

**FEDERAL TRADE COMMISSION****16 CFR Parts 3 and 4****Rules of Practice**

**AGENCY:** Federal Trade Commission (“Commission” or “FTC”).

**ACTION:** Interim final rules with request for comment.

**SUMMARY:** The FTC is amending Parts 3 and 4 of its Rules of Practice, 16 CFR Parts 3 and 4, in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge (“ALJ”) and the Commission in Part 3 proceedings.

**DATES:** These interim final rules are effective on January 13, 2009. These amendments will govern all Commission adjudicatory proceedings that are commenced after January 13, 2009. The rules that were in effect before January 13, 2009 will govern all currently pending Commission adjudicatory proceedings. Written comments must be received on or before February 12, 2009.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to “Parts 3 and 4 Rules of Practice Rulemaking - P072104” to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website at (<http://www.ftc.gov/os/publiccomments.shtml>)—and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records and other individually identifiable health information. In addition, comments should not include any “[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. \* \* \*,” as provided in Section 6(f) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled

“Confidential,” and must comply with Commission Rule 4.9(c).<sup>1</sup>

Because paper mail in the Washington area, and specifically to the FTC, is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (<https://secure.commentworks.com/ftc-part3rules>) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (<https://secure.commentworks.com/ftc-part3rules>). If this document appears at (<http://www.regulations.gov/search/index.jsp>), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at [www.ftc.gov](http://www.ftc.gov) to read this document and the news release describing it.

A comment filed in paper form should include the “Parts 3 and 4 Rules of Practice Rulemaking - P072104” reference both in the text and on the envelope, and should be mailed or delivered by courier to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex R), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.shtml>). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtml>).

<sup>1</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

**FOR FURTHER INFORMATION CONTACT:**

Michael D. Bergman, Attorney, (202) 326-3184, or Lisa M. Harrison, Attorney, (202) 326-3204, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington DC 20580.

**SUPPLEMENTARY INFORMATION:** This discussion contains the following sections:

- I. Overview of Proposal and Comments Received
- II. Section-by-Section Analysis of Interim Final Rule Revisions
- III. Invitation to Comment
- IV. Interim Final Rule Revisions

**I. Overview of Proposal and Comments Received**

In its October 7, 2008, Notice of Proposed Rulemaking (“NPRM”),<sup>2</sup> the Commission invited public comment on proposed amendments to its Rules of Practice governing formal adjudicatory (“Part 3”) proceedings. This public comment period closed on November 6, 2008. The Commission observed in the NPRM that it has periodically engaged in reform efforts to minimize delay and improve the quality of the administrative decisionmaking process in a fair manner fully consistent with the Administrative Procedure Act (“APA”)<sup>3</sup> without prejudicing the due process rights of the parties in these proceedings. Past reforms and the ones proposed in the NPRM have primarily dealt with the long-standing concerns of the courts and the bar that the Commission’s Part 3 adjudicatory process has been too protracted.<sup>4</sup>

In merger cases, parties frequently argue that drawn out proceedings will result in their abandoning transactions before the antitrust merits can be adjudicated and indeed the protracted nature of Part 3 proceedings has contributed to the reluctance of some federal courts to grant preliminary relief in merger cases brought under Section

<sup>2</sup> 73 FR 58832 (Oct. 7, 2008).

<sup>3</sup> 5 U.S.C. 551 *et seq.*

<sup>4</sup> See, e.g., *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1228 n.8 (W.D. Mo. 1995) (“The average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed.”), *aff’d*, 69 F.3d 260 (8th Cir. 1995); see also *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974) (remarking upon the “leisurely course typical of FTC proceedings”); J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST 12 (Spring 2006); *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 116 n.167 (1989) (“It is disappointing that the Commission \* \* \* continues to have problems of delay.”).

13(b) of the FTC Act, 15 U.S.C. 53(b). Moreover, protracted Part 3 proceedings do not necessarily result in decisions that are more just or fair, and instead may result in substantially increased litigation costs for the Commission and respondents whose transactions or practices are challenged. For example, protracted discovery schedules and pretrial proceedings can result in nonessential discovery and motion practice that can be very costly to the Commission, respondents, and third parties.

One of the most critical advantages of administrative adjudications, and a cornerstone characteristic of administrative agencies, is expertise. As detailed more fully in the NPRM, the Congress and the Executive have long recognized that the ability of administrative agencies to apply their expertise and to devote substantial resources to complex problems calling for specialized knowledge is a critical advantage and an important reason for the creation of those agencies.<sup>5</sup> In creating the Commission, Congress intended the agency to use its substantive expertise and administrative adjudicative authority as a “uniquely effective vehicle for the development of antitrust law in complex settings in which the agency’s expertise [could] make a measurable difference,”<sup>6</sup> as well as to apply its specialized knowledge to consumer protection matters. Certainty and quality in Commission opinions could serve not only to improve the resolution of individual cases, but to provide broad guidance to industry and the public and help set the policy agenda.<sup>7</sup> With its expertise and unique institutional tools, the Commission was created to be—and continues to function as—a forum for expert adjudication.

The Commission also recognizes that the APA and the **ATTORNEY GENERAL’S FINAL REPORT**<sup>8</sup> contemplated an important role for the hearing examiner (the predecessor of the ALJ) in the adjudicatory process when acting as the presiding official to preside over prehearing proceedings, hear evidence and issue an initial decision.<sup>9</sup> Under the

APA, the ALJ’s authority is, however, “subject to the published rules of the agency,” a qualification which “is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by [ALJs].”<sup>10</sup> Thus, while the Commission’s rules provide the presiding ALJ with necessary tools to “conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order,”<sup>11</sup> and with important duties including initial fact finding responsibilities, the ALJ must ultimately adhere to Commission decisions. The Commission believes the rules issued in this notice strike the appropriate balance between the important role played by the ALJ and the need to apply the Commission’s expertise.

The proposed amendments announced in the October 7, 2008, NPRM were the culmination of a recent broad and systematic internal review to improve the Commission’s Part 3 practices and procedures in light of recent adjudicatory experiences. The Commission undertook this effort in order to improve the Part 3 process through a comprehensive review, rather than piecemeal modifications of a limited number of rules, which would ensure that the rules are consistent with one another and that they are workable in practice. Input was obtained from various bureaus and offices within the Commission and staff further reviewed the APA’s legal standards, the rules and procedures of the federal courts, and other agencies’ adjudicative procedures.

The Commission intended for the proposed amendments to balance three important interests: the public interest in a high quality decisionmaking process, the interests of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense. For example, in principle, expedited adjudications, while maintaining the high quality of the proceeding, may impose costs on the parties or the agency that they may not need bear if the demands of a given case permit a more leisurely adjudicative process. Alternatively, attempts to increase efficiency or decrease costs to

those involved could lead to trade offs in the quality of the ultimate result.

The most significant of the proposals in the NPRM included tighter time limits during the adjudicatory process leading up to the issuance of the initial decision, changes to ensure that the Commission can appropriately apply its legal and policy expertise earlier in the adjudicatory process, reforms in discovery and motions practice, the streamlining and expedition of evidentiary hearings, and a change in the Commission’s process for handling motions to dismiss or to withdraw a case from administrative adjudication after a federal court’s denial of a preliminary injunction in an action brought by the Commission.

The Commission received eight comments on the proposed amendments from seven individuals or entities: a joint comment from Robert Pitofsky<sup>12</sup> and Michael N. Sohn,<sup>13</sup> the Section of Antitrust Law of the American Bar Association (“Section”), Whole Foods Market, Inc. (“Whole Foods”) (two comments), Linda Blumkin,<sup>14</sup> the Chamber of Commerce of the United States of America (“Chamber”), Stephen Nagin,<sup>15</sup> and Richard Hallberg. Some commenters endorsed the objectives of the Commission’s proposed amendments. The Section commented that it “supports the Commission’s efforts to expedite certain adjudicative proceedings, improve the quality of its adjudicative decision making, and clarify the respective roles” of the Commission and the ALJ. The Pitofsky-Sohn comment noted that “expediting Part 3 proceedings is a step in the right direction.”

But these and other commenters objected to various specific proposals and the absence of any proposal that would set a deadline on the Commission itself, in particular:

(i) the proposed time limits did not set deadlines for the Commission to resolve appeals from initial decisions; (ii) the time limits imposed on ALJs were too rigid and might deprive respondents in some proceedings of their due process right to be heard; (iii) the proposals enabled the Commission to decide dispositive motions while a case is pending before an ALJ and would, therefore, undermine the ALJ’s

<sup>5</sup> **FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 16** (1941) [hereinafter **ATTORNEY GENERAL’S FINAL REPORT**]; see also Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 **ANTITRUST L.J.** 15 (2003) (discussing the formation and history of the FTC); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 **ANTITRUST L.J.** 319 (2003) (discussing the evolution of administrative adjudication at the FTC).

<sup>6</sup> *Hoffman & Royall*, supra note 5, at 319-20.

<sup>7</sup> *Id.*

<sup>8</sup> See supra note 5.

<sup>9</sup> See 5 U.S.C. 556(c).

<sup>10</sup> **ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74-75** (1947) [hereinafter **ATTORNEY GENERAL’S MANUAL**]; see also *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that agencies have discretion to enact procedures where Congress provided agencies with “the responsibility for substantive judgments.”).

<sup>11</sup> 16 CFR 3.42(c).

<sup>12</sup> Counsel to Arnold & Porter LLP and Sheehy Professor of Trade Regulation Law, Georgetown University Law Center. Mr. Pitofsky served as Chairman of the Commission and previously held other positions in the agency.

<sup>13</sup> Senior Partner, Arnold & Porter LLP and former General Counsel of the Commission.

<sup>14</sup> Former Assistant Director for General Litigation in the Bureau of Competition.

<sup>15</sup> Nagin, Gallup & Figueredo, PA.

independence; (iv) the Commission was changing its policy on when it would pursue a case after a denial of a preliminary injunction; and (v) the proposed rule explicitly stating that the Commission or a designated Commissioner could oversee portions of the pretrial process infringed on the ALJ's independence. Several commenters argued that the 30-day comment period was inadequate.

*i) Deadlines on Commission decision making.*

Upon consideration of the various comments, the Commission agrees that the proposed rules should set deadlines on the Commission to act on appeals of initial decisions. The Commission is now adopting in Rule 3.52 tight deadlines on its resolution of appeals. For cases in which the Commission seeks preliminary relief under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), there will be automatic Commission review of the initial decision (*i.e.*, no notice of appeal will need to be filed), briefing will be completed within 45 days of the issuance of the initial decision, and the Commission will commit to issue its final decision within 45 days of oral argument (*i.e.*, within 100 days of the initial decision).<sup>16</sup> For all other cases, an appealing party will need to file its objections to the initial decision by filing a notice of appeal, all briefing will be completed within 67 days of the initial decision, and the Commission will commit to issue its final decision within 100 days of oral argument (*i.e.*, within six months of the initial decision).

Consistent with the need for expedited procedures, the Commission is also setting deadlines for when it must rule on dispositive motions, applications for interlocutory appeals, and motions to dismiss after the denial of a preliminary injunction.

*ii) Deadlines leading up to Initial Decision.*

The comments filed so far do not persuade the Commission that its default timing deadlines are unfair. Comments that the revised rules would unduly limit respondents' ability to engage in adequate discovery or develop their defenses, and, hence, would violate their right to due process, have yet to provide support for this argument. The APA does not expressly require discovery. *See McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

<sup>16</sup> The timing deadlines for the Commission's decisions on appeal or review, as with other rule deadlines, are subject to the timing requirements in Rule 4.3(a), which addresses, *inter alia*, when deadlines fall on a weekend or holiday.

Although "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process," *id.* at 1286, it is difficult to see how the five and eight month deadlines from complaint to hearing, and the duration of pretrial discovery imposed by Rule 3.11(b), fail to satisfy due process. The comments thus far fail to demonstrate that respondents would not have adequate time to pursue broad discovery. Indeed, the revised rules allow the parties to move for more time upon a showing of good cause. Antitrust cases in federal court, such as the government's monopoly case against Microsoft and its merger case against Oracle, have gone to trial on roughly similar schedules, suggesting the reasonableness of such time frames.<sup>17</sup>

Further, the criticism in the comments received thus far that the time limits are too short fails to give adequate weight to provisions that authorize the Commission to grant extensions for "good cause." The Commission anticipates that this authority will be used sparingly but is determined to use this authority whenever necessary to ensure that the parties have adequate time to prepare for trial and to present their case.

*iii) Dispositive motions.*

Commenters' concerns about the role of the Commission in deciding legal and policy issues early in the proceeding have not demonstrated that early Commission involvement improperly interferes with the independence of the ALJ. This is especially true in view of the role that Congress envisioned for the Commission as an expert adjudicator. Moreover, as explained in the analysis of Rule 3.22, while the APA does confer a variety of powers on the ALJ primarily during and after the conduct of the evidentiary hearing, this does not include the authority to rule on prehearing motions that turn on legal and policy determinations.<sup>18</sup> Rather, the ALJ's authority to rule on such motions depends on whether an agency has provided the ALJ with this power in an agency rule. Commission Rule 3.22 previously granted ALJ's this power, and the Commission plainly has the authority to limit it.

<sup>17</sup> *See, e.g., United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>18</sup> For example, the APA authorizes the ALJ to "dispose of procedural requests or similar matters" during the hearing, subject to the published rules of the agency. 5 U.S.C. 556(c)(9).

