

AGENDA DOCUMENT NO. 11-23-C



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Commissioner *Steve Walther*

DATE: May 25, 2011

SUBJECT: Agency Procedure for Disclosure of Documents and
Information in the Enforcement Process

For Meeting of 5-26-11

SUBMITTED LATE

I request that the attached revised draft Agency Procedure for Disclosure of Documents and Information in the Enforcement Process be placed on the agenda for May 26, 2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[NOTICE 2011-XX]

**Agency Procedure for Disclosure of Documents
and Information in the Enforcement Process**

AGENCY: Federal Election Commission

ACTION: Notice of Agency Procedure

SUMMARY: The Federal Election Commission (Commission) is establishing an agency procedure to formally define the scope of documents that will be provided to respondents by the agency, and to formalize the agency's process of disclosing such documents, during the Commission's investigation in enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (the Act).

DATES: Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: _____, Assistant General Counsel, or _____,
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-
1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

I. Recent Changes to the Commission's Enforcement Procedures.

The Commission has, in recent years, adopted several changes to its enforcement process in an effort to provide complainants, respondents and the public with greater transparency with respect to the Commission's process.

On May 1, 2003, the Commission published a Notice of Public Hearing and Request for Public Comment concerning its enforcement procedures.¹ The Commission received written comments from the public, many of which urged increased transparency in Commission procedures and expanded opportunities to contest allegations.² On June 11, 2003, the Commission held an open hearing on its enforcement procedures during which the Commission considered written comments received and oral testimony from several witnesses. In response to issues raised in written comments and at the hearing, the Commission issued several new agency procedures.³

On December 8, 2008, the Commission issued a Notice of Public Hearing and Request for Public Comment regarding the compliance and enforcement aspects of its agency procedures.⁴ There were numerous written comments filed in response to the Notice and on January 14-15, 2009, the Commission received testimony at a public hearing.⁵

Some commenters proposed alternative procedures with respect to information and documents in the possession of the Commission. One commenter recommended instituting a program whereby potential respondents in internally generated matters⁶ would be given a written summary of the matter and an opportunity to respond in writing before the Commission makes a reason to believe (RTB) finding and to provide earlier notice to respondents about the Office of General Counsel's (OGC) recommendation to the Commission.⁷ Other commenters urged the Commission to adopt procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by the Commission's Office of General Counsel before the

¹ See *Enforcement Procedures*, 68 Fed. Reg. 23311 (May 1, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-09/fr68n084p23311.pdf.

² Comments and statements for the record are available at www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml.

³ See *Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations*, 68 Fed. Reg. 50688 (Aug. 22, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf; *Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3 (Jan. 3, 2005), available at www.fec.gov/law/policy/2004/notice2004-20.pdf; *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007), available at www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-21.pdf.

⁴ See *Agency Procedures*, 73 Fed. Reg. 74495 (Dec. 8, 2008), available at http://www.fec.gov/law/policy/enforcement/notice_2008-13.pdf.

⁵ The comments received by the Commission, as well as the transcript of the hearing are available at www.fec.gov/law/policy/enforcement/publichearing011409.shtml.

⁶ Enforcement matters may be internally generated based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g. These non-complaint generated matters can arise from internal referrals to the Office of General Counsel from the Commission's Reports Analysis Division or Audit Division.

⁷ See Comment of Scott E. Thomas dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm15.pdf.

Commission considers such recommendation.⁸ Still others requested even more general access by respondents to documents and information held by the Commission.⁹

The Commission has since updated and augmented several of its procedures including the adoption of: (1) a pilot program providing opportunity to persons requesting an advisory opinion to appear before the Commission to answer questions,¹⁰ (2) a pilot program providing audited committees with an opportunity to request a hearing before the Commission prior to the Commission's adoption of a Final Audit Report,¹¹ and (3) a procedure providing respondents with notice of a non-complaint generated referral¹² and an opportunity to respond prior to the Commission's consideration of whether it has reason to believe that a violation has occurred.¹³ Further, in December 2009, the Commission issued a Guidebook for Complainants and Respondents on the FEC Enforcement Process, which provides a step-by-step guide to assist and educate complainants, respondents and the public concerning the Commission enforcement process.¹⁴

The procedure set forth herein formalizes the Commission's policy on disclosure to respondents of relevant information gathered by the Commission in the investigative stage of its enforcement proceedings.

