

## § 10.113

or her services or for services performed by any other Commission employee working under his or her direction.

### **§ 10.113 Right to challenge distribution of funds to customers.**

Any order of an Administrative Law Judge directing or authorizing the distribution of funds paid as restitution to individual customers shall be considered a final order for appeal purposes to be subject to Commission review pursuant to § 10.102.

### **§ 10.114 Acceleration of establishment of restitution procedure.**

The procedures provided for by §§ 10.111 through 10.113 may be initiated prior to the issuance of the initial decision of the Administrative Law Judge and may be combined with the hearing in the proceeding, either upon motion by the Division of Enforcement or if the Administrative Law Judge, acting on his own initiative or upon motion by a respondent, concludes that the presentation, consideration and resolution of the issues relating to the restitution procedure will not materially delay the conclusion of the hearing or the issuance of the initial decision.

#### **APPENDIX A TO PART 10—COMMISSION POLICY RELATING TO THE ACCEPTANCE OF SETTLEMENTS IN ADMINISTRATIVE AND CIVIL PROCEEDINGS**

It is the policy of the Commission not to accept any offer of settlement submitted by any respondent or defendant in an administrative or civil proceeding, if the settling respondent or defendant wishes to continue to deny the allegations of the complaint or the findings of fact or conclusions of law to be made in the settlement order entered by the Commission or a court. In accepting a settlement and entering an order finding violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of fact and conclusions of law. Similarly, in settling a civil proceeding with a defendant the Commission invites the federal court to make conclusions of law and, in some instances, findings of fact. The Commission does not believe it would be appropriate for it to be making or inviting a court to make such uncontested findings of violations if the party against whom the findings and conclusions are to be

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entered is continuing to deny the alleged misconduct.

The refusal of a settling respondent or defendant to admit the allegations in a Commission-instituted complaint or the findings of fact or conclusions of law in the settlement order entered by the Commission or a court shall be treated as a denial, unless the party states that he or she neither admits nor denies the allegations or the findings and conclusions. In that event, the proposed offer of settlement, consent or consent order must include a provision stating that, by neither admitting nor denying the allegations, findings or conclusions, the settling respondent or defendant agrees that neither he or she nor any of his or her agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or findings or conclusions in the order, or creating, or tending to create, the impression that the complaint or the order is without a factual basis; provided, however, that nothing in this provision shall affect the settling respondent's or defendant's—

- i. Testimonial obligation, or
- ii. Right to take legal positions in other proceedings to which the Commission is not a party.

[64 FR 30903, June 9, 1999]

## **PART 11—RULES RELATING TO INVESTIGATIONS**

### **Sec.**

- 11.1 Scope and applicability of rules.
- 11.2 Authority to conduct investigations.
- 11.3 Confidentiality of investigations.
- 11.4 Subpoenas.
- 11.5 Transcripts.
- 11.6 Oath; false statements.
- 11.7 Rights of witnesses.
- 11.8 Sequestration.

#### **APPENDIX A TO PART 11—INFORMAL PROCEDURE RELATING TO THE RECOMMENDATION OF ENFORCEMENT PROCEEDINGS**

**AUTHORITY:** 7 U.S.C. 4a(j), 9, 12, 12a(5) and 15.

**SOURCE:** 41 FR 29799, July 19, 1976, unless otherwise noted.

### **§ 11.1 Scope and applicability of rules.**

The rules of this part apply to investigatory proceedings conducted by the Commission or its staff pursuant to sections 6(c) and 8 and 12(f) of the Commodity Exchange Act, as amended, 7 U.S.C. 9 and 15 and 12 and 16(f) (Supp. IV, 1974), to determine whether there have been violations of that Act, or the rules, regulations or orders adopted

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thereunder, or, in accordance with the provisions of section 12(f) of the Act, whether there have been violations of the laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority, or whether an application for designation or registration under the Act should be denied. Except as otherwise specified herein, the rules will apply to the conduct of investigation whether or not the Commission has authorized the use of subpoenas in the particular matter to compel the production of evidence.

