assembly) with an airworthy grip assembly.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed except that credit is given in the final rule for previous compliance with the requirement of this AD by adding ''unless accomplished previously'' in the compliance section. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

The FAA estimates that 5 helicopters of U.S. registry will be affected by this AD, that it will take approximately 4 work hours per helicopter to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $576 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $4,080.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

AD 98–21–36 Robinson Helicopter Company: Amendment 39–10845. Docket No. 97–SW–01–AD.

Applicability: Model R44 helicopters, serial numbers (S/N) 0001 through 0159, except S/N 0143, 0150, and 0156, with cyclic control pilot's grip assembly (grip assembly), part number (P/N) A756–6 Revision N or prior, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (b) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition, or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any helicopter from the applicability of this AD.

Compliance: Within 25 hours time-in-service or 30 calendar days after the effective date of this AD, whichever occurs first, unless accomplished previously.

To prevent use of a grip assembly that may crack, resulting in failure of the grip assembly and subsequent loss of control of the helicopter, accomplish the following:

(a) Remove the grip assembly, P/N A756–6 Revision N (or prior), and replace it with an airworthy grip assembly, P/N A756–6 Revision M (or later), in accordance with KI–112 R44 Pilot's Grip Assembly Upgrade Kit instructions, dated December 20, 1996.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Los Angeles Aircraft Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles Aircraft Certification Office.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the helicopter to a location where the requirements of this AD can be accomplished.

(d) The modification shall be done in accordance with KI–112 R44 Pilot's Grip Assembly Upgrade Kit instructions, dated December 20, 1996. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Robinson Helicopter Company, 2901 Airport Drive, Torrance, California 90505. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on November 23, 1998.

Issued in Fort Worth, Texas, on October 7, 1998.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 98–27760 Filed 10–16–98; 8:45 am]

BILLING CODE 4910–13–U

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 10

Rules of Practice; Final Rules

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is adopting final regulations amending its Rules of Practice, which govern most adjudicatory proceedings brought under the Commodity Exchange Act, as amended (''Act''), other than reparations proceedings. In order to improve the overall fairness and efficiency of the administrative process, the Commission published for comment a notice of proposed amendments to the existing rules. Following consideration of the comments received, this notice sets forth each amended rule in its final form.

Most of the substantive amendments adopted by the Commission serve one of two purposes. Some are intended to foster a greater exchange of information between the Commission's Division of Enforcement (''Division'') and the respondents before a hearing takes place and to clarify the production obligations of each party. Others will facilitate use of the authority granted to the Commission by the Futures Trading Practices Act of 1992 to require the

payment of restitution by respondents in administrative enforcement proceedings. The remaining amendments are largely technical in nature.

EFFECTIVE DATE: The effective date of these rules November 18, 1998. The amended Rules of Practice shall apply only to proceedings initiated on or after the effective date. All proceedings initiated before the effective date shall be conducted under the former Rules of Practice.

FOR FURTHER INFORMATION CONTACT: Stephen Mihans, Office of Chief Counsel, Division of Enforcement, at (202) 418–5399, or David Merrill, Office of the General Counsel, at (202) 418–5120, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, D.C. 20581.

SUPPLEMENTARY INFORMATION: On April 3, 1998, the Commission published a notice in the **Federal Register** announcing proposed amendments to the agency's Rules of Practice.[1] Although the Commission's proposals were not intended to be sweeping or groundbreaking, they did represent the first major revision of the Rules of Practice in more than 20 years. The notice identified fourteen existing rules that the Commission proposed to amend. These provisions, and the subject areas that they cover, included Rule 10.1 (scope and applicability of rules of practice); Rule 10.12 (service and filing of documents; form and execution); Rule 10.21 (commencement of the proceeding); Rule 10.22 (complaint and notice of hearing); Rule 10.24 (amendments and supplemental pleadings); Rule 10.26 (motions and other papers); Rule 10.41 (prehearing conferences; procedural matters); Rule 10.42 (discovery); Rule 10.66 (conduct of the hearing); Rule 10.68 (subpoenas); Rule 10.84 (initial decision); Rule 10.101 (interlocutory appeals); Rule 10.102 (review of initial decision); and Rule 10.106 (reconsideration). In addition, the Commission proposed adding to its Rules of Practice a new subpart (proposed Subpart I) addressing the administration of restitution orders issued pursuant to 7 U.S.C. 9 (1994) and a statement of policy relating to the acceptance of settlements in administrative and civil proceedings instituted by the Commission.

In its **Federal Register** notice, the Commission welcomed public comment on the proposed changes to its Rules of Practice and invited other suggestions to improve or expedite the adjudicatory process.[2] Two comment letters were received, one from the Law and Compliance Division of the Futures Industry Association (''FIA'') and the other from the Committee on Commodities and Futures Law of the New York State Bar Association (''NYSBA''). Both letters were supportive of the Commission's efforts to improve the overall fairness and efficiency of the administrative process. Neither letter included specific comments on the proposed amendments to Rules 10.1, 10.12, 10.21, 10.22, 10.26, 10.41 and 10.66, all of which are being adopted as presented in the **Federal Register** notice of April 3, 1998.

However, both the FIA and the NYSBA raised issues relating to the remaining seven rules that the Commission proposed amending. While most of their comments focused on issues related to discovery and restitution, both groups asked that the Commission either modify or clarify other proposed revisions to the Rules of Practice. A discussion of their comments, as well as the changes that the Commission has determined to make in the wording of the proposed amendments, follows.

I. Rule Changes Related to Discovery

A. Prehearing Materials

As proposed by the Commission, new Rule 10.42(a) expands the information required to be included in each party's prehearing memorandum to include the identity, and the city and state of residence, of each witness (other than an expert) who is expected to testify on the party's behalf, along with a brief summary of the matters to be covered by the witness's expected testimony. In addition, each party will be required to furnish a list of documents that he or she will introduce as evidence at the hearing and copies of any documents that the other parties do not already have in their possession or to which they do not have reasonably ready access. With respect to expert witnesses, each party will be required to furnish the other parties with a statement providing relevant information about the witness, as well as a statement setting forth the opinions to be expressed by the witness and the bases or reasons for those opinions.

In commenting on new Rule 10.42(a), the FIA expressed concern that, since a respondent would not have had an opportunity to develop a defense strategy before the complaint was filed, he or she may need additional time to decide whether to seek the testimony of an expert witness. As a consequence, it suggested that the Commission explicitly require its administrative law judges (''ALJs'') to consider the amount of time a respondent has had to prepare when issuing an order directing him or her to submit materials under the new rule.

This suggestion is similar to other comments in both letters, requesting that the amended Rules of Practice include detailed guidelines for the Commission's ALJs to follow in scheduling proceedings. The Commission generally avoids interfering with the discretion of an ALJ to control his or her docket. Moreover, in new Rule 10.42(d), the Commission specifically authorizes its ALJs to modify any requirement of new Rules 10.42(a), 10.42(b) or 10.42(c) that a party can show is unduly burdensome or inappropriate under all the circumstances. The Commission is not inclined to attempt to draft a code of all the various factors an ALJ may take into account in establishing a schedule for the production of prehearing materials under new Rule 10.42(a) or for other prehearing procedures. The Commission is confident that, in issuing scheduling orders, its ALJs will take all relevant factors into consideration so as to ensure both fairness and efficiency. Accordingly, the Commission has determined to adopt new Rule 10.42(a) as proposed, without making any further changes.[3]

B. Investigatory Materials

As proposed by the Commission, new Rule 10.42(b) obligates the Division of Enforcement to make available for inspection and copying by the respondents a broad range of documents obtained during the investigation that preceded the filing of the complaint against them. These include all documents that were subpoenaed or otherwise obtained by the Division from persons not employed by the Commission and all transcripts of investigative testimony taken by the Division, together with all exhibits to those transcripts. As proposed, the Division would not have to produce, however, any documents that reveal (1) the identity of confidential sources, (2) confidential investigatory techniques or procedures or (3) the business transactions and positions of persons other than the respondents unless they are relevant to the resolution of the

[1] *See* 63 FR 16453 (April 3, 1998).

[2] Although the comment period was originally scheduled to end on June 2, 1998, it was extended by the Commission for an additional 30 days. *See* 63 FR 30675 (June 5, 1998).

