will not accept a repayment agreement in place of offset unless the debtor is able to establish that offset would cause undue financial hardship or be unjust. No repayment arrangement will be considered unless the debtor submits a financial statement, executed under penalty of perjury, reflecting the debtor's assets, liabilities, income, and expenses. The financial statement must be submitted within

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ten business days of the Commission's request for the statement. At the Commission's option, a confess-judgment note or bond of indemnity with surety may be required for installment agreements. Notwithstanding the provisions of this section, any reduction or compromise of a claim will be governed by 4 CFR part 103 and 31 CFR 5.3.

§ 204.9 Administrative offset procedures.

(a) If the debtor does not exercise the right to request a review within the time specified in § 204.4, or if as a result of the review, it is determined that the debt is due and no written agreement is executed, then administrative offset shall be ordered in accordance with this subpart without further notice.

(b) *Travel advance.* The Commission will deduct outstanding advances provided to Commission travelers from other amounts owed the traveler by the agency whenever possible and practicable. Monies owed by an employee for outstanding travel advances that cannot be deducted from other travel amounts due that employee will be collected through salary offset as described in subpart B of this part.

(c) *Requests for offset to other Federal agencies.* The Chairperson (or his or her designee) may request that a debt owed to the Commission be administratively offset against funds due and payable to a debtor by another Federal agency. In requesting administrative offset, the Commission, as creditor, will certify in writing to the Federal agency holding funds of the debtor:

- (1) That the debtor owes the debt;
- (2) The amount and basis of the debt; and
- (3) That the Commission has complied with the requirements of 31 U.S.C. 3716, its own administrative offset regulations and the applicable provisions of 4 CFR part 102 with respect to providing the debtor with due process.

(d) *Requests for offset from other Federal agencies.* Any Federal agency may request that funds due and payable to its debtor by the Commission be administratively offset in order to collect a debt owed to such Federal agency by the debtor. The Commission shall initiate the requested offset only upon:

(1) Receipt of written certification from the creditor agency:

- (i) That the debtor owes the debt;
- (ii) The amount and basis of the debt;
- (iii) That the agency has prescribed regulations for the exercise of administrative offset; and
- (iv) That the agency has complied with its own administrative offset regulations and with the applicable provisions of 4 CFR part 102, including providing any required hearing or review.

(2) A determination by the Commission that collection by offset against funds payable by the Commission would be in the best interest of the United States as determined by the facts and circumstances of the particular case, and that such offset would not otherwise be contrary to law.

§ 204.10 Civil and Foreign Service Retirement Fund.

(a) Unless otherwise prohibited by law, the Commission may request that monies due and payable to a debtor from the Civil Service Retirement and Disability Fund, the Foreign Service Retirement Fund or any other Federal retirement fund be administratively offset in reasonable amounts in order to collect in one full payment or a minimal number of payments, debts owed the United States by the debtor. Such requests shall be made to the appropriate officials of the respective fund servicing agency in accordance with such regulations as may be prescribed by the Chairperson of that agency. The requests for administrative offset will certify in writing the following:

- (1) The debtor owes the United States a debt and the amount of the debt;
- (2) The Commission has complied with applicable regulations and procedures; and
- (3) The Commission has followed the requirements of the Federal Claims Collection Standards as described in this subpart.

(b) Once the Commission decides to request offset under paragraph (a) of this section, it will make the request as soon as practical after completion of the applicable procedures in order that the fund servicing agency may identify

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and flag the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the fund. This will satisfy any requirements that offset be initiated prior to expiration of the statute of limitations.

(c) If the Commission collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, the Commission shall act promptly to modify or terminate its request for offset.

(d) This section does not require or authorize the fund servicing agency to review the merits of Commission's determination relative to the debt.

§ 204.11 Jeopardy procedure.

The Commission may effect an administrative offset against a payment to be made to the debtor prior to the completion of the procedures required by § 204.4(c) if failure to take the offset would substantially jeopardize the Commission's ability to collect the debt, and the time available before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset shall be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Commission shall be promptly refunded.

§§ 204.12—204.29 [Reserved]

Subpart B—Salary Offset

AUTHORITY: 5 U.S.C. 5514.

SOURCE: 58 FR 38520, July 19, 1993, unless otherwise noted.

