

who abuse the CEII process by claiming CEII status for extensive portions of non-CEII.<sup>154</sup> Under both the NOPR and the final rule, a claim of privilege has the same effect regardless of whether the privileged information is CEII or other nonpublic information.<sup>155</sup> Under § 388.112 of the Commission's regulations,<sup>156</sup> the portions for which privileged treatment is sought will be placed in the nonpublic file, and will not be released before the submitter has an opportunity to comment on its release, and receives notice of the impending release.

61. Some commenters dislike the practice of creating public and nonpublic documents, expressing concern over potential confusion between versions. These commenters urge the Commission to redesign its forms so that CEII and other nonpublic information are included as a separate attachment.<sup>157</sup> Commonwealth Associates, Inc. (CAI) objects to allowing submitters to designate CEII, out of fear that system owners/operators will abuse the process by making CEII available to their agents, while forcing others to wait for a decision by the CEII Coordinator by making sweeping claims of CEII status. CAI suggests that the Commission determine CEII status in the first instance. Other commenters suggest that the Commission specify penalties for violations of the CEII procedures.<sup>158</sup>

62. The Commission believes, as it did in formulating the NOPR, that the process for submitting CEII will work best if it tracks as closely as possible the existing procedures for submitting other privileged information, procedures that have proven satisfactory over time. It consequently is reluctant to depart from those procedures for fear of creating confusion and encountering unforeseen problems. The suggestion that the CEII Coordinator, rather than the owner of the information, designate CEII in the first instance, rather than reduce any prejudice from delays, will more likely increase the delays. Commission staff would be required to examine every page of a submission to make the determination, as opposed to examining only those portions that are claimed to constitute CEII.

63. The concern that some submitters will make unjustified claims of CEII status is not one that the Commission takes lightly, as it indicated in the

NOPR.<sup>159</sup> The Commission will take action against submitters who abuse the system. It does not intend, however, to specify the form that action may take, as it will depend on the circumstances. Admittedly, the Commission's ability to impose penalties is not extensive, but it can disqualify a person from practice before the Commission in the event of "unethical or improper professional conduct."<sup>160</sup>

64. With respect to the process of separating CEII from non-CEII, the Commission agrees with the commenters preferring a separate appendix for documents containing protected information rather than two entire copies, one public and one nonpublic. Accordingly, the Commission will modify § 388.112(b) of its regulations<sup>161</sup> to state a strong preference for an appendix containing protected information. The Commission will, however, leave the option of separate public and nonpublic versions for situations where the use of an appendix would render the document difficult to read. This revision will apply to non-CEII protected information as well. As stated above, the Commission believes that the procedures for CEII and non-CEII protected information should be as similar as possible to avoid confusion.

65. The suggestion that the Commission redesign its forms to place CEII in attachments or appendices is outside the scope of this rulemaking. As discussed below, however, the Commission does intend to re-examine its forms and reports to determine whether changes are needed to provide better protection for CEII. This issue can be addressed at that time. For now, the Commission will add a requirement to § 388.112 of its regulations<sup>162</sup> that all submissions for which CEII status is claimed be stamped "Contains CEII—Do Not Release" on every page containing CEII rather than just on the front page. A similar provision will be added for other types of protected information as well. In addition, the Commission is revising § 388.112(b)(2) of its regulations<sup>163</sup> to direct those who file on electronic media<sup>164</sup> to provide a list

of the names of each file containing CEII or other privileged material, and to mark the outside of the media (CD, diskette, tape) itself to indicate CEII or other privileged material. Hopefully these additional steps will prevent inadvertent disclosure of material.

#### *J. Challenges to CEII Status*

66. As with the submission of CEII, the NOPR proposed to handle challenges to CEII status through the existing procedures of § 388.112 of the Commission's regulations.<sup>165</sup> Under proposed § 388.112(d), the CEII Coordinator would afford the submitter notice in the event of a request for CEII, and give the submitter at least five days in which to oppose the request.<sup>166</sup> Under proposed § 388.112(e), if the CEII Coordinator denies the claim of privilege, the submitter would receive notice of the denial at least five days prior to release of the information.<sup>167</sup>

67. Several commenters have concerns about the time frames proposed in § 388.112 of the Commission's regulations.<sup>168</sup> They assert that a five-day notice period is insufficient, both for the time in which a submitter must respond to a request for CEII and for the notice of a proposed release. For the former, commenters favor a 10-day notice period.<sup>169</sup> For the latter, commenters prefer anywhere from a 10 to 30-day notice period.<sup>170</sup> The Commission also received suggestions that the time run from receipt of notice and that the notice be "actual" rather than constructive, such as in a **Federal Register** notice.<sup>171</sup> Some commenters also suggest that the Commission provide for an automatic stay of a decision to release CEII in the event of a request for rehearing, arguing that the time limit for making such a request is 30 days and that the information will otherwise be released before that time runs.<sup>172</sup>

68. The Commission continues to believe that the currently existing procedures are adequate. The

fields for nonpublic treatment. The Commission will be examining that software and revising it and the associated filing instructions to permit filers to flag CEII and non-Internet Public information as well.

<sup>154</sup> 67 FR 57994 at pp. 58002–3, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

<sup>155</sup> *Id.* at p. 58003, ¶ 32,564 at p. 34,552.

<sup>156</sup> *Id.* at pp. 58002–3, ¶ 32,564 at p. 34,552.

<sup>157</sup> *See* 18 CFR 388.112.

<sup>158</sup> *E.g.*, Duke at p. 5; National Hydropower Association at pp. 7–8, 12.

<sup>159</sup> *E.g.*, EEI at p. 12; National Hydropower Association at pp. 7–8; National Grid USA at p. 10; NERC at p. 4; Southern at p. 10.

<sup>160</sup> National Hydropower Association at pp. 7–8, 12.

<sup>161</sup> *E.g.*, National Hydropower Association at pp. 7–8, 12; National Grid USA at p. 10.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See* new 18 CFR 388.112.

<sup>157</sup> *E.g.*, NERC at p. 3; National Hydropower Association at pp. 11–12.

<sup>158</sup> *E.g.*, EEI at p. 15; MidAmerican at p. 3.

<sup>159</sup> 67 FR 57994 at p. 58003, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

<sup>160</sup> 18 CFR 385.2102(a)(2).

<sup>161</sup> *See* new 18 CFR 388.112(b).

<sup>162</sup> *See* new 18 CFR 388.112.

<sup>163</sup> *See* 18 CFR 388.112(b)(2).

<sup>164</sup> At the present time, nonpublic documents are filed on electronic media such as CDs, diskettes, and tapes. At some point in the future, the Commission will accept nonpublic and non-Internet public documents through its electronic filing process. Certain filers also use Commission-created submission software (*e.g.*, FERC Form No. 2 software) that enables the filer to "flag" certain