II. Disclosure of Exculpatory Information.

A. Criminal Proceedings: the Constitutional Obligation under *Brady* – the Government's Duty to Disclose.

One issue that must inform the Commission in its consideration of any procedure regarding the disclosure of documents and information to respondents in the enforcement process is whether, and to what extent, there are relevant requirements or constraints imposed by the United States Constitution. The seminal Supreme Court case involving the Constitutional parameters required by, and imposed upon, the government, in the

⁸ See Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf.

⁹ See Comments of Election Law and Government Ethics Practice Group of Wiley Rein LLP dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf; Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf; Comments of Laurence E. Gold dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm20.pdf; Comments of Robert K. Kelner dated January 5, 2009, available at www.fec.gov/law/policy/enforcement/2009/comments/comm10.pdf

¹⁰ See *Advisory Opinion Procedures*, 74 Fed. Reg. 32160 (July 7, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-11.pdf.

¹¹ See *Procedural Rules for Audit Hearings*, 74 Fed. Reg. 33140 (July 10, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf

¹² Non-complaint generated referrals, also referred to as "internally generated matters," are based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g and note 6 above.

¹³ See *Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38617 (August 4, 2009), available at www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf.

¹⁴ This Guidebook is available at http://www.fec.gov/em/respondent_guide.pdf.

context of criminal proceedings, is *Brady v. Maryland*.¹⁵ *Brady* held that the Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to provide criminal defendants with exculpatory evidence – *i.e.*, “evidence favorable to an accused,” that is “material to guilt or punishment” – known to the government but unknown to the defendant.

As noted, the Supreme Court in *Brady* held that the Due Process Clause requires the government to provide criminal defendants with exculpatory or potentially exculpatory evidence that is “material to guilt or punishment.” “The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government’s possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government.”¹⁶ *Brady* is a rule of disclosure, not of discovery.¹⁷ Therefore, *Brady* obligations apply even when a defendant does not request the evidence.¹⁸ The obligations also apply regardless of the good faith of the prosecutor.¹⁹ However, no constitutional duty exists under *Brady* to provide evidence already in the defendant’s possession or which can be obtained with reasonable diligence.²⁰

In *Giglio v. United States*, 405 U.S. 150, the Supreme Court went one step further by requiring disclosure in criminal proceedings “[w]hen the ‘reliability of a particular witness may well be determinative of guilt or innocence,’” and the prosecution has evidence that impeaches that witness’ testimony.²¹ “Such [impeachment] evidence is ‘evidence favorable to an accused’ so that if disclosed and used effectively, it may make the difference between conviction and acquittal.”²² For example, courts have held that impeachment evidence for a key testifying witness includes but is not limited to the following: Prior statements by a witness that are materially inconsistent with the witness’s trial testimony;²³ a conviction of perjury;²⁴ prosecutorial intimidation of a witness;²⁵ and plea bargains and informal statements by the prosecution that a witness would not be prosecuted in exchange for his testimony.²⁶

Because *Brady* disclosure in criminal proceedings is required under the Due Process Clause, legal privileges against discovery such as attorney-client, work-product, or deliberative process do not allow the government in criminal proceedings to avoid

¹⁵ *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (*Brady*).

¹⁶ *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1983) (citations omitted).

¹⁷ See *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (*Bagley*).

¹⁸ See *United States v. Agurs*, 427 U.S. 97, 107-10 (1976).

¹⁹ *Brady*, 373 U.S. at 87.

²⁰ See, e.g., *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989); *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996); *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975).

²¹ *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (*Giglio*).

²² *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87).

²³ *Id.* at 677.

²⁴ *United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996).

²⁵ *Simmons v. Beard*, 581 F.3d 158, 169 (3rd Cir. 2009).

²⁶ *Giglio*, 405 U.S. at 154-55; *United States v. Edwards*, 191 F. Supp. 2d 88, 90 (D.D.C. 2002); *United States v. Buettner-Janusch*, 500 F. Supp. 1287, 1288 (S.D.N.Y. 1980).

disclosure on these grounds.²⁷ However, courts have recognized that *Brady* does not apply to attorney strategies, legal theories, and evaluations of evidence because they are not “evidence.”²⁸

B. The Legal, Professional, and Ethical Duties to Disclose - the Lawyer’s Independent Obligations in Criminal Proceeding.

In addition to, and quite separate from, the Constitutional requirements in criminal cases, there is broad acceptance in the legal and judicial professions that there is also an ethical obligation to provide exculpatory or incriminating information to respondents and litigants that, if not provided, may negatively impact the ability of a respondent or litigant to obtain a just result through a fair and impartial proceeding with the government.

