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PART VII



COMMODITY FUTURES TRADING COMMISSION

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OPEN COMMISSION MEETINGS, EX PARTE COMMUNICATIONS

**Proposed Rules Implementing the
Government in the Sunshine Act**

COMMODITY FUTURES TRADING COMMISSION

[17 CFR Parts 10, 12 and 147]

OPEN COMMISSION MEETINGS; EX PARTE COMMUNICATIONS

Proposed Rules Implementing the Government in the Sunshine Act

The Commodity Futures Trading Commission proposes to adopt rules concerning the opening of meetings of the Commission to public observance and prohibiting ex parte communications between certain persons outside the Commission and Commission decisional employees. When adopted, the rules will reflect the Commission's implementation of the open meeting requirements of section 3(a) of the Government in the Sunshine Act, Pub. L. 94-409, and the prohibitions against ex parte communications contained in section 4 of that Act.¹

The open meeting provisions will comprise a new Part 147 of Title 17 of the Code of Federal Regulations. To implement the ex parte communication provisions, the Commission proposes to revise certain sections of the Commission's Rules of Practice, which comprise Part 10 of Title 17, and the Commission's Rules Relating to Reparations Proceedings, which comprise Part 12 of Title 17.

A section-by-section explanation and the text of the Commission's proposed rules are set forth below:

OPEN COMMISSION MEETINGS

GENERAL POLICY CONSIDERATIONS, PURPOSE AND SCOPE OF RULES; DEFINITIONS

Proposed § 147.1 of Part 147 generally describes the purpose and scope of the rules and states the Commission's desire to inform the public of its activities and to conduct its business in an open manner to the fullest possible extent pursuant to the rules of Part 147. Proposed § 147.2 defines various terms used in Part 147. Consistent with the Government in the Sunshine Act, the term "meeting" is broadly defined to mean the deliberations of a quorum of Commissioners that determine or result in the joint conduct or disposition of official Commission business. The Commission intends broadly to construe this definition to treat as a meeting subject to these regulations all deliberations by any group of Commissioners constituting a quorum that relate to the business of the Commission, whether or not any official action is taken or formal decision made as a result of those deliberations.

GENERAL REQUIREMENT OF OPEN MEETINGS; GROUNDS UPON WHICH MEETINGS MAY BE CLOSED

Proposed § 147.3(a) states the general requirement that every portion of every meeting of the Commission shall be open to the public, and generally prohibits

Commissioners from conducting or disposing of Commission business other than in accordance with the rules of Part 147. Meetings are also prohibited from being held in places which discriminate on the basis of race, color, creed, national origin, ancestry, religion or sex. So long as the orderly conduct of Commission business and effective operation of the Commission permit, the Commission will attempt to hold open meetings at times and in locations which maximize public convenience, and will allow persons in attendance at open meetings electronically to record or otherwise transcribe the proceedings. Of course, persons seeking to attend open meetings will not be burdened by any precondition to admittance; thus the Commission will not require that they identify themselves or whom they represent or disclose their purposes for wishing to attend.

Certain types of meetings or portions of meetings and certain information pertaining thereto are permitted to be treated as non-public pursuant to exemptions contained in section 3(a) of the Government in the Sunshine Act. Section 147.3(b) of the proposed rules sets forth in detail these ten exemptions pursuant to which meetings may be closed to the public. It further states that the requirements of proposed §§ 147.4, 147.5 and 147.6—which generally set forth the procedures for announcing and for closing meetings—shall not apply to any information pertaining to closed meetings that would otherwise be required to be made public by the open meeting rules. The introductory language of § 147.3(b) emphasizes, however, that the Commission may determine that the public interest requires that any meeting or portion thereof, or any information related thereto, which the Commission might lawfully treat as non-public pursuant to § 147.3(b), should nevertheless be opened and made available to the public.

The first exemption from the general open meeting requirement is embodied in proposed § 147.3(b)(1) and relates to matters the disclosure of which are specifically authorized by Executive order to be kept secret in the interests of national defense or foreign policy and which in fact have been properly classified under such an Executive order. The second exemption, contained in proposed § 147.3(b)(2), encompasses matters that relate solely to internal personnel rules and practices of the Commission or any other Federal agency. Under the rules, the application of this exemption will expressly be limited to specific types of matters affecting agency personnel rules and practices; it will not be invoked to close meetings that concern the general operations of the Commission, including, for example, general Commission budgetary matters.²

² Of course, when meetings concerning Commission operating priorities or budgetary considerations focus on certain specific kinds of problems, the Commission may find it necessary and appropriate to close a portion of a meeting to the public as permitted by other exemptions contained in proposed § 147.3(b).