[3] For the sake of accuracy, the heading of new Rule 10.42(a) has been changed from ''Pretrial materials'' to ''Prehearing materials.''

proceeding. In addition, nothing in the new rule limits the Division's ability to withhold documents or other information on the grounds of privilege or the work product doctrine.[4]

In commenting on new Rule 10.42(b), both the FIA and the NYSBA expressed concern about a number of specific provisions and asked the Commission to consider alternative approaches. As a result of these comments and the Commission's own review of the original proposal, several changes have been made in the wording of new Rule 10.42(b). A discussion of the comments and changes follows.[5]

As an initial matter, based on its own further consideration of new Rule 10.42(b), the Commission has made several substantive changes in the final rule that are designed to clarify the limitations of the Division's disclosure obligations. First, the final rule makes clear that, if the Commission or another governmental entity has a continuing investigative interest in another matter or another person, the Division does not have to turn over information that relates to the other matter or person simply because it happens to have been obtained as part of the investigation that led to the pending proceeding. Only if the information is also relevant to the resolution of the proceeding would it have to be made available to the respondents under new Rule 10.42(b).

Second, and in a similar vein, the final rule clarifies that, if a proceeding has resulted from a broad investigation into a general subject matter or a general kind of conduct, the Division's disclosure obligation under new Rule 10.42(b) only attaches to that portion of the investigation relating to the particular transactions, conduct or persons involved in the pending proceeding. At times, the Division will undertake an investigation into a general subject matter area, like the one that recently occurred in connection with so-called hedge to arrive contracts in the grain industry. Such an investigation may spawn a number of separate inquiries and result in the initiation of a number of separate proceedings. When a proceeding is initiated as a result of this kind of broad investigation, the Division is not required to produce all of the documents that it has obtained in the larger investigation. Instead, as paragraph (3) of new Rule 10.42(b) now indicates, it will only be obligated to produce those materials that relate to the particular matters at issue in the pending proceeding.

Third, a provision has been added to new Rule 10.42(b) that allows the Division to withhold information obtained from domestic or foreign governmental entities or from a foreign futures authority, as defined in 7 U.S.C. 1a(10), that either (1) is not relevant to the resolution of the proceeding or (2) was provided on condition that it not be disclosed or only be disclosed by the Commission, or a representative of the Commission, as evidence in an enforcement or other proceeding. To carry out its statutory duties effectively, the Commission must be in a position to receive information from other governmental entities and from foreign futures authorities under circumstances that allow them to be as forthcoming as possible. Thus, the Commission must be able to protect the confidentiality of information that is irrelevant to the pending proceeding or was furnished to the Commission upon condition that its disclosure be restricted. The language that the Commission has added to new Rule 10.42(b) strikes a balance between the appropriate disclosure of information to the respondents in a proceeding and the Commission's need to encourage cooperative information-sharing with other governmental entities here and abroad and with foreign futures authorities.[6]

Turning to other concerns about new Rule 10.42(b), the FIA comment letter proposed that the Division's disclosure obligations be widened to include all subpoenas and written requests for information issued by the Division, as well as all relevant final examination and inspection reports prepared by the Commission's Division of Trading and Markets and Division of Economic Analysis. The Commission agrees that making available for inspection and copying by respondents those portions of subpoenas and written requests for information that resulted in the production of investigative materials may assist the respondents in understanding the produced materials. Accordingly, language has been added to the new rule requiring the Division to provide respondents with access not only to all documents that were produced pursuant to subpoenas issued by the Division or otherwise obtained from persons not employed by the Commission, but also to any portion of a subpoena or written request that resulted in the furnishing of such documents to the Division. However, respondents need not be given access to subpoenas and written requests (or any portion of a subpoena or written request) that did not result in the production of investigatory materials being made available to the respondents. The Commission is also of the view that the FIA's request for all relevant final examination and inspection reports is too vague.

Further commenting on new Rule 10.42(b), the FIA also requested that the Division be required to make investigatory materials available to a respondent within 14 days after he or she files an answer to the complaint. This proposal, however, invites the kind of micromanaging of the prehearing scheduling process in which the Commission is not prepared to engage.

The NYSBA's comment letter raised separate concerns regarding new Rule 10.42(b). First, it noted that, by making investigative materials available at the Commission office where they are ordinarily maintained, the new rule potentially works a hardship on respondents, particularly where the investigation leading to the complaint was conducted by Division staff at the Commission's headquarters in Washington, D.C. Also, the letter suggested that, in the event the Division chooses to withhold documents from production under new Rule 10.42(b), it automatically should be required to compile an index of such documents, as is now the case under the Federal Rules of Civil Procedure.

Both points are well taken. Accordingly, new Rule 10.42(b) has been revised to require that, upon written request, a respondent will be given access to prehearing materials at

[4] In the final version of new Rule 10.42(b), this provision has been revised to make clear that the rule is not intended to require the production of documents containing information that is protected from disclosure by applicable law.

[5] The FIA suggested that a separate provision be added to new Rule 10.42 clarifying that, notwithstanding the Division's right to withhold documents on claims of privilege or the work product doctrine, the Division is nonetheless obligated to turn over all exculpatory materials required to be produced under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). In the notice announcing the proposed amendments, the Commission expressly stated that the scope of the Division's obligations to produce material exculpatory information under *In re First National Monetary Corp.*, [1982–1984 Transfer Binder] Comm. Fut. L. Rep. CCH) ¶ 21,853 at 27,581 (CFTC Nov. 13, 1981) and its progeny is not addressed by these rule changes. 63 FR 16455 n.3. The issues potentially raised by consideration of the appropriate interpretation and application of an obligation to produce material exculpatory information are broad and complex. They have been addressed to date only to a very limited extent in Commission adjudicatory decisions. For these reasons, the Commission is adhering to its decision not to address those issues in these rule amendments.

[6] Of course, like all of the documents that new Rule 10.42(b) allows the Division to withhold from inspection and copying by the respondents, these materials may have to be produced under other provisions in the rules, for example, if the Division intends to introduce them into evidence at the hearing, if they were relied upon by an expert witness testifying on the Division's behalf or if they were appended as exhibits to a witness statement or to investigate testimony taken by the Division.

the Commission office nearest to the location where the respondent or his or her counsel resides or works. In addition, the Division will be obligated to furnish the respondents with an index of all documents being withheld when it makes prehearing materials available for inspection and copying under new Rule 10.42(b). The new rule explicitly states that the index of withheld documents should provide sufficient information to enable the respondents to assess the privilege or protection being claimed by the Division, consistent with the asserted privilege or protection against disclosure.[7]

New Rule 10.42(b) does not require the Division to identify on its index of withheld documents any materials containing information obtained from a governmental agency in the United States or abroad or from a foreign futures authority that was provided on condition that it not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding. In the Commission's view, no point would be served by listing such materials on the Division's index, since they would be properly withheld on the basis of the condition alone. However, if the Division has received these kinds of materials from a governmental agency or foreign futures authority, it will be required to inform the respondents of that fact, without having to index or describe further any of the documents at issue or their source.

Both the FIA and NYSBA objected to the provision in new Rule 10.42(b) that deals with any failure by the Division to make investigative materials available to the respondents. As proposed, the new rule requires that, in the event of such a failure, no rehearing or reconsideration of a matter already heard or decided shall be required, unless the respondent demonstrates resulting prejudice. Each comment letter argued that the burden should be on the Division to show that any failure to make documents available did not prejudice the respondents. This argument overlooks, however, a substantial body of federal case law holding that, even in criminal cases, it is the defendant's burden to show prejudice from the loss or wrongful withholding of evidence by the government. *United States* v. *Walsh,* 75 F.3d 1, 8 (1st Cir. 1995) (noncompliance with the Jencks Act does not justify overturning a criminal conviction in the absence of ''some showing of prejudice* * *beyond mere assertions that the defendant would have conducted cross-examination differently''). As a general rule, the burden is on the party claiming prejudice to show prejudice and for good reason, since among other considerations, the obligation to prove a negative—in this case, the lack of prejudice—often can be impossible one. Accordingly, the final wording of paragraph (6) of new Rule 10.42(b) is unchanged.[8]

C. Witness Statements

As proposed by the Commission, new Rule 10.42(c) requires that each party to a proceeding make available to all of the other parties any statement made by any person whom the party calls, or expects to call, as a witness that relates to his or her anticipated testimony. These statements include transcripts of investigative or trial testimony given by the witness, written statements signed by witness and substantially verbatim notes of interviews with the witness, as well as the exhibits to such transcripts, statements or notes. For purposes of the new rule, substantially verbatim notes mean notes that fairly record the witness's exact words, subject to minor inconsequential deviations.