For example, Rule 3.8(d) of the American Bar Association’s Model Rules of Professional Conduct (ABA Model Rules), imposes an ethical duty on criminal prosecutors that is separate and independent from the Constitutional disclosure obligations addressed in *Brady*. The ABA Model Rules are in force in most State courts and many Federal Courts. Specifically, Rule 3.8(d) requires that a criminal prosecutor “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense” so that the defense can make meaningful use of the evidence and information in making such decisions as whether to plead guilty and how to conduct its defense.²⁹

The Supreme Court has also referred to the status of a U.S. Attorney in the “federal system” as “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”³⁰ Therefore, both Constitutional issues and ethical issues must be considered when a procedure such as the one enunciated here today is formulated and adopted.

²⁷ See Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 254 (4th ed. 2009); *United States v. Goldman*, 439 F. Supp. 337, 350 (S.D.N.Y. 1977).

²⁸ *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *U.S. v. NYNEX Corp.*, 781 F. Supp. 19, 25-26 (D.D.C. 1991); see *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000).

²⁹ See American Bar Association, Model Rules of Professional Conduct, Rule 3.8, Special Responsibilities of a Prosecutor, available at www.abanet.org/cpr/mrpc/rule_3_8.html. See also Formal Opinion 09-454, Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense, American Bar Association, Standing Committee on Ethics and Professional Responsibility, available at [www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/\\$FILE/09-454.pdf](http://www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/$FILE/09-454.pdf).

³⁰ *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Statement of Attorney General Eric Holder Regarding *United States v. Theodore F. Stevens*, available at www.justice.gov/opa/pr/2009/April/09-ag-288.html.

C. Disclosure in Governmental Civil Proceedings.

Courts have held that the Due Process Clause does not require application of *Brady* in administrative proceedings.³¹ Nevertheless, some Federal agencies recently have applied *Brady* principles to their civil administrative enforcement proceedings. For example, the Federal Energy Regulatory Commission (FERC) recently issued a policy statement that provides respondents with access to certain exculpatory evidence during that agency's investigations and adjudications.³² Under FERC's regulations, FERC can conduct either an informal or formal investigation. The new FERC Policy Statement provides, in relevant part that "[d]uring the course of an investigation . . . , Enforcement staff will scrutinize materials it receives from sources other than the investigative subject(s) for material that would be required to be disclosed under *Brady*. Any such materials or information that are not known to be in the subject's possession shall be provided to the subject."³³

Similarly, the Securities and Exchange Commission (SEC) adopted a rule of practice in 1995 for its civil enforcement proceedings whereby its Division of Enforcement shall make available for inspection and copying "documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings."³⁴ The SEC rule permits certain documents to be withheld by the agency, including those documents that are privileged, pre-decisional or work product, a document that would identify a confidential source, or documents identified to a hearing officer as being properly withheld for good cause.³⁵

However, SEC rule 201.230(b)(2) specifically states that nothing in the rule "authorizes the [SEC's] Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady*, . . . documents that contain material exculpatory evidence."³⁶ Although the SEC has limited the application of rule 201.230 to require the "production of examination and inspection reports to circumstances where the Division of Enforcement intends to introduce the report into evidence, either in reliance on the report to prove its case, or to refresh the recollection of any witness," this limitation "does not alter the requirement that the Division produce

³¹ *Mister Discount Stockbrokers v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (no right to exculpatory evidence in National Association of Securities Dealers (NASD) proceedings which are treated the same as administrative agency action); *Sanford v. NASD*, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) ("[W]e find *Brady* inapposite and hold that the ALJ properly denied Nueva's demand for exculpatory materials.").

³² See FERC Policy Statement on Disclosure of Exculpatory Materials, Docket No. PL10-1-000, 129 FERC ¶ 61,248 (Dec. 17, 2009) (FERC Policy Statement), available at <http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf>.

³³ See FERC Policy Statement at ¶ 9.

³⁴ See 17 C.F.R. § 201.230(a)(1) (2010), available at http://edocket.access.gpo.gov/cfr_2010/aprqr/pdf/17cfr201.230.pdf

³⁵ 17 C.F.R. § 201.230(b)(1).

