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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 5-5-11

May 5, 2011

SUBMITTED LATE

MEMORANDUM

TO: Commission Secretary

FROM: Christopher Hughey
Acting General Counsel

Kathleen Guith
Acting Associate General Counsel for Enforcement

SUBJECT: Comments re: Disclosure and Exculpatory Evidence Procedures

Please have the attached document circulated to the Commission and placed on the May 5, 2011 agenda.

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey
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SUBJECT: Comments on Exculpatory Evidence and Evidence Production in the Enforcement Process

Below, the Office of General Counsel ("OGC") analyzes the subject of disclosing exculpatory information during the enforcement process and examines draft agency policies proposed by different Commissioners that outline various procedures for the general disclosure of evidence in enforcement matters.

I. Exculpatory Evidence in the Enforcement Process

This section of the memorandum discusses the issue of sharing exculpatory or mitigating information with respondents in the Commission's enforcement proceedings. In order to prepare this analysis, we contacted a number of different civil enforcement agencies to discuss various aspects of their own formal and informal disclosure policies. These discussions have helped inform our examination of the issue and our analysis of how the Commission could promote further transparency in our enforcement process yet retain the flexibility necessary to avoid frustrating ongoing investigations by the

Commission into other respondents, ongoing investigations by other government agencies, our ability to receive information from other government agencies, and the Commission's confidentiality obligations. As discussed in further detail below, we believe that there are a number of steps the Commission can take to achieve all of these important goals.

A. Disclosure of Exculpatory Evidence

The Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87-8 (1963), held that the Due Process Clause required the government to provide criminal defendants with exculpatory evidence, i.e. "evidence favorable to an accused", that is "material to guilt or punishment." Since *Brady*, the Supreme Court has addressed what types of evidence are considered "material to guilt or punishment." The standard of "materiality" has evolved over time, but the Supreme Court's most recent iteration of the standard requires post-conviction relief for a defendant "when prejudice to the accused ensues . . . [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).[1] Moreover, the purpose of *Brady* is "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur" at trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

In applying the *Brady* doctrine, the Supreme Court has limited the scope of the mandated disclosure to exculpatory, not mitigating, evidence and has not extended the disclosure requirement to allow unfettered access to a prosecutor's investigatory file. The Supreme Court has stated that "[w]e have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995), *citing* ABA Model Rule of Professional Conduct 3.8(d) (1984).[2] *See also Pennsylvania* v. *Ritchie*, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence

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[1] Throughout the evolution of *Brady*, the Supreme Court's application of the "materiality" standard has taken a number of forms when used to determine whether a defendant is entitled to relief. These formulations include "if the omitted evidence creates a reasonable doubt that did not otherwise exist," *United States v. Agurs*, 427 U.S. 97, 112 (1976), "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *United States v. Bagley*, 473 U.S. at 682, if "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable," *Kyles v. Whitley*, 514 U.S. 419, 441 (1995), and if "the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. at 281.

[2] ABA Model Rule of Professional Conduct 3.8(d), which applies only to criminal prosecutors in jurisdictions that have adopted the rule, defines exculpatory evidence as "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."

does not include the unsupervised authority to search through the Commonwealth's files."); *Illinois* v. *Moore*, 408 U.S. 786, 795 (1972) (holding that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

In the criminal context, *Brady* material must be disclosed "in time for its effective use at trial, . . . or at a plea proceeding." (Internal citations omitted.) *U.S.* v. *Douglas*, 525 F.3d 225, 245 (2d. Cir. 2008). In addition, the requirement that *Brady* materials be disclosed for use at trial becomes effective after the indictment. *See U.S.* v. *Coppa*, 267 F.3d. 132, 144 (2d. Cir. 2001). Finally, disclosure of information under Model Rule 3.8(d), which is only applicable to prosecutors in jurisdictions adopting this rule, "must be made early enough that the information can be used effectively." ABA Formal Opinion 09-454. However, even the broader Model Rules provide limitations. For instance, "[w]here early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order." ABA Formal Opinion 09-454.