New Rule 10.42(c) generally accords with Rule 26.2 of the Federal Rules of Criminal Procedures, which places in the Federal Rules the substance of the Jencks Act, 18 U.S.C. 3500. It differs from the former Rules of Practice, *inter alia,* by requiring all parties, and not just the Division of Enforcement, to produce witness statements. In commenting on the new rule, the FIA and NYSBA argued that it disadvantages respondents unfairly. In their view, by having to produce, in advance of the hearing, statements of potentials witnesses who may or may not testify and the scope of whose testimony may still be uncertain, respondents are being forced to disclose their strategy and evidence prematurely. Also, in their view, since the Division has had an opportunity to prepare its case before the compliant was filed, it is not similarly disadvantaged.

In response to this concern, the language of new Rule 10.42(c) has been revised to require that a respondent will not have to make witness statements available until the close of the Division's case-in-chief at the hearing. By then, the respondent will reasonably know whom he or she will call as witnesses for the defense, as well as the testimony that those witnesses can be expected to give. The final rule also provides that, if additional time is needed for the Division to review and analyze a respondent's witness statements before cross-examining his or her witnesses, the ALJ should grant the Division the necessary continuance.

The NYSBA also suggested that the Commission require the production of any summaries that have been made of investigative testimony or witness statements. In the **Federal Register** notice announcing the proposed amendments, however, the Commission specifically noted that it does not intend to require the production of notes prepared by persons other than the witness himself or herself, including attorney's notes. The Commission created a narrow exception for notes that in effect constitute transcriptions of a witness's statement. The NYSBA proposal would substantially widen that narrow exception, opening the door to endless disputes over what constitutes a summary and putting at risk properly privileged material. Accordingly, the Commission has not adopted the NYSBA proposal.

D. Objections to Authenticity or Admissibility of Documents

New Rule 10.42(f) governs prehearing objections to the authenticity or admissibility of documents. As proposed, it provides that, upon order by the ALJ presiding over a proceeding, each party serve on the other parties a list of documents that it intends to introduce at the hearing. Upon receipt of the list, the other parties have 20 days to file a response, disclosing any objections that they wish to preserve as to the authenticity or admissibility of the documents thus identified. Where any other objects to the authenticity or admissibility of any of the listed documents, the ALK may treat the list of documents as a motion *in limine.* After affording the parties an opportunity to brief the motion to the degree necessary for a decision, the ALJ may rule on the advance of the hearing to the extent appropriate.

New Rule 10.42(f) is modeled on Rule 26(a)(3)(C) of the Federal Rules of Civil Procedure. As the NYSBA comment

[7] In like fashion, paragraph (3) of new Rule 10.42(c) is being revised to require that each party to a proceeding make and keep a similar log of all documents withheld under that provision and turn it over to the other parties when producing witness statements. The FIA comment letter also proposed explicit recognition in the rules of an ALJ's authority to conduct *in camera* review of materials being withheld. While ALJs have exercised such authority without Commission objection, the Commission does not wish at this time to open up questions concerning the nature and scope of any such authority by addressing it through rulemaking.

[8] The Commission likewise has determined not to change the burden relating to the showing of prejudice in paragraph (4) of new Rule 10.42(c), which deals with failure of a party to produce witness statements.

letter correctly noted, Rule 26(a)(3)(C) reserves for trial a party's right to object to the admissibility of a document on grounds of relevance, undue prejudice, confusion of issues, needles presentation of cumulative evidence or waste of time. By contrast, under new Rule 10.42(f) as proposed, all objections not raised by a party may be deemed waived. To make the new rule more compatible with the Federal Rules on which it was modeled, the Commission has modified the final rule to permit all objections not raised by a party to be deemed waived, except fro relevance, needless presentation of cumulative evidence or waste of time. Because the evidence and argument in an administrative proceeding is heard by an ALJ rather than a jury, there is no compelling need to preserve objections based on undue prejudice or confusion of the issues.[9]

E. Subpoenas

Under the former rules, documents subpoenaed by a party to an administrative proceeding could only be produced at the time of the hearing itself. New Rule 10.68 allows the parties to a proceeding to apply for the issuance of a subpoena by the ALJ requiring the production of documents at any designated time and place. Although both comment letters were generally supportive of the new rule, the FIA suggested it be modified (1) to permit the filing of a motion to quash by the owner, creator or subject of a subpoenaed document (rather than just the recipient of the subpoena) and (2) to enlarge the time within such a motion could be filed from seven days to 15 days. In addition, the FIA asked the Commission to clarify the standards under which a protective order can be obtained from the ALJ.

In the Commission's views, new Rule 10.68 should not be an attempt to resolve issues of standing with regard to motions to quash or modify subpoenas. Such issues are more appropriately addressed through adjudication.[10] Also, the Commission has determined to set the time for filing such motions at 10 days after the subpoena has been served, which is the amount of time that Rule 10.26 allows generally for responses to motions. Accordingly, paragraph (c) of new Rule 10.68 has been revised to provide simply that, within 10 days after service of a subpoena or at any time prior to the return date thereof, whichever is earlier, a motion to quash or modify the subpoena may be filed with the ALJ who issued it, without reference to who would have standing to file such a motion.[11]

To clarify the standards under which protective orders may be authorized, the Commission has added language to new Rule 10.68(c)(2) explicitly providing that protective orders may be issued upon a showing of good cause and that, in considering whether to issue a protective order, ALJs shall weight the harm resulting from disclosure against the benefits of disclosure. *Cf.* Fed. R. Civ. P. 26(c) advisory committee's note (observing that, in deciding whether to give trade secrets immunity against disclosure, federal courts routinely weigh the moving party's claim to privacy against the need for disclosure).

In promulgating new Rule 10.68(c)(2), the Commission notes that the burden of justifying any protective order remains on the person who seeks it. *Federal Trade Comm'n* v. *Standard Financial Management*, 830 F.2d 404, 411 (1st Cir. 1987) (unsealing defendant's financial documents as germane to district court's approval of negotiated settlement with agency). Good cause can be established only upon a showing that the person seeking the protective order will suffer a clearly defined and serious injury if the requested order is not issued. *Id.* at 412 (''[a] finding of good cause [to impound documents] must be based on a particular factual demonstration of potential harm, not on conclusory statements''). Any such injury must be balanced against the public's recognized right of access to judicial records. *Id.* at 410. All of these considerations, which are reflected in new Rule 10.68(c)(2), are particularly pertinent in the context of enforcement proceedings initiated by the Commission, since such proceedings are ''patently matters of significant public concern.'' *Id.* at 412.

In connection with these revisions to new Rule 1068(c)(2), the Commission has deleted language found in paragraph (7) of new Rule 10.42(c) that dealt with the issuance of protective orders covering confidential information contained in prehearing materials produced by the Division of Enforcement. In considering requests for protective orders sought under any section of the rules, ALJs henceforth shall rely on the standards set forth in paragraph (2) of new Rule 10.68(c)[12]

II. Rule Changes Related to Restitution

Since 1992, Section 6(c) of the Act, 7 U.S.C. 9 (1994), has authorized the Commission to require restitution in administrative proceedings to customers of damages proximately caused by violations committed by the respondents. To facilitate this process, the Commission prosed amending Rule 10.84 of the Rules of Practice to include a new provisions specifically to address restitution and adding a new Subpart I, which would address the administration of restitution orders.

Commentting on this proposal, the NYSBA suggested that, because the other provisions of Rule 10.84 deal only with procedural matters, it would be preferable to move all of the regulatory provisions on restitution to the new Subpart I. In promulgating final rules, the Commission has made the suggested revision.

As thus revised, the final Subpart I provides that, in any proceeding where an order requiring restitution may be entered, the ALJ shall determine, as part of his or her Initial Decision, whether restitution is an appropriate remedy. In making this decision, the ALJ can consider the degree of complexity likely to be involved in establishing individual claims; the likehood that such claimants can obtain compensation through their own efforts; the respondent's ability to pay claimants damages that his or her violations have caused; the availability of resources to administer restitution; and any other matters that justice may require. *See In re Staryk*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,812 (CFTC Dec. 18, 1997). In the event that restitution is deemed to be appropriate, the ALJ's Initial Decision shall include an order of restitution. In it, the ALJ will specify (1) the violations that form the basis for restitution, (2) the particular persons, or class or classes of persons, who have suffered damages proximately caused by such violations, (3) the method of calculating the amount of damages that will be paid as restitution, and (4) if then determinable, the amount of restitution to be paid.

Under new Subpart I, the ALJ's Initial Decision need not address how or when restitution will be paid. Instead, after an

[9] In discussing new Rule 10.26(f), the NYSBA comment letter also questioned whether 20 days is sufficient time for a party to identify all of the objections that he or she may have to the substantial number of trading records and other documents typically involved in a complex trade-practice case. To allay this concern, the language of the final rule has been revised to require the filing of a party's response within 20 days or such other time as may be designated by the ALJ. Again, the Commission is confident that its ALJs will consider all relevant circumstances in trying to set as expeditious a schedule as practicable, consistent with fairness to all parties.