Proposed § 147.3(b)(3) protects against disclosure of matters specifically exempted from disclosure by statute. This will include, but will not necessarily be limited to, data and information obtained by the Commission pursuant to sections 8 and 16 of the Commodity Exchange Act, as amended, 7 U.S.C. 12 to 12-3 and 20.

Meetings concerning or involving discussions of trade secrets and commercial or financial information obtained from a person and privileged or confidential will be protected under proposed § 147.3(b)(4), and the fifth exemption, proposed § 147.3(b)(5), will permit the Commission to discuss in confidence matters that involve accusing any person of a crime, or formally censuring any person.

Proposed § 147.3(b)(6), the sixth exemption from the general open meeting requirement, encompasses matters involving information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Discussions involving certain investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records are the subject of the seventh exemption, contained in proposed § 147.3(b)(7). Proposed § 147.3(b)(8) will permit the Commission to hold a non-public meeting concerning information contained in or related to certain reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for regulating or supervising financial institutions, but only to the extent that premature disclosure of such information would be likely to have an adverse effect on commodities market conditions.

Exemption nine, proposed § 147.3(b)(9), pertains to matters involving information the premature disclosure of which would be likely to lead to significant financial speculation in currencies, securities, or commodities, significantly endanger the stability of any financial institution, or, in general, frustrate significantly the implementation of a proposed Commission action. Finally, the tenth exemption, as set forth in proposed § 147.3(b)(10), relates to matters which specifically concern the Commission's involvement in federal or state civil actions or similar legal proceedings, or formal adjudications by the Commission.

The Commission intends to construe these exemptions narrowly in light of the broad remedial purposes to be served by the open meeting requirements, although not so narrowly as to defeat the important competing policy considerations that Congress recognized by the adoption of the exemptive provisions. Thus, for example, the seventh and tenth exemptions, as incorporated in § 147.3(b)(7) and 147.3(b)(10) respectively, will normally be invoked only to close meetings relating to specific investigative, enforcement or litigation matters (either existent or proposed); they will not be invoked as a basis for closing meetings which involve no more than generalized legal discussions or at which the Commission receives legal or other advice of a general nature.

¹ The open meeting rules are being proposed following consultation by the Commission with the Office of the Chairman of the Administrative Conference of the United States as required by section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b(g).

PROCEDURE FOR ANNOUNCING MEETINGS

Advance notice of all Commission meetings is required to be provided to the public by proposed § 147.4(a). Generally, the advance notice must be made by a public announcement at least one week before the meeting. The notice will generally indicate the date, time, place and subject matter of the meeting, including which portions of the meeting shall be open or closed to the public, and designate an official of the Commission who may be contacted for further information about the meeting. However, when a majority of Commissioners determines by a recorded vote that Commission business requires the holding of a meeting upon less than a week's public notice, proposed § 147.4(b) will allow the Commission to make the public announcement required by § 147.4(a) at the earliest practicable time.

Proposed § 147.4(c) provides that necessary changes in the time or place of a meeting for which a public announcement has previously been made shall be publicly announced at the earliest practicable time. A change in the subject matter of a previously announced meeting, or a change concerning which portion or portions of a previously announced meeting will be open or closed to the public, must be authorized by a majority of Commissioners, determined by a recorded vote, and publicly announced at the earliest practicable time.

The methods by which meetings are to be publicly announced—as required by proposed §§ 147.4 (a), (b) and (c)—are set forth in proposed §§ 147.4(d) and (e), and include a public calendar to be printed and regularly distributed to interested persons, publication in the FEDERAL REGISTER of the public announcements, and direct public access to the Commission's Office of the Secretariat, which may be contacted during normal business hours for information about meetings.

GENERAL PROCEDURE FOR CLOSING MEETINGS

In accordance with the provisions of proposed § 147.5, a Commission determination to close a meeting, as authorized pursuant to § 147.3(b), shall be made only upon the majority vote of all Commissioners. The vote of each Commissioner must be recorded and no proxies shall be allowed. While a separate recorded vote must be taken with respect to each meeting or portion of a meeting to be closed or with respect to any related information to be withheld, a single vote may be taken with respect to a series of meetings or with respect to related information when all meetings in the series involve the same matters and are scheduled to be held within a 30-day period.

To the extent that his interests may be directly affected, proposed § 147.5(d) permits any person to petition the Commission in writing to close a portion of a meeting pursuant to any of three specific exemptive provisions contained in § 147.3(b). Upon request of any Commissioner, the Commission shall cast a re-

corded vote whether to close that portion of the meeting.

Proposed § 147.5(e) will permit any Commission employee to petition the Commission in writing to open a meeting or portion thereof which might otherwise be closed if that employee's appointment, employment or dismissal is the subject of the meeting or portion of the meeting. Upon receipt of a petition from an employee, the Commission shall open the meeting or portion of the meeting to the public.