B. Exculpatory Evidence in Administrative Enforcement

We consulted eight federal administrative agencies regarding their disclosure policies: Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Trade Commission, Federal Communications Commission, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and the Office of the Comptroller of the Currency. While the *Brady* requirements do not formally apply to administrative proceedings,[3] a number of those agencies have adopted disclosure practices in their formal administrative enforcement actions that may include disclosure of *Brady* material. The federal enforcement agencies we reviewed that have applied *Brady* tend to follow the Supreme Court's interpretation of *Brady*. While the scope of disclosure varies among the agencies, all of them seem to limit disclosure to material *evidence*, not simply

[3] *See, e.g., 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); *Zandford v. NASD*, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same). *See also* Federal Energy Regulatory Commission, Policy Statement on Disclosure of Exculpatory Materials, ¶ 6 Docket No. PL10-1-000 (Dec. 17, 2009) ("FERC Policy Statement"), *available at* http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf . The Commodity Futures Trading Commission has been required to comply with certain *Brady* requirements through its administrative adjudications. *See, e.g., In re First Nat'l Monetary Corp.*, Opinion and Order, CFTC No. 79-56, CFTC No. 79-57, 1981 WL 26049 (Nov. 13, 1981). But the Commodity Futures Trading Commission has declined to incorporate *Brady* requirements into its Rules of Practice. *See* Explanation and Justification: Commodity Futures Trading Commission Rules of Practice, 63 Fed. Reg. 55784, 55786 (Oct. 19, 1998) ("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.").

information. As a result, even the agencies with the broadest disclosure policies exclude the release of privileged information, internal deliberative memos, or information obtained from a confidential source.[4]

Unlike the Commission, the investigations handled by the agencies we spoke with typically lead to a formal hearing or other adjudicative process before a board or administrative law judge ("ALJ") who is able to impose penalties or other remedies. With one exception, none of these agencies require disclosure of this evidence before its formal adjudicatory process begins or is about to begin. For example, the Securities and Exchange Commission's ("SEC") Rules of Practice provide that the 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." Rule 230(a)(1). The Commodity Futures Trading Commission ("CFTC") is similar to the SEC in that it provides for disclosure of certain information during the "discovery" phase of its formal adjudications. *See* 17 C.F.R. § 10.42. The Environmental Protection Agency ("EPA") provides for some disclosure in its adjudications pursuant to its prehearing information exchange. *See* 40 C.F.R. § 22.19(a). The Nuclear Regulatory Commission ("NRC") follows general disclosure requirements that apply to cases in all types of hearing tracts that requires all parties to disclose documents within 30 days of the start of proceedings. *See* 10 C.F.R. § 2.336.

There are some agencies with formal adjudicative processes that do not apply *Brady* disclosure requirements at all. For instance, the Federal Trade Commission's ("FTC") rules allow for parties to make requests to inspect documents in their possession, 16 C.F.R. § 3.37, but the FTC does not apply the *Brady* disclosure requirements to its adjudicative proceedings. *See Allied Chemical Corp. et al.*, 75 F.T.C. 1055 (Jan. 30, 1969) (declining to apply *Brady* obligations to FTC staff, but requiring compliance with Jencks Act, which deals only with materials that must be disclosed to a defendant at trial in order to effectively cross-examine a witness). Similarly, while the parties to a proceeding before the Federal Communications Commission ("FCC") may request that any other party produce and permit inspection of records or other documents, the FCC itself is excluded from such disclosure obligations. 47 C.F.R. § 1.325. In addition, these discovery rules only apply once formal proceedings have commenced. Likewise, the Office of the Comptroller of the Currency ("OCC") provides for some discovery during adjudications, although it appears to be limited to relevant, non-privileged information and the agency has not implemented an exculpatory evidence disclosure policy for adjudications. 12 C.F.R. § 19.25. Also, the OCC has not implemented any *Brady*-like disclosure policies for its investigations, formal or otherwise. *See* 12 C.F.R. § 19.1 *et seq.*

[4] *See* FERC Policy Statement, *supra* note 3, ¶ 7; 17 C.F.R. § 201.230 (SEC Rules of Practice); *In re First Nat'l Monetary Corp, supra* note 3.

