

proceeding has been sought by the applicant or any party to the proceeding.

PART 4—MISCELLANEOUS RULES

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

§ 4.1 Appearances.

(a) *Qualifications*—(1) *Attorneys*. (i) U.S.-admitted. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) European Community (EC)-qualified. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

(2) *Others*. (i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(ii) At the request of counsel representing any party in an adjudicative

proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.

(b) *Restrictions as to former members and employees*—(1) *General Prohibition*. Except as provided in this section, or otherwise specifically authorized by the Commission, no former member or employee (“former employee” or “employee”) of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation¹ (except that a former employee who is disqualified solely under paragraph (b)(1)(ii) or paragraph (b)(1)(iv) of this section, is not prohibited from assisting or advising behind-the-scenes) if:

(i) The former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate;

(ii) The participation would begin within two years after the termination of the former employee’s service and, within a period of one year prior to the

¹It is important to note that a new “proceeding or investigation” may be considered the same matter as a seemingly separate “proceeding or investigation” that was pending during the former employee’s tenure. This is because a “proceeding or investigation” may continue in another form or in part. In determining whether two matters are actually the same, the Commission will consider: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest. See 5 CFR 2637.201(c)(4). For example, where a former employee intends to participate in an investigation of compliance with a Commission order, submission of a request to reopen an order, or a proceeding with respect to reopening an order, the matter will be considered the same as the adjudicative proceeding or investigation that resulted in the order. A former employee who is uncertain whether the matter in which he seeks clearance to participate is wholly separate from any matter that was pending during his tenure should seek advice from the General Counsel or the General Counsel’s designee before participating.

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employee's termination, the proceeding or investigation was pending under the employee's official responsibility;

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in §4.10(a), came to, or would be likely to have come to, the former employee's attention in the course of the employee's duties, (unless Commission staff determines that the nature of the documents or information is such that no present advantage could thereby be derived); or

(iv) The former employee's participation would begin within one year after the employee's termination and, at the time of termination, the employee was a member of the Commission or a "senior employee" as defined in 18 U.S.C. 207(c).

(2) *Clearance Request Required.* Any former employee, before participating in a Commission proceeding or investigation (see footnote 1), whether through an appearance before a Commission official or behind-the-scenes assistance, shall file with the Secretary a request for clearance to participate, containing the information listed in §4.1(b)(4) if:

(i) The proceeding or investigation was pending in the Commission while the former employee served;

(ii) A proceeding or investigation from which such proceeding or investigation directly resulted was pending during the former employee's service; or

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in §4.10(a), came to or would likely have come to the former employee's attention in the course of the employee's duties, and the employee left the Commission within the previous three years.

NOTE: This requirement applies even to a proceeding or investigation that had not yet been initiated formally when the former employee terminated employment, if the employee had learned nonpublic information relating to the subsequently initiated proceeding or investigation.

(3) *Exceptions.* (i) Paragraphs (b) (1) and (2) of this section do not apply to:

(A) Making a pro se filing of any kind;

(B) Submitting a request or appeal under the Freedom of Information Act, the Privacy Act, or the Government in the Sunshine Act;

(C) Testifying under oath (except that a former employee who is subject to the restrictions contained in paragraph (b)(1)(i) of this section with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any person other than the United States in that same matter);

(D) Submitting a statement required to be made under penalty of perjury; or

(E) Appearing on behalf of the United States.

(ii) With the exception of subparagraph (b)(1)(iv), paragraphs (b) (1) and (2) of this section do not apply to participating in a Commission rulemaking proceeding, including submitting comments on a matter on which the Commission has invited public comment.

(iii) Paragraph (b)(1)(iv) of this section does not apply to submitting a statement based on the former employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by §4.5 for witnesses.

(iv) Paragraph (b)(2) of this section does not apply to filing a premerger notification form or participating in subsequent events concerning compliance or noncompliance with Section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulation issued under that section.