[10] *See generally* Fed. R. Civ. P. 45(c)(3).

[11] The ALJ, of course, may extend the deadline for filing a motion to quash or modify a subpoena, just as he or she may extend other deadlines in the Rules of Practice, for good cause shown.

[12] Consistent with the former Rules of Practice, new Rule 10.68(c)(2) provides that no protective order shall be granted that will tend to impair either the Division's or a respondent's ability to present its case.

order requiring restitution becomes effective (*i.e.*, becomes final or is not stayed), the Division of Enforcement will be required to recommend to the Commission or, at the Commission's discretion, to the ALJ, a procedure for implementing the payment of restitution. Each respondent will be required to pay restitution shall be afforded notice of the Division's recommendations and an opportunity to be heard.

Based on the Division's recommendations and any response from the respondents, the Commission or the ALJ shall establish a procedure for identifying and notifying individual claimants who may be entitled to restitution; receiving and evaluating claims; obtaining funds to be paid as restitution from the respondents; and distributing such funds to qualified claimants. If appropriate, the Commission or the ALJ may appoint any person, including a Commission employee, to administer, or assist in administering, restitution. If the administrator is a Commission employee, no fees shall be charged for his or her services or for services performed by other Commission employees working under his or her direction.[13]

Commenting on the new rules facilitating restitution, both the FIA and the NYSBA argued that, in order to be consistent with provisions of the Act governing reparations proceedings and private rights of action, the Commission should impose a two-year state of limitations on claims for restitution in administrative enforcement proceedings. This argument ignores that, in amending Section 6(c) to add restitution as a remedy available to the Commission in administrative proceedings, Congress did not limit restitution to violations occurring less than two years before the filing of a complaint. Similarly, despite concerns raised by the FIA, the Commission does not believe it would be appropriate to revise new Subpart I to preclude persons who have sued a respondent in other forums from receiving restitution in an administrative enforcement proceeding. The Commission expects that, as part of the process of administering a restitution order, all appropriate equitable considerations can and will be taken into account to avoid double recovery or an undue windfall to any person.

Finally, new Subpart I provides that, unless otherwise ordered by the Commission, all costs incurred in administering an order of restitution shall be paid from the restitution funds obtained from the respondent who was so sanctioned. In response to this provision, the NYSBA asked that the Commission clarify that all costs incurred in administering restitution will come from the restitution fund itself and not from the funds of the respondent. The Commission recognizes that, in federal court practice, receivership costs and other expenses arising from the administration of restitution ordinarily are paid out of the restitution funds themselves. *See generally Gaskill v. Gordon*, 27 F.3d 248,251 (7th Cir. 1994) ''[a]s a general rule, the expenses and fees of a receivership are a charge upon the property administered''). Nevertheless, it would be within the discretion of the Commission to require a respondent to pay some or all of the costs incurred in administering an order of restitution. *Id.* at 250 (''[r]eceivership is an equitable remedy, and the district court may, in its discretion, determine who shall be charged with the costs of receivership'').

III. Other Rule Changes

In addition to addressing the proposed amendments relating to discovery and restitution, the FIA and the NYSBA commented on other changes and proposed additional revisions to the Rules of Practice. A review of those comments and proposals follows.

A. Separation of Functions and Ex Parte Contacts

Although the Commission did not announce any proposal to amend Rule 10.9, which deals with the separation of functions in enforcement proceedings, the FIA comment letter pointed out that, as currently written, the rule does not fully track the wording of 5 U.S.C. 554(d), the section of the Administrative Procedure Act (''APA'') on which it is based. The separation-of-functions requirement presently set forth in Rule 10.9 only references Initial Decisions issued by the Commission's ALJs. By contrast, 5 U.S.C. 554(d) requires that:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The Commission and its staff, of course, abide by their obligations under the law, and so the more narrow wording of Rule 10.9 is of no substantive consequence. However, to avoid any possible misunderstanding or confusion, the Commission has amended existing Rule 10.9 to follow the language of the APA more closely.

Although the FIA comment letter suggested otherwise, the Commission sees no need to revise existing Rule 10.10, which prohibits interested persons outside the Commission from making *ex parte* communications relevant to the merits of a proceeding to any Commissioner, ALJ or Commission decisional employee. The language of Rule 10.10 fully accords with 5 U.S.C. 557(d)(1) and, like that provision of the APA, is not intended to address communications between the Commission and its staff. While the Commission recognizes that some agencies have extended the *ex parte* communications rule to cover persons inside the agency, the Commission does not view that extension as either necessary or well advised. In the Commission's view, 5 U.S.C. 554(d) and the revised Rule 10.9 address the relevant concern. Accordingly, the expansion of the *ex parte* communication rule suggested in the FIA comment letter is not being adopted.

B. Amendments and Supplemental Pleadings

New Rule 10.24 clarifies the authority retained by the Commission to amend the complaint in an administrative enforcement proceeding after the proceeding has been initiated. In addition, it permits the Division of Enforcement, upon motion to the ALJ and with notice to all of the other parties and the Commission, to amend a complaint for the limited purpose of correcting typographical or clerical errors or making similar, non-substantive revisions.

In its comment letter, the NYSBA objected to new Rule 10.24 as disadvantaging respondents unfairly. According to the comment letter, the Commission should be able to amend a complaint only after the respondent has had an opportunity to argue against amendment. The NYSBA's objections notwithstanding, new Rule 10.24 simply recognizes the plenary authority retained by the Commission over complaints that it issues in administrative enforcement proceedings. In order to ensure that respondents are not unfairly disadvantaged when the Commission amends a complaint, a suggestion made

[13] Under new Subpart I, the ALJ will be permitted to combine the procedures for adopting and administering a plan of restitution with the hearing on liability, when the ALJ concludes that presentation, consideration and resolution of the issues relating to restitution will not materially delay the conclusion of the hearing or the issuance of an initial decision.

by both comment letters has been incorporated into the final version of new Rule 10.24. As a result, the new rule will provide that, if the Commission amends the complaint in an administrative proceeding, the ALJ shall adjust the scheduling of the proceeding so as to avoid any prejudice to any of the parties to the proceeding.

C. Interlocutory Appeals

Like its predecessor, new Rule 10.101 governs the filing of interlocutory appeals from specified rulings of an ALJ. To correct an ambiguity in the proposed rule that was pointed out in one of the comment letters, the second sentence in paragraph (b)(1) of the rule has been revised to clarify that, if a request for certification has been filed with the ALJ, an application for interlocutory review under any of the five paragraphs in § 10.101(a) may be filed with the Commission within five days after notification of the ALJ's ruling on the request for certification.

D. Review of Initial Decisions

Like its predecessor, new Rule 10.102 governs the appeal of Initial Decisions to the Commission. Unlike the former rule, however, the new rule allows cross appeals and provides for the filing of reply briefs by appellants. Under new rule 10.102, if a timely notice of appeal has been filed by one party, any other party may file a notice of cross appeal within 15 days after service of the notice of appeal or within 15 days after service of the Initial Decision, whichever is later. If such a notice of cross appeal is filed, the Commission will, to the extent practicable, adjust both the briefing schedule and any otherwise applicable page limitations in order to allow for consolidated briefing by all appealing parties.

In its comment letter, the NYSBA objected to cross appeals, asserting that they raise due process issues. According to the comment letter, by setting up the risk of a cross appeal by the Division of Enforcement when an appeal otherwise would not have been filed, the new rule creates a disincentive for the respondents to appeal Initial Decisions. This argument ignores the fact that cross appeals have long been permitted under the Federal Rules of Appellate Procedure, with no apparent abridgement of any party's right to due process. *See* F.R. App. P. 4(a)(3). The Commission continues to believe that the provision of cross appeals will facilitate the appellate process and so has retained the provision as proposed in the final rules.

The NYSBA comment letter also noted that, because existing Rule 10.12(a)(2) already does so, there is no need for new Rule 10.102 to extend by three days the time within which a notice of appeal must be filed if service of the Initial Decision or other order terminating the proceeding has been effected by mail or commercial carrier. However, since an ALJ is not a party to a proceeding and an Initial Decision is not a document to which any response can be filed, it is unclear that Rule 10.12(a)(2) governs the time within which a notice of appeal can be filed. By amending the language regarding the deadline for filing a notice of appeal, new Rule 10.102 removes any ambiguity.