*iv) 1995 Policy Statement and procedures related to Part 3 proceedings following denial of a preliminary injunction.*

The Commission has adopted its proposal to amend Rule 3.26 to eliminate automatic withdrawals from adjudication or stays of Part 3 proceedings when a party files a motion for withdrawal or to dismiss based on the denial of a preliminary injunction in an ancillary federal court action brought by the Commission. The Commission, however, has also amended the Rule to promote more prompt consideration of whether to proceed with Part 3 by providing for the filing of such motions long before the Commission has an opportunity to exhaust its appeals as provided in the previous Rule, and has also set a 30-day deadline for the Commission to decide such motions. The Commission also reaffirms in this document its adherence to its 1995 Policy Statement calling for a case-by-case analysis of whether the Commission should pursue Part 3 litigation after it loses a preliminary injunction.<sup>19</sup>

*v) The proposed amendment providing express authority for the Commission or a Commissioner to preside over prehearing procedures.*

Commenters criticized as infringing on the independence of the ALJ proposed Rule 3.42(a) that would have made explicit the authority of the Commission or one of its members to preside over discovery or certain other prehearing procedures before transferring the matter to the ALJ. The Commission or its members have the authority to preside over prehearing procedures under the APA, 5 U.S.C. 556(b), as well as unamended Rule 3.42, and the collection of rule revisions adopted today reduce the need for early Commission involvement in case management. For these reasons, and to ensure there is no public misperception that the proposed revision unfairly enlarged the Commission's authority, the Commission has decided not to adopt the proposed revision to this rule.

*vi) Improving Part 3 litigation while protecting the rights of the parties.*

Upon consideration of all the comments received so far, the Commission believes that the rules will improve the Part 3 litigation process. The timing deadlines, while aggressive, are consistent with the manner in which federal courts can move in complex antitrust cases, and parties can seek to extend them when necessary. The rules

<sup>19</sup> 60 FR 39741 (Aug. 3, 1995).

bring the Commission's expertise to bear sooner in the process, which can be expected to streamline cases, especially where the principal issue is legal not factual, while ensuring that the ALJs will continue to play the dominant role in managing the litigation and overseeing the evidentiary hearing.

*vii) Comment periods.*

As stated in the NPRM, the Commission sought public comment even though the proposed rule revisions relate solely to agency practice, and thus are not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b)(A). The Commission has been well served by the public comment period and the quality of many of the criticisms and suggestions undercuts the argument of some commenters that the 30-day comment period was too short. In any event, the rule amendments published in this notice are being issued only on an interim basis, and any rules that the Commission re-promulgates after the current comment period are not necessarily permanent. Instead, the Commission is instructing its internal Standing Committee on the Part 3 rules, as announced in the NPRM, to make recommendations bi-annually to the Commission on the need for changes to the Part 3 rules, including the rule revisions that become effective today and any rules that the Commission re-promulgates after the current comment period.

In view of the many modifications and additions to rule amendments proposed in the NPRM and described in Part II of this document, the Commission is requesting further comments on its adjudicatory reforms. The Commission will consider comments on any of the rule revisions issued today, but will especially welcome comment on any amendments that were not proposed in the NPRM.

The comments are addressed in more detail in the following section-by-section analysis of the interim final rule revisions.<sup>20</sup>

<sup>20</sup> The final rule amendments are not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2) or the requirements of the Paperwork Reduction Act, 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4 (exempting information collected during the conduct of administrative proceedings or investigations).

## II. Section-by-Section Analysis of Interim Final Rule Revisions

### Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

#### *Section 3.1: Scope of the rules in this part.*

The proposed amendment would have allowed the ALJ or the Commission to shorten time periods set by the Rule, provided that the shortened time periods would not unfairly prejudice any party. This authority is intended for use in proceedings where expedited procedures would serve the public interest (*e.g.*, unconsummated mergers) or where the issues do not require elaborate discovery or evidentiary hearings (*e.g.*, cases where the parties agree that a copious evidentiary record already exists that merely needs to be supplemented). In response to a comment, the Commission is amending the Rule to provide that the ALJ or the Commission may shorten time periods with the consent of the parties. Because consent will be required, the Commission is eliminating as unnecessary the qualifications that the shortening of a time period must not "unfairly prejudice any party" and not violate a party's legal rights. The Commission has also amended the Rule to state that the Part 3 rules generally apply only to "formal" adjudicative proceedings, *i.e.*, those actions that are governed by the adjudicatory provisions of the APA, 5 U.S.C. 554, 556-57.

#### *Section 3.2: Nature of adjudicative proceedings.*

The Commission proposed technical revisions to this Rule that would clarify that Commission consideration of consent orders—in addition to negotiations of consent orders—are not adjudicative proceedings. The proposed changes also omitted from the list of excluded items proceedings under specific statutes that have rarely occurred in recent decades. No comments were received on the proposed revisions, and the Commission adopts them as proposed.

### Subpart B—Pleadings

#### *Section 3.11: Commencement of proceedings.*

The Commission proposed amending Rule 3.11(b) to specify that the actual date for the evidentiary hearing would be five months from the date the complaint is issued in merger cases and eight months from the date of the complaint in all other cases, while allowing the Commission discretion to determine a different date for the evidentiary hearing when it issues the

complaint. The Commission would also be able to extend the date of the evidentiary hearing upon a good cause showing by movants, as set out in proposed Rule 3.21(c).

The Section and Whole Foods asserted that the five and eight month deadlines, along with the deadlines in other rules, are "one-size-fits-all" rules. These comments overlooked the Commission's ability to extend the hearing date for all types of cases where a party can show that it needs more time to prepare for trial. The Commission, in its discretion, could also consider other factors in determining whether to find good cause to extend the hearing date, for example, if a respondent agrees not to consummate a merger that has not been enjoined by a court during the pendency of the Part 3 proceeding.

The Section stated further that the five month deadline for consummated merger cases "may be appropriate in some cases and not in other cases" and that "whether the matter was the subject of a preliminary injunction hearing" should be one of the factors considered in setting the hearing date for consummated mergers. The Commission believes this comment has merit and is revising the Rule so that only those cases in connection with which the Commission has sought or is seeking relief under Section 13(b) of the FTC Act<sup>21</sup> will be subject to the five month deadline, unless of course the Commission sets a different date for the evidentiary hearing when it issues the complaint. The eight month deadline will apply to all other cases unless the Commission sets a different deadline when it issues the complaint. For example, it is possible that the Commission might set a consummated merger case, that was not the subject of a Section 13(b) action, under the five month schedule if an expedited schedule would be in the public interest.

The Commission typically seeks preliminary injunctive relief under Section 13(b) when it challenges an unconsummated merger, and the Part 3 proceedings in these cases are frequently the ones that are most in need of expedition. As noted above, parties have argued that protracted proceedings for merger cases could result in their abandoning transactions before their antitrust merits can be adjudicated. The interim final Rule, like the proposed Rule, provides the Commission discretion to determine a different date for the evidentiary hearing when it issues the complaint, and Rule 3.21(c) provides that the Commission

<sup>21</sup> 15 U.S.C. 53(b).

may subsequently extend the date of the hearing upon a good cause showing by movants.

The Chamber and Whole Foods asserted that rules expediting proceedings may violate due process if they deny respondents a fair opportunity to develop their defense. Whole Foods stated further that the deadlines favor complaint counsel because respondents do not share complaint counsel's power to obtain fact discovery during the pre-complaint investigation conducted pursuant to Part 2 of the Commission's Rules of Practice.<sup>22</sup> The five and eight month pretrial periods, however, should provide sufficient time for respondents to obtain discovery. Rule 3.31(a) requires both complaint counsel and respondent's counsel to make comprehensive initial disclosures within five days of receipt of respondent's answer to the complaint. These disclosures include documents complaint counsel has obtained from third parties, subject to the limitations on discovery in Rule 3.31(c)(2). The rules allow respondents to serve immediately on other parties interrogatories and requests for production of documents. Further, the rules allow respondents to issue immediately subpoenas for discovery, subject to the restrictions of Rules 3.36 and 3.31(c)(2). In the unlikely event that a respondent does not have adequate time for discovery, the respondent may file a motion with the Commission to delay the hearing date.

Further, the APA does not expressly provide for discovery, and as at least two appellate courts have observed:

The extent of discovery to which a party to an administrative proceeding is entitled is primarily determined by the particular agency. . . . [C]ourts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings. If an agency has adopted rules providing for discovery in its proceedings, the agency is bound by those rules and must ensure that its procedures meet due process requirements.<sup>23</sup>

As demonstrated above, and based on the comments received thus far, the five and eight month deadlines more than satisfy due process requirements because respondent will have ample time for broad discovery and a respondent may also move for more

time upon a showing of good cause under Rule 3.21(c).

The deadlines in Rule 3.11 are similar to the schedules established in some complex antitrust cases in federal district court, some of which have gone to trial in five months or less.<sup>24</sup> Moreover, other federal agencies provide limits on the pretrial process. For example, the Securities and Exchange Commission ("SEC") puts cases on one of three tracks when it issues an order instituting administrative proceedings. For the longest track, SEC rules require that the hearing commence approximately four months from the date of the order.<sup>25</sup>

In contrast to the concerns raised by the Chamber and Whole Foods, the Section supported a far more accelerated pretrial schedule for unconsummated mergers. The Section advocated a five month period from complaint issuance to *final Commission order* for these cases. The Section's recommendation was based on its concern, shared by the Pitofsky-Sohn comment, that the proposed rules "will not expedite Part 3 proceedings nearly enough to make them practicable for unconsummated mergers."<sup>26</sup>

The Commission also proposed deleting Rule 3.11(c), which allowed the respondent to file a motion for more definite statement. These motions are seldom filed and even less likely to be granted because Commission complaints are typically very detailed. Moreover, under previous Rule 3.12, if a respondent elected to file a motion for more definite statement, the motion tolled the deadline for the answer to the complaint and would result in substantial delay in the proceedings. As noted below, respondents may still raise similar objections in a motion to dismiss. The Commission therefore adopts this change.

#### Section 3.12: Answer.

Proposed Rule 3.12(a) shortened the deadline for filing an answer from 20 to 14 days. The Section opposed a reduction in the time to answer the complaint, arguing that complaints can be very detailed and that respondents need adequate time to analyze the factual and legal allegations to respond properly, while the time saved by the

Rule is modest. The Commission continues to believe, however, that 14 days to answer the complaint are sufficient for respondents who have become familiar with the issues during the Part 2 precomplaint investigation. While the Section argues that Part 2 "is not a substitute for" Part 3 proceedings and that respondents often are not made aware of "the full range of facts" or gain a complete understanding of the Commission's legal theory during Part 2, the fact remains that very few, if any, Part 3 cases are ever initiated without the respondent having had extensive meetings with the Commissioners and staff. By the time the Commission issues a complaint, the parties should be well aware of the agency's factual and legal assertions. Further, if necessary, the Commission may exercise its authority to extend the 14 days for good cause. See Rule 4.3(b). The Commission is adopting the revision as proposed.

Proposed Rule 3.12(a) also eliminated the provision in the Rule that allowed the filing of any motion to toll the deadline for respondents to file an answer to the complaint.<sup>27</sup> The Commission was concerned that this provision too broadly permitted the filing of any motion, regardless of its merit or requested relief, to substantially delay the beginning of the Part 3 proceeding. The Section objected that no answer should be required until, at least, resolution of a motion for a more definite statement or to strike that challenges the sufficiency of a complaint. The Commission notes that its complaints tend to be highly detailed and that motions for a more definite statement are rarely filed and more rarely granted. Respondents may, however, always file a motion to dismiss to challenge the sufficiency of the complaint if necessary. The revisions to Rule 3.12(a) will ensure an earlier prehearing conference, earlier discovery, and will expedite the ultimate resolution of the proceeding. The Commission adopts the revisions to Rule 3.12(a) as proposed.

The Commission also proposed in Rule 3.12(b) and (c) to eliminate the ALJ's authority to render an initial decision when the allegations of the complaint are admitted or there is a default. In those cases, the Commission would issue a final decision on the basis of the facts alleged in the complaint. While the Section suggested that a decision by an independent ALJ can be useful even without a record to review, the Commission believes that in these

<sup>24</sup> See, e.g., *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>25</sup> 17 CFR 201.360(a)(2).

<sup>26</sup> Both sets of comments noted that the proposed Rule fails to address a substantial source of delay—the time it takes the Commission to issue a final decision. As discussed below in the analysis of Rule 3.52, the Commission is responding to this concern by adopting rules that will expedite Commission review of initial decisions in all cases.

<sup>27</sup> This provision had been added by the Commission in its 2001 Rule amendments. See 66 FR 17622 (Apr. 3, 2001).

<sup>22</sup> 16 CFR 2.1 *et seq.*

<sup>23</sup> *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387-88 (9th Cir. 1984) (citing *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)).

circumstances cases can be resolved more expeditiously without the intermediate step of an ALJ's initial decision; the only issues in such cases are legal or policy ones, in which the Commission's expertise is most relevant. The proposed revisions are adopted.