The Federal Energy Regulatory Commission ("FERC") is the only agency consulted that has a policy on exculpatory evidence covering both informal agency investigations and formal adjudications. *See* FERC Policy Statement, *supra* note 3, ¶ 7. Because the agency adopted the policy only in December 2009, it has had limited experience with implementation. Further, because FERC's ongoing cases are non-public and there are no closed cases on the public record involving the policy, we were unable to obtain specific details about cases in which the policy has been applied.

Disclosing exculpatory material during an administrative investigation appears to have posed a variety of concerns for the other agencies we consulted. Agencies not applying a *Brady*-like disclosure policy have expressed that protecting the confidentiality of their investigations is of particular importance in not adopting such a policy. Other concerns include the agencies' ability to conduct investigations effectively and efficiently, prevent the disclosure of confidential information, avoid collusion between witnesses or parties, and prevent the source of complaints and informants from dwindling. Early disclosure of such information may also negatively impact a parallel criminal investigation or proceeding.

C. Exculpatory Evidence in the Commission's Enforcement Process

While other agencies' enforcement processes lead to adjudicative proceedings before a commission, board, or administrative law judge, the Commission's enforcement process ultimately leads to federal court. As a result, while these other agencies are subject to various regulatory discovery and disclosure obligations during their adjudicative proceedings, the Commission is only subject to such obligations after it files a civil enforcement action in district court. We are not aware of any civil enforcement agency that lacks authority to impose penalties or fines that also imposes broad disclosure or discovery obligations. Likewise, in researching agency disclosure practices during non-adjudicative proceedings, we found only limited examples relevant to our non-adjudicative enforcement process.[5]

Nevertheless, the Commission's administrative enforcement process provides ample opportunity for OGC to disclose exculpatory information at various points. However, in doing so we must maintain an appropriate balance between notifying the respondent of any exculpatory evidence, fulfilling the Commission's obligation to comply with the confidentiality provisions set forth in Section 437g(a)(12)(A) of the Act,

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[5] The CFTC, FTC, and SEC provide respondents the opportunity to review and copy materials from those agencies' investigatory files. *See* 17 C.F.R. 10.42(b) (CFTC); 16 C.F.R. Parts 0-5 (FTC); 17 C.F.R. § 201.230(SEC). However, those exchanges are done during the discovery phase of the agencies' formal adjudicative procedures. At the discretion of its staff, the SEC informs potential respondents of the possible violations for which they may be charged prior to the beginning of formal adjudications. *See* SEC Division of Enforcement, Enforcement Manual, at 27-34, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. Occasionally, recipients of these "Wells" notices may request to review portions of the staff's investigative file and such access may be granted on a case-by-case basis.

and protecting the integrity of the Commission's investigations.[6] Although we believe that notice of exculpatory evidence is most crucial when the General Counsel's Briefs are served, as explained below, exculpatory evidence may play a role in the Commission's enforcement process at various stages, including during the reason to believe stage, investigations, and pre-probable cause conciliation. For instance, at the First General Counsel's Report stage, the Commission may find no reason to believe or dismiss based on exculpatory information presented in the General Counsel's report. At the pre-probable cause conciliation stage, the Commission may take no further action or mitigate the civil penalty based on such information. Finally, the discovery of exculpatory information also impacts the Commission's determination of whether it should find probable cause or whether to make knowing and willful findings. We discuss each of these stages further below.