§ 204.30 Purpose and scope.

(a) This regulation provides procedures for the collection by administrative offset against a federal employee's current pay account without his/her consent under 5 U.S.C. 5514 to satisfy certain debts owed to the Commission. This regulation does not apply when the employee consents to recovery from his/her current pay account.

(b) This regulation does not preclude an employee from requesting a waiver or questioning the amount or validity of a debt by submitting a claim to the

General Accounting Office in accordance with procedures prescribed by the General Accounting Office.

(c) This Salary Offset plan is for internal use and Government-wide claims collections. 5 CFR 550.1104(a). This regulation implements 5 U.S.C. 5514; 5 CFR part 550, subpart K.

§ 204.31 Excluded debts or claims.

This regulation does not apply to:

(a) Debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1), the Social Security Act (42 U.S.C. 301) or the tariff laws of the United States.

(b) Any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute, such as travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108.

§ 204.32 Definitions.

The following definitions apply to this regulation:

Chairman means the Chairman of the Securities and Exchange Commission.

Commission means the Securities and Exchange Commission.

Creditor agency means the agency to which the debt is owed.

Debt means an amount owed to the United States from sources which include but are not necessarily limited to, erroneous payments made to employees such as overpayment of benefits, salary or other allowances; loans when insured or guaranteed by the United States; and other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayment, penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice) and all other similar sources.

Disposable pay means the amount that remains from an employee's federal pay after required deductions for federal, state and local income taxes; Social Security taxes, including Medicare taxes; federal retirement programs; premiums for life and health insurance benefits; and such other deductions that are required by law to be withheld. (See 5 CFR 581.105(b) through

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(f) for items required by law to be withheld, and therefore excluded from disposable pay for the purposes of this regulation.)

Employee means a current employee of the Securities and Exchange Commission, or other agency, including an active duty member or reservist in the U.S. Armed Forces or a former employee (or former active duty member or Reservist in the Armed Forces) with a current pay account.

FCCS means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR part 101.

Hearing official means an individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and who renders a decision on the basis of such hearing. A hearing official may not be under the Chairman's supervision or control, except that nothing in this regulation shall be construed to prohibit the appointment of an administrative law judge.

Pay means basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an individual not entitled to basic pay, other authorized pay.

Program official means, for the purpose of implementing this offset regulation, the Comptroller or designee.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s), at one or more officially established pay intervals, from the current pay account of an employee, without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774, 32 U.S.C. 716, 5 U.S.C. 8346(b), or any other law.

§ 204.33 Pre-offset notice.

A program official must provide an employee with written notice at least 30 calendar days prior to offsetting his/her salary. A program official need not notify an employee of adjustments to pay in connection with the employee's election of coverage or change in coverage under a Federal benefits program requiring periodic deductions from pay,

if the amount to be recovered was accumulated over four pay periods or less. When required, the written notice must include the following:

(a) The nature, origin and amount of the indebtedness determined by the Commission to be due;

(b) The intention of the Commission to collect the debt through deductions from the employee's current disposable pay account;

(c) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(d) An explanation of the Commission's policy concerning interest, penalties, and administrative costs, including a statement that such assessments must be made unless excused in accordance with the FCCS;

(e) The employee's right to inspect and copy Commission records relating to the debt (if copies of such records are not attached), or if the employee or his or her representative cannot personally inspect the records, the right to request and receive a copy of such records. The Commission will respond to a request for inspection and/or copying as soon as practicable;

(f) The opportunity, under terms agreeable to the Commission, to enter into a written agreement to establish a schedule for repayment in lieu of offset. The agreement must be in writing, signed by both the employee and the Commission, and documented in the Commission's files (4 CFR 102.2(e));

(g) The employee's right to a hearing conducted by an official arranged by the Commission if a petition is filed as prescribed by §204.35, Petition for pre-offset hearing. Such hearing official will be either an administrative law judge or at the chief administrative law judge's discretion, another hearing official who is also not under the control of the head of the agency;

(h) The method and time period for petitioning for a hearing, including a statement that the timely filing of a petition for hearing will stay the commencement of collection proceedings;

(i) If a hearing is requested, the hearing official will issue a final decision, based on information presented to the hearing official, at the earliest practicable date, but no later than 60 days after the petition for the hearing is

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filed unless the employee requests and the hearing official, for good cause or in the interests of justice, deems it necessary to extend that time period (5 CFR 550.1104(d)(10));

(j) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729-3731, or any other applicable statutory authority; and/or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or any other applicable statutory authority.