**Subpart C—Prehearing Procedures; Motions: Interlocutory Appeals; Summary Decisions**

*Rule 3.21: Prehearing procedures.*

The Commission proposed amendments to Rule 3.21 that would impose tighter deadlines on prehearing procedures. No comments on this Rule were received, and the Commission adopts the rule revisions as proposed. Rule 3.21(a) requires that the parties' initial meet-and-confer session take place within five days of the answer and requires the parties to discuss electronically stored information ("ESI") at that time, including the scope of and the time period for the exchange of ESI and the format for exchanging such information. This change is intended to help expedite the case and facilitate resolution of production issues in ways that minimize costs. Rule 3.21(a) is also modified by deleting a phrase that suggested the parties should discuss a proposed hearing date because that date will already have been set by the Commission when it issued the complaint and the date can be modified only by the Commission upon a showing of good cause. Rule 3.21(a), as amended, specifies broad subjects to be discussed at the parties' meet-and-confer session(s) before the scheduling conference.

Rule 3.21(b) advances the deadline for the scheduling conference from 14 days after the answer is filed to 10 days after the answer is filed. Although the Commission extended the deadline to 14 days in 2001,<sup>28</sup> it believes the ten day deadline is reasonable for most cases. The Rule includes additional items to be discussed at the scheduling conference, such as stages of the proceeding that may be expedited. Under the Rule, the Commission contemplates that the parties will inform the ALJ of the results of their initial meeting(s) regarding their proposed discovery plan, including the disclosure of ESI, and that the ALJ will incorporate in the scheduling order a discovery plan that he or she deems appropriate.

Rule 3.21(c)(1) specifies that the ALJ's scheduling order will establish a schedule of proceedings that will permit the evidentiary hearing to commence on

the date set by the Commission. The Rule also states that the Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint. The deadline for the prehearing scheduling conference and order and the more detailed requirements for both are intended to help keep the prehearing proceedings on track and enable the parties to contribute to a high quality record on which the ALJ can base his or her decisions.

Rule 3.21(c)(2) authorizes the ALJ to extend, upon a showing of good cause, any deadline in the scheduling order other than the date of the evidentiary hearing. Rule 3.21(f) states that the ALJ shall hold additional prehearing and status conferences or enter additional orders as may be needed to "ensure the just and expeditious disposition of the proceeding and to avoid unnecessary cost." These revisions give the ALJ substantial flexibility and discretion to manage particular cases.

*Section 3.22: Motions.*

The proposed revision to Rule 3.22(a) provided that the Commission would resolve in the first instance motions to strike, motions for summary decision, and prehearing motions to dismiss, but provided the Commission discretion to refer the motion to the ALJ and to set a deadline in which the ALJ must rule on the motion. Significantly, the Section acknowledged in its comment that "[e]arlier Commission involvement [to resolve dispositive motions] will undoubtedly result in more efficient resolution of these issues. Moreover, it will allow the Commission to apply its antitrust expertise to matters at an earlier stage. Delay occasioned by an erroneous ALJ decision on a dispositive motion \* \* \* provides little benefit and exacts a toll on all participants in the process."

Nonetheless, commenters (including the Section) criticized the proposed Rule change as unfairly invading the province of the independent ALJ and compromising the Commission's dual roles as prosecutor and adjudicator. For example, the Section argued that the proposed changes, while "likely [to] reduce or avoid delay," could raise concerns about the impartiality and fairness of the Part 3 proceeding by permitting the Commission to adjudicate dispositive issues, including motions to dismiss challenging the facial sufficiency of a complaint, shortly after the Commission has voted out the complaint finding that it has "reason to believe" there was a law violation, without the benefit of an opinion by an

independent ALJ. The Section added that, while "it may sometimes be desirable for the Commission to address dispositive motions in the first instance, changing the Part 3 rules to make that the default procedure is unnecessary," and that "concern about improving the quality of Commission decisions is better addressed by enhancing the antitrust expertise of the ALJs." The Pitofsky-Sohn comment similarly argued that the proposed rules, including Rule 3.22, would arguably infringe on the fairness of the Part 3 proceeding if the Commission more frequently "invades what has heretofore been the province of an independent ALJ." Whole Foods argued that the rule change would compromise the independence of the ALJ, who will lose the opportunity to "live with the case," will not write his initial decision on a "clean slate," but will be unduly influenced by the "entirely transparent views of the Commission delivered on less than a full record," and will lose his ability to effectively manage discovery. The Chamber and Blumkin comments similarly argued that this change would compromise the ALJ's independent decision making role.

Commenters, however, provided essentially no legal support for their argument that the Commission's resolution of dispositive motions in the first instance will unfairly prejudice litigants in Part 3 proceedings or would violate the APA. Most important, these comments failed to undermine the central premise supporting the rule change: that the Commission has the authority and expertise to rule initially on dispositive motions and that doing so will improve the quality of the decisionmaking and (as acknowledged by the Section) will expedite the proceeding.<sup>29</sup> This is because an erroneous decision by the ALJ on a dispositive motion dismissing the complaint may lead to unnecessary briefing, hearing, and reversal, resulting in substantial costs and delay to the litigants. Moreover, the APA does not confer on an ALJ the specific authority to rule on dispositive motions, and indeed, permits the Commission or Commissioners to act as presiding officers. *See* 5 U.S.C. 556(b).<sup>30</sup> It is

<sup>29</sup> The Commission has in recent practice retained jurisdiction to resolve legal issues raised in a dispositive motion. *See, e.g., In re S. Carolina State Bd. of Dentistry*, 136 F.T.C. 229 (2004) (Commission retained jurisdiction to hear motions to dismiss and denied at that stage respondent's legal defense that its alleged unlawful activities were protected by the state action doctrine).

<sup>30</sup> Under the APA, the Commission or one of its Commissioners may take evidence at the hearing, 5 U.S.C. 556(b), and the Commission, on appeal or

<sup>28</sup> *Id.*

therefore hard to see how allowing the Commission to rule on dispositive motions deprives an ALJ of the independence conferred by the APA or is unfair to the parties.

Codifying this approach will likely expedite the proceedings and save litigants resources to the extent the case is dismissed or the issues narrowed by the resolution of the legal or public interest issue. For example, a Commission order denying a motion to dismiss can articulate the legal standard to be applied to the facts alleged in the complaint and can be a useful tool to apply as facts are developed during discovery.<sup>31</sup>

Concerns raised by the Section that this rule change will result in “the practical unavailability of a motion to dismiss” because the Commission had just previously found there to be a “reason to believe” there was a law violation, are without support and are refuted by recent Commission practice.<sup>32</sup> Further, the logic of the argument about the benefit of delaying the Commission’s involvement with the legal issues in a case would cast doubt on any effort to significantly reduce the time it takes for a case to reach the Commission for a final decision on both the law and the facts of the case. Indeed, the Section’s proposal that the Commission issue a final decision in all unconsummated merger cases within five months after issuance of the complaint would have the Commission resolve the facts and law of the case within a few months after it voted to bring the case.

The Commission also proposed in paragraph (a) that rulings on motions to dismiss based on the alleged failure to establish a *prima facie* case would be deferred until after the hearing record is closed, and eliminated the provision in

the previous Rule for a recommended ruling by the ALJ when certifying to the Commission a motion outside his or her authority to decide. The Commission received no comments on these proposals and they have been adopted as proposed.

Proposed paragraph (b) required that proceedings before the ALJ not be stayed during the Commission’s consideration of the motion, unless otherwise ordered by the Commission. The Commission has revised the caption of paragraph (b) to “Proceedings not stayed,” to more accurately describe the subject matter of the paragraph. Proposed paragraph (e) required the ALJ to decide all motions within 14 days of the filing of all motion papers unless otherwise provided by rule or if the Commission extends the time for good cause. The purpose of proposed paragraph (b) was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions, and paragraph (e) is similarly intended to expedite the proceedings. The Section objected that eliminating the stay for pre-answer motions will result in inadequate review of the sufficiency of a complaint, but as explained above, the Commission’s complaints tend to be highly detailed and, in any event, respondents retain the right to challenge the sufficiency of a complaint by filing a motion to dismiss. Except for the revision of the caption of paragraph (b), paragraphs (b) and (e) are adopted as proposed.

The Section commented, however, that by not staying the Part 3 case during the pendency of a dispositive motion before the Commission and with no deadlines imposed on the Commission to resolve such motions, litigants (and the ALJ) will be disadvantaged by not knowing the precise scope of the issues to be addressed at the hearing or, indeed, whether there will be any hearing at all. The Commission agrees and has therefore revised paragraph (a) to require that the Commission resolve any dispositive motion within 45 days of the filing of the motion papers unless it finds there to be good cause for an extension. In those cases where the Commission grants a dispositive motion, that decision will constitute the agency’s final decision in the case, and this 45 day period for deciding dispositive motions is therefore the same amount of time as the Commission has allocated for issuing its final decision following oral argument in cases where the Commission has sought relief under Section 13(b).

Proposed paragraph (c) also imposed word count limits on motion papers. Briefs in support of, and in opposition to, dispositive motions were to be limited to 10,000 words (approximately 40 double-spaced pages), and briefs in support of, and in opposition to, non-dispositive motions were limited to 2,500 words (approximately 10 double-spaced pages). The Commission received no comments on these word count limitations and they have been adopted as proposed.

Proposed paragraph (d) provided an automatic right of reply in support of dispositive motions, stated that reply and surreply briefs in support of non-dispositive motions “shall be permitted only in circumstances where the parties wish to draw the ALJ’s or the Commission’s attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief,” and imposed a five day filing deadline for any authorized reply to a motion. No comments were received on these provisions and they are adopted as proposed.

The other proposed changes to Rule 3.22, such as eliminating previous paragraph (e) and redesignating previous paragraph (f) as paragraph (g), generated no comments and are adopted.

### Section 3.23: *Interlocutory appeals.*

The Commission proposed amendments to Rule 3.23 that would expedite consideration by the ALJ and the Commission of certain applications by a party that seek discretionary review of an interlocutory ruling by the ALJ. As noted in the NPRM, the proposal left unchanged in paragraph (a) the types of rulings that the parties can ask the Commission to review without a determination by the ALJ that interlocutory review is appropriate.

In paragraph (b), the proposal continued to allow applications for interlocutory review of other rulings only on a determination that the ruling “involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.” In order to reduce delay, the Commission proposed requiring the ALJ to make his or her determination whether the application for review involves such a controlling question within three days after the filing by a party of a request for such a determination. The revision eliminated the requirement that the ALJ provide a

review, may make its own legal determinations and *de novo* factual findings from the hearing record. See, e.g., 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”).

<sup>31</sup> Whole Foods mistakenly asserted that by deciding dispositive motions, such as motions for summary decision, the Commission will be taking away the independent role of the ALJ to interpret facts and parse the evidentiary record. On the contrary, such motions inherently do not resolve factual disputes, but rather resolve legal or policy issues where there are no genuine issues of material facts in dispute. This commenter acknowledged that motions raising “purely legal defenses” might be appropriate for the Commission to resolve.

<sup>32</sup> See, e.g., *S. Carolina State Bd. of Dentistry*, 136 F.T.C. 229 (denying respondent’s motion to dismiss on state action grounds, but refusing to deny respondent’s motion to dismiss on mootness grounds as urged by complaint counsel in favor of remanding to ALJ for limited discovery on mootness issue).

written justification for his or her determination. It also allowed the party to file its application for review with the Commission if the ALJ does not make a timely ruling on its request for a determination on the appropriateness of review. The Commission adopts these revisions as proposed.

Because the pendency of an application for review may leave a cloud over the proceeding before the ALJ, paragraph (d) of the proposed Rule would have treated the failure of the Commission to act within three days as a denial of the application. As suggested by the Section's comment, the Commission has eliminated this default provision and the Rule now requires instead that the Commission decide whether to entertain an appeal within three days after the filing of the answer to the application. The Commission has also adopted the Section's suggestion that the Rule make explicit that the denial of an application does not constitute a ruling on the merits of the appeal.

Also, to avoid unnecessary delay, the proposed Rule set shorter deadlines than the previous Rule for the filing of applications and answers and, to reduce burdens, imposed tighter limits than the previous Rule on the length of these filings. No comments were received on these provisions and the Commission has adopted them.

#### *Section 3.24: Summary decisions.*

Proposed paragraph (a), in conjunction with proposed Rule 3.22, was revised to permit the Commission in the first instance to resolve dispositive motions unless referred by the Commission to the ALJ. This proposal was criticized by many of the commenters as improperly infringing on the independence of the ALJ. These commenters asserted that, after the Commission issues a complaint, it should not intervene in the Part 3 proceedings until after the ALJ has conducted the Part 3 hearing and issued an initial decision. As noted in the analysis of Rule 3.22, the Commission may properly make initial rulings on dispositive motions presenting legal or public interest issues and doing so does not infringe on the ALJ's ability to preside over the evidentiary hearing and issue an initial decision.

Proposed paragraph (a) also required that summary decision motions be filed no later than 30 days before the evidentiary hearing instead of 20 days as in the unamended Rule. The proposed Rule also extended the deadline for filing affidavits in opposition to a summary decision motion from 10 to 14 days in order to

provide the nonmoving party more time to oppose the motion where the moving party may have had months in which to prepare its summary decision brief and supporting papers. No comments were received on these proposals and they are therefore being adopted.