³⁶ 17 C.F.R. § 201.230(b)(2).

documents containing material exculpatory evidence as required by *Brady v. Maryland*.”³⁷

As with FERC and the SEC, the Commodity Futures Trading Commission (CFTC) also provides for disclosure of certain information during the “discovery” phase of its formal adjudications.³⁸ In addition to a prehearing exchange of documents, identities of witnesses, and an outline of its case, the CFTC’s Division of Enforcement “shall make available for inspection and copying by the respondents” certain documents.³⁹ These documents include all documents subpoenaed by the CFTC and all transcripts of investigative testimony and exhibits to those transcripts.⁴⁰ However, the Division of Enforcement may withhold, for example, the identity of a confidential source, confidential investigatory techniques, and other confidential information, such as trade secrets.⁴¹ Privileged documents and information may also be withheld by CFTC’s Division of Enforcement.⁴²

In the case of this Commission, as a Federal agency engaged in proceedings to find liability of persons under Federal laws, whose conduct can lead to civil penalties and potentially has the reach of the criminal system, it has been the Commission’s practice to provide certain types of information to respondents. The Commission is formalizing its practice to ensure effective and fair enforcement of the Act.

The Commission recognizes that *Brady* was decided in the context of a criminal proceeding and that its holding, therefore, does not extend, by its own terms, to a Federal agency civil enforcement agency proceeding. However, the Commission is empowered (a) to civilly pursue matters that may have potential criminal consequences, and (b) to engage respondents in the enforcement process, and possibly in litigation if the Commission and respondents are unable to reach a mutually acceptable voluntary conciliation agreement, where a Court may impose a civil monetary penalty, injunctive, or other relief. See 2 U.S.C. § 437g(a)(6)(A).

The Commission has also entered into a Memorandum of Understanding with the Department of Justice (DOJ) whereby the Commission will refer certain matters to the DOJ for criminal prosecution review and whereby DOJ will refer matters to the

³⁷ See Securities and Exchange Commission, Explanation and Justification: Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission, 69 Fed. Reg. 13166, 13170 (Mar. 19, 2004), available at www.sec.gov/rules/final/34-49412.htm.

³⁸ See 17 C.F.R. § 10.42 (2010), available at http://edocket.access.gpo.gov/cfr_2010/aprqr/pdf/17cfr10.42.pdf.

³⁹ See 17 C.F.R. § 10.42(a)(1) & (2); 17 C.F.R. § 10.42(b)(1).

⁴⁰ *Id.* See also *In re First National Monetary Corp.*, Opinion and Order, CFTC No. 79-56, CFTC No. 79-57 (Nov. 13, 1981) (Any material . . . known to the Division of Enforcement, or which by the exercise of due diligence may become known to the Division, that is arguably exculpatory and material to guilt or punishment within the meaning of *Brady* [and its progeny] should be either provided to respondent directly, or provided to the [ALJ], for his determination as to whether it is productible [sic] or not).

⁴¹ 17 C.F.R. § 10.42(b)(2).

⁴² 17 C.F.R. § 10.42(b)(3).

Commission.⁴³ Nothing in the procedure adopted herein is intended to impact in anyway the Commission's conduct with respect to, and relationship with, the DOJ, including any agreement between the Commission and the DOJ whereby the Commission agrees not to disclose information obtained from the DOJ. The procedure adopted herein provides for mandatory withholding of information by the Office of General Counsel of any documents or information submitted to the Commission by the DOJ either pursuant to an agreement between the Commission and the DOJ or simply upon request from the DOJ not to disclose the information.⁴⁴ Moreover, the procedure adopted herein protects from disclosure not only the information submitted by the DOJ but also any information that was derived from such information, including all separate documents quoting, summarizing, or otherwise using information provided by the DOJ.⁴⁵

Accordingly, the Constitutional and ethical principles of fairness and due process in *Brady*, as well as the procedures adopted by other Federal agencies, inform the Commission's adoption of the procedure announced today in its civil administrative enforcement process.

In summary, while the Commission does not believe that the Constitution requires the agency to institute a procedure requiring disclosure of documents and information, including exculpatory information, to respondents in its civil enforcement process, the Commission's enforcement proceedings may, in some instances, inform potential or concurrent criminal proceedings. Accordingly, adopting a formal internal procedure requiring disclosure of information to respondents will (1) eliminate uncertainty regarding the Commission's position on this issue, (2) serve the Commission's goal of providing fairness to respondents, and (3) set forth a written procedural framework within which disclosures are made.

