

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application.

(1) *For a decision involving a prevailing party:* The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(2) *For a decision involving an excessive agency demand:* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That decision shall be based upon all the facts and circumstances of the case. The decision shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(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. 504(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.

[63 FR 36341, July 6, 1998, as amended at 76 FR 52253, Aug. 22, 2011]

PART 4—MISCELLANEOUS RULES

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AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

§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.

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(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 in the same discipline as 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 investigation¹ (except

¹It 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. 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

that a former employee who is disqualified solely under paragraph (b)(1)(ii) or 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, (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).

(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:

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.

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(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.

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(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 deter-

mined 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.

(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:

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(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) *Reprimand, suspension, or disbarment of attorneys.* (1)(i) The following provisions govern the evaluation of allegations of misconduct by attorneys practicing before the Commission who are not employed by the Commission.¹ The Commission may publicly reprimand, suspend, or disbar from practice before the Commission any such person who has practiced, is practicing, or holds himself or herself out as entitled to practice before the Commission if it finds that such person:

(A) Does not possess the qualifications required by §4.1(a);

(B) Has failed to act in a manner consistent with the rules of professional conduct of the attorney's state(s) of licensure;

(C) Has engaged in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation; or

(D) Has knowingly or recklessly given false or misleading information, or has knowingly or recklessly participated in the giving of false information to the Commission or any officer or employee of the Commission.²

(ii) An attorney may be responsible for another attorney's violation of this paragraph (e) if the attorney orders, or with knowledge of the specific conduct,

¹The standards of conduct and disciplinary procedures under this §4.1(e) apply only to outside attorneys practicing before the Commission and not to Commission staff. Allegations of misconduct by Commission employees will be handled pursuant to procedures for employee discipline or pursuant to investigations by the Office of Inspector General.

²For purposes of this rule, knowingly giving false or misleading information includes knowingly omitting material facts necessary to make any oral or written statements not misleading in light of the circumstances under which they were made.

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ratifies the conduct involved. In addition, an attorney who has direct supervisory authority over another attorney may be responsible for that attorney's violation of this paragraph (e) if the supervisory attorney knew of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action.

(2) Allegations of attorney misconduct in violation of paragraph (e)(1) of this section may be proffered by any person possessing information concerning the alleged misconduct. Any such allegations may be submitted orally or in writing to a Bureau Officer who will evaluate the sufficiency of the allegations in the first instance to determine whether further action by the Commission is warranted. The Director of the Bureau or office responsible for the matter about which the allegations are made, or the Director's designee, shall serve as the Bureau Officer.

(3) After review and evaluation of the allegations, any supporting materials, and any additional information that the Bureau Officer may acquire, the Bureau Officer, if he or she determines that further action is warranted, shall in writing notify the subject of the complaint of the underlying allegations and potential sanctions available to the Commission under this section, and provide him or her an opportunity to respond to the allegations and provide additional relevant information and material. The Bureau Officer may request that the Commission issue a resolution authorizing the use of compulsory process, and may thereafter initiate the service of compulsory process, to assist in obtaining information for the purpose of making a recommendation to the Commission whether further action may be warranted.

(4) If the Bureau Officer, after review and evaluation of the allegations, supporting material, response by the subject of the allegations, if any, and all additional available information and material, determines that no further action is warranted, he or she may close the matter if the Commission has not issued a resolution authorizing the use of compulsory process. In the event the Bureau Officer determines that fur-

ther Commission action may be warranted, or if the Commission has issued a resolution authorizing the use of compulsory process, he or she shall make a recommendation to the Commission. The recommendation shall include all relevant information and material as to whether further Commission action, or any other disposition of the matter, may be warranted.

