

§ 10.42

17 CFR Ch. I (4–1–07 Edition)

and of authenticity or contents of documents;

(c) Determining matters of which official notice may be taken;

(d) Discussing amendments to pleadings;

(e) Limiting the number of witnesses;

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

(g) Discussing adoption of shortened procedures pursuant to § 10.92;

(h) Promoting a fair and expeditious hearing.

At or following the conclusion of a prehearing conference, the Administrative Law Judge shall serve a prehearing memorandum containing agreements reached and any procedural determinations made by him, unless the conference shall have been recorded and transcribed in written form and a copy of the transcript has been made available to each party.

[41 FR 2511, Jan. 16, 1976, as amended at 63 FR 55791, Oct. 19, 1998]

§ 10.42 Discovery.

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

(i) An outline of its case or defense;

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

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

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

(2) *Expert witnesses*. Unless otherwise ordered by the Administrative Law Judge, in addition to the information

described in paragraph (a)(1) of this section, any party who intends to call an expert witness shall also furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge:

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

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

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

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

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

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

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

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

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

thereof, that resulted in the furnishing of such documents to the Division; and

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

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

(i) The identity of a confidential source;

(ii) Confidential investigatory techniques or procedures;

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

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

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

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

(4) *Index of withheld documents.* When documents are made available for inspection and copying pursuant to paragraph (b)(1) of this section, the Division of Enforcement shall furnish the respondents with an index of all documents that are withheld pursuant to

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

(5) *Arrangements for inspection and copying.* Upon request by the respondents, all documents subject to inspection and copying pursuant to this paragraph (b) shall be made available to the respondents at the Commission office nearest the location where the respondents or their counsel live or work. Otherwise, the documents shall be made available at the Commission office where they are ordinarily maintained or at any other location agreed upon by the parties in writing. Upon payment of the appropriate fees set forth in appendix B to part 145 of this chapter, any respondent may obtain a photocopy of any document made available for inspection. Without the prior written consent of the Division of Enforcement, no respondent shall have the right to take custody of any documents that are made available for inspection and copying, or to remove them from Commission premises.

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

be required, unless the respondent demonstrates prejudice caused by the failure to make the documents available.

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

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

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

(ii) Written statements signed by the witness, and

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

to review and analyze any witness statements produced by the respondents.

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

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

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

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

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

(2) *Response.* A matter shall be considered to be admitted unless, within 15

days after service of the request, or within such other time as the Administrative Law Judge may allow, the party upon whom the request is directed serves upon the requesting party a sworn written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The response shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(3) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(4) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used at a hearing as against the party who made the admission. However, the Administrative Law Judge may permit withdrawal or amendment when the presentation on the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice

him in maintaining his action or defense on the merits.

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

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

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

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995; 63 FR 55792, Oct. 19, 1998; 63 FR 68829, Dec. 14, 1998]