

129 FERC ¶ 61,248  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Enforcement of Statutes, Regulations, and Orders      Docket No. PL10-1-000

POLICY STATEMENT ON DISCLOSURE OF EXCULPATORY MATERIALS

(Issued December 17, 2009)

1. The Commission issues this Policy Statement to provide guidance concerning the obligations and procedures for disclosing exculpatory materials during investigations under Section 1b and administrative enforcement actions under Part 385 of the Commission's regulations.<sup>1</sup>

**I. Introduction**

2. In *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (referred to along with its progeny as *Brady*), the Supreme Court held that the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence "material to guilt or punishment" known to the government but unknown to the defendant in criminal cases. The longstanding practice of staff in the Commission's Office of Enforcement (Enforcement staff) has been to provide to the subjects of its investigations such evidence in its investigations and administrative enforcement actions. While the Commission does not believe that the Constitution requires it to institute a policy requiring disclosure of exculpatory evidence in its civil administrative proceedings, promulgating such a policy eliminates uncertainty regarding the Commission's position on this issue, serves the Commission's goal of providing fairness to regulated entities appearing before it, and sets forth a procedural framework within which exculpatory disclosures are made. The policy we announce today will provide guidance to the administrative law judges, Enforcement staff, and the regulated community. The Commission also believes

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<sup>1</sup> Administrative enforcement actions are proceedings that arise from Section 1b investigations. See 18 C.F.R. § 1b (2009); 18 C.F.R. Part 385 (2009).

that this policy will allow efficient resolution of issues regarding disclosure of exculpatory material and avoid unnecessary consumption of regulated entities' and Enforcement staff's resources in future proceedings.

## II. Legal Analysis

3. As noted, the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 88 (1963), held that the Due Process Clause required the government to provide criminal defendants with exculpatory or potentially exculpatory evidence that is "material to guilt or punishment." "The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government."<sup>2</sup> *Brady* is a rule of disclosure, not of discovery.<sup>3</sup> Therefore, *Brady* obligations apply even when a defendant does not request the evidence.<sup>4</sup> The obligations also apply regardless of the good faith of the prosecutor.<sup>5</sup> However, no duty exists under *Brady* to provide evidence already in the defendant's possession or which can be obtained with reasonable diligence.<sup>6</sup>

4. In *Giglio v. United States*, 405 U.S. 150, 154-55 (1972), the Supreme Court went one step further requiring disclosure in criminal proceedings "[w]hen the 'reliability of a particular witness may well be determinative of guilt or innocence,'" and the prosecution has evidence that impeaches that witness' testimony. "Such [impeachment] evidence is 'evidence favorable to an accused' so that if disclosed and used effectively, it may make the difference between conviction and acquittal."<sup>7</sup> For example, courts have held that impeachment evidence for a key testifying witness includes prior statements by a witness that

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<sup>2</sup> *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1983) (citations omitted).

<sup>3</sup> See *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985).

<sup>4</sup> See *United States v. Agurs*, 427 U.S. 97, 107-10 (1976).

<sup>5</sup> *Brady*, 373 U.S. at 87.

<sup>6</sup> See, e.g., *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir 1989); *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996); *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975).

<sup>7</sup> *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87).

are materially inconsistent with the witness's trial testimony;<sup>8</sup> a conviction of perjury;<sup>9</sup> prosecutorial intimidation of a witness;<sup>10</sup> and plea bargains and informal statements by the prosecution that a witness would not be prosecuted in exchange for his testimony.<sup>11</sup>

5. Because *Brady* disclosure in criminal proceedings is required under the Due Process Clause, legal privileges against discovery like attorney-client, work-product, or deliberative process do not allow the government in criminal proceedings to avoid disclosure on these grounds.<sup>12</sup> However, courts have recognized that *Brady* does not apply to attorney strategies, legal theories, and evaluations of evidence because they are not "evidence."<sup>13</sup>

6. Courts have held that the Due Process Clause does not require application of *Brady* in administrative proceedings.<sup>14</sup> Nevertheless, some agencies have applied *Brady* to their administrative proceedings while other agencies have taken the opposite approach. The Securities and Exchange Commission (SEC) applies *Brady* in administrative enforcement actions. Pursuant to SEC Rule of Practice

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<sup>8</sup> *Id.* at 677.

<sup>9</sup> *United States v. Cuffie*, 80 F.3d 514, 517-19 (D.C. Cir. 1996).

<sup>10</sup> *Simmons v. Beard*, 581 F.3d 158, 169 (3rd Cir. 2009).

<sup>11</sup> *Giglio*, 405 U.S. at 154-55; *United States v. Edwards*, 191 F. Supp. 2d 88, 90 (D.D.C. 2002); *United States v. Buettner-Janusch*, 500 F. Supp. 1287, 1288 (S.D.N.Y. 1980).

<sup>12</sup> See Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Criminal* 3d § 254.2 (2000); *United States v. Goldman*, 439 F. Supp. 337, 350 (S.D.N.Y. 1977).

<sup>13</sup> *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *U.S. v. NYNEX Corp.*, 781 F. Supp. 19, 25-26 (D.D.C. 1991); see *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000).