Within one day after any vote has been taken pursuant to one of the foregoing subsections of § 147.5, the Commission will be required under proposed § 147.5 (f) to make publicly available a written copy of the vote, as well as a full written explanation of the Commission's action closing any portion of any meeting—including a list of persons expected to attend the meeting and their affiliations. In addition, for every meeting or portion of a meeting closed to the public, the Commission's General Counsel is required by proposed § 147.5(g) to certify publicly that, in his or her opinion, the meeting or portion thereof may be closed, stating each relevant exemptive provision contained in § 147.3(b).

Proposed §§ 147.5(h) and 147.5(i) require that the following shall be made available for public inspection in the Commission's Public Reference room: written copies of votes to close meetings; written explanations, pursuant to § 147.5 (f), of the Commission's action in closing portions of meetings; certifications of the Commission's General Counsel required by § 147.5(g); and a statement from the presiding officer at every meeting which is closed, in whole or in part, setting forth the time and place of the meeting and the persons present.

SPECIAL PROCEDURE FOR CLOSING CERTAIN MEETINGS

A special procedure for closing Commission meetings or portions of meetings that may properly be closed pursuant to any one or more of five specific exemptions found in § 147.3(b) is set forth in proposed § 147.6.³ Section 147.6(a) provides that any meeting or portion of a meeting may be closed pursuant to these five exemptions upon a majority vote of Commissioners cast at the beginning of a meeting or portion of a meeting. Section 147.6(b) states that the provisions of

³ Section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b(d) (4), provides that any agency, a majority of whose meetings may properly be closed to the public pursuant to one or another of these five exemptions, may adopt regulations implementing special procedures for closing meetings pursuant to these exemptions. In reviewing the agendas for Commission meetings held since the creation of the Commission in April 1975, the Commission has found that well in excess of a majority of agenda items comprise, and well in excess of a majority of Commission meeting time has been devoted to, matters that are encompassed by these five exemptions. Accordingly, the Commission has proposed § 147.6 to implement the special procedures set forth in 5 U.S.C. 552b (d) (4).

§ 147.4 (relating to the announcement of meetings) and certain provisions of § 147.5 (relating to the general procedure for closing meetings) shall not apply to meetings or portions thereof to which § 147.6(a) is applied.

A written copy of all votes taken pursuant to § 147.6(a) is required by § 147.6 (c) to be made publicly available in the Commission's Public Reference Room and the Commission is required to make the earliest practicable public announcement of the time, place and subject matter of any portion of a meeting to which § 147.6(a) is applied.

MAINTENANCE OF TRANSCRIPTS, RECORDINGS AND MINUTES OF CLOSED MEETINGS

As a general rule, proposed § 147.7(a) requires the Commission to make a complete transcript or electronic recording of each meeting or portion of a meeting closed to the public. However, in the case of meetings or portions of meetings that may be closed pursuant to any one or more of four specific exemptions found in § 147.3(b),⁴ proposed § 147.7(b) will allow the Commission merely to keep a set of minutes fully describing and summarizing all matters discussed and all actions taken.

PUBLIC AVAILABILITY OF AND REQUESTS FOR COPIES OF TRANSCRIPTS, RECORDINGS AND MINUTES OF CLOSED MEETINGS

The Commission is required by proposed § 147.8(a) promptly to make available in its Public Reference Room the transcript, electronic recording or set of minutes that § 147.7 requires to be kept with respect to each closed meeting or portion of a meeting, except that the Commission is not required to disclose any items of discussion or testimony that are determined to contain information which may be withheld under § 147.3(b). Pursuant to proposed section 147.8(b), this determination will be made by the Director of the Commission's Office of Public Information after consultation with the Commission's General Counsel and the Director of any affected staff division; any person objecting to a determination may, by written petition, seek Commission review of that determination.

Under the provisions of proposed § 147.8(c), the Commission is required to keep the transcript, electronic recording or set of minutes required to be made of a closed meeting or closed portion of a meeting for at least two years after the meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever is longer.

Copies of transcripts, transcriptions of electronic recordings or sets of minutes publicly available under § 147.8(a) which disclose the identity of each speaker, are required by proposed § 147.9 to be furnished upon request to any person at the actual cost of duplication or transcription. These costs shall be determined by reference to the schedule of fees in-

⁴ These exemptions can also serve as a basis for invoking the special procedure for closing meetings pursuant to proposed § 147.6.

incorporated in the Commission's rules implementing the Freedom of Information Act, 17 CFR 145b.