[63 FR 5233, Feb. 2, 1998]

### § 11.2 Authority to conduct investigations.

(a) The Director of the Division of Enforcement and members of the Commission staff acting pursuant to his authority and under his direction may conduct such investigations as he deems appropriate to determine whether any persons have violated, are violating, or are about to violate the provisions of the Commodity Exchange Act, as amended, or the rules, regulations or orders adopted by the Commission pursuant to that Act, or, in accordance with the provisions of section 12(f) of the Act, whether any persons have violated, are violating or are about to violate the laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority, or whether an applicant for registration or designation meets the requisite statutory criteria. For this purpose, the Director may obtain evidence through voluntary statements and submissions, through exercise of inspection powers over boards of trade, reporting traders, and persons required by law to register with the Commission, or when authorized by order of the Commission, through the issuance of subpoenas. The Director shall report to the Commission the results of his investigations and recommend to the Commission such enforcement action as he deems appropriate.

(b) The Commission hereby delegates, until the Commission orders otherwise, to its Regional Directors and to the Director, the Deputy Directors, the Program Coordinator, the

Chief Counsel, the Associate Directors, and the Regional Counsel of the Division of Enforcement the authority to grant to any employee of the Division of Enforcement all or a portion of the authority which the Commission, by order, has authorized specified employees of the Commission to perform in connection with a Commission investigation conducted by the Division of Enforcement. With the approval of the Executive Director, the Director of the Division of Enforcement may also grant such authority to any Commission employee under the direction of the Executive Director.

(Secs. 2a(11) and 6(b) of the Act, 7 U.S.C. 4a(j) and 15 (1976), as amended by the Futures Trading Act of 1978, Pub. L. 95-405, sec. 13, 92 Stat. 871 (1978))

[41 FR 29799, July 19, 1976, as amended at 43 FR 55348, Nov. 28, 1978; 60 FR 54802, Oct. 26, 1995; 61 FR 1709, Jan. 23, 1996; 62 FR 17702, Apr. 11, 1997; 63 FR 5233, Feb. 2, 1998; 67 FR 62352, Oct. 7, 2002; 78 FR 22419, Apr. 16, 2013; 82 FR 28767, June 26, 2017]

### § 11.3 Confidentiality of investigations.

All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as non-public by the Commission and its staff except to the extent that (a) the Commission directs or authorizes the public disclosure of the investigation; (b) the information or documents are made a matter of public record during the course of an adjudicatory proceeding; or (c) disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, and the rules adopted by the Commission thereunder, 17 CFR part 145. Procedures by which persons submitting information to the Commission during the course of an investigation may specifically seek confidential treatment of information for purposes of Freedom of Information Act disclosure are set forth in 17 CFR 145.9. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not, however, prevent disclosure for law enforcement purposes or when disclosure is otherwise found appropriate in the public interest and permitted by law.

**§ 11.4 Subpoenas.**

(a) *Issuance of subpoenas.* The Commission or any member of the Commission or of its staff who, by order of the Commission, has been authorized to issue subpoenas in the course of a particular investigation may issue a subpoena directing the person named therein to appear before a designated person at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.

(b) *Authorization to issue subpoenas.* An order of the Commission authorizing one or more members of the Commission or of its staff to issue subpoenas in the course of a particular investigation shall include:

- (1) A general description of the scope of the investigation;
- (2) The authority under which the investigation is being conducted; and
- (3) A designation of the members of the Commission or of its staff authorized by the Commission to issue subpoenas.

(c) *Service.* Service of subpoenas issued for investigative purposes shall be effected in the following manner:

- (1) *Service upon a natural person.* Delivery of a copy of a subpoena to a natural person may be effected by
  - (i) Handing it to the person;
  - (ii) Leaving it at his office with the person in charge thereof or, if there is no one in charge, by leaving it in a conspicuous place therein;
  - (iii) Leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;
  - (iv) Mailing it by registered or certified mail to him at his last known address; or
  - (v) Any other method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena may be effected by (i) handing it to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (ii) mailing it by registered or certified mail to any such representative at his last known address; or (iii) any other method whereby actual notice is given to any such representative.