Proposed paragraph (a) also eliminated the previous 30 day deadline for ruling on a motion for summary decision but allowed the Commission to set a deadline for a decision when referring such a motion to the ALJ. As discussed above, several commenters complained that the lack of a Commission deadline to rule on dispositive motions while the Part 3 case is proceeding may unfairly prejudice litigants who do not know if or how the issues will be narrowed before the beginning of the evidentiary hearing. In response, in Rule 3.22 the Commission has imposed on itself a 45 day deadline to resolve dispositive motions. As noted earlier, this 45 day period for deciding dispositive motions is the same amount of time as the Commission has allocated for issuing its final decision following oral argument in cases where the Commission has sought relief under Section 13(b).

Finally, commenter Nagin suggested that, where an affidavit in support of or in opposition to a motion for summary decision is filed in bad faith, the list of possible disciplinary actions under Rule 3.24(b) be expanded, from "reprimand, suspension or disbarment" to include "notice to all professional licensing, registration and certification entities to which a lawyer is subject to discipline." The Commission has the authority to refer unethical conduct to state bar associations and does not believe that a special provision for this is needed in the Rule on summary decisions.

#### *Section 3.26: Motions following denial of preliminary injunctive relief.*

Rule 3.26 was first adopted in connection with a 1995 Policy Statement, which explained that the Commission takes a case-by-case approach in deciding whether to pursue administrative litigation of a merger case following the denial of a preliminary injunction in federal court.<sup>33</sup> Many commenters objected to the Commission's proposal to eliminate provisions in the Rule for automatic withdrawals from adjudication or stays when a party moves for withdrawal or to dismiss after the Commission loses a motion for preliminary injunction in a merger case. Several commenters argued that the Commission should not pursue administrative litigation in merger cases

if it loses its application for a preliminary injunction. Of course, if the Commission were to adopt a policy uniformly disclaiming any intent to pursue the Part 3 adjudication on the merits after losing a preliminary injunction, there would be no need for Rule 3.26 at all. The Commission does not choose to take that approach and instead adheres to the case-by-case approach of the 1995 Policy Statement.

Several comments argued that, by stating in the NPRM that continuation of the Part 3 adjudication after loss of a preliminary injunction should be the "norm," the Commission's proposed amendment amounted to a reversal of its 1995 Policy Statement. According to that Statement,

[I]t would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied. Nor would it be in the public interest to require an administrative trial in every case in which a preliminary injunction has been denied. Thus, a case-by-case determination is appropriate. This approach gives the Commission the opportunity to assess such matters as (i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.<sup>34</sup>

The 1995 Statement, however, offered no view on whether the typical outcome of a case-by-case analysis would be to continue or to abandon Part 3 litigation. The Pitofsky-Sohn comment states that "articulating such a 'norm' leaves the impression that the Commission will take little or no notice of what preliminary injunction courts have to say" and points out that the NPRM was "silent with respect to whether any or all of the factors [listed in the 1995 Statement and quoted above] will continue to be considered."

The Commission continues to consider the five factors as highly relevant to any determination whether to proceed with Part 3 and anticipates that the parties will address them in their motion papers and, if a motion for withdrawal is granted, in their presentations during the time the case is

<sup>33</sup> 60 FR 39741 (1995).

<sup>34</sup> *Id.* at 39743.

withdrawn. The Commission, of course, will also continue to consider carefully the rulings by the district court and any appellate court rulings in deciding whether to proceed with Part 3. In this connection, the Commission urges parties to address anything in the judicial rulings that they believe is relevant to the public interest in further proceedings. Besides the factors listed in the 1995 Policy Statement, this would include, for example, a discussion of whether any judicial ruling on the merits of the challenge to the merger was based on a determination that the Commission had not even raised “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals,” the test articulated in such decisions as *FTC v. H.J. Heinz Co.*<sup>35</sup> and *FTC v. Whole Foods Market, Inc.*<sup>36</sup> for whether the Commission had made a sufficient showing of likelihood of success on the merits to warrant preliminary injunctive relief. Such a determination would itself raise serious questions about whether the Part 3 case should continue.

Although the Commission will maintain the case-by-case approach outlined in the 1995 Statement, this approach does not warrant the delays that result from automatic withdrawals or stays. The Commission, however, is committed to a prompt and careful consideration of the public interest and has accordingly added a requirement that it rule on motions to dismiss or for withdrawal from adjudication not later than 30 days after the filing of motion papers.

The Commission is making another change to the proposed amendment to ensure prompt consideration of the public interest in proceeding with the Part 3 litigation. Proposed paragraph (b) would have made explicit a requirement in the original Rule<sup>37</sup> that a motion to dismiss or for withdrawal be filed only after the exhaustion of appeals from the district court’s denial of the preliminary injunction. This restriction could prevent the filing of motions to dismiss or for withdrawal from adjudication under this Rule until many months after the district court decision. In order to allow much more prompt consideration of the public interest in determining

whether to proceed with the Part 3 case, the Commission has revised paragraph (b) to authorize the filing of a motion to dismiss or for withdrawal at any time within 14 days after, but not earlier than, a court of appeals has denied a Commission request for an injunction or stay pending appeal. For cases in which the Commission has not sought relief from the court of appeals within seven days following the denial of a preliminary injunction, the Rule revision authorizes the filing of a motion to dismiss or for withdrawal at any time within 14 days after the district court denies a Commission request for preliminary relief.

#### **Subpart D—Discovery; Compulsory Process**

##### *Section 3.31: General discovery provisions.*

The Commission proposed to revise Rule 3.31(b) to specify that the documents to be disclosed as part of the parties’ mandatory initial disclosures include declarations or affidavits, as well as transcripts of investigational hearings and depositions, and that initial disclosures also include ESI. The reference to ESI would update the term “data compilations” and would parallel the 2006 amendment to Fed. R. Civ. P. 26(a)(1)(B). The proposed limitations on disclosure of ESI in Rule 3.31(c)(3) follow Fed. R. Civ. P. 26(b)(2)(B). In particular, the proposed provision in Rule 3.31(c)(3) that a party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost is anticipated to reduce delays and costs to the parties. There were no comments on these revisions and the Commission adopts them as proposed. As discussed below, the Commission also proposed to treat expert discovery in a new Rule 3.31A, thereby eliminating the provisions in paragraphs (b) and (c) governing expert discovery.

The proposed revisions to Rule 3.31(c)(2) would limit the scope of discovery for complaint counsel, respondents, and third parties who receive a discovery request. Complaint counsel would only need to search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody, or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The ALJ could authorize for good cause additional discovery of materials in the possession, custody, or

control of those Bureaus or Offices, or authorize other discovery pursuant to Rule 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under the rules would be required to search for materials generated and transmitted between an entity’s counsel (including counsel’s legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the ALJ determines there is good cause to provide such materials.

The Section argued that requiring respondents to satisfy the “heightened requirements” of good cause for agency materials that fall outside these limits could create a disparity in substantive outcomes in Part 3 proceedings and those in federal court. In fact, however, the proposed rule is similar to the restrictions on discovery in the Federal Rules of Civil Procedure. The Section admitted that “the FRCP generally limit the discovery of evidence that is duplicative, privileged, or work product.” As the Commission stated in the NPRM, the materials excluded by the proposed rule are frequently duplicative and almost always protected by the deliberative process or attorney-client privileges or as work product. In the rare event that material excluded by the proposed rule is not duplicative, privileged or work product, it should not be difficult for respondent to satisfy a good cause standard or the requirements of Rule 3.36. Moreover, any alleged disadvantage for respondents is offset by the corresponding limitations on discovery of materials held by respondents and third parties. The Commission is adopting the revisions to Rule 3.31(c)(2) as proposed.

Proposed Rule 3.31(d) would require the ALJ to issue the standard protective order set forth in an appendix to the Rule. The Section argued that the parties should be able to negotiate orders suited to the needs of the particular case. These negotiations, however, can substantially delay discovery, prevent the Commission from protecting confidential material in a uniform manner in all Part 3 cases, and reduce the confidence of third party submitters that their confidential submissions will be protected.

The Section specifically objected to a provision that would prohibit disclosure of confidential discovery materials to a respondent’s in-house counsel. It asserted that, in many cases, this restriction would inhibit a respondent’s ability to defend itself. The Commission’s statutory obligation to maintain the confidentiality of

<sup>35</sup> 246 F.3d 708, 714-15 (D.C. Cir. 2001).

<sup>36</sup> No. 07-5276, 2008 U.S. App. LEXIS 24092, at \*10 (D.C. Cir. Nov. 21, 2008) (Brown, J.); *id.* at \*30 (Tatel, J., concurring).

<sup>37</sup> See 60 FR 39640, 39641; *In re Equitable Resources, Inc.*, No. 9322, 2007 F.T.C. LEXIS 49 (May 30, 2007).

commercially sensitive information,<sup>38</sup> however, raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent's representation, for example, by making or giving advice about the company's business decisions.<sup>39</sup> The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

The proposed standard protective order covered "sensitive personal information," which includes, but is not limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identified<sup>40</sup> by individual, such as an individual's medical records. The Commission is retaining this provision, and as discussed below, is making further conforming amendments to Rule 3.45, which will accord *in camera* treatment if such material is to be introduced as evidence or otherwise used in the proceeding. Likewise, the Commission is amending Rule 4.2, as explained further below, to govern the use of sensitive personal information in filings to the Commission.

The Nagin comment suggested several modifications to the standard protective order, including barring disclosure of confidential material to anyone affiliated with or employed "directly or indirectly" by a respondent, requiring notice if a party receives a discovery request from another government agency without regard to whether the request is part of an agency "proceeding," and adding specific requirements for the disposition of electronically stored discovery materials at the end of the proceeding. It also recommended that parties maintain logs of all recipients of confidential discovery materials.

Although the term "proceeding" is broad enough to encompass government investigations, the Commission is

revising paragraph 11 of the standard order to apply to discovery requests "received in any investigation or in any other proceeding or matter." The Commission, however, is not convinced that the comment's other recommended modifications are needed to protect confidential discovery material.

The Commission has also eliminated paragraph (g) from the previous Rule. This paragraph applied to applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to Rule 3.34. Because the Commission has amended Rule 3.34 to eliminate such applications, this paragraph is unnecessary.

Rule 3.31(g) (proposed Rule 3.31(h)), as revised, addresses the resources used to avoid the risk of privilege and work product waiver, which add to the costs and delay of discovery. The risk of waiver, and the time and effort needed to avoid it, are aggravated when the party is producing ESI. The proposed amendment would limit the risk of waivers resulting from inadvertent disclosures as long as parties take reasonable measures to protect privileged materials. The proposal did not address obligations imposed by state bar rules on attorneys who receive materials that appear to be subject to a privilege claim.

The FTC Act requires the Commission to protect "privileged or confidential" information.<sup>41</sup> By providing that the Commission will not treat genuinely inadvertent disclosures as waivers of privilege claims, the proposed amendment, together with the relevant provisions of the FTC Act, was intended to assure respondents and third parties alike that if otherwise privileged materials are held by the FTC, those materials will not readily find their way into the public record. In this regard, the protective order expressly includes privileged information in the order's definition of "confidential materials" subject to the protective order. No comments were received on the provision regarding inadvertent disclosure, and the Commission adopts it as proposed.

Rule 3.31(h) (proposed Rule 3.31(i)), as revised, prohibits the filing of discovery materials with the Office of the Secretary, the ALJ, or otherwise providing such materials to the Commission, except when used to support or oppose a motion or to offer as evidence. This change is similar to Fed. R. Civ. P. 5(d), which generally prohibits the filing of discovery material unless ordered by the court or used in

the proceeding. No comments were received on this provision and the Commission adopts it as proposed.

#### *Section 3.31A: Expert discovery.*

Proposed Rule 3.31A mandated a schedule for the disclosure of potential expert witnesses, the production of expert reports, and the start and completion of expert depositions. The proposed Rule also incorporated and revised certain provisions contained in previous Rule 3.31(b) and (c). As discussed below, the Commission is revising the Rule to expressly address respondent's ability, in limited circumstances, to call surrebuttal witnesses and to file surrebuttal reports. The Commission is adopting the remaining provisions of Rule 3.31A as proposed.

The scheduling provisions in the Rule will provide for expert discovery in a more orderly and expeditious manner than what has occurred in past proceedings by not permitting expert discovery to begin until fact discovery is essentially completed. The Commission believes that discovery of experts, including the production of expert reports, will be less than thorough if facts potentially relevant to their opinions have yet to be discovered. The Rule requires the parties to serve each other with a list of experts that they intend to call at the hearing no later than one day after the close of fact discovery. Commenter Nagin asserted that requiring respondents to disclose their expert witnesses at the close of fact discovery invades the work product of respondents. The disclosure of expert witnesses is necessary, however, to allow the parties to prepare for depositions and to engage in other discovery relevant to that witness.

The Rule also limits the number of expert witnesses to five per side. The Section claimed that the revision should allow each party to call five experts, instead of limiting the number of experts to five per "side." It has been the Commission's experience, however, that five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases. The Rule also has a safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances.

The Rule requires that each expert who will testify at the evidentiary hearing produce a written report, thereby eliminating the ALJ's authority to dispense with them. Preparation of a written expert report is a common requirement in federal courts and, given the Commission's goal of expedited proceedings, will be required during the

<sup>38</sup> E.g., FTC Act 6(f), 15 U.S.C. 46(f).

<sup>39</sup> Although protective orders could limit in-house counsel's access only to less sensitive third party information, third party submitters during a Part 2 investigation could only guess what degree of protection would eventually be afforded their confidential information in a subsequent Part 3 proceeding.

<sup>40</sup> The final version of the standard protective order substitutes "identifiable" for "identified."