E. Reconsideration; Stay Pending Appeal

Unlike its predecessor, which addressed motions for reconsideration of Commission opinions and orders, new Rule 10.106 sets forth the standards on which the Commission relies in granting applications by respondents to stay sanctions in administrative enforcement proceedings pending reconsideration by the Commission or judicial appeal. In order to obtain such relief, the applicant must show (1) that he or she is likely to succeed on the merits of the appeal, (2) that denial of the requested stay would cause irreparable harm to the applicant and (3) that neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

Also, as proposed, new Rule 10.106 provides that, as long as neither the public interest nor the interest of any other party is adversely affected, the Commission shall grant any application to stay the effect of a civil monetary penalty once the applicant has filed an appropriate surety bond with the Commission's Proceedings Clerk. In commenting on the new rule, both the FIA and the NYSBA appeared to question whether a surety bond must be filed along with the stay application itself or afterwards, *i.e.*, once the Commission has determined to grant the stay application.

The final version of new Rule 10.106 has been revised to clarify that, if a respondent seeks to stay the imposition of a civil monetary penalty, he or she must file an appropriate surety bond at the time he or she applies for relief and demonstrate that neither the public interest nor the interest of any other party will be harmed by the stay. As the revision also makes clear, if a respondent chooses not to post a surety bond, then he or she will have to meet all of the criteria necessary to stay the effectiveness of other sanctions or the Commission will not stay the imposition of his or her civil monetary penalty.

In addition, the final rule has been revised to allow a respondent to use the same surety bond procedure in seeking to stay the effectiveness of an order requiring him or her to pay a specific sum as restitution. The Commission added this provision because the rationale justifying a stay of civil penalties after filing a bond is equally applicable to orders of restitution where the amount of restitution to be paid by the respondent has been determined. This provision would not apply, however, to any restitution order of the Commission in which the specific amount of restitution is not set.[14]

F. Commission Policy Relating to the Acceptance of Settlements

As part of the proposed amendments to the Rules of Practice, the Commission included a statement setting forth its policy not to accept any offer of settlement in an administrative or civil proceeding if the respondent or defendant wished to continue to deny the allegations of the Commission's complaint (although they may state that they neither admit nor deny the allegations). The FIA comment letter suggested that the policy statement—which is being incorporated into the rules as new Appendix A—be modified to reflect the fact that the Commission's position is grounded in public policy.

The Commission believes that the public-policy considerations underlying Appendix A are clearly reflected in the document itself. In accepting a settlement and entering an order finding violations of the Act or the regulations, the Commission makes uncontested findings of fact and conclusions of law. The Commission does not believe that it would be appropriate for the agency to be making such uncontested findings of violations if the party against whom the uncontested findings are to be entered is continuing to deny the alleged misconduct. Since these considerations are clearly articulated in Appendix A, the Commission sees no need to alter the wording of its policy statement at this time.

IV. Related Matters

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.* (1988), requires that, in adopting final rules, agencies consider the impact of those

[14] As revised, new Rule 10.106 also makes clear that, in the event the Commission denies a motion to stay the effectiveness of an order imposing a civil monetary penalty or directing the respondents to pay a fixed amount as restitution, any surety bond that was filed by the applicant will be returned to him or her by the Processings Clerk.

rules on small businesses. In its preamble to the proposed amendments, the Commission determined that the Part 10 rules are not subject to the provisions of the RFA because they relate solely to agency organization, procedure and practice. Nevertheless, because the rules do not impose regulatory obligations on commodity professionals and small commodity firms and because the amendments adopted by the Commission will expedite and impose the administrative process, the Chairperson certifies, on behalf of the Commission, that the amended rules will not have a significant economic impact on a substantial number of small business entities.

List of Subjects in 17 CFR Part 10

Administrative practice and procedure, Commodity futures.

In consideration of the foregoing, the Commission amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 10—RULES OF PRACTICE

1. The authority citation for part 10 continues to read as follows:

Authority: Pub. L. 93–463, sec. 101(a)(11), 88 Stat. 1391; 7 U.S.C. 4a(j), unless otherwise noted.

2. Section 10.1 is amended by deleting the third ''and'' from paragraph (d), redesignating paragraphs (e), (f), (g) and (h) as paragraphs (f), (g), (h) and (i), respectively, and adding a new paragraph (e), to read as follows.

§ 10.1 Scope and applicability of rules of practice.

* * * * *

(e) The issuance of restitution orders pursuant to section 6(c) of the Act, 7 U.S.C. 9; and

* * * * *

3. Section 10.9 is amended by revising paragraph (b) to read as follows:

§ 10.9 Separation of functions.

* * * * *

(b) No officer, employee or agent of the Commission who is engaged in the performance of investigative or prosecuting functions in connection with any proceeding shall, in that proceeding or any factually related proceeding, participate or advise in the decision of the Administrative Law Judge or the Commission except as witness or counsel in the proceeding, without the express written consent of the respondents in the proceeding. This provision shall not apply to the members of the Commission.

* * * * *

4. Section 10.1 is amended by revising paragraph (a)(2) to read as follows:

§ 10.12 Service and filing of documents; form and execution.

(a) * * *

(2) *How service is made.* Service shall be made by personal service, delivering the documents by first-class United States mail or a similar commercial package delivery service, or transmitting the documents via facsimile machine. Service shall be complete at the time of personal service or upon deposit in the mails or with a similar commercial package delivery service of a properly addressed document for which all postage or fees have been paid to the mail or delivery service. Where a party effects service by mail or similar package delivery service, the time within which the party being served may respond shall be extended by three days. Service by facsimile machine shall be permitted only if all parties to the proceeding have agreed to such an arrangement in writing and a copy of the written agreement, signed by each party, has been filed with the Proceedings Clerk. The agreement must specify the facsimile machine telephone numbers to be used, the hours during which the facsimile machine is in operation and when service will be deemed complete.

* * * * *

5. Section 10.21 is revised to read as follows:

§ 10.21 Commencement of the proceeding.

An adjudicatory proceeding is commenced when a complaint and notice of hearings is filed with the Office of Proceedings.

6. Section 10.22 is amended by adding a new sentence at the end of the introductory text in paragraph (b) and adding new paragraphs (b)(1) and (b)(2) to read as follows:

§ 10.22 Complaint and notice of hearing:

* * * * *

(b) *Service.* * * * If a respondent is not found at his last known business or residence address and no forwarding address is available, additional service may be made, at the discretion of the Commission, as follows:

(1) By publishing a notice of the filing of the proceeding and a summary of the complaint, approved by the Commission or the Administrative Law Judge, once a week for three consecutive weeks in one or more newspapers having a general circulation where the respondent's last known business or residence address was located and, if ascertainable, where the respondent is believed to reside or be doing business currently; and

(2) By continuously displaying the complaint on the Commission's Internet web site during the period referred to in paragraph (b)(1) of this section.

7. Section 10.4 is amended by revising paragraphs (a), (b) and (c) to read as follows.

§ 10.24 Amendments and supplemental pleadings.

(a) *Complaint and notice of hearing.* The Commission may, at any time, amend the complaint and notice of hearing in any proceeding. If the Commission so amends the complaint and notice of hearing, the Administrative Law Judge shall adjust the scheduling of the proceeding to the extent necessary to avoid any prejudice to any of the parties to the proceeding. Upon motion to the Administrative Law Judge and with notice to all other parties and the Commission, the Division of Enforcement may amend a complaint to correct typographical and clerical errors or to make other technical, non-substantive revisions within the scope of the original complaint.

(b) *Other pleadings.* Except for the complaint and notice of hearing, a party may amend any pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, he may amend it within 20 days after it is served. Otherwise a party may amend a pleading only by leave of the Administrative Law Judge, which shall be freely given when justice so requires.

(c) *Response to amended pleadings.* Any party may file a response to any amendment to any pleading, including the complaint, within ten days after the date of service upon him of the amendment or within the time provided to respond to the original pleading, whichever is later.

* * * * *

8. Section 10.26 is amended by revising the last sentence in paragraph (b) to read as follows:

§ 10.26 Motions and other papers.

* * * * *

(b) *Answers to motions.* * * * The absence of a response to a motion may be considered by the Administrative Law Judge or the Commission in deciding whether to grant the requested relief.

* * * * *

9. Section 10.41 is amended by redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively, and

by adding a new paragraph (f) to read as follows.

§ 10.41 Prehearing conferences; procedural matters.