(d) *Witness fees and mileage.* Witnesses appearing pursuant to subpoena shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

(e) Pursuant to the authority granted under Sections 2(a)(11) and 8a(5) of the Act, the Commission hereby delegates to the Director of the Division of Enforcement, with the concurrence of the General Counsel or General Counsel's delegatee, and until such time as the Commission orders otherwise, the authority to invoke, in case of contumacy by, or refusal to obey a subpoena issued to, any person, the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda and other records pursuant to subpoenas issued in accordance with section 6(c) of the Act for the purpose of securing effective enforcement of the provisions of this Act, for the purpose of any investigation or proceeding under this Act, and for the purpose of any action taken under section 12(f) of the Act.

(f) Notwithstanding the delegation of authority to the Director set forth in paragraph (e) of this section, in any case in which the Director believes it appropriate the matter may be submitted to the Commission for its consideration. Nothing in this section shall prohibit the Commission from exercising the authority delegated in paragraph (e) of this section.

[41 FR 29799, July 19, 1976, as amended at 67 FR 37322, May 29, 2002]

**§ 11.5 Transcripts.**

Transcripts of testimony taken in the course of an investigative proceeding shall be recorded solely by an official reporter or other person or by other means authorized by the Commission or by a member of the Commission or its staff conducting the investigation for the Commission.

**§ 11.6 Oath; false statements.**

(a) *Oath.* At the discretion of the member of the Commission or staff member conducting the investigation,

testimony of a witness may be taken under oath.

(b) *Penalties for false statements and other false information.* Any person making false statements under oath during the course of a Commission investigation is subject to the criminal penalties for perjury in 18 U.S.C. 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up a material fact, or submits any false writing or document, knowing it to contain false, fictitious or fraudulent information, is subject to the criminal penalties set forth in 18 U.S.C. 1001.

#### § 11.7 Rights of witnesses.

(a) *Orders authorizing issuance of subpoenas.* Any person upon whom a subpoena has been served compelling him to furnish documentary evidence or testimony in an investigation shall, upon his request, be permitted to examine a copy of the Commission's order pursuant to which the subpoena has been issued. However, a copy of the order shall not be furnished for his retention except with the express approval of either the Director, a Deputy Director, the Program Coordinator, the Chief Counsel, an Associate Director, or a Regional Counsel of the Division of Enforcement, or a Regional Director of the Commission; approval shall not be given unless it has been shown by the person seeking to retain a copy that his retention of a copy would be consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.

(b) *Copies of testimony or data.* A person compelled to submit data or evidence in the course of an investigatory proceeding shall be entitled to retain or, upon payment of appropriate fees as set forth in the Schedule of Fees for records services, 17 CFR part 145b, procure a copy or transcript thereof, except that the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) *Right to counsel.* A person compelled to appear, or who appears in person by request or permission of the Commission or its staff during an in-

vestigation, may be accompanied, represented, and advised by counsel. Subject to the provisions of § 11.8(b) of this part, he may be represented by any attorney-at-law who is admitted to practice before the highest court in any State or territory or the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, and who has not been excluded from further participation in the particular investigatory proceeding for good cause established in accordance with paragraph (c)(2) of this section.

(1) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of an investigative proceeding and to have this attorney advise his client before, during and after the conclusion of such examination. At the conclusion of the examination, counsel may request the person presiding to permit the witness to clarify any of his answers which may need clarification in order that his answers not be left equivocal or incomplete on the record. For his use in protecting the interests of his client with respect to that examination counsel may make summary notes during the examination.