<sup>41</sup> FTC Act, 6(f), 21(d)(1)(B), 15 U.S.C. 46(f), 57b-2(d)(1)(B).

discovery period to allow the parties more effective and targeted discovery. Paragraph (c) of the Rule specifies additional requirements for expert reports, including “a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.” The Nagin comment argued that every expert should be required to maintain a database with substantial information about his or her testimony in other proceedings. This suggestion overlooks the fact that individuals may serve as experts in proceedings in other forums before being asked to be an expert in a Commission Part 3 matter. An FTC rule could not require individuals to “maintain” such information when they are not involved in Commission proceedings, and to require an individual to create such a database once they are selected as an expert for a Part 3 matter would be unduly burdensome. The comment suggested further that the FTC maintain a database of all expert reports and expert testimony submitted in all Part 3 proceedings. The Commission already makes all of the trial testimony and exhibits available to the public—except for confidential material—and has begun posting trial testimony at [www.ftc.gov](http://www.ftc.gov).<sup>42</sup> The Commission declines the invitation to assume the additional burden suggested by the commenter.

The Rule provides that complaint counsel submit their initial expert reports first, followed by respondents’ expert reports. Respondents’ reports, of course, can rebut material in complaint counsel’s initial expert reports. The Rule also explicitly authorizes complaint counsel to call rebuttal experts and, if complaint counsel intends to exercise this option, requires the experts to prepare rebuttal expert reports. Thus, the Rule allows complaint counsel’s experts an opportunity to respond to respondents’ expert reports. The Section asserted that respondents should also have the express right to call surrebuttal experts in all situations, not just when material outside the scope of a fair rebuttal is presented. While the Commission continues to believe that respondents should only be able to call surrebuttal experts in order to respond to new arguments raised by complaint counsel’s rebuttal experts, it is clarifying the Rule so that the “appropriate relief” sought by respondents in this circumstance explicitly includes the

right to seek leave to call surrebuttal experts and to file a surrebuttal report, and includes a deadline for respondents to file such a motion.

The Rule also excludes from expert discovery anyone who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing unless he or she is expected to be called as a witness at the hearing, so as to prevent the discovery of the unpublished work product of non-testifying experts, particularly where such materials are proprietary and highly confidential. The discovery of such marginally relevant materials can be a major distraction from the central case and can have an adverse effect on the willingness of non-testifying experts to consult in the future.

#### *Section 3.33: Depositions.*

The Commission has added to paragraph (a) a reference to Rule 3.36, which provides that certain subpoenas requiring the appearance of certain persons may issue only upon a motion approved by the ALJ.

The proposed Rule added paragraph (b) to Rule 3.33, which allows the ALJ, upon a party’s motion, to prevent the taking of a deposition if it would not meet the scope of discovery standard under Rule 3.31(c) or if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence (as set forth under Rule 3.43(b)). Proposed paragraph (b) also clarified that the fact that a witness testifies in an investigative hearing does not preclude the deposition of that witness.

The Section contended that the proposed revision is inconsistent with the Federal Rules of Civil Procedure, because Fed. R. Civ. P. 30(a)(2) sets out only limited circumstances when permission from a federal judge is required to take a deposition. In addition, the Section asserted that the revision imposes a burden on a party seeking to take the deposition to show that the evidence will be admissible. However, the Commission is adopting the revision as proposed. Under general principles of motions practice, the party filing a motion has the burden of persuasion. In this situation, the party moving to prevent the taking of the deposition would have the burden of showing that the evidence should be excluded for the reasons stated in the proposed Rule; there would not be a burden on the party seeking to take the

deposition to show that the evidence will be admissible. The revision is therefore not a significant departure from the federal rules.

The Commission proposed revising paragraph (c) to stop the practice of filing notices of deposition with the Office of the Secretary, the ALJ, or otherwise providing such notices to the Commission, except as provided in proposed Rule 3.31(h). Such notices serve no purpose for the ALJ or the agency, and receipt of these notices causes unnecessary processing costs for the Commission. No comments were received on this proposal and the Commission adopts it as proposed.

Consistent with Rule 3.43, the Commission has proposed eliminating previous Rule 3.33(g)(1) because it contains hearsay-based limitations for the use of depositions. Revised Rule 3.43 reflects existing case law by providing for the admission of hearsay evidence in the evidentiary hearing if the evidence is “relevant, material, and bears satisfactory indicia of reliability so that its use is fair.” If meeting this standard, depositions, investigational hearings, and other prior testimony may be admitted. As discussed further below, the Commission is adopting Rule 3.43 as proposed, and accordingly is eliminating previous Rule 3.33(g)(1).

#### *Section 3.34: Subpoenas.*

The Commission proposed amending paragraphs (a) and (b) to authorize counsel for a party to sign and issue a subpoena on a form provided by the Secretary. These revisions are intended to expedite the commencement of hearings by speeding the issuance of discovery and hearing subpoenas. The definition of “documents” would also be revised to parallel Fed. R. Civ. P. 45(c)(1). No comments were received on these rule changes and the Commission adopts them as proposed.

The Commission also proposed revising paragraph (c) to reflect revised Rule 3.36, discussed below, which requires a special showing of need for subpoenas directed to the offices of the Commissioners, the General Counsel, Bureaus and Offices not involved in the matter, the ALJs, or the Secretary. No comments were received on the proposed revisions to Rule 3.36 and the Commission is adopting them as well as the corresponding changes in Rule 3.34(c).<sup>43</sup> The Commission is also adding a reference to the discovery limitations in Rule 3.31(c)(2).

<sup>42</sup> For example, the trial transcript for the *In re Rambus, Inc.* matter is available at (<http://www.ftc.gov/os/adjpro/d9302/exhibits/index.shtml>).

<sup>43</sup> See *infra* note 44.

*Section 3.35: Interrogatories to parties.*

The Commission proposed to add Rule 3.35(a)(3) to provide that interrogatories should not be filed with the Office of the Secretary, the ALJ, or otherwise provided to the Commission except as provided in proposed Rule 3.31(i) because ordinarily there is no reason to file discovery pleadings. No comments were received on this proposal and the Commission is adopting Rule 3.35(a)(3) as proposed.

Proposed Rule 3.35(b)(2) would allow parties to delay answering a contention interrogatory until the close of discovery, the pretrial conference, or “other later time.” Although the Section recognized that contention interrogatories usually are not answered in federal court cases until the end of fact discovery, it nonetheless asserted that the proposed Rule unfairly shifts the burden of seeking a response to a contention interrogatory to the party who propounds it. The Section also commented that the phrase “other later time” is ambiguous and may allow the recipient of such an interrogatory to evade an answer altogether. The purpose of the proposed Rule is to conform Commission practice with federal court practice and consistently allow a party to delay answering a contention interrogatory until fact discovery is almost complete. However, the proposed Rule also allowed a party posing a contention interrogatory to secure an earlier answer, if one was necessary, by filing a motion seeking an earlier answer. The Rule is not intended to allow an answering party to evade an answer, but to postpone answering until it has all the information it needs to supply a full answer. Accordingly, the Rule now clarifies that contention interrogatories must be answered by the time designated discovery has been completed, but in no case later than three days before the final pretrial conference.

*Section 3.36: Applications for subpoenas for records of or appearances by certain officials or employees of the Commission or officials or employees of governmental agencies other than the Commission, and subpoenas to be served in a foreign country.*

The Commission proposed to revise Rule 3.36 to require a special showing of need for subpoenas directed to the offices of the Commissioners, the General Counsel, Bureaus and Offices not involved in the matter, the ALJs, and the Secretary because these offices are unlikely to possess relevant, discoverable information that is not available from other sources. The

Commission believed that the lack of useful additional information likely to be available from these offices suggested that the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification. The Commission’s proposed revision to paragraph (b)(3) would require a showing of “compelling need” as the corresponding standard for witness testimony. No comments were received on these proposed amendments to Rule 3.36 and they are adopted as proposed.<sup>44</sup>

*Section 3.37: Production of documents, electronically stored information, and any tangible thing; access for inspection and other purposes.*

The Commission proposed to amend Rule 3.37 to include provisions from Fed. R. Civ. P. 34 on electronic discovery. The proposed amendment also provided that requests under this Rule not be filed with the Office of the Secretary, the ALJ or otherwise provided to the Commission, except as provided in proposed Rule 3.31(i). No comments were received on this proposal and it is adopted as proposed.

*Section 3.38: Motion for order compelling disclosure or discovery; sanctions.*

The Commission proposed amending Rule 3.38 to impose short deadlines for responses to and rulings on motions to compel and a 2,500 word limit for motions and answers. The Commission also proposed to amend the Rule to consolidate the sanctions for failure to comply with discovery and disclosure requirements and to add as a sanction the inability to call a witness who was not disclosed under Rule 3.31(b) or an expert not disclosed under proposed Rule 3.31A. No comments were received on the proposed amendments to Rule 3.38 and they are adopted as proposed.

*Section 3.38A: Withholding requested material.*

The Commission proposed to amend Rule 3.38A to modify the requirement that a privilege/work product log always contain specific information for each item being withheld. The Commission proposed to substitute the more flexible requirement in Fed. R. Civ. P. 26(b)(5)(A) that the schedule of withheld items “describe the nature of the documents, communications, or tangible things not produced or

disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” This proposed requirement would permit parties to describe withheld items by categories, but only if the description “will enable other parties to assess the claim.” Unless such descriptions are sufficient, item-by-item descriptions would be required.

The proposed Rule also clarified that the log need not describe any material outside the scope of the duty to search set forth in revised Rule 3.31(c)(2) except to the extent that the ALJ has authorized additional discovery as provided in that Rule.

No comments were received on the proposed amendments to this Rule and they are adopted.

*Section 3.39: Orders requiring witnesses to testify or provide other information and granting immunity.*

The Commission proposed various technical revisions to this Rule. No comments were received on the proposed amendments and they are adopted.

**Subpart E—Hearings**

*Section 3.41: General hearing rules.*

The proposed revisions to Rule 3.41(b) required that the evidentiary hearing commence on the date set in the notice accompanying the complaint, limited the length of the evidentiary hearing to 210 hours (or the equivalent of 30 seven hour trial days) unless extended by the Commission, and established reasonable time allocations. The goal of these proposed revisions was to expedite the proceedings.

The Section commented that the proposed Rule should allow “additional flexibility” for the ALJ to extend the hearing length particularly for nonmerger cases involving multiple parties. Whole Foods complained that the proposed rule unfairly limited the ALJ’s discretion over the length of the hearing and cited to the lack of such a limit in a recent Part 3 scheduling order, and the Chamber similarly asserted that the ALJ should decide if a longer trial is needed. The Commission believes that, in the vast majority of cases, 30 trial days is more than sufficient to complete the evidentiary hearing. Further, the Rule permits the Commission “upon a showing of good cause” to extend the commencement date or the length of the hearing if the case involves, for example, a particularly lengthy record or complex legal issues. For these reasons, the Rule is adopted as proposed.

<sup>44</sup> The Section did object to a related provision in proposed Rule 3.31(c)(2) to limit the scope of complaint counsel’s obligation to search. As discussed earlier, the Commission is not persuaded by that objection.

Commenter Nagin recommended that under paragraph (b)(3), the Commission should clarify that the ALJ can hold a separate segment of the hearing relating to one or more respondents in case any particular claim or issue necessitates such treatment. The current language of this provision, which permits the Commission or ALJ to order separate hearings of any claim, any separate issue, or any number of claims or issues, sufficiently covers the scenario raised by this commenter and, therefore, no change to this provision is necessary.

Finally, the Commission's proposed amendment included a new paragraph (f), a provision moved (and revised) from previous Rule 3.51(a) concerning the effect of collateral federal court actions on Part 3 proceedings. The new provision states that the pendency of a collateral federal action will stay the Part 3 proceeding only if the Commission (as opposed to the ALJ) so orders "for good cause," and that deadlines set by the rules will be tolled during the period of the stay. The Commission, and not the ALJ, should be authorized to stay the Part 3 proceeding pending a collateral action in federal court, since the granting of a stay is likely to implicate public interest considerations that the Commission, rather than the ALJ, should resolve.

#### Section 3.42: Presiding officials.

The proposed amendment would make explicit provision for the Commission to retain jurisdiction over a matter during some or all of the prehearing proceedings and to designate one or more Commissioners to preside. The Section objected that by "codifying" the Commission's right to interject itself into prehearing case management, it may undermine the integrity of the process, compromise the ALJ, and create an appearance of unfairness." The Pitofsky-Sohn comment argued that "the more the Commission invades what has heretofore been the province of an independent ALJ, the more it lends credence to concerns regarding the fairness of the Part 3 adjudicative process."

The APA, 5 U.S.C. 556(b), and unamended Rule 3.42(a) allow the Commission or one or more Commissioners to preside over the hearing as ALJ. It therefore remains unclear how authorizing the Commission or a Commissioner to preside over the initial phases of the pretrial proceeding raises a legal issue or, for that matter, creates an appearance of unfairness. The package of rule amendments governing scheduling, discovery, and other aspects of the

pretrial proceedings, however, will reduce the need for early Commission or Commissioner involvement in case management. Nor is the proposed Rule needed to authorize the Commission or a Commissioner to preside over the initial phases of the pretrial process; that authority is already implicit in Rule 3.42(a), which authorizes the Commission or one or more Commissioners to preside. The Commission, therefore, views the proposed amendment to Rule 3.42(a) as unnecessary and has not adopted it.