III. Current Disclosure Process.

Before the Commission may determine that there is probable cause to believe a violation of the Act has occurred or is about to occur, the Act permits respondents to present directly to the Commission their interests and positions on the matter under review. The Commission's General Counsel shall notify respondents prior to any recommendation to the Commission by the General Counsel to proceed to a vote on probable cause.⁴⁶ Included in this notification is a written brief stating the position of the General Counsel on the legal and factual issues of the case to which respondents may reply.⁴⁷ This allows the Commission to be informed not only by the recommendations of its General Counsel, but also by the factual presentations and legal arguments of respondents. By requirement of the Act, or by its discretion, the Commission has similar

⁴³ See Department of Justice and Federal Election Commission, *Memorandum of Understanding*, 43 Fed. Reg. 5441 (Feb. 8, 1978)

⁴⁴ See Updated Formal Procedure at paragraph (b)(1)(v), below.

⁴⁵ *Id.*

⁴⁶ See 2 U.S.C. 437g(a)(3).

⁴⁷ See 2 U.S.C. 437g(a)(3); see also 11 C.F.R. § 111.16 .

procedures at various stages of the enforcement process to keep the Commissioners informed both by its staff and by respondents.

In addition, while the Commission may attempt to conciliate matters with respondents at any time, the Act requires the Commission to attempt conciliation after it finds probable cause.⁴⁸ If the Commission determines that there is probable cause, the Act requires that, for a period of at least 30 day (or at least 15 days, if the probable cause determination occurs within 45 days of an election), the Commission must attempt to correct or prevent the violation through conference, conciliation, and persuasion.⁴⁹

The General Counsel provides a probable cause brief to respondents presenting OGC's analysis of the information and may address any available exculpatory evidence. The Commission's current practice at the probable cause stage has generally been to provide respondents, upon request, with information cited or relied upon (whether or not cited) in the General Counsel's probable cause brief. Where possible, this has included documents containing the information upon which OGC is relying to support its recommendation to the Commission that there is probable cause to believe a violation of the Act has occurred. This production of documents is subject to all applicable privileges and confidentiality considerations, including the confidentiality provisions of the Act. Where such considerations apply, OGC has generally provided only the relevant information derived from the document, and not the document itself. Examples of the types of documents OGC has provided at this stage are deposition transcripts, responses to formal discovery, and documents obtained in response to requests for documents. In instances where OGC obtains factual information from a source other than the respondent that tends to exculpate the respondent, OGC may note the existence of the information in its brief, particularly if OGC does not know whether a respondent is already aware of the information.⁵⁰ In instances where OGC provides mitigating or exculpatory information, OGC provides any documents cited to in connection with that information, such production is also subject to the same privilege and confidentiality concerns noted above.

In two limited instances, OGC may provide information to respondents earlier than the probable cause stage in the enforcement process. First, pursuant to the Commission's Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, all deponents, including respondent deponents, may obtain a copy of the transcript of their own deposition, including any exhibits that may have been obtained from sources other than the respondent, provided there is no good cause to limit the deponent's access to the transcript.⁵¹ Second, OGC may share information, including documents, with respondents during the post-investigative pre-probable cause conciliation process to assist in explaining the factual basis for a violation. That

⁴⁸ See 2 U.S.C. 437g(a)(4).

⁴⁹ *Id.*

⁵⁰ When advising the Commission on whether OGC intends either to proceed with its probable cause recommendation or to withdraw the recommendation, OGC will also provide and discuss the potentially exculpatory evidence, as well as any available mitigating evidence. See 11 C.F.R. § 111.16(d).

⁵¹ See *Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations*, 68 Fed. Reg. 50688 (Aug. 22, 2003), available at www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf.

information may include documents not already in the respondent's possession. This practice is used solely for the purpose of facilitating conciliation.

As the current practice has demonstrated, the Commission's probable cause considerations and subsequent conciliation efforts are furthered when, in presenting their respective positions, respondents have the greatest practicable access to documents and information gathered by the agency, including certain information that might be favorable to the respondent. This allows both the Commission's Office of General Counsel and the respondents that are under investigation to present fully informed submissions and frame legal issues for the Commission's consideration.

At the same time, however, the Act and other laws restrict information that the Commission may make public without the consent of persons under investigation.⁵² Investigations that involve multiple respondents, each of whom may be at different stages of the enforcement process, raise questions as to what documents and information the Commission may disclose to any given respondent before determining probable cause.

The procedure adopted herein is not intended to expand the disclosure of information regarding a co-respondent as to any such information that is subject to existing confidentiality requirements under the Act. In order to reconcile the Commission's interests in permitting respondents to present fully their positions without compromising the Commission's confidentiality obligations, the Commission is formalizing its procedure. This agency procedure clarifies how the Commission will, consistent with the confidentiality provisions of 2 U.S.C. 437g(A)(12), enhance its enforcement process by permitting increased access to documents and information held by the Commission.