* * * * *

(f) Considering objections to the introduction of documentary evidence and the testimony of witnesses identified in prehearing materials filed or otherwise furnished by the parties pursuant to § 10.42;

* * * * *

10. Section 10.42 is amended by revising paragraph (a); by redesignating paragraphs (b) and (c) as paragraphs (c) and (e), respectively; by revising newly redesignated paragraphs (c) and (e)(1); and by adding a new paragraph (b), a new paragraph (d) and a new paragraph (f), to read as follows.

§ 10.42 Discovery.

(a) *Prehearing Materials*—(1) *In general.* Unless otherwise ordered by an Administrative Law Judge, the parties to a proceeding shall furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge in the form of a prehearing memorandum or otherwise:

(i) An outline of its case or defense;

(ii) The legal theories upon which it will rely;

(iii) The identify, and the city and state of residence, of each witness, other than an expert witness, who is expected to testify on its behalf, along with a brief summary of the matters to be covered by the witness's expected testimony;

(iv) A list of documents which it intends to introduce at the hearing, along with copies of any such documents which the other parties do not already have in their possession and to which they do not have reasonably ready access.

(2) *Expert witnesses.* Unless otherwise ordered by the Administrative Law Judge, in addition to the information described in paragraph (a)(1) of this section, any party who intends to call an expert witness shall also furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge:

(i) A statement identifying the witness and setting forth his or her qualifications;

(ii) A list of any publications authored by the witness within the preceding ten years;

(iii) A list of all cases in which the witness has testified as an expert, at trial or in deposition, within the preceding four years;

(iv) A complete statement of all opinions to be expressed by the witness and the basis or reasons for those opinions; and

(v) A list of any documents, data or other written information which were considered by the witness in forming his or her opinions, along with copies of any such documents, data or information which the other parties do not already have in their possession and to which they do not have reasonably ready access.

(3) The foregoing procedures shall not be deemed applicable to rebuttal evidence submitted by any party at the hearing.

(4) In any action where a party fails to comply with the requirements of this paragraph (a), the Administrative Law Judge may make such orders in regard to the failure as are just, taking into account all of the relevant facts and circumstances of the failure to comply.

(b) *Investigatory materials*—(1) *In general.* Unless otherwise ordered by the Commission or the Administrative Law Judge, the Division of Enforcement shall make available for inspection and copying by the respondents, prior to the scheduled hearing date, any of the following documents that were obtained by the Division prior to the institution of proceedings in connection with the investigation that led to the complaint and notice of hearing:

(i) All documents that were produced pursuant to subpoenas issued by the Division or otherwise obtained from persons not employed by the Commission, together with each subpoena or written request, or relevant portion thereof, that resulted in the furnishing of such documents to the Division; and

(ii) All transcripts of investigative testimony and all exhibits to those transcripts.

(2) *Documents that may be withheld.* The Division of Enforcement may withhold any document that would disclose:

(i) The identify of a confidential source;

(ii) Confidential investigatory techniques or procedures;

(iii) Separately the market positions, business transactions, trade secrets or names of customers of any persons other than the respondents, unless such information is relevant to the resolution of the proceeding;

(iv) Information relating to, or obtained with regard to, another matter of continuing investigatory interest to the Commission or another domestic or foreign governmental entity, unless such information is relevant to the resolution of the proceeding; or

(v) Information obtained from a domestic or foreign governmental entity or from a foreign futures authority that either is not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding.

(3) Nothing in paragraphs (b)(1) and (b)(2) of this section shall limit the ability of the Division of Enforcement to withhold documents or other information on the grounds of privilege, the work product doctrine or other protection from disclosure under applicable law. When the investigation by the Division of Enforcement that led to the pending proceeding encompasses transactions, conduct or persons other than those involved in the proceeding, the requirements of (b)(1) of this section shall apply only to the particular transaction, conduct and persons involved in the proceeding.

(4) *Index of withheld documents.* When documents are made available for inspection and copying pursuant to paragraph (b)(1) of this section, the Division of Enforcement shall furnish the respondents with an index of all documents that are withheld pursuant to paragraphs (b)(2) or (b)(3) of this section, except for any documents that are being withheld because they disclose information obtained from a domestic or foreign governmental entity or from a foreign futures authority on condition that the information not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding, in which case the Division shall inform the other parties of the fact that such documents are being withheld at the time it furnishes its index under this paragraph, but no further disclosures regarding those documents shall be required. This index shall describe the nature of the withheld documents in a manner that, to the extent practicable without revealing any information that itself is privileged or protected from disclosure by law or these rules, will enable the other parties to assess the applicability of the privilege or protection claimed.

(5) *Arrangements for inspection and copying.* Upon request by the respondents, all documents subject to inspection and copying pursuant to this paragraph (b) shall be made available to the respondents at the Commission office nearest the location where the respondents or their counsel live or work. Otherwise, the documents shall be made available at the Commission office where they are ordinarily maintained or at any other location agreed upon by the parties in writing. Upon payment of the appropriate fees

set forth in appendix B to part 145 of this chapter, any respondent may obtain a photocopy of any document made available for inspection. Without the prior written consent of the Division of Enforcement, no respondent shall have the right to take custody of any documents that are made available for inspection and copying, or to remove them from Commission premises.

(6) *Failure to make documents available.* In the event that the Division of Enforcement fails to make available documents subject to inspection and copying pursuant to this paragraph (b), no rehearing or reconsideration of a matter already heard or decided shall be required, unless the respondent demonstrates prejudice caused by the failure to make the documents available.

(7) *Requests for confidential treatment; protective orders.* If a person has requested confidential treatment of information submitted by him or her, either pursuant to rules adopted by the Commission under the Freedom of Information Act (part 145 of this chapter) or under the Commission's Rules Relating To Investigations (part 11 of this chapter), the Division of Enforcement shall notify him or her, if possible, that the information is to be disclosed to parties to proceeding and he or she may apply to the Administrative Law Judge for an order protecting the information from disclosure, consideration of which shall be governed by § 10.68(c)(2).

(c) *Witness statements*—(1) *In general.* Each party to an adjudicatory proceeding shall make available to the other parties any statement of any person whom the party calls, or expects to call, as a witness that relates to the anticipated testimony of the witness and is in the party's possession. Such statements shall include the following:

(i) Transcripts of investigative, deposition, trial or similar testimony given by the witness,

(ii) Written statements signed by the witness, and

(iii) Substantially verbatim notes of interviews with the witness, and all exhibits to such transcripts, statements and notes. For purposes of this paragraph (c), ''substantially verbatim notes'' means that fairly record the exact words of the witness, subject to minor, inconsequential deviations. Such statements shall include memoranda and other writings authored by the witness that contain information relating to his anticipated testimony. The Division of Enforcement shall produce witness statements pursuant to this paragraph prior to the scheduled hearing date, at a time to be designated by the Administrative Law Judge. Respondents shall produce witness statements pursuant to this paragraph at the close of the Division's case in chief during the hearing. If necessary, the Administrative Law Judge shall, upon request, grant the Division a continuance of the hearing in order to review and analyze any witness statements produced by the respondents.

(2) Nothing in paragraph (c)(1) of this section shall limit the ability of a party to withhold documents or other information on the grounds of privilege, the work product doctrine or other protection from disclosure under applicable law.

(3) *Index of withheld documents.* When a party makes witness statements available pursuant to paragraph (c)(1) of this section, he or she shall furnish each of the other parties with an index of all documents that the party is withholding on the grounds of privilege or work product. This index shall describe the nature of the withheld documents in a manner that, to the extent practicable without revealing information that itself is privileged or protected from disclosure by law or these rules, will enable the other parties to assess the applicability of the privilege or protection claimed.

(4) *Failure to produce witness statements.* In the event that a party fails to make available witness statements subject to production pursuant to this section, no rehearing or reconsideration of a matter already heard or decided shall be required, unless another party demonstrates prejudice caused by the failure to make the witness statements available.

(d) *Modification of production requirements.* The Administrative Law Judge shall modify any of the requirements of paragraphs (a) through (c) of this section that any party can show is unduly burdensome or is otherwise inappropriate under all the circumstances.

(e) *Admissions*—(1) *Request for admissions.* Any party may serve upon any other party, with a copy to the Proceedings Clerk, a written request for admission of the truth of any facts relevant to the pending proceeding set forth in the request. Each matter of which an admission is requested shall be separately set forth. Unless prior written approval is obtained from the Administrative Law Judge, the number of requests shall not exceed 50 in number including all discrete parts and subparts.