INTERPRETATION OF PART 147 WITH OTHER PROVISIONS OF LAW

Finally, proposed § 147.10 makes clear that nothing in Part 147 shall otherwise expand or limit the present rights of any person under the Commission's rules implementing the Freedom of Information Act as set forth in Part 145 of Title 17, except that the exemptions to the general open meeting requirement that are set forth in § 147.3(b) shall apply to any request made under the Commission's Freedom of Information Act Rules (Part 145) for access to transcripts, recordings or sets of minutes described in Part 147. Further, § 147.10 notes that Part 147 does not authorize the Commission to withhold any record (including transcripts, recordings or sets of minutes required by Part 147) from any person which is otherwise available under the Commission's rules implementing the Privacy Act as set forth in Part 146 of Title 17, and that the provisions of Chapter 33 of Title 44 of the United States Code regarding the disposal of records shall not apply to the transcripts, recordings or sets of minutes described in Part 147.

The text of proposed Part 147 of Title 17 of the Code of Federal Regulations is as follows:

PART 147—OPEN COMMISSION MEETINGS

- Sec.
- 147.1 General policy considerations, purpose and scope of rules relating to open Commission meetings.
- 147.2 Definitions.
- 147.3 General requirement of open meetings; grounds upon which meetings may be closed.
- 147.4 Procedure for announcing meetings.
- 147.5 General procedure for closing meetings.
- 147.6 Special procedure for closing certain meetings.
- 147.7 Maintenance of transcripts, recordings and minutes of closed meetings.
- 147.8 Public availability of transcripts, recordings and minutes of closed meetings.
- 147.9 Requests for copies of transcripts, recordings or minutes of closed meetings.
- 147.10 Interpretation of this part with other provisions.

AUTHORITY: Sec. 3(a), Pub. L. 94-409, 90 Stat. 1241 (5 U.S.C. 552b); sec. 101(a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j)) (Supp. V, 1975).

§ 147.1 General policy considerations, purpose and scope of rules relating to open Commission meetings.

(a) This part contains the rules of the Commodity Futures Trading Commission implementing the open meeting requirements of the Government in the Sunshine Act (Pub. L. 94-409, 90 Stat. 1241, 5 U.S.C. 552b). These rules apply to all deliberations of a quorum of the Commission which determine or result in the conduct or disposition of official Commission business, with the

exception of deliberations required or permitted by §§ 147.4, 147.5 or 147.6.

(b) Among the primary purposes of these rules is the Commission's desire to inform the public to the fullest extent possible of its activities as an aid to its properly carrying out its responsibility for administering and enforcing the Commodity Exchange Act, as amended, 7 U.S.C. 1, *et seq.*, and the Commission's belief that, in order to guarantee public confidence in the integrity of its decision-making, it must, to the fullest possible extent, conduct its business in an open manner.

§ 147.2 Definitions.

For purposes of this part: (a) "Agency" includes the Commodity Futures Trading Commission;

(b) "Commission" means the Commodity Futures Trading Commission;

(c) "Commissioner" means a member of the Commodity Futures Trading Commission duly appointed as a Commissioner in accordance with section 2(a) (2) of the Commodity Exchange Act, as amended, 7 U.S.C. 4a(a);

(d) "Meeting" means the deliberations of a quorum of Commissioners that determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by §§ 147.4, 147.5 or 147.6;

(e) "Person" includes an individual, partnership, corporation, association, exchange or other entity or organization;

(f) "Quorum" means at least the minimum number of Commissioners required to take action on behalf of the Commission.

§ 147.3 General requirement of open meetings; grounds upon which meetings may be closed.

(a) Commissioners shall not jointly conduct or dispose of agency business other than in accordance with the rules of this part, and meetings shall not be held in places which restrict membership or attendance or otherwise discriminate on the basis of race, color, creed, national origin, ancestry, religion or sex. Except as provided in paragraph (b) of this section, every portion of every meeting of the Commission shall be open to public observation.

(b) Except where the Commission finds that the public interest requires otherwise, meetings or portions of meetings shall not be open to public observation, and the requirements of §§ 147.4, 147.5 and 147.6 shall not apply to any information pertaining to such meetings or portions of meetings otherwise required by the rules of this part to be publicly disclosed, where the Commission determines that such meetings or portions of meetings or the disclosure of such information is likely to:

(1) Disclose matters that (i) are specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy, and (ii) are

in fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and personnel practices of the Commission or any other agency of the Government of the United States, including, but not limited to, operational rules, guidelines, and manuals of procedure for investigators, auditors, and other employees (other than those rules and practices which establish legal requirements to which members of the public are expected to conform);

(3) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, as amended, 5 U.S.C. 552), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld. This includes, but is not limited to, data and information which would separately disclose the business transactions of any person and trade secrets or names of customers that have been obtained by the Commission in an investigation conducted pursuant to section 8 or section 16 of the Commodity Exchange Act, as amended, 7 U.S.C. 12 to 12-3 and 20, for the efficient execution of the provisions of that Act or in order to provide information for the use of Congress;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential including, but not limited to:

(i) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only, and the information is of a kind not normally disclosed by the person from whom it was obtained including, but not limited to:

(A) Certain information on Form 1-FF required filed pursuant to 17 CFR 1.10 and schedules 1, 2, 4, 5, 6, 7, 8, and 9 thereto;

(B) Reports of stocks of grain, such as Forms 38, 38C, 38M and 38T, required to be filed pursuant to 17 CFR 1.44;

(C) Statements of reporting traders on Form 40 required to be filed pursuant to 17 CFR 18.04;

(D) Statements concerning special calls on positions required to be filed pursuant to 17 CFR 21.00;

(E) Statements concerning identification of special account on Form 102 required to be filed pursuant to 17 CFR 17.01; and

(F) Reports filed on forms in the 01, 03 and 04 series required to be filed pursuant to 17 CFR 17.00, 18.00 and 19.00;

(ii) Information contained in reports, summaries, analyses, transcripts, letters or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other formal or informal inquiry or investigation; and

(iii) Information for which confidential treatment has been requested and granted in accordance with 17 CFR 145.9;

(5) Involve accusing any person of a crime, or formally censuring any person, including but not limited to:

(1) Requests by the Commission that the Attorney General of the United States institute a criminal action against any person believed to have violated any provision of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or any rule, regulation or order thereunder;

(ii) The consideration of any administrative proceeding instituted or to be instituted by the Commission against any person for a violation of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or any rule, regulation or order thereunder;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, including, but not limited to, information of that character contained in:

(i) Files concerning employees of the Commission;

(ii) Files concerning persons subject to regulation by the Commission, including files with respect to applications for registration as a futures commission merchant, an association person, a floor broker, a commodity pool operator, a commodity trading advisor, and biographical data forms submitted with such applications. Examples of the information on the applications or forms which may be protected are a person's home address, social security number, date and place of birth and, in appropriate cases, some of the information concerning prior arrests, indictments, criminal convictions or other sanctions imposed by state or federal courts or regulatory authorities; and

(iii) Files containing information for which confidential treatment has been requested and granted in accordance with 17 CFR 145.9;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, to the extent that production of such records or information would (i) interfere with enforcement proceedings (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel. Investigatory records and information include all documents, records, transcripts, correspondence and related memoranda and work-product concerning examinations and other inquiries or investigations and related litigation as authorized by law, which pertain to or may disclose the possible violations by any person of any provision of law, including the Commodity Exchange Act, as amended, or of any rule or regulation adopted by the Commission or which pertain to the qualifications of any person registered or seeking registra-

tion under that Act or of any person affiliated with such person; and all written communications from or to any person who has confidentially complained or otherwise furnished information respecting such possible violations, as well as all correspondence and memoranda in connection with such confidential complaints or information;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Commission or any other agency responsible for the regulation or supervision of financial institutions when the premature disclosure of such information would be likely to have an adverse effect on commodities market conditions;

(9) Disclose information the premature disclosure of which would be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, (ii) significantly endanger the stability of any financial institution, or (iii) frustrate significantly the implementation of a proposed Commission action, except where the Commission has already disclosed to the public the content or nature of its proposed action, or where the Commission is required by law to make such disclosure on its own initiative prior to taking final Commission action on such proposal; or

(10) Specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Commission of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 147.4 Procedure for announcing meetings.

(a) Advance notice of all meetings of the Commission shall be provided to the public. In the case of each meeting, except as provided in paragraph (b) of this section and in § 147.6, the Commission shall, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), make a public announcement, at least one week before the date of the meeting, of the time, place and subject matter of the meeting and which portions of the meeting shall be open or closed to the public, and shall indicate an official of the Commission who may be contacted at a designated telephone number for information about the meeting.

(b) When a majority of Commissioners determines by a recorded vote that Commission business requires a meeting to be held upon public notice of less than one week as required by paragraph (a) of this section, the Commission shall, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), make a public announcement, at the earliest practicable time, of the time, place and subject matter of the meeting and which portions of the meeting shall be open or closed

to the public, and indicate an official of the Commission who may be contacted at a designated telephone number for information about the meeting.

(c) (1) When it becomes necessary to change the time or place of a meeting for which a public announcement has been made pursuant to paragraphs (a) or (b) of this section, the Commission shall publicly announce such change at the earliest practicable time.

(2) When it becomes necessary with respect to a meeting for which a public announcement has already been made pursuant to paragraphs (a), (b) or (c) (1) of this section to change the subject matter of a meeting, or change the Commission's determination as to which portions of a meeting shall be open or closed to the public, a majority of all Commissioners shall determine by a recorded vote that Commission business requires such a change and that no earlier announcement of the change was possible, and the Commission shall publicly announce such change and the vote of each Commissioner upon such change at the earliest practicable time.

(d) Public announcement of meetings, as required by this section, shall be provided as follows:

(1) A public calendar shall be printed and distributed by the Commission on a regular basis to interested persons to provide advance public notice of meetings as required by paragraph (a) of this section, and, to the extent practicable, as required by paragraphs (b) and (c) of this section. Upon request in writing to the Office of Public Information, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, any person or organization will be sent the public calendar on a regular basis free of charge. Copies of the public calendar also will be publicly available in the Commission's Office of Public Information.

(2) Interested persons may contact the Commission's Office of the Secretariat during normal business hours to obtain information concerning future meetings.

(e) Immediately following each public announcement required by this section, the Commission shall submit for publication in the FEDERAL REGISTER, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), notice of the time, place, and subject matter of a meeting, which portions of the meeting shall be open or closed to the public, any change in one of the preceding and the name and telephone number of an official of the Commission who may be contacted for information about the meeting.

§ 147.5 General procedure for closing meetings.

(a) The Commission shall determine that a meeting or portion of a meeting will be closed to public observation pursuant to § 147.3(b) only upon the majority vote of all Commissioners. The vote of each Commissioner shall be recorded, and the use of proxies shall be prohibited.

(b) A separate vote of Commissioners shall be taken with respect to each meet-

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ing a portion or portions of which are proposed to be closed to the public pursuant to § 147.3(b), or with respect to any information which is proposed to be withheld under § 147.3(b).

(c) A single vote of Commissioners may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, when each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series.

(d) Whenever any person whose interests may be directly affected by a portion of a meeting requests in writing to the Commission that the Commission close such portion to the public for any of the reasons set forth in §§ 147.3(b)(5), 147.3(b)(6) or 147.3(b)(7), the Commission, upon the request of any Commissioner, shall vote by recorded vote whether to close that portion of the meeting.

(e) Whenever any Commission employee whose appointment, employment or dismissal is to be the subject of a meeting or portion of meeting closed to the public pursuant to § 147.3(b) requests in writing to the Commission that the Commission open that meeting or portion of meeting, the Commission shall open that meeting or portion of meeting to the public.

(f) Within one day of any vote taken pursuant to paragraphs (b), (c) or (d) of this section, the Commission shall make publicly available a written copy of that vote reflecting the vote of each Commissioner on the question. If the Commission determines by a vote taken pursuant to paragraphs (b), (c) or (d) of this section that a portion of a meeting is to be closed to the public, the Commission shall, within one day of such vote, make publicly available a full written explanation of its action closing the portion of the meeting together with a list of all persons expected to attend the meeting and their affiliations, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b).

(g) For every meeting or portion of a meeting closed pursuant to § 147.3(b), the Commission's General Counsel shall publicly certify that, in his or her opinion, the meeting or portion of meeting may be closed to the public, and shall state each relevant exemptive provision.

(h) Written copies of votes to close meetings and written explanations of Commission actions closing portions of meetings to the public required to be made publicly available by paragraph (f) of this section shall be available for public inspection in the Commission's Public Reference Room, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581.

(i) A copy of the certification of the Commission's General Counsel required by paragraph (g) of this section, together with a statement from the presiding officer at any meeting closed, in

whole or in part, pursuant to § 147.3(b), setting forth the time and place of the meeting, and the persons present, shall be retained by the Commission and, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), shall be available for public inspection in the Commission's Public Reference Room, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581.

§ 147.6 Special procedure for closing certain meetings.

(a) Any meeting or portion of meeting that may properly be closed to the public pursuant to §§ 147.3(b)(4), 147.3(b)(8), 147.3(b)(9)(i), 147.3(b)(9)(ii) or 147.3(b)(10), or any combination thereof, may be closed if a majority of Commissioners votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting.

(b) The provisions of § 147.4, and of §§ 147.5(a), 147.5(b), 147.5(c), 147.5(d), 147.5(e), 147.5(f) and 147.5(h) shall not apply to any portion of a meeting to which paragraph (a) of this section is applied. The provisions of §§ 147.5(g) and 147.5(i) shall apply to any such portions of meetings.

(c) A written copy of all votes taken pursuant to paragraph (a) of this section reflecting the vote of each Commissioner on the question shall be made available for public inspection in the Commission's Public Reference Room, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581.

(d) The Commission shall, except to the extent that such information is exempt from disclosure under the provisions of § 147.3(b), make public announcement at the earliest practicable time of the time, place, and subject matter of any portion of a meeting to which paragraph (a) of this section is applied. Such public announcement shall be provided, to the extent practicable, through the Commission's public calendar as described in § 147.4(d)(1), and by the Commission's Office of the Secretariat as set forth in § 147.4(d)(2).

§ 147.7 Maintenance of transcripts, recordings and minutes of closed meetings.

(a) The Commission shall make and maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting or portion of meeting closed to the public, except as provided in paragraph (b) of this section.

(b) (1) In the case of each meeting or portion of meeting closed to the public pursuant to §§ 147.3(b)(8), 147.3(b)(9)(i), 147.3(b)(9)(ii) or 147.3(b)(10), or any combination thereof, the Commission shall make and maintain either a complete transcript or recording as described in paragraph (a) of this section, or a set of minutes.

(2) When the Commission elects to keep minutes under paragraph (b)(1) of this section, the minutes shall fully and

clearly describe all matters discussed at the closed meeting or closed portion thereof, and shall provide a full and accurate summary of any actions taken, and the reasons therefore, including a description of each of the views expressed on any item, and a record of any rollcall vote taken which reflects the vote of each Commissioner on the question. All documents considered in connection with any actions shall be identified in such minutes.

§ 147.8 Public availability of transcripts, recordings and minutes of closed meetings.

(a) The Commission shall make promptly available to the public, in its Public Reference Room, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, the transcript, electronic recording or set of minutes of the discussion of any item on the agenda of any closed meeting or closed portion thereof (as required by § 147.7), or of any item of the testimony of any witness received at such meeting or portion thereof, except for such item or items of such discussion or testimony that are determined, in accordance with the procedure set forth in paragraph (b) of this section, to contain information which may be withheld under § 147.3(b).

(b) (1) All determinations made pursuant to paragraph (a) of this section that items of discussion or testimony reflected in transcripts, recordings or sets of minutes of closed meetings or closed portions thereof are exempt from disclosure pursuant to § 147.3(b), shall be made by the Director of the Commission's Office of Public Information after due consultation with the Office of the Commission's General Counsel and the Director of any affected staff division.

(2) Any person who objects to any determination made pursuant to paragraph (b)(1) of this section may seek Commission review of that determination by filing with the Commission's Office of the Secretariat a brief written statement that review is sought which contains a concise statement of the reasons why the determination should be set aside.

(c) The Commission shall maintain a complete verbatim copy of the transcript, a complete electronic recording or a complete copy of the minutes of each meeting or portion of a meeting closed to the public, which are made in accordance with § 147.7(a) or § 147.7(b), for a period of at least two years after such meeting or portion of meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.

§ 147.9 Requests for copies of transcripts, recordings or minutes of closed meetings.

(a) Copies of a transcript, transcription of an electronic recording or set of minutes disclosing the identity of each speaker, which are publicly available pursuant to § 147.8(a), shall be furnished to any person at the actual cost of duplication or transcription pursuant to the schedule of fees set forth in 17 CFR 145b

(a) (3), (a) (4), (a) (5), (a) (7), (d) and (e).

(b) Request for copies of transcripts, transcriptions of electronic recordings or sets of minutes as described in paragraph (a) of this section may be made either in person at, or by mail addressed to, the Commission's Office of Public Information, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581.

§ 147.10 Interpretation of this part with other provisions.

(a) Nothing in this part shall be interpreted as:

(1) Expanding or limiting the present rights of any person under Part 145 of this Title (implementing the provisions of the Freedom of Information Act, 5 U.S.C. 552), except that the exemptions set forth in § 147.3(b) of this part shall govern in the case of any request made pursuant to Part 145 to copy or inspect the transcripts, recordings or sets of minutes described in this part; or

(2) Authorizing the Commission to withhold from any person any record, including transcripts, recordings or sets of minutes required by this part, which is otherwise accessible to such individual under Part 146 of this Title (implementing the provisions of the Privacy Act, 5 U.S.C. 552a).

(b) The requirements of Chapter 33 of Title 44, United States Code (with respect to the disposal of records), shall not apply to the transcripts, recordings and minutes described in this part.

EX PARTE COMMUNICATIONS

Currently, the Commission has in effect a general prohibition against ex parte communications in proceedings conducted pursuant to its Rules of Practice, 17 CFR 10.10, and in reparation proceedings, 17 C.F.R. § 12.9. These rules are being revised in order to implement the specific prohibitions and sanctions against ex parte communications now contained in section 4 of the Government in the Sunshine Act. Therefore, each of these two rules will be superseded in a substantially identical manner by a new proposed rule which will prohibit and provide sanctions for the making of ex parte communications between certain persons outside the Commission and Commission decisional employees, in accordance with the requirements of the Government in the Sunshine Act.

Subsection (a) of the proposed rule defines various terms used in the rule, including "Commission decisional employee," which includes, generally, all employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding; and "Interested person," which includes parties and others who may have an interest in a proceeding. Subsection (b) states the general rule against ex parte communications by prohibiting any interested person outside the Commission from making or knowingly causing to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of

a proceeding. Commissioners, Administrative Law Judges and Commission decisional employees are likewise prohibited from making or knowingly causing to be made such ex parte communications to any interested person.

Subsection (c) of the proposed rule establishes the procedure for handling ex parte communications that are made in violation of subsection (b). Any Commissioner, Administrative Law Judge or Commission decisional employee who receives, or makes or knowingly causes to be made, an ex parte communication shall place on the public record of the proceeding all such written communications, and memoranda summarizing the substance of all such oral communications, and all written responses and memoranda summarizing the substance of all oral responses thereto. In addition, written notice of all such communications and the responses thereto shall be given to all parties to the proceedings to which the communications or responses relate.

The sanctions for violating the prohibition against ex parte communications contained in subsection (b) are set forth in subsection (d) of the proposed rule. Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party to a proceeding, the Commission, Administrative Law Judge or Commission decisional employee presiding at the hearing is empowered, to the extent consistent with the interests of justice and the policy of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq. (Supp. V, 1975), to require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied or otherwise adversely affected on account of the making of the ex parte communication. Further, any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication prohibited by subsection (b) of the proposed rule may be deemed to have violated, and be subject to discipline under, the Commission's Rules Relating to Suspension or Disbarment from Appearance and Practice, 17 CFR Part 14. In addition, any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication prohibited by subsection (b) of the proposed rule may be deemed to have violated, and be subject to discipline under, the Commission's Code of Conduct for Commission members and employees, 17 CFR Part 140, Subpart C.

Finally, subpart (e) of the proposed rule prescribes that the prohibitions of the rule shall apply to any person who has actual knowledge that a Commission proceeding has been or will be commenced and to all persons after public notice has been given that a proceeding has been or will be commenced. The prohibitions of the rule shall remain in effect until a final Commission order has been entered in the proceeding which is

no longer subject to review or reconsideration by the Commission or any court. Subpart (e) also notes that nothing in the proposed rule constitutes authority to withhold information from Congress.

Accordingly, 17 CFR 10.10 and 17 CFR 12.9 are hereby proposed to be revised to read as follows:

PART 10—RULES OF PRACTICE

§ 10.10 Ex parte communications.

(a) Definitions. For purposes of this section:

(1) "Commission decisional employee" means employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding, including, but not limited to:

(i) Members of the personal staffs of the Commissioners;

(ii) Members of the staffs of the Administrative Law Judges;

(iii) The General Counsel, and the Chief and members of the Opinions section;

(iv) Members of the staff of the Office of Hearings and Appeals; and

(v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part;

(3) "Interested person" includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) "Party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a proceeding, and a person or agency permitted limited participation or to state views in a proceeding by the Commission.

(b) Prohibitions against ex parte communications—(1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) Procedures for handling ex parte communications. A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:

PART 12—RULES RELATING TO REPARATION PROCEEDINGS

§ 12.9 Ex parte communications in reparation proceedings.

(a) *Definitions.* For purposes of this section:

(1) "Commission decisional employee" means employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding, including, but not limited to:

- (i) Members of the personal staffs of the Commissioners;
- (ii) Members of the staffs of the Administrative Law Judges;
- (iii) The General Counsel, and the Chief and members of the Opinions section;
- (iv) Members of the staff of the Office of Hearings and Appeals; and
- (v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part;

(3) "Interested person" includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) "Party" includes a complainant, respondent and any other person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a reparation proceeding, and a person or agency permitted limited participation or to state views in a reparation proceeding by the Commission.

(b) *Prohibitions against ex parte communications.*—(1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be

made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:

(i) All such written communications;

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

(iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (1)(i) and (1)(ii) of this subsection (c); and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.*—(1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR § 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR § 14.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.*—(1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review or recon-

(i) All such written communications;

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

(iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (1)(i) and (1)(ii) of this subsection (c); and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.*—(1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR § 140.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.*—(1) The prohibitions of this section against ex parte communications shall apply

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

sideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

(Sec. 4, Pub. L. 94-409, 90 Stat. 1246, 1247 (5 U.S.C. 551(14), 556(d) and 557(d)); sec. 101(a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975)))

Interested persons are invited to express their views and comments on whether the foregoing proposed rules should be adopted either in the form proposed or as modified in some respect. To be considered, written statements of views and comments should be submitted to the Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, Attn: Secretariat, on or before March 4, 1977. All such communications will be available for public inspection.

Issued in Washington, D.C., on January 27, 1977.

WILLIAM T. BAGLEY,
*Chairman, Commodity Futures
Trading Commission.*

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