#### Section 3.43: Evidence.

The proposed revision in paragraph (b) defined hearsay evidence and expressly provided for the admission of such evidence if it "is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." The Section complained that expressly permitting the admission of hearsay evidence would create unnecessary disparities between Part 3 and federal court procedures that could lead to substantive differences in case outcomes. It also asserted that the unamended Rule, which it interprets as applying a case-by-case approach to hearsay, is preferable to "the new default rule admitting hearsay evidence in every circumstance" that might unfairly disadvantage respondents.

However, it is settled law that the Commission's Rules of Practice already permit the introduction of hearsay evidence, provided that it meets the standards of materiality, reliability, and relevance. *See, e.g., In re Schering-Plough Corp.*, 136 F.T.C. 956, 1007 (2003), *vacated on other grounds*, 402 F.3d 1056 (11th Cir. 2005). As stated in the NPRM, and as acknowledged by the Section, administrative agencies are not bound by the stricter hearsay rules in the Federal Rules of Evidence, but must independently assess the reliability of the evidence itself.<sup>45</sup> The ALJ in the first instance, and the Commission in its *de novo* review, must determine the

admissibility and probative value, if any, to be given to hearsay evidence by analyzing, for example, the possible bias of an out-of-court declarant, the context in which the hearsay material was created, whether the statement was sworn to, and whether it is corroborated or contradicted by other forms of direct evidence.

Proposed paragraph (b) also provided concrete examples of this principle by expressly stating that depositions, investigational hearings, and prior testimony in Commission and other proceedings, and any other form of hearsay, would be admissible and would not be excluded solely because they constitute or contain hearsay, if the testimony or other form of hearsay was sufficiently reliable and probative. Proposed paragraph (b) also provided that relevant statements or testimony by a party-opponent would be admitted; such statements do not constitute hearsay.

The proposed Rule was intended to ensure that ALJs do not take an overly narrow approach to admitting hearsay evidence. The proposed Rule did not, however, provide for the admission of hearsay evidence "in every circumstance," but only where such evidence is sufficiently relevant, reliable and probative "so that its use is fair." The Commission is adopting the hearsay provision in paragraph (b) as proposed.

The Section also argued that, if the amendment is to be adopted, it should require parties to provide notice every time they intend to introduce hearsay evidence to permit the opposing party to rebut the evidence, relying on the residual hearsay exception rule in Fed. R. Evid. 807 that requires such notice. Rule 807, however, does not govern the most familiar forms of admissible hearsay exceptions and the Commission is not persuaded that a blanket notice rule should apply to the admission of hearsay evidence in Part 3 proceedings. The Commission notes that the Rule contains provisions designed to protect against the unfair use of hearsay evidence by prohibiting the admission of unreliable, immaterial or duplicative hearsay evidence, by excluding relevant hearsay evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," and by providing the right of parties "to submit rebuttal evidence" to counter the admission of any hearsay evidence.

The Commission also proposed a new paragraph (c) to facilitate the admissibility of third party documents by self-authentication through a written declaration of the third party document custodian. This provision is analogous to Fed. R. Evid. 902(11). The

<sup>45</sup> *See* 5 U.S.C. 556(d) (APA provides that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."); *see also J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (hearsay admissible in administrative proceedings if "reliable and credible"); *FTC v. Cement Inst.*, 333 U.S. 683, 705-06 (1948); *Richardson v. Perales*, 402 U.S. 389, 407-08 (1971); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980); *Buchwalter v. FTC*, 235 F.2d 344 (2d Cir. 1956) (hearsay evidence is admissible in FTC administrative cases).

Commission received no comments on this provision and it is adopted as proposed.

Proposed paragraph (d)(1) expressly incorporated the APA standard in 5 U.S.C. 556(d) to allow a party “to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination, as in the discretion of the Administrative Law Judge, may be required for a full and true disclosure of the facts.” While the Section objected that the proposed provision might be interpreted to limit cross-examination in violation of the APA, the new provision expressly incorporates the APA standard for the presentation of evidence. While the APA standard does not impose an absolute or unlimited right of cross examination,<sup>46</sup> it necessarily allows for all cross-examination in order to ascertain the “full and true disclosure of the facts.” This revision is adopted as proposed.

Commenter Nagin recommended that paragraph (e), which allows the disclosure and offering into evidence of any information obtained by the Commission, be amended to require adherence to other Part 3 rules in order to prevent “unfairness or surprise.” There is a large difference, however, between offering such evidence into the record and its admission into the record, and—given the mandatory disclosure requirements and other discovery obligations—there are sufficient protections in these rules against any unfair use of evidence by complaint counsel. The Commission is not persuaded that this change is necessary.

Finally, the Commission proposed in re-designated paragraph (f) a definition of “official notice,” and to provide that a party may controvert an officially noticed fact either by opposing the other party’s request that official notice be taken or after it has been noticed by the ALJ or the Commission. Previous Rule 3.43 did not define official notice or what constitutes such notice. The Commission received no comments on this revision and it is adopted as proposed.

Other paragraphs in the proposed Rule were redesignated to accommodate new paragraphs and will be adopted as proposed.

#### Section 3.44: Record.

The Commission proposed to revise Rule 3.44 to require that witness

testimony be video recorded digitally and made part of the official record along with the witness’s written transcript. As noted in the NPRM, the purpose of the proposed revision is to enable the Commission, which is tasked with reviewing the record *de novo*, to independently assess witness demeanor when necessary. Courts have recognized the “added value of demeanor evidence” from video recording.<sup>47</sup> Requiring video recording of witness testimony will improve the quality of Commission decisions whenever witness demeanor is an important issue. No comments criticized this provision and it is adopted as proposed.

The Commission also proposed to revise paragraph (c) by deleting the word “immediately” at the beginning of the first sentence to provide the parties with three business days to review the record to determine if it is complete or needs to be supplemented. This revision generated no comments and is adopted as proposed.

#### Section 3.45: In camera orders.

The Commission proposed revising paragraph (b) to add a paragraph making clear that parties have no obligation to file or provide *in camera* versions of filings with sensitive materials with anyone other than opposing counsel and the ALJ during the proceedings, as well as with the Commission or federal courts during any appeals. No comments were received on this revision and the Commission adopts it as proposed.

Additional amendments are being made to conform the Commission’s *in camera* procedures to the standard protective order that the Commission has adopted as final as an appendix to Rule 3.31, discussed above.

Accordingly, paragraph (b) of Rule 3.45 has been further amended to incorporate the order’s definition of “sensitive personal information” to be accorded *in camera* treatment if such material is to be introduced as evidence or otherwise used in the proceeding. Thus, where a party’s proposed findings, briefs, or other documents, filings, and submissions contain such information, parties will be required to prepare public (redacted) and non-public (*in camera*) versions in order to avoid public disclosure, just as the parties are currently required to do under the Rule for other material granted *in camera* treatment or subject to a protective order. See Rule 3.45(d), (e). Likewise, the Commission is amending Rule 4.2, as explained further below, to require

that parties minimize or omit sensitive personal information in their filings when such information is not needed for the conduct of the proceeding.

#### Section 3.46: Proposed findings, conclusions, and order.

The Commission proposed to revise paragraph (a) to provide expressly for the simultaneous filing of proposed findings of fact, conclusions of law, rule or order, and supporting briefs within 21 days of the close of the hearing record, as well as the optional filing of proposed reply findings, conclusions, and briefs within 10 days of the filing of the initial proposed findings. The previous Rule did not impose any deadlines or specify the order of these filings, requiring instead that such submissions be filed “[u]pon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge.” The proposed change was intended to require the orderly and timely submission of proposed findings and conclusions on which the ALJ may consult and to expedite the post-hearing phase and issuance of the initial decision.

Whole Foods commented that the proposed change “revokes the ALJ’s discretion over the timing of proposed findings of fact, conclusions of law and briefs in favor of rigid, one-size-fits-all time schedules.” The schedule outlined in the proposed Rule, however, should be reasonable in the vast majority of cases. In the unusual situation, a party may move the ALJ under Rule 4.3 for an extension “[f]or good cause shown.” The revision is adopted as proposed.

#### Subpart F—Decision

##### Section 3.51: Initial decision.

The Commission proposed to revise paragraph (a) to require the initial decision to be filed within 70 days after the last-filed proposed findings of fact and conclusions of law (or 85 days after the closing of the hearing record if the parties waive filing proposed findings), but allowed the ALJ to extend these deadlines by 30 days “for good cause.” The previous Rule required that the initial decision be filed within 90 days of the close of the hearing record, but the Commission determined that setting the initial decision deadline to the filing of proposed findings and conclusions, on which the ALJ may consult in preparing his or her decision, was more reasonable than basing the deadline on the closing of the hearing record.

The proposed revision also maintained the previous Rule’s over-all one year deadline for the issuance of the

<sup>46</sup> See, e.g., *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 351 (1st Cir. 2004); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063 (5th Cir. 1982).

<sup>47</sup> See *FTC v. Tarriff*, 557 F. Supp. 2d 92, 97 (D.D.C. 2008).

initial decision, but added that only the Commission could extend the one year deadline “upon a finding of extraordinary circumstances and if appropriate in the public interest.” The previous Rule permitted the ALJ to grant consecutive 60 day extensions upon a finding of “extraordinary circumstances,” but the Commission believed that the proposed revision would prevent protracted delays while still providing sufficient time for the ALJ to review the evidence and issue the initial decision.

The Section’s comment was generally favorable, stating that while it “believes that in most cases, expediting the merger review process is a positive step, such timing requirements are not universally applicable. The Section applauds this revision to speed up an ALJ’s decision.” The Section noted, however, that based on other deadlines imposed in these rules, the schedule for cases in which the hearing will typically be set for eight months after the complaint issues will likely result in the initial decision being filed slightly beyond the one year deadline. The Commission has eliminated the overall one year deadline for all cases. The Commission concludes that the filing of the initial decision within 70 days after the filing of the last-filed proposed findings and conclusions (or 30 days beyond that if the ALJ directs the one-time extension for “good cause”) provides a sufficient time limit.

Based on these revisions to this paragraph, the Commission is also slightly modifying a sentence in the proposed Rule to now state that: “The Commission may further extend any of these time periods for good cause.” This modification imposes a standard for extensions and clarifies that the ALJ cannot extend the deadline beyond the 30 days provided in the Rule.

The Commission has also removed language from previous Rule 3.51(a) regarding the effect of a pending collateral federal court proceeding on a Part 3 case, and inserted revised language into Rule 3.41 as the stay and tolling provisions incident to collateral federal actions potentially affect more than the deadline for filing the initial decision.

Commenter Nagin recommended that paragraph (c), regarding the evidence to support an initial decision, be changed from “reliable and probative evidence,” to “competent and reliable, probative evidence” so as to be consistent with certain scientific nomenclature. The Commission does not believe that such a change materially alters the standard of evidence necessary to support an

initial decision and therefore does not revise the Rule as suggested.

Finally, proposed paragraph (c)(2) required that the initial decision be filed in a word processing format that is accessible to the Commission on review. This revision generated no comments and is adopted as proposed.

*Section 3.52: Appeal from initial decision.*

The Commission proposed to revise paragraphs (b) and (c) to shorten the word counts for the principal appellate briefs from 18,750 words to 14,000 words (approximately 55 double-spaced pages), to revise paragraph (d) to shorten the word count limits for reply briefs to half of the principals’ briefs (or 7,000 words), to make explicit that parties cannot raise new arguments or matters in reply briefs that could have been raised earlier, to revise paragraph (c) to reduce the word count limit for cross-appeal briefs to 16,500 words, and to revise paragraph (j) to limit the word count limit on *amicus* briefs to “no more than one-half the maximum length authorized by these rules for a party’s principal brief.” The Commission also proposed to revise paragraph (k) to specify the contents of the brief that would count toward the word count limit. While the Commission is not required to follow the Federal Rules of Appellate Procedure in its Rules of Practice, these new word count limits are consistent with limits for analogous briefs under Fed. R. App. P. 28.1, 29 and 32.

As explained in the NPRM, while lengthier appellate briefs could be justified by the Commission’s obligation to review the record *de novo*, the Commission’s review is also enhanced by its access to the parties’ proposed findings and conclusions filed with the ALJ. Further, the Commission may extend these word count limits if the case involves a particularly large record or complex legal issues. As noted in paragraph (k), however, the Commission will not lightly permit such extensions. The Commission received no comments on these suggested word count revisions and they are adopted as proposed.

The Commission is also imposing deadlines on the issuance of its final decision. The Commission had announced in the NPRM “its intention to make best efforts to expedite its preparation and disposition of final orders and opinions in its review of initial decisions in adjudicatory proceedings.”<sup>48</sup> The Commission recognized that complaints about the protracted nature of Part 3 proceedings

extend both to proceedings before the ALJ and to the Commission’s issuance of the final decision.

Nonetheless, given the Commission’s stated goal of expediting the Part 3 process, several commenters criticized the absence in the proposed rules of any formal deadlines for the Commission to issue its final decision of an appeal. For example, according to the Pitofsky-Sohn comment:

The proposed changes to Part 3 do not address the absence in the present rules of any limitation on the Commission’s time to render a decision in the event of an appeal from the ALJ’s decision. It has been said that since 2000, it has taken the Commission an average of 18 months to render its own decision, even in those cases where no complicated remedial issues requiring further proceedings were involved. This hole should be plugged with a rule change requiring the Commission to render its decision within six months of the ALJ’s ruling, except in narrow and unusual circumstances.