(4) *Request Contents.* Clearance requests filed pursuant to §4.1(b)(2) shall contain:

(i) The name and matter number (if known) of the proceeding or investigation in question;

(ii) A description of the contemplated participation;

(iii) The name of the Commission office(s) or division(s) in which the former employee was employed and the position(s) the employee occupied;

(iv) A statement whether, while employed by the Commission, the former employee participated in any proceeding or investigation concerning

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the same company, individual, or industry currently involved in the matter in question;

(v) A certification that while employed by the Commission, the employee never participated personally and substantially in the same matter or proceeding;

(vi) If the employee's Commission employment terminated within the past two years, a certification that the matter was not pending under the employee's official responsibility during any part of the one year before the employee's termination;

(vii) If the employee's Commission employment terminated within the past three years, either a declaration that nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), never came to the employee's attention, or a description of why the employee believes that such nonpublic documents or information could not confer a present advantage to the employee or to the employee's client in the proceeding or investigation in question; and

(viii) A certification that the employee has read, and understands, both the criminal conflict of interest law on post-employment activities (18 U.S.C. 207) and this Rule in their entirety.

(5) *Definitions.* The following definitions apply for purposes of this section:

(i) *Behind-the-scenes participation* includes any form of professional consultation, assistance, or advice to anyone about the proceeding or investigation in question, whether formal or informal, oral or written, direct or indirect.

(ii) *Communicate to or appear before* means making any oral or written communication to, or any formal or informal appearance before, the Commission or any of its members or employees on behalf of any person (except the United States) with the intent to influence.

(iii) *Directly resulted from* means that the proceeding or investigation in question emanated from an earlier phase of the same proceeding or investigation or from a directly linked, antecedent investigation. The existence of some attenuated connection between a proceeding or investigation that was

pending during the requester's tenure and the proceeding or investigation in question does not constitute a direct result.

(iv) *Pending under the employee's official responsibility* means that the former employee had the direct administrative or operating authority to approve, disapprove, or otherwise direct official actions in the proceeding or investigation, irrespective of whether the employee's authority was intermediate or final, and whether it was exercisable alone or only in conjunction with others.

(v) *Personal and substantial participation.* A former employee participated in the proceeding or investigation personally if the employee either participated directly or directed a subordinate in doing so. The employee participated substantially if the involvement was significant to the matter or reasonably appeared to be significant. A series of peripheral involvements may be considered insubstantial, while a single act of approving or participating in a critical step may be considered substantial.

(vi) *Present advantage.* Whether exposure to nonpublic information about the proceeding or investigation could confer a present advantage to a former employee will be analyzed and determined on a case-by-case basis. Relevant factors include, *inter alia*, the nature and age of the information, its relation and current importance to the proceeding or investigation in question, and the amount of time that has passed since the employee left the Commission.

(vii) *Proceeding or investigation* shall be interpreted broadly and includes an adjudicative or other proceeding; the consideration of an application; a request for a ruling or other determination; a contract; a claim; a controversy; an investigation; or an interpretive ruling.

(6) *Advice as to Whether Clearance Request is Required.* A former employee may ask the General Counsel, either orally or in writing, whether the employee is required to file a request for clearance to participate in a Commission matter pursuant to paragraph (b)(2) of this section. The General

Counsel, or the General Counsel's designee, will make any such determination within three business days.

(7) *Deadline for Determining Clearance Requests.* By the close of the tenth business day after the date on which the clearance request is filed, the General Counsel, or the General Counsel's designee, will notify the requester either that:

(i) the request for clearance has been granted;

(ii) the General Counsel or the General Counsel's designee has decided to recommend that the Commission prohibit the requester's participation; or

(iii) the General Counsel or the General Counsel's designee is, for good cause, extending the period for reaching a determination on the request by up to an additional ten business days.

(8) *Participation of Partners or Associates of Former Employees.* (i) If a former employee is prohibited from participating in a proceeding or investigation by virtue of having worked on the matter personally and substantially while a Commission employee, no partner or legal or business associate of that individual may participate except after filing with the Secretary of the Commission an affidavit attesting that:

(A) The former employee will not participate in the proceeding or investigation in any way, directly or indirectly (and describing how the former employee will be screened from participating);

(B) The former employee will not share in any fees resulting from the participation;

(C) Everyone who intends to participate is aware of the requirement that the former employee be screened;

(D) The client(s) have been informed; and

(E) The matter was not brought to the participant(s) through the active solicitation of the former employee.