1. Reason to Believe

At the First General Counsel's Report stage, before an investigation has begun, the First General Counsel's Report provides information relevant to a Commission decision on whether to find reason to believe or dismiss a matter, including exculpatory and mitigating information. Any such information that is known at this stage will likely already be known to a respondent, may have even been provided to the Commission by the respondents themselves, and would therefore not even be disclosed under the stricter *Brady* doctrine applicable to criminal trials.[7] Either way, any such information is presented to and analyzed for the Commission in the General Counsel's report and typically shared with the respondent in the Commission's Factual and Legal Analysis.

2. Investigation

Disclosing exculpatory material to respondents during an administrative investigation causes OGC the same types of concerns expressed by each of the agencies contacted. *See supra* at p. 5. Based on our experience, the Commission appears to face similar risks and concerns about disclosing exculpatory evidence before or during an investigation. Particularly worrisome are the potential for compromising a Commission investigation and the potential conflict that such a disclosure would have with the Commission's confidentiality provision at Section 437g(a)(12)(A). Like other agencies, we believe that disclosing evidence during an investigation has the potential to compromise that investigation because such information could be used to coordinate testimony by witnesses or to discern the Commission's investigatory strategy at a point when the Commission is still trying to ascertain the exact nature of the violation(s). It

[6] By "integrity of the Commission's investigation" we mean the ability of the Commission's investigation to bring about truthful and complete information concerning the facts at issue.

[7] Under *Brady* and its progeny, the government is not required to disclose information to a criminal defendant that is already in his or her possession. *See, e.g.*, FERC Policy Statement, *supra* note 3, ¶ 3, n. 6; *see also In re First National Monetary Corp.*, *supra* note 3.

appears that the potential to disrupt an agency's investigation is the primary reason why all other agencies contacted, except FERC, do not release exculpatory evidence until the completion of an investigation. Further, depending on the source of the information and whether the matter involves multiple respondents, and other factors, our ability to provide respondents access to certain information is simply hampered by the Act's confidentiality provisions. Other agencies that have similar confidentiality concerns either do not disclose exculpatory evidence, thereby eliminating any potential conflict with their confidentiality obligations, or resolve these conflicts before ALJs on a case-by-case basis, as is the practice at FERC. Similarly, there are concerns over the impact of disclosure on a pending criminal investigation as well as potential negative consequences that such disclosure might have on our relationship with criminal law enforcement agencies such as the Department of Justice.

Providing exculpatory evidence during an investigation is also impractical because the exact nature and scope of the violation is not always known until the completion of the investigation. Since exculpatory evidence under *Brady* must lead to a reasonable probability that the evidence would make a difference in the verdict, it is impractical for the Commission to make that decision before it has even gathered and analyzed the evidence in a comprehensive matter. Further, when OGC does discover evidence during its investigation that completely exculpates a respondent, or mitigates a violation, our General Counsel's Reports and Factual and Legal Analyses reflect the state of the evidence at a point when that information can be properly weighed by the Commission.

Further, in some cases, disclosure of exculpatory information during our investigations will jeopardize parallel criminal investigations that may not yet be at the stage of requiring the release of *Brady* material. Disclosure may frustrate our relationships with criminal law enforcement agencies such as the Department of Justice and their willingness to share information with the Commission from their own investigative files.

3. Pre-Probable Cause Conciliation

Pre-probable cause conciliation can occur either before or after a Commission investigation. In the Commission's determination of whether to authorize pre-probable cause conciliation, which violations to pursue, and the extent of the civil penalty, the Commission always examines the exculpatory and mitigating evidence gathered during the investigation. As a result, it may be appropriate to inform a respondent at this point that the Commission has taken exculpatory and mitigating evidence into account. Any exculpatory or mitigating evidence that is material to the violations at issue in the conciliation inherently will be presented to the respondent through the Factual and Legal Analysis, but in order to be more explicit, the Commission can also inform respondents that it considered such information in the letter notifying respondents that the Commission has authorized conciliation. In instances where the Commission enters pre-probable cause conciliation prior to an investigation, it would be unlikely that the

Commission would be in possession of mitigating information that is not already in the possession of the respondent. Most of the other agencies researched also indicated that at this stage, such exculpatory or mitigating evidence would already likely be in the possession of the respondent, and would not have been required to be disclosed pursuant to the *Brady* doctrine. *See supra* note 7.