The Section commented that the rule proposals “fail sufficiently to expedite Part 3 proceedings by not imposing a time within which the Commission should issue a final decision,” which is “the stage of the proceeding that consumes the greatest time.” The Section recommended that, in unconsummated merger cases, the final Commission order be issued within five months from filing of the complaint and that, in general, the Commission issue its final order within 90 days after the initial decision. The Chamber also asserted that the Commission failed to place a deadline on “a decision by the Commissioners, which is very often a source of substantial delay.” Based on these concerns, the Commission is setting strict deadlines for the issuance of its final decisions in all Part 3 cases.

For cases in which the Commission has sought preliminary relief under Section 13(b) of the FTC Act<sup>49</sup> (typically unconsummated merger cases), the Commission has provided that it will review all initial decisions—without requiring a notice of appeal—and issue a final decision within 45 days of oral argument (*i.e.*, within 100 days of the filing of the initial decision).<sup>50</sup> Although the Section has urged the Commission to decide all merger cases within five months of the filing of the complaint,

<sup>49</sup> 15 U.S.C. 53(b).

<sup>50</sup> The timing deadlines for the Commission’s decisions on appeal or review, as with other rule deadlines, are subject to the timing requirements in Rule 4.3(a). Thus, these deadlines may be enlarged slightly if, for example, a deadline were to fall on a weekend or holiday.

<sup>48</sup> 73 FR at 58834.

the Commission believes that this is a pace that unduly rushes the parties and virtually precludes any opportunity for the Commission to treat exhaustively any novel issues that may arise in a particular case. This deadline would also be faster than what federal courts frequently manage even for expedited permanent injunction cases on the merits (after which, like Commission decisions, appeals are to be filed in federal appellate courts).<sup>51</sup> This rule revision institutionalizes an approach for dealing with such cases on a consistent and even-handed basis as opposed to an expedited schedule being issued *ad hoc* on a case-by-case basis.

The Commission is also setting deadlines in all other cases in which preliminary relief was not sought, although on a less rapid schedule. These cases will typically include cases involving allegations of anticompetitive conduct, most cases challenging consummated mergers, and most consumer protection cases. In these matters, the Commission will issue its final decision within 100 days after oral argument (*i.e.*, within six months of the issuance of the initial decision).

To accommodate those expedited deadlines, the Commission is reducing the time in which parties may file briefs from the initial decision. For cases in which the Commission has sought preliminary relief under Section 13(b), there will be automatic Commission review of the initial decision (*i.e.*, no notice of appeal will be required). In these cases, a party objecting to any portion of the initial decision (*e.g.*, decision on liability or scope of remedy) must file its opening brief within 20 days of the issuance of the initial decision. Parties would respond to any objections filed by another party by filing answering briefs within 20 days of service of the opening brief, and any reply briefs would be due within five days of service of the answering brief. The Commission will schedule oral argument within 10 days after the deadline for the filing of any reply briefs and will issue its final decision within 45 days after oral argument.<sup>52</sup>

<sup>51</sup> *United States v. Carilion Health Sys.*, 707 F. Supp. 840, 841 (W.D. Va.), *aff'd*, No. 89-2625, 1989 WL 157282 (4th Cir. Nov. 29, 1989) (decision issued approximately nine months after complaint filed); *United States v. Primestar, Inc.*, No. 98-CV-01193 (D.D.C. filed May 12, 1998) (approximately nine months from complaint to trial on the merits).

<sup>52</sup> In the event that no objections to the initial decision are filed, the Commission in its discretion may schedule oral argument within 10 days after the deadline for the filing of objections, and will issue its final decision within 45 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision within 45 days after the deadline for the filing of objections.

For all other cases, review by the Commission will not be automatic, but will normally be initiated by a party filing a notice of appeal (as under the previous Rule).<sup>53</sup> In these cases, any party objecting to any portion of the initial decision must file a notice of appeal within 10 days of the initial decision, or within five days of the initial notice if a party is filing a cross-appeal. Any party filing a notice of appeal (including a cross-notice of appeal) must then perfect its appeal by filing its opening brief within 30 days of the issuance of the initial decision. Parties may respond to opening briefs by filing answering briefs within 30 days of service of the opening briefs and may file reply briefs within seven days of service of the answering briefs. The Commission will schedule oral argument within 15 days after the deadline for the filing of the reply briefs, and the Commission will issue its final decision within 100 days after oral argument.<sup>54</sup>

The new Rule requires simultaneous briefing on review for all cases brought in Part 3. For that reason, the word count limitations in the former Rule for a combined answering and cross-appeal brief, and the additional rounds of briefing provided in the former Rule for cross-appeals, are unnecessary, and these provisions have been eliminated in the new Rule.

Finally, the Commission's proposal to revise paragraph (h) regarding oral arguments by striking the last two sentences generated no comments and will be adopted.

#### *Section 4.2: Requirements as to form, and filing of documents other than correspondence.*

The Commission has added a new paragraph (c)(4), and redesignated existing paragraph (c)(4) as (c)(5), to require that filing parties redact or omit "sensitive personal information" from their filings when such information is not needed for the conduct of the proceeding. Sensitive personal information, which is also protected by the standard protective order contained in Appendix A of Rule 3.31, will be accorded *in camera* treatment pursuant to Rule 3.45 if such material is to be introduced as evidence or otherwise used in the proceeding. These procedures, as amended, are intended to safeguard the confidentiality of such information in the event such

<sup>53</sup> The Commission has retained Rule 3.53, which authorizes the Commission to place a case on its docket for review in the absence of an appeal.

<sup>54</sup> If no argument is scheduled, the Commission will issue its final decision within 100 days after the deadline for the filing of any reply briefs.

information must be filed or otherwise used in the proceeding.

#### *Section 4.3: Time.*

The proposed revision to Rule 4.3(b) specified that the ALJ may extend a time period set by a Commission order only if the order expressly authorizes the ALJ to do so. It also added time limits regarding motions directed to the Commission to the list of extensions that only the Commission may grant. The revision also clarified that the ALJ may not enlarge any deadline that a rule specifically authorizes only the Commission to extend. No comments were received on these revisions and the Commission adopts them as proposed.

### III. Invitation To Comment

The Commission invites interested members of the public to submit written comments addressing any issues raised by the interim rule amendments. Such comments must be filed by February 12, 2009, and must be filed in accordance with the instructions in the **ADDRESSES** section of this document. While the Commission will consider all comments it receives, it is inviting comment in particular on the rules it is adopting which reflect changes from the proposed amendments.

### IV. Interim Final Rule Revisions

#### List of Subjects in 16 CFR Part 3

Administrative practice and procedure.

#### List of Subjects in 16 CFR Part 4

Administrative practice and procedure.

■ For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter 1, Subchapter A of the Code of Federal Regulations, parts 3 and 4, as follows:

#### **PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS**

■ 1. The authority citation for part 3 continues to read as follows:

**Authority:** 15 U.S.C. 46, unless otherwise noted.

■ 2. Revise § 3.1 to read as follows:

##### **§ 3.1 Scope of the rules in this part.**

The rules in this part govern procedure in formal adjudicative proceedings. To the extent practicable and consistent with requirements of law, the Commission's policy is to conduct such proceedings expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay. The

Commission, at any time, or the Administrative Law Judge at any time prior to the filing of his or her initial decision, may, with the consent of the parties, shorten any time limit prescribed by these Rules of Practice.

■ 3. Revise § 3.2 to read as follows:

**§ 3.2 Nature of adjudicative proceedings.**

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act, but does not include rulemaking proceedings up to the time when the Commission determines under § 1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed. The term also includes proceedings for the assessment of civil penalties pursuant to § 1.94 of this chapter. The term does not include other proceedings such as negotiations for and Commission consideration of the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; or the promulgation of substantive rules and regulations.

■ 4. Revise § 3.11 to read as follows:

**§ 3.11 Commencement of proceedings.**

(a) *Complaint.* Except as provided in § 3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint.* The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the specific date, time and place for the evidentiary hearing. Unless a different date is determined by the Commission, the date of the evidentiary hearing shall be 5 months from the date of the administrative complaint in a proceeding in which the Commission, in an ancillary proceeding, has sought or is seeking relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and 8 months from the date of issuance of the administrative complaint in all other proceedings

■ 5. Revise § 3.12 to read as follows:

**§ 3.12 Answer.**

(a) *Time for filing.* A respondent shall file an answer within 14 days after being served with the complaint.

(b) *Content of answer.* An answer shall conform to the following:

(1) *If allegations of complaint are contested.* An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

■ 6. Revise § 3.21 to read as follows:

**§ 3.21 Prehearing procedures.**

(a) *Meeting of the parties before scheduling conference.* As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, but in any event no later than 5 days after the answer is filed by the last answering respondent, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also agree, if possible, on (1) a proposed discovery plan specifically addressing a schedule for depositions of fact witnesses, the production of documents and electronically stored information, and the timing of expert discovery pursuant to § 3.31A. The parties' agreement regarding electronically stored information should include the scope of and a specified time period for the exchange of such information that is subject to §§ 3.31(b)(2), 3.31(c), and 3.37(a), and the format for the disclosure of such information, consistent with § 3.31(c)(3) and § 3.37(c); (2) a preliminary estimate of the time required for the evidentiary hearing; and (3) any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than 10 days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address: (1) their factual and legal theories; (2) the current status of any pending motions; (3) a schedule of proceedings that is consistent with the date of the evidentiary hearing set by the Commission; (4) steps taken to preserve evidence relevant to the issues raised by the claims and defenses; (5) the scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information; (6) issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and (7) other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

(c) *Prehearing scheduling order.* (1) Not later than 2 days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the

date set by the Commission, including a plan of discovery that addresses the deposition of fact witnesses, timing of expert discovery, and the production of documents and electronically stored information, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference. The Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint. (2) The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the just and expeditious disposition of the proceeding and to avoid unnecessary cost. Such

conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

■ 7. Revise § 3.22 to read as follows:

#### § 3.22 Motions.

(a) *Presentation and disposition.* Motions filed under § 3.26 or § 4.17 shall be directly referred to and ruled on by the Commission. Motions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge. Motions not referred to the Administrative Law Judge shall be ruled on by the Commission within 45 days of the filing of the last-filed answer or reply to the motion, if any, unless the Commission determines there is good cause to extend the deadline. If the Commission refers the motion to the Administrative Law Judge, it may set a deadline for the ruling by the Administrative Law Judge, and a party may seek review of the ruling of the Administrative Law Judge in accordance with § 3.23. During the time a proceeding is before an Administrative Law Judge, all other motions shall be addressed to and decided by the Administrative Law Judge, if within his or her authority. The Administrative Law Judge shall certify to the Commission a motion to disqualify filed under § 3.42(g) if the Administrative Law Judge does not disqualify himself or herself within 10 days. The Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed. All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also

provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) *Proceedings not stayed.* A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.

(c) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Documents that fail to comply with these provisions shall not be filed with the Secretary. Motions must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief. If a party includes in a motion information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the motion in accordance with the procedures set forth in § 3.45(e). The party shall mark its confidential filings with brackets or similar conspicuous markings to indicate the material for which it is claiming confidential treatment. The time period specified by § 3.22(d) within which an opposing party may file an answer will begin to run upon service on that opposing party of the confidential version of the motion.

(d) *Responses.* Within 10 days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the

opposing party shall file 2 versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. The reply may be conditionally filed with the motion seeking leave to reply. Any reply with respect to a dispositive motion, or any permitted reply to any other motion, shall be filed within 5 days after service of the last answer to that motion.

(e) *Rulings on motions.* Unless otherwise provided by a relevant rule, the Administrative Law Judge shall rule on motions within 14 days after the filing of all motion papers authorized by this section. The Commission, for good cause, may extend the time allowed for a ruling.

(f) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(g) *Statement.* Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

■ 8. Revise § 3.23 to read as follows:

### § 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.*

(1) The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(i) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to § 3.36, if such appeal is based solely on a claim of privilege: *Provided*, that the Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, an individual Commissioner, or the Office of the General Counsel;

(ii) Suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or

(iii) Grants or denies an application for intervention pursuant to the provisions of § 3.14.

(2) Appeal from such rulings may be sought by filing with the Commission an application for review within 3 days after notice of the Administrative Law Judge's ruling. An answer may be filed within 3 days after the application for review is filed. The Commission upon its own motion may enter an order staying compliance with a discovery demand authorized by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of memoranda of law if deemed appropriate by the Commission.

(b) *Other interlocutory appeals.* A party may request the Administrative Law Judge to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. An answer may be filed within 3 days after the application for review is filed. The Administrative Law Judge shall issue a ruling on the request for determination within 3 days of the deadline for filing an answer. The party may file an application for review with the Commission within 1 day after notice that the Administrative Law

Judge has issued the requested determination or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.

(c) The application for review shall attach the ruling from which appeal is being taken and any other portions of the record on which the moving party relies. Neither the application for review nor the answer shall exceed 2,500 words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). The Commission may order additional briefing on the application.

(d) *Ruling on application for review.* Within 3 days after the deadline for filing an answer, the Commission will determine whether to grant the application for review. The denial of an application shall not constitute a ruling on the merits of the ruling that is the subject of the application.