* * * * *

(f) *Objections to authenticity or admissibility of documents*—(1) *Identification of documents.* The Administrative Law Judge, acting on his or her own initiative or upon motion by any party, may direct each party to serve upon the other parties, with a copy to the Proceedings Clerk, a list identifying the documents that it intends to introduce at the hearing and requesting the other parties to file and serve a response disclosing any objection, together with the factual or legal grounds therefor, to the authenticity or admissibility of each document identified on the list. A copy of each document identified on the list shall be served with the request, unless the party being served already has the document in his possession or has reasonably ready access to it.

(2) *Objections to authenticity or admissibility.* Within 20 days after service or at such other time as may be designated by the Administrative Law Judge, each party upon whom the list described in paragraph (f)(1) of this section was served shall file a response disclosing any objection, together with the factual or legal grounds therefor, to the authenticity or admissibility of each document identified on the list. Except for relevance, waste of time or needless presentation of cumulative evidence, all objections not raised may be deemed waived.

(3) *Rulings on objections.* In his or her discretion, the Administrative Law Judge may treat as a motion in limine any list served by a party pursuant to paragraph (f)(1) of this section, where any other party has filed a response objecting to the authenticity or the admissibility on any item listed. In that event, after affording the parties an opportunity to file briefs containing arguments on the motion to the degree necessary for a decision, the ALJ may rule on any objection to the authenticity or admissibility of any document identified on the list in advance of trial, to the extent appropriate.

11. Section 10.66 is amended by revising paragraph (b) to read as follows:

§ 10.66 Conduct of the hearing.

* * * * *

(b) *Rights of parties.* Every party shall be entitled to due notice of hearings, the right to be represented by counsel, and the right to cross-examine witnesses, present oral and documentary evidence, submit rebuttal evidence, raise objections, make arguments and move for appropriate relief. Nothing in this paragraph limits the authority of the Commission or the Administrative Law Judge to exercise authority under other provision of the Commission's rules, to enforce the requirements that evidence presented be relevant to the proceeding

or to limit cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness.

* * * * *

12. Section 10.68 is amended by revising paragraphs (a)(1), (a)(2), (b)(3) and (c)(1), by revising the heading of paragraph (c), by adding four new sentences to the end of paragraph (c)(2), by revising the second sentence in paragraph (e)(1) and by adding a new sentence to the end of paragraph (f), to read as follows.

§ 10.68 Subpoenas.

(a) Application for and issuance of subpoenas—(1) *Application for and issuance of subpoena ad testificandum.* Any party may apply to the Administrative Law Judge for the issuance of a subpoena requiring a person to appear and testify (subpoena ad testificandum) at the hearing. All requests for the issuance of a subpoena ad testificandum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. A subpoena ad testificandum shall be issued upon a showing by the requesting party of the general relevance of the testimony being sought and the tender of an original and two copies of the subpoena being requested, except in those situations described in paragraph (b) of this section, where additional requirements are set forth.

(2) *Application for subpoena duces tecum.* An application for a subpoena requiring a person to produce specified documentary or tangible evidence (subpoena duces tecum) at any designated time or place may be made by any party to the Administrative Law Judge. All requests for the issuance of a subpoena ad testificandum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. Except in those situations described in paragraph (b) of this section, where additional requirements are set forth, each application for the issuance of a subpoena duces tecum shall contain a statement or showing of general relevance and reasonable scope of the evidence being sought and be accompanied by an original and two copies of the subpoena being requested, which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible.

* * * * *

(b) * * *

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge and shall provide such terms or conditions for the production of the material, the disclosure of the information or the appearance of the witness as may appear necessary and appropriate for the protection of the public interest.

* * * * *

(c) *Motions to quash subpoenas; protective orders*—(1) *Application.* Within 10 days after a subpoena has been served or at any time prior to the return date thereof, a motion to quash or modify the subpoena or for a protective order limiting the use or disclosure of any information, documents or testimony covered by the subpoena may be filed with the Administrative Law Judge who issued it. At the same time, a copy of the motion shall be served on the party who requested the subpoena and all other parties to the proceeding. The motion shall include a brief statement setting forth the basis for the requested relief. If the Administrative Law Judge to whom the motion has been directed has not acted upon the motion by the return date, the subpoena shall be stayed pending his or her final action.

(2) *Diposition.* * * * The Administrative Law Judge may issue a protective order sought under paragraph (c)(1) of this section or under any other section of these rules upon a showing of good cause. In considering whether good cause exists to issue a protective order, the Administrative Law Judge shall weigh the harm resulting from disclosure against the benefits of disclosure. Good cause shall only be established upon a showing that the person seeking the protective order will suffer a clearly defined and serious injury if the offer is not issued, provided, however, that any such injury shall be balanced against the public's right of access to judicial records. No protective order shall be granted that will prevent the Division of Enforcement or any respondent from adequate presenting its case.

* * * * *

(e) *Service of subpoenas*—(1) *How effected.* * * * Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraphs (e)(2) or (e)(3) of this section, as applicable, and by tendering to him or her the fees for one day's attendance and mileage as specified in paragraph (d) of this section. * * *

(f) *Enforcement of subpoenas.* * * * When instituting an action to enforce a subpoena requested by the Division of Enforcement, the Commission, in its discretion, may delegate to the Director of the Division or any commission employee designated by the Director and acting under his or her direction, or to any other employee of the Commission, authority to serve as the Commission's counsel in such subpoena enforcement action.

13. Section 10.84 is amended by revising paragraph (b) to read as follows:

§ 10.84 Initial decision

* * * * *

(b) *Filing of initial decision.* After the parties have been afforded an opportunity to file their proposed findings of fact, proposed conclusions of law and supporting briefs pursuant to § 10.82, the Administrative Law Judge shall prepare upon the basis of the record in the proceeding and shall file with the Proceedings Clerk his or her decision, a copy of which shall be served by the Proceedings Clerk upon each of the parties.

* * * * *

14. Section 10.101 is amended by revising paragraph (b)(1) to read as follows:

§ 10.101 Interlocutory appeals.

* * * * *

(b) *Procedure to obtain interlocutory review*—(1) *In general.* An application for interlocutory review may be filed within five days after notice of the Administrative Law Judge's ruling on a matter described in paragraphs (a)(1), (a)(2), (a)(3) or (a)(4) of this section, except if a request for certification under paragraph (a)(5) of this section has been filed with the Administrative Law Judge within five days after notice of the Administrative Law Judge's ruling on the matter. If a request for certification has been filed, an Application for interlocutory review under paragraphs (a)(1) through (a)(5) of this section may be filed within five days after notification of the Administrative Law Judge's ruling on such request.

15. Section 10.102 is amended by revising paragraphs (a) and (d)(2) and the first sentence of (e)(2); by redesignating paragraph (b)(3) as paragraph (b)(4) and revising it; by adding a new sentence between the third and fourth sentences of paragraph (e)(1); and by adding a new paragraph (b)(3) and a new paragraph (b)(5), to

read as follows. (The undesignated paragraph after (b)(3) and before paragraph(c) should appear after new (b)(5) and before paragraph (c).)

§ 10.102 Review of initial decision.

(a) *Notice of appeal*—(1) *In general.* Any party to a proceeding may appeal to the Commission an initial decision or a dismissal or other final disposition of the proceeding by the Administrative Law Judge as to any party. The appeal should be initiated by serving and filing with the Proceedings Clerk a notice of appeal within 15 days after service of the initial decision or other order terminating the proceeding; where service of the initial decision or other order terminating the proceeding is effected by mail or commercial carrier, the time within which the party served may file a notice of appeal shall be increased by three days.

(2) *Cross appeals.* If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within 15 days after service of the first notice of within 15 days after service of the initial decision or other order terminating the proceeding, whichever is later.

(3) *Confirmation of filing.* The Proceedings Clerk shall confirm the filing of a notice of appeal by mailing a copy thereof to each other party.

(b) * * *

(3) *Reply brief.* With 14 days after service of an answering brief, the party that filed the first brief may file a reply brief.

(4) No further briefs shall be permitted, unless so ordered by the Commission on its own motion.

(5) *Cross appeals.* In the event that any party files a notice of cross appeal pursuant to paragraph (a)(2) of this section, the Commission shall, to the extent practicable, adjust the briefing schedule and any page limitations otherwise applicable under this section so as to accommodate consolidated briefing by the parties.

* * * * *

(d) * * *

(2) The answering brief generally shall follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the party does not dispute the issues and statement of the case contained in the appeal brief. Any reply brief shall be confined to matters raised in the answering brief and shall be limited to 15 pages in length.