(ii) If the Commission finds that the screening measures being taken are unsatisfactory or that the matter was brought to the participant(s) through the active solicitation of the former employee, the Commission will notify the participant(s) to cease the representation immediately.

(9) *Effect on Other Standards.* The restrictions and procedures in this sec-

tion are intended to apply in lieu of restrictions and procedures that may be adopted by any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations. Nothing in this section supersedes other standards of conduct applicable under paragraph (e) of this section. Requests for advice about this section, or about any matter related to other applicable rules and standards of ethical conduct, shall be directed to the Office of the General Counsel.

(c) *Public Disclosure.* Any request for clearance filed by a former member or employee pursuant to this section, as well as any written response, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter. Information identifying the subject of a nonpublic Commission investigation will be redacted from any request for clearance or other document before it is placed on the public record.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written notice of appearance, stating the basis for eligibility under this section and including the attorney's jurisdiction of admission/qualification, attorney identification number, if applicable, and a statement by the appearing attorney attesting to his/her good standing within the legal profession. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

(e) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice

before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[32 FR 8456, June 13, 1967, as amended at 40 FR 15235, Apr. 4, 1975; 41 FR 16453, Apr. 19, 1976; 46 FR 26295, May 12, 1981; 48 FR 44767, Sept. 30, 1983; 50 FR 50781, Dec. 12, 1985; 50 FR 53306, Dec. 31, 1985; 56 FR 44139, Sept. 27, 1991; 58 FR 40737, July 30, 1993; 63 FR 15758, Apr. 1, 1998; 64 FR 14830, Mar. 29, 1999; 66 FR 13645, Mar. 7, 2001; 66 FR 64143, Dec. 12, 2001]

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

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided, however,* That informal applications or requests may be submitted directly to the official in charge of any Bureau, Division, or Office of the Commission, or to the Administrative Law Judge.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Paper and electronic copies of and service of filings before the Commission, and of filings before an ALJ in adjudicative proceedings.* (1) Except as otherwise provided, each document filed before the Commission, whether in an adjudicative or a nonadjudicative proceeding, shall be filed with Secretary of the Commission, and shall include a paper original, twelve (12) paper copies, and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word). Except as otherwise provided, each document filed by a party in an adjudicative proceeding before an ALJ shall be filed with the Secretary of the Commission, and shall include a paper original, one (1) paper copy and an elec-

tronic copy (in ASCII format, WordPerfect, or Microsoft Word).

(2) The first page of the paper original of each such document shall be clearly labeled either public, or *in camera* or confidential. If the document is labeled *in camera* or confidential, it must include as an attachment either a motion requesting *in camera* or otherwise confidential treatment, in the form prescribed by § 3.45(b), or a copy of a Commission, ALJ, or federal court order granting such treatment. The document must also include as a separate attachment a set of only those pages of the document on which the *in camera* or otherwise confidential material appears.

(3) The electronic copy of each such public document shall be filed by e-mail, as the Secretary shall direct, in a manner that is consistent with technical standards, if any, that the Judicial Conference of the United States establishes, except that the electronic copy of each such document containing *in camera* or otherwise confidential material shall be placed on a diskette so labeled, which shall be physically attached to the paper original, and not transmitted by e-mail. The electronic copy of all documents shall include a certification by the filing party that the copy is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

(4) A paper copy of each such document in an adjudicative proceeding shall be served by the party filing the document or person acting for that party on all other parties pursuant to § 4.4, at or before the time the paper original is filed.

(d) *Paper and electronic copies of all other documents filed with the Commission.* Except as otherwise provided, each document to which paragraph (c) of this section does not apply, such as public comments in Commission proceedings, may be filed with the Commission in either paper or electronic form. If such a document contains non-public information, it must be filed in paper form with the Secretary of the Commission, and the first page of the