4. Probable Cause

At the probable cause stage, we address the evidence obtained during the investigation in the General Counsel's Report circulated to the Commission, including evidence that might have some tendency to negate culpability or mitigate the civil penalty. Because a probable cause finding is a pre-requisite for triggering formal adjudicative proceedings in federal court, the review of the evidence in the General Counsel's Brief and Report, along with a respondent's reply brief, provides the Commission a full opportunity to weigh the merits of the case before finding probable cause and later filing a judicial complaint.

We believe that it is appropriate to detail any exculpatory evidence assembled during an investigation in the General Counsel's Brief that is served on the respondent. Despite the Act's lack of formal adjudication, we believe that the General Counsel's Brief is the appropriate document to disclose such evidence because the service of this brief marks the beginning of the probable cause phase and a finding of probable cause can trigger certain legal consequences for respondents. For example, the Commission may refer a potential criminal violation to the Attorney General of the United States if it determines that there is probable cause to believe the respondent committed a knowing and willful violation. 2 U.S.C. § 437g(5)(C). In addition, a finding of probable cause to believe requires the Commission to attempt, for a period of at least 30 days, to correct or prevent such violation through methods such as conciliation. 2 U.S.C. § 437g(4)(A)(i).

Evidence that completely vindicates a respondent would not appear in a General Counsel's Brief because such evidence would have led to a recommendation to take no further action rather than to find probable cause, but the General Counsel's Brief may contain evidence that has a tendency to negate culpability or mitigate damages. However, this practice of including such information in the brief can be evaluated on a case-by-case basis because in some matters with multiple respondents, this practice may pose a risk of divulging information that is confidential under Section 437g(a)(12)(A) of the Act. Similarly, the benefits of disclosure would need to be balanced with the potential of divulging information that affects a criminal prosecution. Moreover, since most agencies contacted indicate that they disclose exculpatory evidence informally, we believe that the most appropriate manner by which the Commission can disclose such evidence would be by explicitly including language in the form letter used in serving General Counsel's Briefs to reflect that the information contained therein includes exculpatory evidence. The respondents would then receive a copy of such information as part of the service of the briefs.

D. Conclusion

As detailed above, although the Commission differs from other civil enforcement agencies because it lacks a formal adjudicatory process, we believe that the disclosure of exculpatory evidence can be implemented at appropriate times in our enforcement process, and in many phases of enforcement, it already is. While OGC already strives to disclose such information in Factual and Legal Analyses and General Counsel's Briefs served on respondents, pursuant to the general guidelines contained in this memorandum, we can begin to make our practice more consistent and explicit through our notification letters at the pre-probable cause conciliation stage and at the time the brief is provided to a respondent.

II. Comments on Proposed "Agency Procedure for Disclosure of Documents and Information in the Enforcement Process"

This section of the memorandum provides comments from OGC concerning the proposed "Agency Procedure for Disclosure of Documents and Information in the Enforcement Process" ("Procedure") proposed in Agenda Document X11-23.

The purpose of this section is to explain the legal and policy concerns we have identified in the draft. Where appropriate, we also suggest changes to the approach taken in the draft Procedure that would address our concerns. We also reiterate our agreement with and appreciation for the benefits derived from providing exculpatory evidence to respondents, and we remain focused on ensuring that respondents have access to relevant exculpatory information. The Commission should have an opportunity to hear respondents' arguments about such information as it makes decisions in the enforcement process, as long as the applicable procedure does not violate the Act's confidentiality provisions, unnecessarily waive important privileges, or hinder the Commission's enforcement efforts.

A. Scope of Disclosure

The primary concern of the proposed Procedure appears to be applying "the principle of *Brady*, and its judicial progeny," to information obtained in Commission investigations. *See generally* Procedure, Section II. In order to accomplish this goal, section IV of the Procedure broadly defines "exculpatory information" as "information in the possession of the agency, not reasonably knowable by the respondent, that is relevant to a possible violation of the Act 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." However, the scope of the disclosure required pursuant to the proposed Procedure appears to extend beyond that necessary to provide respondents with exculpatory information, as defined therein. Specifically, Section IV(a)(1) requires the production of "all documents obtained by the Office of General Counsel, not publicly available and not already in the possession of the respondent, in connection with its investigation." If the Commission's primary concern

is to ensure fairness for respondents in their ability to present an appropriate defense in the enforcement process, we believe that limiting the Procedure to the disclosure of exculpatory information, in conjunction with our current practice of providing to respondents any documents or information on which the Commission relies, would achieve that end. A procedure focused on exculpatory information rather than a broader disclosure process that may prove administratively burdensome and time consuming would also harmonize with the Commission's goal of ensuring the timely resolution of enforcement matters.

The proposed Procedure recognizes that the Act and other laws restrict information that the Commission may make public without the consent of persons under investigation, and also contemplates the ability to withhold documents provided by other agencies and confidential sources. *See* Procedure, Section IV(b). However, the Procedure does not explicitly detail these limitations. We recommend making such limitations explicit and mandatory. We also interpret the Procedure to allow the initial withholding of attorney-client privilege and work-product protected documents, including documents (such as Commission staff statements, memoranda, and transcripts that encompass informal communications) that we normally withhold as privileged in litigation. We support this aspect of the Procedure and believe it is necessary to carry out investigations timely and successfully.

B. Scope of Policy

Based on the procedures set forth at Section IV(g)(1), the scope of the proposed Procedure includes both the probable cause and pre-probable cause conciliation stages of the enforcement process, including pre-probable cause conciliation conducted prior to the completion of an investigation. For a variety of reasons we favor limiting the disclosure requirements to the probable cause stage. Because of the potential delay in the enforcement process, the additional Commission resources to be expended in the production of documents to respondents and the complexity of matters involving multiple respondents, it seems more appropriate to limit application of the proposed Procedure to those matters at the probable cause stage and not to those respondents engaged in pre-probable cause conciliation. Further, a finding of probable cause is a statutory pre-requisite to both civil litigation and referral to the Department of Justice, and as such the need for the Respondent to obtain such documents is greater at probable cause than pre-probable cause conciliation. This notion is further supported by provisions in the Act that appears to contemplate disclosure of evidence, through a brief, to respondents at the probable cause stage. *See* 2 U.S.C. § 437g(a)(3).

C. The Act's Confidentiality Provision

The Act provides: "Any notification or investigation made under this section shall not be made public by the Commission or any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 2 U.S.C. § 437g(a)(12)(A). Section IV(e)(1) of the proposed

Procedure appears to satisfy the requirements of 437g(a)(12) by requiring that any co-respondent from whom documents were received sign a confidentiality waiver authorizing the Commission to provide such documents to other respondents. Section IV(e)(1) further protects the confidentiality of a Commission investigation by stating that the respondent receiving such documents "may be required to sign a nondisclosure agreement to keep confidential any document or information it obtains form the Commission." However, the proposed Procedure also indicates that, if the respondent providing the documents does not sign a waiver, the Commission may, nevertheless, determine that those documents should still be disclosed to co-respondents. In so doing, Section IV(e)(3) appears internally inconsistent with Section IV(b)(1)(iii), which allows the withholding of documents if providing the document is "prevented by law, regulation, or upon agreement with the source of the information or document from disclosing information, document or category of documents." Further, and perhaps most important, this section explicitly creates the potential for a scenario where the Commission is providing information subject to 437g(a)(12)(A) despite the explicit refusal by a respondent to waive confidentiality.

This issue is most likely to present itself in matters where respondents have interests that are adverse to one another, and will therefore be reluctant to sign a confidentiality waiver, e.g., in corporate reimbursement cases where the corporate entity reports corporate reimbursements made from its accounts, but points the finger at individual officers or employees and claims that it was unaware of the scheme. There are also matters where co-respondents not only have adverse interests generally, but are in civil litigation with each other over issues related to the subject matter of the MUR and have attempted to use the Commission process to obtain documents for use in the civil litigation.

Although the Procedure attempts to remedy the problem by requiring the respondent viewing the documents to sign a nondisclosure agreement, that protection may not suffice under 2 U.S.C. § 437g(a)(12) in all circumstances. Section 437g(a)(12)(A) has been interpreted by federal courts to prevent the Commission from disclosing information concerning an ongoing investigation and even the existence of an investigation, without the consent of the target of the investigation. *In re: Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001) ("[B]oth 2 U.S.C. § 437g(a)(12)(A) and 11 C.F.R. § 111.21(a) plainly prohibit the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation."); *AFL-CIO* v. *Federal Election Commission*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("[R]espondents [in an ongoing Commission investigation] have a 'strong confidentiality interest' analogous to the interest of targets of grand jury investigations."). Similar concerns exist for the confidentiality provisions that cover information derived in connection with conciliation. *See* 2 U.S.C. § 437g(a)(4)(B)(i); 11 C.F.R. § 111.20.

The existence of the "Nondisclosure Agreement" pursuant to paragraph (e)(1) in the proposed Procedure may adequately remedy the Procedure's apparent conflict with

the Act's confidentiality provisions, but this is not assured. *See* Procedure, Section IV(e)(1). Certainly, we have in previous instances provided material to *complainants* pursuant to courts' protective orders. For instance, in defending delay suits under 2 U.S.C. § 437g(a)(8), we have provided complainants with chronologies of actions taken in open MURs under protective orders, and the theory there has been that with an appropriate confidentiality agreement or protective order nothing is being made "public" that would require the assent of any respondent. However, it is not clear that this argument would be successful in all cases. First, providing material to a complainant is not the same as providing it to a respondent; a complainant usually will know the identities of those about whom he or she has complained (although the Commission does have the ability to add additional respondents based on additional information). Second, it is conceivable that in a given case there could be so many respondents that even with confidentiality agreements, releases of information come closer to the line of a "public" release; we are currently defending a 437g(a)(8) dismissal suit challenging, among other things, our failure to notify well over 100 persons whom that complainant wished to be "respondents." Third, and most significantly, even assuming the "Nondisclosure Agreement" section prevents any violation of the letter of Section 437g(a)(12), there will from time to time be cases where identification of Respondent Jones as a Respondent to Respondent Smith would violate the statute's spirit. Jones and Smith may have conflicting interests and might be able to take advantage of confidential information even without "going public" with it; for instance, Jones may not wish Smith to know the degree to which Jones is or is not cooperating with us. Therefore, limiting the scope of the proposed disclosure and retaining the ability to withhold certain documents may be the more appropriate way for the Commission to reconcile disclosing exculpatory evidence to respondents and complying with the Act's confidentiality provision.

Finally, the agency's deliberate disclosure of the existence of another respondent in a multi-respondent matter would appear to be a new interpretation of the Act's confidentiality provisions. This may be best achieved after providing an opportunity for public notice and comment. Specifically, the Commission may wish to consider input from the public (especially from counsel representing respondents who may have the existence of their Commission investigations disclosed to other respondents) on how the Commission should interpret the Act's confidentiality provisions. Alternatively, if the Commission were interested in altering the confidentiality provisions of the Commission's regulations, it could pursue a rulemaking to that effect. *See, e.g.,* 18 C.F.R. § 1b.9 (FERC enacted a formal regulation concerning the confidentiality of its investigations setting forth instances where information obtained during the course of an investigation can be made public).

D. Implementation of Pilot Program

Finally, we suggest that, if the Commission adopts a new disclosure process, it should do so initially as a pilot program. This would allow the agency time to identify and address any unforeseen needs or considerations before a procedure becomes permanent.