(k) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(l) The employee's right to a prompt refund if amounts paid or deducted by salary offset are later waived or found not owed to the United States, unless otherwise provided by law or contract; and

(m) The specific address to which all correspondence shall be directed regarding the debt.

§ 204.34 Employee response.

(a) *Introduction.* An employee must respond to a pre-offset notice, if at all, within 15 calendar days following receipt, in one or more of the ways discussed in §204.34, Employee response, and §204.35, Petition for pre-offset hearing. Where applicable, the employee bears the burdens of proof and persuasion.

(b) Responses must be submitted in writing to the program official who signed the pre-offset notice. A timely response will stay the commencement of collection by salary offset, at least until the issuance of a written decision. (See §204.37, Extensions of time). Failure to submit a timely response will be treated as an admission of indebtedness, and will result in salary offset in accordance with the terms specified in the pre-offset notice.

(c) A response filed after expiration of the 15 day period may be accepted if the employee can show that the delay was due to circumstances beyond his or

her control or failure to receive notice of the time limit (unless otherwise aware of it).

(d) *Voluntary repayment agreement.* An employee may request to enter into a voluntary written agreement for repayment of the debt in lieu of offset. It is within the discretion of the program official whether to enter into such an agreement, and if so, upon what terms. Voluntary deductions may exceed 15 percent of the employee's disposable pay. If an agreement is reached, the agreement must be in writing, and must be signed by both the employee and the program official. A signed copy must be sent to the Comptroller's office. The program official shall notify the employee in writing of its decision not to accept the proposed voluntary repayment schedule before making any deductions from the employee's salary.

(e) *Waiver.* Any request for waiver of the debt must be accompanied by evidence that the waiver is authorized by law.

(f) *Reconsideration.* An employee may request reconsideration of the existence or amount of the debt or the offset schedule as reflected in the pre-offset notice. The request must be accompanied by a detailed narrative and supporting documentation as to why the offset decision is erroneous and/or why the offset schedule imposes an undue hardship.

§ 204.35 Petition for pre-offset hearing.

(a) The employee may petition for a pre-offset hearing. The petition must state with specificity why the employee believes the agency's determination is in error.

(b) The petition must fully identify and explain, with reasonable specificity, all the facts, evidence and witnesses, if any, that the employee believes support his or her position. The petition must be signed by the employee.

§ 204.36 Granting of a pre-offset hearing.

(a) If the employee timely requests a pre-offset hearing or the timeliness is waived, the program official must:

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(1) arrange for a hearing official. If the hearing official is an administrative law judge, he or she shall be designated by the Chief Administrative Law Judge as set forth in 17 CFR 200.310(a)(2); and

(2) provide the hearing official with a copy of all records on which the determination of the debt and any involuntary repayment schedule are based.

(b) The hearing official shall notify the employee by personal service, by first class, registered or certified mail, or by a reliable commercial courier or overnight delivery service whether the employee is entitled to an oral or "paper" (i.e., a review on the written record) hearing. (See 4 CFR 102.3(c).) Within 20 calendar days of receipt of this notice the employee shall provide the hearing official with a full description of all relevant facts, documentary evidence, and witnesses which the employee believes support his or her position. The hearing official may extend the time for the employee to respond to the notice for good cause shown.

(c) If an oral hearing is scheduled, the hearing official shall notify the program official and the employee in writing of the date, time and location of the hearing. The place for the hearing shall be fixed by the hearing official with due regard for the public interest and the convenience and necessity of the parties, the participants, or their representatives.

(d) If the employee is entitled to an oral hearing, but requests to have the hearing based only on the written submissions, the employee must notify the hearing official and the program official at least 3 calendar days before the date of the oral hearing. The hearing official may waive the 3-day requirement for good cause.

(e) Failure of the employee to appear at the oral hearing may result in dismissal of the petition and affirmation of the program official's decision.

§ 204.37 Extensions of time.