This procedure will allow efficient, fair and just resolution of issues regarding disclosure of exculpatory information and avoid unnecessary consumption of respondent and Commission staff resources in future proceedings.

IV. The Updated Formal Procedure.

The Commission is formalizing its agency procedure to provide respondents in enforcement proceedings with relevant information ascertained by the Commission as the result of an investigation. The Commission believes that, while not mandated by the Constitution, the principle of *Brady*, and its judicial progeny, should apply following investigations conducted under Section 437g of the Act and Subpart A of Part 111 of the Commission's regulations.⁵³

The Commission believes that formalizing the procedure will promote fairness in the Commission's Section 437g enforcement process. The Commission also believes the procedure articulated in this Notice will promote administrative efficiency and certainty,

⁵² See, e.g., 2 U.S.C. 437g(a)(4)(B)(i) and (a)(12).

⁵³ See generally 2 U.S.C. 437g and 11 C.F.R. Part 111.

and will contribute to the Commission's goal of open, fair and just investigations and enforcement proceedings.

For purposes of this procedure, the term "documents" includes writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

For purposes of this procedure, the term "exculpatory information" means information gathered by the Office of General Counsel in its investigation, not reasonably knowable by the respondent, that is relevant to a possible violation of the Act or the Commission's regulations, under investigation by the Commission and that may tend to favor the respondent in defense of violations alleged or which would be relevant to the mitigation of the amount of any civil penalty resulting from a finding of such a violation by a court.

The procedure is as follows:

(a) Documents to be Produced or Made Available.

(1) Subject to paragraphs (b) through (e) of this procedure, and unless otherwise directed by the Commission, by an affirmative vote of four or more Commissioners,⁵⁴ the Office of General Counsel shall make available to a respondent all relevant documents gathered by the Office of General Counsel in its investigation, not publicly available and not already in the possession of the respondent, in connection with its investigation of allegations against the respondent. This includes any documents that contain exculpatory information, as defined herein. This shall not include any documents created internally by a Commissioner or by a member of a Commissioner's staff. This shall be done either by producing copies in electronic format or permitting inspection and copying of such documents. The documents covered by this procedure shall include:

- (i) Documents, not in possession of a respondent, turned over in response to any subpoenas or other requests, written or otherwise;
- (ii) all deposition transcripts and deposition transcript exhibits; and
- (iii) any other documents, not otherwise publicly available and not in possession of a respondent, gathered by the Commission from sources outside the Commission.

⁵⁴ In any instance in which the Office of General Counsel has concerns that disclosure of information pursuant to this procedure would lead to a result that is materially inconsistent with either the Commission's administrative responsibilities or with the promotion of fairness and efficiency in the Commission's enforcement process, the Office of General Counsel may seek formal guidance from the Commission on how it should proceed.

- (2) Nothing in this paragraph (a) shall limit the authority of the Commission, by an affirmative vote of four or more Commissioners, to make available or withhold any other document, or shall limit the capacity of a respondent to seek access to, or production of, a document through timely written requests to the Commission subsequent to the production of documents pursuant to paragraph (d) below. If respondent submits such a written request, respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.
- (3) Nothing in this procedure requires the Office of General Counsel to conduct any search for materials other than those it receives in the course of its investigatory activities. This procedure does not require staff to conduct any search for exculpatory materials that may be found in the offices of other agencies or elsewhere.

(b) Documents that May Be Withheld.

- (1) Unless otherwise determined by the Commission, as provided in subparagraph (2) below, the Office of General Counsel shall withhold a document or a category of documents from a respondent if:
 - (i) the document contains privileged information, such as, but not limited to, attorney-client communications, attorney-work product, staff-work product or work product subject to the deliberative process privilege; provided, however, if the document contains only a portion of material that should not be disclosed, if possible to do so effectively, the Office of General Counsel shall excise or redact from such document any information that prevents disclosure if the remaining portion is informative and otherwise qualifies for disclosure as provided herein, prior to disclosing the document or information contained therein;
 - (ii) the document or category of documents is determined by the General Counsel to be not relevant to the subject matter of the proceeding;
 - (iii) the Commission is prevented by law or regulation from disclosing the information or documents, including, under certain circumstances, information obtained from, or regarding, co-respondents;⁵⁵
 - (iv) the document contains information only a portion of which prevents disclosure as provided herein, and that portion cannot be excised or redacted without affecting the main import of the document; or

⁵⁵ See paragraph (e) of this procedure addresses issues regarding documents and information that may be subject to confidentiality pursuant to sections 437g(a)(4)(B)(i) and 437g(a)(12) of the Act. 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12).