<sup>14</sup> *Mister Discount Stockbrokers v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (no right to exculpatory evidence in National Association of Securities Dealers (NASD) proceedings which are treated the same as administrative agency action); *Zandford v. NASD*, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) ("[W]e find *Brady* inapposite and hold that the ALJ properly denied Nueva's demand for exculpatory materials.").

230, 17 C.F.R. § 201.230 (2009), SEC Enforcement must produce “documents that contain material exculpatory evidence” in SEC administrative enforcement proceedings. The Commodity Futures Trading Commission (CFTC) applies *Brady* in administrative enforcement actions through decisions by the commission and administrative law judges.<sup>15</sup> On the other hand, the Federal Trade Commission has declined to apply *Brady* to its administrative proceedings.<sup>16</sup> Similarly, the National Labor Relations Board and National Association of Securities Dealers, whose proceedings are treated as the equivalent of administrative agency action, have chosen not to apply *Brady*.<sup>17</sup>

### **III. Commission Policy on Disclosing Exculpatory Evidence**

7. The Commission believes that, while not constitutionally mandated, the principle of *Brady* should apply to Section 1b investigations and administrative enforcement actions under Part 385 of its regulations.

8. Enforcement staff’s prior practice has been to provide exculpatory material to subjects; however, the Commission believes formalizing Enforcement staff’s obligation, and the procedures necessary to comply with that obligation, will promote maximum fairness in its Section 1b investigations and administrative enforcement actions. The Commission believes the policy articulated in this statement will promote administrative efficiency and certainty, and will contribute to its goal of open and fair investigations and enforcement proceedings.<sup>18</sup>

9. During the course of an investigation conducted under Section 1b of the Commission’s regulations, Enforcement staff will scrutinize materials it receives from sources other than the investigative subject(s) for material that would be required to be disclosed under *Brady*. Any such materials or information that are not known to be in the subject’s possession shall be provided to the subject.

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<sup>15</sup> *In re First Guaranty Metals Co.*, 1980 CFTC LEXIS 141, at \*28-29 (Nov. 13, 1981).

<sup>16</sup> *In re Amrep Corp.*, 102 FTC 1362, 1371 (1983); *Allied Chem. Corp.*, 75 FTC 1055, 1056 (1969).

<sup>17</sup> *See Mister Discount Stockbrokers*, 768 F.2d at 878; *Zanford*, 30 F. Supp. 2d at 22 n.12; *Nueva Eng’g, Inc.*, 761 F.2d at 969.

<sup>18</sup> *See Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 21 (2008).

10. After the Commission has set an enforcement matter for administrative hearing, Enforcement staff will provide the presiding administrative law judge with an affidavit stating whether exculpatory materials were provided to the respondent(s). Enforcement staff will continue to determine whether third party materials or information require disclosure to the respondent.

11. We are not requiring Enforcement staff to conduct any search for materials outside those it receives in discovery or as part of its investigatory activities. Consequently, we will not require Enforcement staff to conduct any search for exculpatory materials that may be found in the offices of other agencies. Enforcement subjects may seek the disclosure of such materials by direct contact with other agencies. This process is consistent with SEC and CFTC practice.<sup>19</sup>

12. Notwithstanding the foregoing provisions, respondent(s) in a Part 385 enforcement hearing may move the presiding administrative law judge for disclosure of materials or information the respondent(s) have a reasonable basis to believe are exculpatory. In such a case, the presiding administrative law judge may, if necessary, examine any set of materials *in camera* to determine if material is subject to *Brady* disclosure.

13. Exculpatory materials or information may be contained in documents subject to Commission privilege or immunity. As we explained above, the privileged status of exculpatory material or information will not preclude the disclosure of such material or information. However, their disclosure in Section 1b investigations shall be subject to Commission approval because the privileges belong to the Commission, not to staff, and nonpublic investigative information cannot be disclosed absent Commission direction.<sup>20</sup> In administrative enforcement actions, if arguably exculpatory material is privileged, the presiding administrative law judge must certify to the Commission a potential release of *Brady* material, consistent with Rule 410(d)(2)(ii) of our Rules of Practice and Procedure.<sup>21</sup>

14. Equally important to the efficient resolution of *Brady* issues is guidance as to what is not required of Enforcement staff to fulfill the obligations contained in this policy statement. Because *Brady* applies only to evidentiary material rather

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<sup>19</sup> See *In re Haber*, 1994 SEC LEXIS 352, at \*2-3 (Feb. 2, 1994); *In re Bilello*, 1997 CFTC LEXIS 244, at \*13 (Oct. 10, 1997).

<sup>20</sup> See 18 C.F.R. § 1b.9 (2009).

<sup>21</sup> 18 C.F.R. § 385.410(d)(2)(ii) (2009).

than opinions, our adoption of this *Brady* policy does not entitle a respondent to disclosure of Enforcement staff's strategies, legal theories, or evaluations of evidence.<sup>22</sup> Consistent with Paragraph 13, the Commission will consider whether factual information, as distinct from opinion, contained in documents subject to discovery privileges or immunities constitute exculpatory material.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>22</sup> *Ylst*, 447 F.3d at 742; *NYNEX Corp.*, 781 F. Supp. at 25-26; *see Williamson*, 221 F.3d at 1182.