The hearing official may for good cause or in the interests of justice postpone the commencement of the hearing, adjourn a convened hearing for a reasonable period of time or extend or shorten any other time limits prescribed under this section. This ex-

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tension is not intended to abridge the 30 day initial notice or extend the 60 day decision requirement other than as provided for in 5 CFR 550.1104(d)(10).

§ 204.38 Pre-offset hearing.

(a) The hearing official shall determine the form and content of hearings granted under this section, pursuant to 4 CFR 102.3(c). All oral hearings shall be on the record. Except as otherwise ordered by the hearing official, hearings shall be recorded or transcribed verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to the discretion and approval of the hearing official, and a transcript thereof shall be made.

(b) Oral hearings are informal in nature. The Commission, represented by an attorney from the Office of General Counsel, and accompanied by a program official and the employee, and/or the employee's representative, orally shall explain their respective positions using relevant documentation. The employee may testify on his or her own behalf, subject to cross examination. Other witnesses may be called to testify where the hearing official determines the testimony to be relevant and not redundant. The Federal Rules of Evidence serve as a guideline, but are not controlling. The employee bears the burdens of proof and persuasion.

(c) The hearing official shall:

(1) Conduct a fair and impartial hearing;

(2) Preside over the course of the hearing, maintain decorum and avoid delay in the disposition of the hearing; and

(3) Issue a decision in accordance with § 204.39, Written decision, on the basis of the oral hearing and the written record.

(d) Oral hearings are normally open to the public. However, the hearing official may close all or any portion of the hearing at either the request of either party or upon the hearing official's initiative when doing so is in the best interest[s] of the employee or the public.

(e) Oral hearings may be conducted by conference call at the request of the employee or at the discretion of the hearing official.

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(f) *Pre-offset “paper” hearing.* If a hearing is to be held only upon written submissions, the hearing official shall issue a decision based solely upon the written record.

§ 204.39 Written decision.

(a) *If pre-offset hearing is held.* Within 60 days of the filing of the employee’s petition for a pre-offset hearing, the hearing official will issue a written decision setting forth the basis of his/her findings in accordance with 5 CFR 550.1104(g)(3).

(b) If the employee challenges the pre-offset notice under §204.34, Employee response and/or §204.35, Petition for pre-offset hearing, without requesting a hearing or a hearing is denied, the program official must notify the employee of his/her final determination in writing before offset can begin. The agency’s execution of a voluntary repayment agreement satisfies this requirement.

§ 204.40 Deductions.

(a) When deductions may begin:

(1) If a pre-offset hearing is held, deductions shall be made in accordance with the hearing official’s decision.

(2) If parties execute a voluntary repayment agreement, deductions shall be made in accordance with the terms of that agreement.

(3) If the employee requests a waiver or reconsideration or the program official refuses to accept a proposed alternate repayment schedule, deductions shall be made in accordance with the program official’s written decision.

(4) If the employee consents to the terms and conditions set forth in the Commission’s Pre-offset Notice or fails to respond in timely fashion to the Pre-offset Notice, or waives his/her right to a hearing without otherwise challenging the terms of the Pre-offset Notice, deductions shall be made in accordance with the terms and conditions set forth therein.

(b) *Retired or separated employees.* If the employee retires, resigns, or is terminated before the debt is fully repaid, the remaining indebtedness will be offset pursuant to 31 U.S.C. 3716 and 4 CFR part 101.

(1) To the extent possible, the remaining indebtedness will be liq-

uidated from any final payment due the former employee as of the date of separation (e.g., final salary payment, lump-sum leave, etc.). See §204.40d(3), Offset deductions from final salary and/or lump-sum leave payment.

(2) Thereafter, the remaining indebtedness will be recovered from later payments of any kind due the former employee from the United States. See 4 CFR 102.13.

(c) *Method of collection and source of deduction.* The method of collecting debts under these regulations shall be by salary offset. Deductions will be made from the employee’s current disposable pay account except as provided for in §204.34b, Employee response.

(d) *Amount and duration of deductions.* Debts must be collected in one lump sum where possible. If the employee demonstrates financial hardship to the Commission’s satisfaction or the amount of the debt exceeds 15 percent of the indebted employee’s current disposable pay, collection must be made in installments over a period not greater than the anticipated period of active employment, except as provided in Section 34b, Employee Response.