(5) If the Commission has reason to believe, after review of the Bureau Officer's recommendation, that an attorney has engaged in professional misconduct of the type described in paragraph (e)(1) of this section, the Commission may institute administrative disciplinary proceedings proposing public reprimand, suspension, or disbarment of the attorney from practice before the Commission. Except as provided in paragraph (e)(7) of this section, administrative disciplinary proceedings shall be handled in accordance with the following procedures:

(i) The Commission shall serve the respondent attorney with an order to show cause why the Commission should not impose sanctions against the attorney. The order to show cause shall specify the alleged misconduct at issue and the possible sanctions. The order to show cause shall be accompanied by all declarations, deposition transcripts, or other evidence the staff wishes the Commission to consider in support of the allegations of misconduct.

(ii) Within 14 days of service of the order to show cause, the respondent may file a response to the allegations of misconduct. If the response disputes any of the allegations of misconduct, it shall do so with specificity and include all materials the respondent wishes the Commission to consider relating to the allegations. If no response is filed, the allegations shall be deemed admitted.

(iii) If, upon considering the written submissions of the respondent, the Commission determines that there remains a genuine dispute as to any material fact, the Commission may order further proceedings to be presided over by an Administrative Law Judge or by one or more Commissioners sitting as Administrative Law Judges (hereinafter referred to collectively as the Administrative Law Judge), or by the Commission. The Commission order

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shall specify the nature and scope of any proceeding, including whether live testimony will be heard and whether any pre-hearing discovery will be allowed and if so to what extent. The attorney respondent shall be granted due opportunity to be heard in his or her own defense and may be represented by counsel. If the written submissions of the respondent raise no genuine dispute of material fact, the Commission may issue immediately any or all of the sanctions enumerated in the order to show cause provided for in paragraph (e)(5)(i) of this section.

(iv) Commission counsel shall be appointed by the Bureau Officer to prosecute the allegations of misconduct in any administrative disciplinary proceedings instituted pursuant to this rule.

(v) If the Commission assigns the matter to an Administrative Law Judge, the Commission will establish a deadline for an initial decision. The deadline shall not be modified by the Administrative Law Judge except that it may be amended by leave of the Commission.

(vi) Based on the entirety of the record of administrative proceedings, the Administrative Law Judge or the Commission if it reviews the matter in the first instance, shall issue a decision either dismissing the allegations or, if it is determined that the allegations are supported by a preponderance of the evidence, specify an appropriate sanction. An Administrative Law Judge's decision may be appealed to the Commission by either party within 30 days. If the Administrative Law Judge's decision is appealed, the Commission will thereafter issue a scheduling order governing the appeal.

(vii) Investigations and administrative proceedings prior to the hearing on the order to show cause will be non-public unless otherwise ordered by the Commission. Any administrative hearing on the order to show cause, and any oral argument on appeal, shall be open to the public unless otherwise ordered for good cause by the Commission or the Administrative Law Judge.

(6) Regardless of any action or determination the Commission may or may not make, the Commission may direct the General Counsel to refer the allega-

tions of misconduct to the appropriate state, territory, or District of Columbia bar or any other appropriate authority for further action.

(7) Upon receipt of notification from any authority having power to suspend or disbar an attorney from the practice of law within any state, territory, or the District of Columbia, demonstrating that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without resort to any of the procedures described in this section, enter an order temporarily suspending the attorney from practice before it and directing the attorney to show cause within 30 days from the date of said order why the Commission should not impose further discipline against the attorney. If no response is filed, the attorney will be deemed to have acceded to such further discipline as the Commission deems appropriate. If a response is received, the Commission may take action or initiate proceedings consistent with paragraph (e)(5) of this section before making a determination whether, and to what extent, to impose further discipline against the attorney.

(8) The disciplinary process described in this section is in addition to, and does not supersede, the authority of the Commission or an Administrative Law Judge to discipline attorneys participating in part 3 proceedings pursuant to §§3.24(b)(2) or 3.42(d).

[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; 64 FR 14830, Mar. 29, 1999; 66 FR 13645, Mar. 7, 2001; 66 FR 64143, Dec. 12, 2001; 77 FR 59309, Sept. 27, 2012]

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

(a) *Filing.* (1) All paper and electronic documents filed with the Commission or with an Administrative Law Judge pursuant to part 0, part 1, part 2, or part 3 of this chapter shall be filed with the Secretary of the Commission, except that: