

If the stay is vacated, the information will be released under the Freedom of Information Act ten calendar days after the person requesting confidential treatment is notified of this action by telephone, if possible, with a facsimile or certified mail letter sent to the person's last known address, unless the court orders otherwise.

(f) *Initial determination that confidential treatment is warranted.* If it is determined by the Commission's Freedom of Information Act Officer that confidential treatment is warranted, the person submitting the information and the person requesting access to the information under the Freedom of Information Act will be so informed by mail. The person requesting access, pursuant to the Freedom of Information Act, will also be informed of the right to appeal the determination to the General Counsel. Any such appeal must be taken in accordance with the provisions of the Freedom of Information Act and Commission rules thereunder. See 17 CFR 200.80(d)(6).

(g) *Confidential treatment request and substantiation as nonpublic.* Any confidential treatment request and substantiation of it shall be nonpublic. If an action is filed in a Federal court, however, by either the Freedom of Information Act requester (under 5 U.S.C. 552(a)(4) and §200.80(d)(6)) or by the confidential treatment requester (under paragraph(e)(5) of this section), both request and substantiation may become part of the public court record.

(h) *Effect of no prior request for confidentiality.* (1) If access is requested under the Freedom of Information Act to information which is submitted to the Commission on or after October 20, 1980 with respect to which no request for confidential treatment has been made pursuant to either paragraph (c)(1) or (c)(5) of this section, it will be presumed that the submitter of the information has waived any interest in asserting an exemption from disclosure under the Freedom of Information Act for reasons of personal privacy or business confidentiality, or for other reasons.

(2) Notwithstanding paragraph (h)(1) of this section, in appropriate circumstances, any person who would be affected by the public disclosure of in-

formation under the Freedom of Information Act may be contacted by Commission personnel to determine whether the person desires to make a request for confidential treatment. Any request for confidential treatment that is asserted in response to such inquiry shall be made in accordance with provisions of this section.

(i) *Extensions of time limits.* Any time limit under this section may be extended in the discretion of the Commission, the Commission's General Counsel, or the Commission's Freedom of Information Act Officer for good cause shown.

(j) *Electronic filings.* Confidential treatment requests shall be submitted in paper format only, whether or not the person making the request is an electronic filer.

(k) In their discretion, the Commission, the Commission's General Counsel, and the Freedom of Information Act Officer may use alternative procedures for considering requests for confidential treatment.

[45 FR 62421, Sept. 19, 1980, as amended at 47 FR 20289, May 12, 1982; 58 FR 14659, Mar. 18, 1993; 65 FR 55184, 55185, Sept. 13, 2000]

Subpart E [Reserved]

Subpart F—Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees

AUTHORITY: 15 U.S.C. 77s, 78w, 79t, 77sss, 80a-37, 80b-11; 5 U.S.C. 557.

§ 200.110 Purpose.

This code is adopted in conformity with section 4 of the Government in the Sunshine Act, Pub. L. 94-409, and is designed to insulate the administrative process from improper influence.

[42 FR 14690, Mar. 16, 1977]

§ 200.111 Prohibitions; application; definitions.

(a) *Prohibited communications.* In any agency proceeding which is subject to this subpart, except to the extent required for the disposition of ex parte matters as authorized by law:

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(1) No interested person outside the agency shall make or knowingly cause to be made to any member of the Commission or decisional employee an ex parte communication relevant to the merits of the proceeding; and

(2) No member of the Commission or decisional employee shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding.

(b) *Proceedings to which prohibitions apply.* This subpart shall apply to all proceedings subject to 5 U.S.C. 557(a), including suspension proceedings instituted pursuant to the provisions of Regulations A, B, E, and F of the Securities Act of 1933 (§ 230.251 *et seq.* of this chapter), all review proceedings instituted pursuant to section 19(g) of the Securities Exchange Act of 1934, and all other proceedings where an evidentiary hearing has been ordered pursuant to a statutory provision or rule of the Commission and where the action of the Commission must be taken on the basis of an evidentiary record. In addition, this subpart shall apply to any other proceeding in which the Commission so orders.

(c) *Period during which prohibitions apply.* (1) The prohibitions in § 200.111 (a) shall begin to apply when the Commission issues an order for hearing; *Provided,*

(i) That in suspension proceedings pursuant to Regulations A, B, E and F of the Securities Act of 1933 (§ 230.251 *et seq.* of this chapter), these prohibitions shall commence when the Commission enters an order temporarily suspending the exemption; and

(ii) That in proceedings under section 19(d) of the Securities Exchange Act of 1934 these prohibitions shall commence from the time that a copy of an application for review has been served by the Secretary upon the self-regulatory organization; and

(iii) In no case shall the prohibitions in § 200.111(a) begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

(2) The prohibitions in § 200.111(a) shall continue until the time to file a petition for rehearing from the final order of the Commission has expired. In the event a petition for rehearing is filed, these prohibitions shall cease if and when the petition for rehearing is denied.

(3) The Commission may, by specific order entered in a particular proceeding, determine that these prohibitions shall commence from some date earlier than the time specified in this paragraph (c) or shall continue until a date subsequent to the time specified herein.

(d) *Definitions.* As used in this subpart:

(1) *Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all participants to the proceeding is not given, but it shall not include requests for status reports on any matter or proceeding. In addition, an ex parte communication shall not include:

(i) Any written communication of which copies are served by the communicator contemporaneously with the transmittal of the communication in accordance with requirements of Rule 150 of the Commission's Rules of Practice, § 201.150 of this chapter, upon all participants to the proceeding (including the interested Division or Office of the Commission); or

(ii) Any oral communication where 48 hours advance written notice is given to all participants to the proceeding (including the interested division of the Commission).

(2) *Participants to the proceeding* means all parties to the proceeding (including the interested Division or Office of the Commission) and any other persons who have been granted limited participation pursuant to the provisions of Rule 210(c) of the Commission's Rules of Practice, § 201.210(c) of this chapter.

(3) *Decisional employee* means: (i) The administrative law judge assigned to the proceeding in question; and

(ii) All members of the staff of the Office of Opinions and Review; and

(iii) The legal and executive assistants to members of the Commission; and

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(iv) Any employee of the Commission who has been specifically named by order of the administrative law judge or the Commission in the proceeding to assist thereafter in making or recommending a particular decision; and

(v) Any other employee of the Commission who is, or may reasonably be expected to be, involved in the decisional process of the proceeding.

[42 FR 14690, Mar. 16, 1977, as amended at 60 FR 32795, June 23, 1995]

§ 200.112 Duties of recipient; notice to participants.

(a) *Duties of recipient.* A member of the Commission or decisional employee who receives, or who make or knowingly causes to be made, a communication prohibited by this section, or who receives or makes a communication which he or she concludes should, in fairness, be brought to the attention of all participants to the proceeding, shall transmit to the Commission's Secretary, who shall place on the public record of the proceeding:

(1) All such written communications; and

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) (1) and (2) of this section.

(b) *Notice to participants.* The Secretary shall send copies of the communication to all participants to the proceeding with respect to which it was made, and shall notify the communicator of the provisions of this code prohibiting ex parte communications. If the communications are from persons other than participants to the proceedings or their agents, and the Secretary determines that it would be too burdensome to send copies of the communications to all participants because: (1) The communications are so voluminous, or (2) the communications are of such borderline relevance to the issues of the proceedings, or (3) the participants to the proceeding are so numerous, the Secretary may, instead, notify the participants that the communications have been received, placed in the file, and are available for examination.

(c) *Post decisional communications.* Any Commission member or decisional employee who receives a communication which would be prohibited by this Code, but for the fact that it was received subsequent to the date when the prohibitions imposed hereby have ceased to apply, shall comply with the provisions of § 200.112(a) with respect to such communication in the event that he or she is to act in a decisional capacity in the same proceeding pursuant to remand where he or she concludes, in fairness, that such communication should be brought to the attention of all participants to the proceeding.

[42 FR 14691 Mar. 16, 1977]

§ 200.113 Opportunity to respond; interception.

(a) *Opportunity to respond.* All participants to a proceeding may respond to any allegations or contentions contained in a prohibited ex parte communication placed in the public record in accordance with § 200.112. Such responses shall be included in the public record.

(b) *Interception of communications.* All written communications addressed to the Commission respecting a proceeding will be deemed to be communications to the staff of the interested division and will be directed to that division by the Commission's mail room. A Commission member or decisional employee may instruct any of his assistants who are nondecisional employees to intercept any communication directed to him which might appear to violate this Code and authorize them either to transmit any such written communication to the staff of the interested division of the Commission, if it appears from the contents of the communication that the intent of the sender is consistent with such action, or to return the communication to the sender.

[28 FR 4447, May 3, 1963, as amended at 42 FR 14691, Mar. 16, 1977]

§ 200.114 Sanctions.

(a) *Discipline of persons practicing before the Commission.* The Commission may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before it of any