- (v) the Commission obtained the information or documents from the Department of Justice or another government entity, either pursuant to a written agreement with the Department of Justice, or the other government entity, not to disclose the information, documents or category of documents or upon written request from the Department of Justice, or the other government entity. Withholding any such information obtained from the Department of Justice also includes withholding any information that was derived from such information, including all separate documents quoting, summarizing, or otherwise using information provided by the other government entity.
- (2) For any document withheld by the General Counsel pursuant to subparagraphs (1)(i)-(1)(iv) above, the Commission may, pursuant to a timely written request by the respondent or otherwise, consider whether to make available such document and, after consideration of relevant law and regulation, by an affirmative vote of four or more Commissioners, may determine, consistent with relevant law and regulation, whether or not it is appropriate to produce such document. If respondent submits such a written request, it must be within 15 days of the Commission's production of documents and respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.
 - (3) For any document withheld by the General Counsel pursuant to a written agreement with, or written request from, the Department of Justice or the other government entity under subparagraph (1)(v) above, the General Counsel shall provide a report to the Commission identifying the documents and information that has been withheld and providing the Commission with a copy of the written agreement with, or request from, the Department of Justice or the other government entity.

(c) Withheld Document List.

- (1) Within ten business days of receipt of documents disclosed pursuant to paragraph (d) below, a respondent may request in writing that the Commission direct the General Counsel to produce to the respondent a list of documents or categories of documents withheld pursuant to paragraph (b)(1) of this procedure. If respondent submits such a written request, respondent must sign a tolling agreement for the time necessary, not to exceed 60 days, for the General Counsel to provide the list of documents, unless the Commission, by an affirmative vote of four or more Commissioners, determines that a tolling agreement is not required. Requests for a list of documents or categories of documents shall be granted, unless the Commission, by an affirmative vote of four or more

Commissioners, denies the request, in whole or in part. Once the Commission has voted upon the written request, respondent may not seek reconsideration of that decision.

- (2) When similar documents are withheld pursuant to paragraph (b)(1), those documents may be identified by category instead of by individual document.

(d) Timing of Production or Inspection and Copying.

- (1) The disclosure of documents and information referenced herein shall be made pursuant to a timely written request by the respondent filed within fifteen days of the dates specified in subparagraphs (i) and (ii) below, and subject to paragraph (e), or unless otherwise determined by the Commission by an affirmative vote of four or more Commissioners. The General Counsel shall produce in electronic format, or commence making documents available to a respondent for inspection and copying pursuant to this procedure, at the earlier of the following:

- (i) the date of the General Counsel's notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause; or
- (ii) no later than seven days after certification of a vote by the Commission to conciliate with a respondent.

(e) Issues Respecting Documents provided by, or relating to, Co-respondents.

- (1) If there is more than one respondent that is under investigation in the same matter, or in related matters, before the General Counsel may produce documents, other than exculpatory information or documents cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause, to one co-respondent that either (a) have been provided to the Commission by another co-respondent or (b) that relate to another co-respondent, the General Counsel must obtain a confidentiality waiver from the co-respondent who provided the document or about whom the document relates. Additionally, the respondent receiving such documents may be required to sign a nondisclosure agreement to keep confidential any document or information it obtains from the Commission.
- (2) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver, the General Counsel shall, if it is possible to do so effectively, in accordance with 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12), summarize or redact those portions of the document or documents that are subject to confidentiality under the Act, or are determined to be in the category of

documents to be withheld under paragraph (b) in order to remove that portion of material that may not be disclosed.

- (3) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver and it is not possible to effectively summarize or redact those portions of the document or documents that are subject to confidentiality, the General Counsel shall seek direction from the Commission, by an affirmative vote of four or more Commissioners, regarding how to balance the competing concerns of disclosure and confidentiality. In any event, the General Counsel shall produce complete or appropriately redacted copies of those documents cited or relied on in the brief that accompanies its notice of a recommendation to vote on probable cause, whether or not the documents have been specifically identified in the brief.
 - (4) If the confidentiality issue cannot be resolved with respect to a co-respondent (*e.g.*, lack of waiver, ineffective redaction, etc.), the General Counsel may, in an appropriate case make a recommendation to the Commission for segregation of the matters under review.
 - (5) If any document or information provided to the Commission by a one co-respondent contains exculpatory information, or is cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause for another co-respondent, that information or document will be provided to the other co-respondent, which shall be subject to the same redactions described in paragraph (b)(1)(i).
 - (6) Before disclosing any portion of the document that raises an unresolved confidentiality issue, the General Counsel shall seek a determination by the Commission, by an affirmative vote of four or more Commissioners, that disclosure of a document containing exculpatory information (redacted, summarized, or in any other way altered) conforms to the confidentiality provisions of 2 U.S.C. § 437g(a)(4)(B)(i) and 437g(a)(12).
- (f) Place of Inspection and Copying Costs and Procedures.
- (1) Documents subject to inspection and copying pursuant to this procedure shall be made available to the respondent for inspection and copying at the Commission's office, or at such other place as the Commission, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this procedure unless formal written approval is provided by an affirmative vote of four or more Commissioners.

- (2) The respondent may obtain a photocopy of any documents made available for inspection. The respondent is responsible for all costs related to photocopying of any documents.

(g) Continuing Obligation to Produce During Conciliation.

- (1) If, prior to the completion of an investigation, the Commission votes to enter into conciliation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation related to that respondent, so long as the respondent enters into a tolling agreement of the applicable statute of limitation. If there is no such tolling agreement, the formal investigation and conciliation may take place simultaneously. The tolling agreement must have a specific time for its duration approved by the Commission, by an affirmative vote of four or more Commissioners, and shall not be open-ended. If there is more than one respondent under investigation in the same matter, or in related matters, and the Commission votes to enter into conciliation with one or more respondents prior to the completion of a formal investigation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation as to those respondents in conciliation, so long as the respondents enter into a tolling agreement of the applicable statute of limitation. If the Commission receives documents in the course of the formal investigation as to respondents not in conciliation that would otherwise be required to be produced under this procedure during such investigation, the Commission shall promptly produce them to the respondent in conciliation pursuant to this procedure.
- (2) If the Commission receives documents during such conciliation, from whatever source, the General Counsel shall within a reasonable period of time inform the respondent of any documents obtained that would otherwise be required to be produced under this procedure, and as to such documents, the General Counsel shall timely produce them to the respondent, consistent with the statutory confidentiality provision preventing disclosure of any information derived in connection with conciliation attempts. 2 U.S.C. 437g(a)(4)(B).

V. Failure to Produce Documents as Required Herein – Remedies and Consequences.

In the event that a document required to be made available to a respondent pursuant to this procedure is not made available, no reconsideration by the Commission is required, unless the Commission concludes, by an affirmative vote of four or more Commissioners, that there is a reasonable likelihood that the decision of the Commission or result of the conciliation would have been different than the one made had such disclosure taken place. Any failure by the Commission to make a document available does not create any rights for a respondent to seek judicial review, nor any right for a

defendant in litigation to request or receive a dismissal or remand or any other judicial remedy. A respondent may not request reconsideration by the Commission more than ten days after the conclusion of conciliation.

VI. Consequences of Disclosure.

Disclosure of documents pursuant to this procedure is not an admission by the Commission that the information or document exculpates or mitigates respondent's liability for potential violations of the Act.

VII. Applicability During Civil Litigation.

In any civil litigation with the respondent, the discovery rules of the court in which the matter is pending, and any order made by that court, shall govern the obligations of the Commission. The intention of the Commission is for this procedure to serve as internal guidance only and the procedure adopted herein does not create any rights that are reviewable or enforceable in any court.

VIII. Annual Review.

No later than June 1 of each year, the General Counsel shall prepare and distribute to the Commission a report describing the application of the procedure adopted herein over the previous year. This annual report shall include the General Counsel's assessment of whether, and to what extent, the procedure has provided an appropriate balance between the Commission's interest in providing respondents with relevant documents and information and the confidentiality provisions of the Act, consistent with the Commission's goal of maintaining open, fair and just investigations and enforcement proceedings, along with any recommendations from the General Counsel regarding how the Commission could better accomplish that goal.

IX. Conclusion.

Failure to adhere to this procedure does not create a jurisdictional bar for the Commission to pursue all remedies to correct or prevent a violation of the Act.

This notice establishes an internal agency procedure for disclosing to respondents documents and information acquired by the agency during its investigations in the enforcement process. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers. Consequently, this procedure does not bind the Commission or any member of the general public, nor does it create any rights for respondents or third parties. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which

apply when notice and comment are required by the APA or another statute, are not applicable.