* * * * *

(3) *Appendix to briefs*—(1) *Designation of contents of appendix.* * * * Any reply brief filed by the appellant may, if necessary, supplement the appellant's previous designation. * * *

(2) *Preparation of the appendix.* Within 15 days after the last answering brief or reply brief of a party was due to be filed, the Office of Proceedings shall prepare an appendix to the briefs which will contain a list of the relevant docket entries filed in the proceedings before the Administrative Law Judge, the initial decision and order of the Administrative Law Judge, the pleadings filed on behalf of the parties who are participating in the appeal and such other parts of the record designated by the parties to the appeal in accordance with the procedures set forth in paragraph (e)(1) of this section. * * *

* * * * *

16. Section 10.106 is amended by revising the section heading; by designating the existing text as paragraph (a) and adding a paragraph heading to it; and by adding a new paragraph (b) and a new paragraph (c) to read as follows.

§ 10.106 Reconsideration; stay pending judicial review.

(a) *Reconsideration.* * * *

(b) *Stay pending judicial appeal*—(1) *Application for stay.* Within 15 days after service of a Commission opinion and order imposing upon any party any of the sanctions listed in §§ 10.1(a) through 10.1(e), that party may file an application with the Commission requesting that the effective date of the order be stayed pending judicial review. The application shall state the reasons why a stay is warranted and the facts relied upon in support of the stay. Any averments contained in the application must be supported by affidavits or other sworn statements or verified statements made under penalty of perjury in accordance with the provisions of 28 U.S.C. 1746.

(2) *Standards for issuance of stay.* The Commission may grant an application for a stay pending judicial appeal upon a showing that:

(i) The applicant is likely to succeed on the merits of his appeal;

(ii) Denial of the stay would cause irreparable harm to the applicant; and

(iii) Neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

(3) *Civil monetary penalties and restitution.* Nothwithstanding the requirements set forth in paragraph (b)(2) of this section, the Commission shall grant any application to stay the imposition of a civil monetary penalty or an order to pay a specific sum as restitution if the applicant has filed with the Proceedings Clerk a surety bond guaranteeing full payment of the penalty or restitution plus interest in the event that the Commission's opinion and order is sustained or the applicant's appeal is not perfected or is dismissed for any reason and the Commission has determined that neither the public interest nor the interest of any other party will be affected by granting the application. The required surety bond shall be in the form of an undertaking by a surety company on the approved list of sureties issued by the Treasury Department of the United States, and the amount of interest shall be calculated in accordance with 28 U.S.C. 1961(a) and (b), beginning on the date 30 days after the Commission's opinion and order was served on the applicant. In the event the Commission denies applicant's motion for a stay, the Proceedings Clerk shall return the surety bond to the applicant.

(c) *Response.* Unless otherwise requested by Commission, no response to a petition for reconsideration pursuant to paragraph (a) of this section or an application for a stay pursuant to paragraph (b) of this section shall be filed. The Commission shall set the time for filing any response at the time it asks for a response. the Commission shall not grant any such petition or application without providing other parties to the proceeding with an opportunity to respond.

17. A new Subpart 1 is added to Part 10, to read as follows.

Subpart 1—Restitution Orders

Sec.
10.110 Basis for issuance of restitution orders.
10.111 Recommendation of procedure for implementing restitution.
10.112 Administraton of restitution.
10.113 Right to challenge distribution of funds to customers.

Subpart 1—Restitution Orders

§ 10.110 Basis for issuance of restitution orders.

(a) *Appropriateness of restitution as a remedy.* In any proceeding in which an order requiring restitution may be entered, the Administrative Law Judge shall, as part of his or her initial decision, determine whether restitution is appropriate. In deciding whether restitution is appropriate, the Administrative Law Judge, in his or her discretion, may consider the degree of complexity likely to be involved in establishing claims, the likelihood that claimants can obtain compensation through their own efforts, the ability of the respondent to pay claimants damages that his or her violations have

caused, the availability of resources to administer restitution and any other matters that justice may require.

(b) *Restitution order.* If the Administrative Law Judge determines that restitution is an appropriate remedy in a proceeding, he or she shall issue an order specifying the following:

(1) All violations that form the basis for restitution;

(2) The particular persons, or class or classes of persons, who suffered damages proximately caused by each such violation;

(3) The method of calculating the amount of damages to be paid as restitution; and

(4) If then determinable, the amount of restitution the respondent shall be required to pay.

§ 10.111 Recommendation of proceeding for implementing restitution.

Except as provided by § 10.114, after such time as any order requiring restitution becomes effective (*i.e.*, becomes final and is not stayed), the Division of Enforcement shall petition the Commission for an order directing the Division to recommend to the Commission or, in the Commission's discretion, the Administrative Law Judge a procedure for implementing restitution. Each party that has been ordered to pay restitution shall be afforded an opportunity to review the Division of Enforcement's recommendations and be heard.

§ 10.112 Administration of restitution.

Based on the recommendations submitted pursuant to § 10.111, the Commission or the Administrative Law Judge, as applicable, shall establish in writing a procedure for identifying and notifying individual persons who may be entitled to restitution, receiving and evaluating claims, obtaining funds to be paid as restitution from the party and distributing such funds to qualified claimants. As necessary or appropriate, the Commission or the Administrative Law Judge may appoint any person, including an employee of the Commission, to administer, or assist in administering, such restitution procedure. Unless otherwise ordered by the Commission, all costs incurred in administering an order of restitution shall be paid from the restitution funds obtained from the party who was so sanctioned; provided, however, that if the administrator is a Commission employee, no fee shall be charged for his or her services or for services performed by any other Commission employee working under his or her direction.

§ 10.113 Right to challenge distribution of funds to customers.

Any order of an Administrative Law Judge directing or authorizing the distribution of funds paid as restitution to individual customers shall be considered a final order for appeal purposes to be subject to Commission review pursuant to § 10.102.

§ 10.114 Acceleration of establishment of restitution procedure.

The procedures provided for by §§ 10.111 through 10.113 may be initiated prior to the issuance of the initial decision of the Administrative Law Judge and may be combined with the hearing in the proceeding, either upon motion by the Division of Enforcement or if the Administrative Law Judge, acting on his own initiative or upon motion by a respondent, concludes that the presentation, consideration and resolution of the issues relating to the restitution procedure will not materially delay the conclusion of the hearing or the issuance of the initial decision.

18. A new appendix A is added to part 10, to read as follows.

Appendix A to Part 10—Commission Policy Relating to the Acceptance of Settlements in Administrative and Civil Proceedings

It is the policy of the Commission not to accept any offer of settlement submitted by any respondent or defendant in any administrative or civil proceedings, if the settling respondent or defendant wishes to continue to deny the allegations of the complaint. In accepting a settlement and entering an order finding violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of fact and conclusions of law. The Commission does not believe it would be appropriate for it to be making such uncontested findings of violations if the party against whom the findings and conclusions are to be entered is continuing to deny the alleged misconduct.

The refusal of a settling respondent or defendant to admit the allegations in a Commission-Instituted complaint shall be treated as a denial, unless the party states that he or she neither admits nor denies the allegations. In that event, the proposed offer of settlement, consent or consent order must include a provision stating that, by neither admitting nor denying the allegations, the settling respondent or dependent agrees that neither he or she nor any of his or her agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or creating, or tending to create, the impression that the complaints is without a factual basis; provided, however, that nothing in this provision shall affect the settling respondent's or defendant's testimonial obligation, or right to take legal positions, in other proceedings to which the Commission is not a party.

Issued in Washington, DC, on October 8, 1998, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–27983 Filed 10–15–98; 10:43 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Part 1275

[Docket No. NHTSA–98–4537]

RIN 2127–AH47

Repeat Intoxicated Driver Laws

AGENCY: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule implements a new program established by the Transportation Equity Act for the 21st Century (TEA–21) Restoration Act, which provides for the transfer of Federal-aid highway construction funds to 23 U.S.C. 402 State and Community Highway Safety Program grant funds for any State that fails to enact and enforce a conforming ''repeat intoxicated driver'' law.

This regulation is being published as an interim final rule, which will go into effect prior to providing notice and the opportunity for comment. Following the close of the comment period, NHTSA will publish a separate document responding to comments and, if appropriate, will revise provisions of the regulation.

DATES: This interim final rule becomes effective on November 18, 1998. Comments on this interim rule are due no later than December 18, 1998.

ADDRESSES: Written comments should refer to the docket number of this notice and be submitted (preferably in two copies) to: Docket Management, Room PL–401 Section, National Highway Traffic Safety Administration, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. (Docket hours are Monday–Friday, 10 a.m. to 5 p.m., excluding Federal holidays.)

FOR FURTHER INFORMATION CONTACT: In NHTSA: Ms. Jennifer Higley, Office of State and Community Services, NSC–01, National Highway Traffic Safety