(1) Installment deductions will be made over the shortest period possible. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee’s ability to pay.

(2) The amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. Installment payment of less than \$100 per pay period will be accepted only in the most unusual circumstances.

(3) Offset deductions from final salary and/or lump-sum leave payment. Such an offset deduction may exceed 15 percent of an employee’s final salary and/or lump-sum leave payment pursuant to 31 U.S.C. 3716, 64 CG 907.

(e) Interest, penalties and administrative costs on debts under this part will be assessed and/or waived according to the provisions of 4 CFR 102.13.

§ 204.41 Non-waiver of rights.

An employee’s involuntary payment of all or any portion of a debt being

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collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights that the employee may have under 5 U.S.C. 5514 or any other provision of contract or law, unless there are statutory or contractual provisions to the contrary.

§ 204.42 Refunds.

(a) The Commission will refund promptly to the appropriate individual amounts offset under this regulation when:

(1) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(2) The Commission is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

(b) Refunds do not bear interest unless required or permitted by law or contract.

§ 204.43 Coordinating offset with another federal agency.

(a) *Responsibility of the Commission as the Creditor Agency.* The Commission shall request recovery from the current paying agency. Upon completion of the procedures established in these regulations and pursuant to 5 U.S.C. 5514, 5 CFR 550.1108 the Commission must:

(1) Certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the Government's right to collect the debt first accrued and that the Commission's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) If the collection must be made in installments, the Commission also must advise the paying agency of the amount or percentage of disposable pay to be collected in each installment, and if the Commission wishes, the number and the commencing date of the installments (if a date other than the next officially established pay period is required).

(3) Advise the paying agency of the actions taken pursuant to 5 U.S.C. 5514(b) and give the date(s) the action(s) was taken (unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required proce-

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dures and the written consent or statement is forwarded to the paying agency).

(4) Except as otherwise provided in this paragraph (a)(4), the Commission must submit a debt claim containing the information specified in paragraphs (a)(1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency.

(5) If the employee is in the process of separating, the Commission must submit its debt claim to the employee's paying agency for collection as provided in 5 CFR 550.1104(1). Pursuant to 5 CFR 1101, the paying agency must certify the total amount of its collection and notify the creditor agency and employee. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the paying agency has fully complied with the provisions of this section. The Commission must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(6) If the employee is already separated and all payments due from his or her former paying agency have been paid, the Commission may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801) or other similar funds, be administratively offset to collect the debt (See 31 U.S.C. 3716 and 4 CFR part 101).

(7) When an employee transfers to another paying agency, the Commission shall not repeat the due process procedures described in 5 U.S.C. 5514 and subpart B of this part to resume the collection. The Commission must review the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency. The Commission must submit a properly certified claim to the

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new paying agency before collection can be resumed.

(b) *Responsibility of the Commission as the paying agency*—(1) *Complete claim*. When the Commission receives a properly certified claim from a creditor agency, deductions should be scheduled to begin at the next officially established pay interval. The Commission must notify the employee in writing that the Commission has received a certified debt claim from the creditor agency (including the amount) and the date salary offset will begin and the amount of such deductions.

(2) *Incomplete claim*. When the Commission receives an incomplete certification of debt from a creditor agency, the Commission must return the debt claim with notice that procedures under 5 U.S.C. 5514 and subpart B of this part must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review*. The Commission is not authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) *Employees who transfer from one paying agency to another*. If, after the creditor agency has submitted the debt claim to the Commission and before the Commission collects the debt in full, the employee transfers to another agency, the Commission must certify the total amount collected on the debt. One copy of the certification must be furnished to the employee and one copy to the creditor agency along with notice of the employee's transfer.

(c) *Responsibility of the Program Official*. (1) The Program Official shall coordinate debt collections and shall, as appropriate:

(i) Arrange for a hearing upon proper petition by a federal employee; and

(ii) Prescribe, upon consultation with the General Counsel, such practices and procedures as may be necessary to carry out the intent of this regulation.

(2) The Program Official shall be responsible for:

(i) Ensuring that each certification of debt sent to a paying agency is con-

sistent with the pre-offset notice (§204.33, Pre-offset notice).

(ii) Obtaining hearing officials from other agencies pursuant to §204.36, Granting of a pre-offset hearing.