(2) With due regard for the rights of a witness, the Commission may for good cause exclude a particular attorney from further participation in any investigation in which the Commission has found the attorney to have engaged in dilatory, obstructionist or contemptuous conduct. The person conducting an investigation may report to the Commission instances of apparently dilatory, obstructionist or contemptuous conduct on the part of an attorney. After due notice to the attorney, the Commission may take such action as the circumstances warrant based upon a written transcript evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the Commission may permit or direct.

(d) *Self-Incrimination; immunity*—(1) *Self-Incrimination.* Except as provided in paragraph (d)(2) of this section, a witness testifying or otherwise giving

information in an investigation may refuse to answer questions on the basis of the right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.

(2) *Immunity.*<sup>2</sup> If the Commission believes that the testimony or other information sought to be obtained from any individual may be necessary to the public interest and that individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the Commission, with the approval of the Attorney General, may issue an order requiring the individual to give testimony or provide other information which he previously refused to give on the basis of self-incrimination. Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in an investigation under this part, and the person presiding over the investigation communicates to the witness an order issued by the Commission requiring the witness to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

[41 FR 29799, July 19, 1976, as amended at 61 FR 1709, Jan. 23, 1996]

### § 11.8 Sequestration.

(a) *Sequestration of witnesses.* All witnesses and potential witnesses shall be sequestered and prohibited from being present during the examination of any other witness unless otherwise per-

mitted in the discretion of the person conducting the investigation.

(b) *Sequestration of counsel.* When a reasonable basis exists to believe that an investigation may be obstructed or impeded, directly or indirectly, by an attorney's representation of more than one witness during the course of an investigation, the member of the Commission or of the Commission's staff conducting the investigation may prohibit that attorney from being present during the testimony of any witness other than the witness in whose behalf counsel first appeared in the investigatory proceeding. To the extent practicable, consistent with the integrity of the investigation, the attorney will be advised of the reasons for his having been sequestered.

#### APPENDIX A TO PART 11—INFORMAL PROCEDURE RELATING TO THE RECOMMENDATION OF ENFORCEMENT PROCEEDINGS

The Division of Enforcement ("Division"), in its discretion, may inform persons who may be named in a proposed enforcement proceeding of the nature of the allegations pertaining to them. The Division, in its discretion, may advise such persons that they may submit a written statement prior to the consideration by the Commission of any staff recommendation for the commencement of such proceeding. Unless otherwise provided for by either the Director, a Deputy Director, the Program Coordinator, the Chief Counsel, an Associate Director, or a Regional Counsel of the Division, or a Regional Director of the Commission, such written statements shall be submitted within 14 days after persons are informed by the Division of Enforcement of the nature of the proposed allegations pertaining to them and shall be no more than 20 pages, double spaced on 8½ by 11 inch paper, setting forth their views of factual, legal or policy matters relevant to the commencement of an enforcement proceeding. Any statement of fact included in the submission must be sworn to by a person with personal knowledge of such fact. Statements shall be forwarded to the Director, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, with copies to the staff conducting the investigation, shall clearly identify the specific investigation, and, if desired, may request that the statement be forwarded to the Commission. Similarly, persons who become involved in an investigation, and submit a written statement on their initiative, should follow the relevant procedures described

<sup>2</sup>This subsection shall be effective on and after such date as section 6001 of Title 18 of the United States Code has been amended to include the Commodity Futures Trading Commission among those agencies which may, with the approval of the Attorney General, grant immunity to witnesses to the extent and in the manner prescribed in 18 U.S.C. 6001 *et seq.*

herein. In the event the Division recommends the commencement of an enforcement proceeding to the Commission, any written statement will be forwarded to the Commission if so requested. The Commission may, in its discretion, consider all, any portion or none of the submission when it considers the staff recommendation to commence an enforcement proceeding.

[52 FR 19501, May 26, 1987, as amended at 60 FR 49334, Sept. 25, 1995; 61 FR 1709, Jan. 23, 1996]

## **PART 12—RULES RELATING TO REPARATIONS**

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