(iii) Ensuring that hearings are properly scheduled.

§ 204.44 Interest, penalties, and administrative costs.

Charges may be assessed for interest, penalties, and administrative costs in accordance with the Federal Claims Collection Standards, 4 CFR 102.13.

Subpart C—Tax Refund Offset

AUTHORITY: 5 U.S.C. 8347(a) and 8461(g), 31 U.S.C. 3720A.

SOURCE: 58 FR 64372, Dec. 7, 1993, unless otherwise noted.

§ 204.50 Purpose.

This subpart establishes procedures for the Commission to refer past-due legally enforceable debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of an individual, sole proprietorship, partnership, corporation, nonprofit organization or any other form of business association, (31 U.S.C. 3720A(4)) owing debts to the Commission. In the case of refunds of business associations, this section applies only to refunds payable on or after January 1, 1995 (31 U.S.C. 3720A(5)). It specifies the agency procedures and the rights of the debtor applicable to claims referred under the Federal Tax Refund Offset Program for the collection of debts owed to the Commission.

§ 204.51 Past-due legally enforceable debt.

A past-due legally enforceable debt for referral to the IRS is a debt that:

(a) Resulted from:

(1) Erroneous payments made under the Civil Service Retirement or the Federal Employees' Retirement Systems; or

(2) Unpaid health or life insurance premiums due under the Federal Employees' Health Benefits or Federal Employees' Group Life Insurance Programs; or

(3) Any other statute administered by the Commission;

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(b) Is an obligation of a debtor;
(c) Except in the case of a judgment debt, has been delinquent at least three months but not more than ten years at the time the offset is made;

(d) Is at least \$25.00;

(e) With respect to which the individual's rights described in the collection of debts owed to the Civil Service Retirement and Disability Fund (5 CFR 831.1301 through 831.1309) have been exhausted;

(f) With respect to which either:

(1) The Commission's records do not contain evidence that the person owing the debt (or his or her spouse) has filed for bankruptcy under title 11 of the United States Code; or

(2) The Commission can clearly establish at the time of the referral that the automatic stay under 11 U.S.C. 362 has been lifted or is no longer in effect with respect to the person owing the debt or his or her spouse, and the debt was not discharged in the bankruptcy proceeding;

(g) Cannot currently be collected under the salary offset provisions of 5 U.S.C. 5514(a)(1);

(h) Is not eligible for administrative offset under 31 U.S.C. 3716(a) because of 31 U.S.C. 3716(c)(2), or cannot currently be collected as an administrative offset by the Commission under 31 U.S.C. 3716(a) against amounts payable to the debtor by the Commission; and

(i) Has been disclosed by the Commission to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless the amount of the debt does not exceed \$100.

§ 204.52 Notification of intent to collect.

(a) *Notification before submission to the IRS.* A request for reduction of an IRS income tax refund will be made only after the Commission makes a determination that an amount is owed and past-due and gives or makes a reasonable attempt to give the debtor 60 days written notice of the intent to collect by IRS tax refund offset.

(b) *Contents of notice.* The Commission's notice of intent to collect by IRS

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tax refund offset (Notice of Intent) will state:

(1) The amount of the debt;

(2) That unless the debt is repaid within 60 days from the date of the Commission's Notice of Intent, the Commission intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as a Federal income tax refund by an amount equal to the amount of the debt and all accumulated interest and other charges;

(3) A mailing address for forwarding any written correspondence and a contact name and a telephone number for any questions; and

(4) That the debtor may present evidence to the Commission that all or part of the debt is not past due or legally enforceable by:

(i) Sending a written request for a review of the evidence to the address provided in the notice;

(ii) Stating in the request the amount disputed and the reasons why the debtor believes that the debt is not past due or is not legally enforceable; and

(iii) Including in the request any documents that the debtor wishes to be considered or stating that the additional information will be submitted within the remainder of the 60-day period.

§ 204.53 Reasonable attempt to notify.

In order to constitute a reasonable attempt to notify the debtor, the Commission must have used a mailing address for the debtor obtained from the IRS pursuant to 26 U.S.C. 6103(m)(2) within a period of one year preceding the attempt to notify the debtor, unless the Commission received clear and concise notification from the debtor that notices from the agency are to be sent to an address different from the address obtained from IRS. Clear and concise notice means that the debtor has provided the agency with written notification, including the debtor's name and identifying number (as defined in 26 CFR 301.6109-1), and the debtor's intent to have the agency notices sent to the new address.

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§ 204.54 Commission action as a result of consideration of evidence submitted in response to the notice of intent.

(a) *Consideration of evidence.* If, as a result of the Notice of Intent, the Commission receives notice that the debtor will submit additional evidence or receives additional evidence from the debtor within the prescribed time period, any notice to the IRS will be stayed until the Commission can:

(1) Consider the evidence presented by the debtor; and

(2) Determine whether or not all or a portion of the debt is still past due and legally enforceable; and

(3) Notify the debtor of its determination.

(b) *Notification to the debtor.* Following review of the evidence, the Commission's designee will issue a written decision notifying the debtor whether the Commission has sustained, amended, or canceled its determination that the debt is past-due and legally enforceable. The notice will advise the debtor of any further action to be taken and explain the supporting rationale for the decision.

(c) *Commission action on the debt.* (1) The Commission will notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund if it sustains its decision that the debt is past-due and legally enforceable. The Commission will also notify the debtor whether the amount of the debt remains the same or is modified; and

(2) The Commission will not refer the debt to the IRS for offset against the debtor's Federal income tax refund if it reverses its decision that the debt is past due and legally enforceable.

§ 204.55 Change in notification to Internal Revenue Service.

(a) Except as noted in paragraph (b) of this section, after the Commission sends the IRS notification of an individual's liability for a debt, the Commission will promptly notify the IRS of any change in the notification, if the Commission:

(1) Determines that an error has been made with respect to the information contained in the notification;

(2) Receives a payment or credits a payment to the account of the debtor named in the notification that reduces the amount of the debt referred to the IRS for offset; or

(3) Receives notification that the individual owing the debt has filed for bankruptcy under Title 11 of the United States Code or has been adjudicated bankrupt and the debt has been discharged.

(b) The Commission will not notify the IRS to increase the amount of a debt owed by a debtor named in the Commission's original notification to the IRS.

(c) If the amount of a debt is reduced after referral by the Commission and offset by the IRS, the Commission will refund to the debtor any excess amount and will promptly notify the IRS of any refund made by the Commission.

§ 204.56 Administrative charges.

All administrative charges incurred in connection with the referral of the debts to the IRS will be assessed on the debt and thus increase the amount of the offset.

§§ 204.57—204.74 [Reserved]

Subpart D—Miscellaneous: Credit Bureau Reporting, Collection Services

AUTHORITY: 31 U.S.C. 3701, 3711, 3718.

SOURCE: 58 FR 64373, Dec. 7, 1993, unless otherwise noted.

§ 204.75 Collection services.

Section 13 of the Debt Collection Act (31 U.S.C. 3718) authorizes agencies to enter into contracts for collection services to recover debts owed the United States. The Act requires that certain provisions be contained in such contracts, including:

(a) The agency retains the authority to resolve a dispute, including the authority to terminate a collection action or refer the matter to the Attorney General for civil remedies; and

(b) The contractor is subject to the Privacy Act of 1974, as it applies to private contractors, as well as subject to State and Federal laws governing debt collection practices.

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§ 204.76 Use of credit bureau or consumer reporting agencies.

(a) The Commission may report delinquent debts to consumer reporting agencies (See 31 U.S.C. 3701(a)(3), 3711). Sixty days prior to release of information to a consumer reporting agency, the debtor shall be notified, in writing, of the intent to disclose the existence of the debt to a consumer reporting agency. Such notice of intent may be a separate correspondence or included in correspondence demanding direct payment. The notice shall be in conformance with 31 U.S.C. 3711(f) and the Federal Claims Collection Standards. The Commission shall provide, in this notice, the debtor with:

(1) An opportunity to inspect and copy agency records pertaining to the debt;

(2) An opportunity for an administrative review of the legal enforceability or past due status of the debt;

(3) An opportunity to enter into a repayment agreement on terms satisfactory to the Commission to prevent the Commission from reporting the debt as overdue to consumer reporting agencies, and provide deadlines and method for requesting this relief;

(4) An explanation of the rate of interest that will accrue on the debt, that all costs incurred to collect the debt will be charged to the debtor, the authority for assessing these costs, and the manner in which the Commission will calculate the amount of these cost;

(5) An explanation that the Commission will report the debt to the consumer reporting agencies to the detriment of the debtor's credit rating; and

(6) A description of the collection actions that the agency may take in the future if those presently proposed actions do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and assignment of the debt for collection by offset against Federal income tax refunds or the filing of a lawsuit against the debtor by the Federal Government.

(b) The information that may be disclosed to the consumer reporting agency is limited to:

(1) The debtor's name, address, social security number or taxpayer identi-

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fication number, and any other information necessary to establish the identity of the individual;

(2) The amount, status, and history of the claim; and

(3) The Commission program or activity under which the claim arose.

§ 204.77 Referrals to collection agencies.

(a) The Commission has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(c) and the Federal Claims Collection Standards (4 CFR 102.6).

(b) The Commission will use private collection agencies where it determines that their use is in the best interest of the Government. Where the Commission determines that there is a need to contract for collection services, the contract will provide that:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, or refer the matter to the Department of Justice for litigation or to take any other action under this part will be retained by the Commission;

(2) Contractors are subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor is required to strictly account for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable Commission to determine whether to pursue collection through litigation or to terminate collection; and

(5) The contractor must agree to provide any data in its files relating to paragraphs (a) (1), (2) and (3) of Section 105.2 of the Federal Claims Collection Standards upon returning the account to the Commission for subsequent referral to the Department of Justice for litigation.

(c) The Commission will not use a collection agency to collect a debt owed by a current employed or retired

Federal employee, if collection by salary or annuity offset is available.

PART 209—FORMS PRESCRIBED UNDER THE COMMISSION'S RULES OF PRACTICE

Sec.

209.0-1 Availability of forms.

209.1 Form D-A: Disclosure of assets and financial information.

AUTHORITY: 15 U.S.C. 77h-1, 77u, 78u-2, 78u-3, 78v, 78w, 80a-9, 80a-37, 80a-38, 80a39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12, unless otherwise noted.

SOURCE: 60 FR 32823, June 23, 1995, unless otherwise noted.

§ 209.0-1 Availability of forms.

(a) This part identifies and describes the forms for use under the Securities and Exchange Commission's Rules of Practice, part 201 of this chapter.

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Any person may inspect the forms at this address and at the Commission's regional and district offices. (See § 200.11 of this chapter for the addresses of the SEC regional and district offices.)

§ 209.1 Form D-A: Disclosure of assets and financial information.

(a) Rules 410 and 630 of the Rules of Practice (17 CFR 201.410 and 201.630) provide that under certain circumstances a respondent who asserts or intends to assert an inability to pay disgorgement, interest or penalties may be required to disclose certain financial information. Unless otherwise ordered, this form may be used by individuals required to supply such information.

(b) The respondent filing Form D-A is required promptly to notify the Commission of any material change in the answer to any question on this form.

(c) Form D-A may not be withheld from the interested division. A respondent making financial information disclosures on this form after the institution of proceedings may make a motion, pursuant to Rule 322 of the Com-

mission's Rules of Practice (17 CFR 201.322), for the issuance of a protective order to limit disclosure to the public or parties other than the interested division of the information submitted on Form D-A. A request for a protective order allows the requester an opportunity to justify the need for confidentiality. The making of a motion for a protective order, however, does not guarantee that disclosure will be limited.

(d) No party receiving information for which a motion for a protective order has been made may transfer or convey the information to any other person prior to a ruling on the motion without the prior permission of the Commission or a hearing officer.

(e) A person making financial information disclosures on Form D-A prior to the institution of proceedings, in connection with an offer of settlement or otherwise, may request confidential treatment of the information pursuant to the Freedom of Information Act. See the Commission's Freedom of Information Act ("FOIA") regulations, 17 CFR 200.83. A request for confidential treatment allows the requester an opportunity to substantiate the need for confidentiality. No determination as to the validity of any request for confidential treatment will be made until a request for disclosure of the information under FOIA is received.

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

APPLICATION OF REGULATION S-X (17 CFR PART 210)

Sec.

210.1-01 Application of Regulation S-X (17 CFR part 210).

210.1-02 Definitions of terms used in Regulation S-X (17 CFR part 210).