(e) *Proceedings not stayed.* An application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

■ 9. Revise § 3.24 to read as follows:

### § 3.24 Summary decisions.

(a) *Procedure.* (1) Any party may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Counsel in support of the complaint may so move at any time after 20 days following issuance of the complaint and any respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least 30 days before the date fixed for the hearing.

(2) Any other party may, within 14 days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as

provided in § 3.24(a)(3). The parties may file memoranda of law in support of, or in opposition to, the motion consistent with § 3.22(c). If a party includes in any such brief or memorandum information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). If the Commission (or, when appropriate, the Administrative Law Judge) determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order. In the event that the motion has been referred to the Administrative Law Judge, such determination by the Administrative Law Judge shall constitute his or her initial decision and shall conform to the procedures set forth in § 3.51(c). A summary decision, interlocutory in character and in compliance with the procedures set forth in § 3.51(c), may be rendered on the issue of liability alone although there is a genuine issue as to relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Commission (or, when appropriate, the Administrative Law Judge) may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that it cannot, for reasons stated, present by affidavit facts essential to justify its opposition, the Commission (or, when appropriate, the Administrative Law Judge) may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Commission (or, when appropriate, the

Administrative Law Judge) shall issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) *Affidavits filed in bad faith.* (1) Should it appear to the satisfaction of the Commission (or, when appropriate, the Administrative Law Judge) at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Commission (or, when appropriate, the Administrative Law Judge) shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Commission (or, when appropriate, the Administrative Law Judge) concludes that action to suspend or remove an attorney from the case is warranted, it shall take action as specified in § 3.42(d). If the Administrative Law Judge to whom the Commission has referred a motion for summary decision concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the Administrative Law Judge shall certify the matter, with his or her findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules. If the Commission has addressed the motion directly, it may consider such disciplinary action without a certification by the Administrative Law Judge.

■ 10. Revise § 3.26 to read as follows:

**§ 3.26 Motions following denial of preliminary injunctive relief.**

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. If the Commission has filed a request for a stay, injunction, or

other emergency relief pending appeal to a court of appeals, the motion must be filed within 14 days after, but no earlier than, the court of appeals has denied the Commission's request. In cases in which the Commission has not sought relief from the court of appeals within 7 days following the denial of a preliminary injunction, the motion must be filed within 14 days after the district court has denied preliminary relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed jointly or separately by each of the respondents in the adjudicative proceeding. Complaint counsel may file a response within 14 days after such motion is filed. The matter will not be withdrawn from adjudication unless the Commission so directs.

(d) *Consideration on the record.* Instead of a motion to withdraw the matter from adjudication, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Complaint counsel may file a response within 14 days after such motion is filed. The filing of a motion to dismiss shall not stay the proceeding unless the Commission so directs.

(e) *Form.* Memoranda in support of or in opposition to such motions shall not exceed 10,000 words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e).

(f) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *in camera* materials for purposes of this paragraph and the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph

will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

(g) *Ruling by Commission.* The Commission shall rule on any motion authorized by this section within 30 days after the filing of the motion and any memoranda in support of or in opposition to the motion.

■ 11. Revise § 3.31 to read as follows:

**§ 3.31 General discovery provisions.**

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Except as provided in the rules, or unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) *Mandatory initial disclosures.* Complaint counsel and respondent's counsel shall, within 5 days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); and

(2) A copy of, or a description by category and location of, all documents and electronically stored information including declarations, transcripts of investigational hearings and depositions, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are subject to the limitations in § 3.31(c)(2), privileged as defined in § 3.31(c)(4), pertain to hearing preparation as defined in § 3.31(c)(5), pertain to experts as defined in § 3.31A, or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

(c) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition, and location of any books, documents, other tangible things, electronically stored information, and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.* Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to § 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules is required to search for materials generated and transmitted between an entity's counsel (including counsel's legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he or she determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery outweigh its likely benefit.

(3) *Electronically stored information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the Administrative Law Judge may nonetheless order discovery if the requesting party shows good cause, considering the limitations of paragraph (c)(2). The Administrative Law Judge may specify conditions for the discovery.

(4) *Privilege.* Discovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(5) *Hearing preparations: Materials.* Subject to the provisions of § 3.31A, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(d) *Protective orders; orders to preserve evidence.* In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section. The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence

upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(e) *Supplementation of disclosures and responses.* A party who has made a mandatory initial disclosure under § 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its mandatory initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty to amend in a timely manner a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

(f) *Stipulations.* When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(g) *Inadvertent production.* The inadvertent production of information produced by a party or third party in discovery that is subject to a claim of privilege or immunity for hearing preparation material shall not waive such claims as to that or other information regarding the same subject matter if the Administrative Law Judge determines that the holder of the claim made efforts reasonably designed to protect the privilege or the hearing preparation material, provided, however, this provision shall not apply if the party, or an entity related to that party, who inadvertently produced the privileged information relies upon such information to support a claim or defense.

(h) *Restriction on filings.* Unless otherwise ordered by the Administrative Law Judge in his or her discretion, mandatory initial and supplemental disclosures, interrogatories, depositions, requests for documents, requests for admissions, and answers and responses thereto shall be served upon other parties but shall not be filed with the Office of the Secretary, the

Administrative Law Judge, or otherwise provided to the Commission, except to support or oppose a motion or to offer as evidence.

#### **Appendix A to § 3.31: Standard Protective Order.**

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

**IT IS HEREBY ORDERED THAT** this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or

discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL—FTC Docket No. XXXX" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL—FTC Docket No. XXXX" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including

consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all

documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

■ 12. Add § 3.31A to read as follows:

### § 3.31A Expert discovery.

(a) The parties shall serve each other with a list of experts they intend to call as witnesses at the hearing not later than 1 day after the close of fact discovery, meaning the close of discovery except for depositions and other discovery permitted under § 3.24(a)(4), and discovery for purposes of authenticity and admissibility of exhibits. Complaint counsel shall serve the other parties with a report prepared by each of its expert witnesses not later than 14 days after the close of fact discovery. Each respondent shall serve each other party with a report prepared by each of its expert witnesses not later than 14 days after the deadline for service of complaint counsel's expert reports. Complaint counsel shall serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 10 days after the deadline for service of respondent's expert reports. Aside from any information required by paragraph (c), a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports. If material outside the scope of fair rebuttal is presented, a respondent may file a motion not later than 5 days after the deadline for service of complaint counsel's rebuttal reports, seeking appropriate relief with the Administrative Law Judge, including striking all or part of the report, leave to submit a surrebuttal report by respondent's experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition

within the preceding 4 years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the Administrative Law Judge, a deposition of any expert witness shall be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a). Depositions of expert witnesses shall be completed not later than 65 days after the close of fact discovery. Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate. A party, however, may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing.

■ 13. Revise § 3.33 to read as follows:

### § 3.33 Depositions.

(a) *In general.* Any party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1) and subject to the requirements in § 3.36. Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them. The parties may stipulate in writing or the Administrative Law Judge may upon motion order that a deposition be taken by telephone or other remote electronic means. A deposition taken by such means is deemed taken at the place

where the deponent is to answer questions.

(b) The Administrative Law Judge may rule on motion by a party that a deposition shall not be taken upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b). The fact that a witness testifies at an investigative hearing does not preclude the deposition of that witness.

(c)(1) *Notice to corporation or other organization.* A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(2) *Notice to Commission.* Except as provided in § 3.31(h), notices of depositions shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any party shall have the right to question him or her. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the deposition to the deponent and to any party.

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

- (1) The name and address of the person who is to answer them, and
- (2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of § 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him or her. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him or her, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under § 3.33(g)(2)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his or her remarks, stating with specificity the alleged errors in the transcript.

(g) *Objections; errors and irregularities.*

(1) *Objections to admissibility.* Subject to the provisions of paragraph (g)(2) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(2) *Effect of errors and irregularities in depositions—(i) As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) *As to taking of deposition.* (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(iv) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

■ 14. Revise § 3.34 to read as follows:

### § 3.34 Subpoenas.

(a) *Subpoenas ad testificandum.* Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony at the taking of a

deposition to a party requesting such subpoena or to attend and give testimony at an adjudicative hearing.

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term “documents” includes written materials, electronically stored information, and tangible things. A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by § 3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with § 3.31(c)(2) and § 3.36.

■ 15. Revise § 3.35 to read as follows:

### § 3.35 Interrogatories to parties

(a) *Availability; procedures for use.* (1) Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity

as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time.

(3) Except as provided in § 3.31(h), interrogatories shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters that can be inquired into under § 3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but such an interrogatory need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final pretrial conference.

(c) *Option to produce records.* Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

■ 16. Revise § 3.36 to read as follows:

**§ 3.36 Applications for subpoenas for records of or appearances by certain officials or employees of the Commission or officials or employees of governmental agencies other than the Commission, and subpoenas to be served in a foreign country.**

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a request requiring the production of or access to documents, other tangible things, or electronically stored information for the purposes described in § 3.37(a), in the possession, custody, or control of the Commissioners, the General Counsel, any Bureau or Office not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of a Commissioner, the General Counsel, an official of any Bureau or Office not involved in the matter, an Administrative Law Judge, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of an official or employee of another governmental agency, or for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall make a showing that:

- (1) The material sought is reasonable in scope;
- (2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant;
- (3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means or, if for purposes of compelling a witness to appear at the evidentiary hearing, the movant has a compelling need for the testimony;
- (4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or

will be met before the subpoena is served; and

(5) If the subpoena requires access to documents or other tangible things, it meets the requirements of § 3.37.

(c) *Execution.* If an Administrative Law Judge issues an order authorizing a subpoena pursuant to this section, the moving party may forward to the Secretary a request for the authorized subpoena, with a copy of the authorizing order attached. Each such subpoena shall be signed by the Secretary; shall have attached to it a copy of the authorizing order; and shall be served by the moving party only in conjunction with a copy of the authorizing order.

■ 17. Revise § 3.37 to read as follows:

**§ 3.37 Production of documents, electronically stored information, and any tangible things; access for inspection and other purposes.**

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents or electronically stored information, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of § 3.31(c)(1) and in the possession, custody, or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be produced or inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the production or inspection and performing the related acts. Each request may specify the form in which electronically stored information is to be produced, but the requested form of electronically stored information must not be overly burdensome or unnecessarily costly to the producing party. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34. Except as provided in § 3.31(h), requests under this section shall not be

filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(b) *Response; objections.* No more than 30 days after receiving the request, the response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the party must state the form it intends to use. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Production of documents or electronically stored information.* Unless otherwise stipulated or ordered by the Administrative Law Judge, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form; and
- (iii) A party need not produce the same electronically stored information in more than one form.

■ 18. Revise § 3.38 to read as follows:

**§ 3.38 Motion for order compelling disclosure or discovery; sanctions.**

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37. Any memorandum in support of such motion shall be no longer than 2,500 words. Any response

to the motion by the opposing party must be filed within 5 days of receipt of service of the motion and shall be no longer than 2,500 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). The Administrative Law Judge shall rule on a motion to compel within 3 business days of the date in which the response is due. Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made.

(b) If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:

(1) Order that any answer be amended to comply with the request, subpoena, or order;

(2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;

(3) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;

(5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he or she shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

■ 19. Revise § 3.38A to read as follows:

**§ 3.38A Withholding requested material.**

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34 or § 3.36, written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

(b) A person withholding material for reasons described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5 of the FTC Act (15 U.S.C. 45))

■ 20. Revise § 3.39 to read as follows:

**§ 3.39 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under 18 U.S.C. 6002, Directors and Assistant Directors of Bureaus and Regional Directors and Assistant Regional Directors of Commission Regional Offices who

supervise complaint counsel responsible for presenting evidence in support of the complaint are authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of such order. Upon receipt of approval by the Attorney General (or his or her designee), the Administrative Law Judge is authorized to issue an order requiring the witness or deponent to testify or provide other information and granting immunity when the witness or deponent has invoked his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(b) Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 may be made to the Administrative Law Judge and may be made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his or her designee) has granted such approval, to issue such order when the witness or deponent has invoked his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(18 U.S.C. 6002, 6004)

■ 21. Revise § 3.41, to read as follows:

**§ 3.41 General hearing rules.**

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to § 3.45(b) of this chapter or unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. The hearing will take place on the date specified in the notice accompanying the complaint, pursuant to § 3.11(b)(4), and should be limited to no more than 210 hours. The Commission, upon a showing of good cause, may order a later date for the evidentiary hearing to commence or extend the number of hours for the hearing. Consistent with the requirements of expedition:

(1) The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the prehearing procedure if the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.

(2) When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Commission or the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Commission or the Administrative Law Judge may order all the actions consolidated; and the Commission or the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(3) When separate hearings will be conducive to expedition and economy, the Commission or the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues.

(4) Each side shall be allotted no more than half of the trial time within which to present its opening statements, *in limine* motions, all arguments excluding the closing argument, direct or cross examinations, or other evidence.

(5) Each side shall be permitted to make an opening statement that is no more than 2 hours in duration.

(6) Each side shall be permitted to make a closing argument no later than 5 days after the last filed proposed findings. The closing argument shall last no longer than 2 hours.

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee

thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(e) Requests for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 shall be disposed of in accordance with § 3.39.

(f) *Collateral federal court actions.* The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs. A stay shall toll any deadlines set by the rules.

■ 22. Revise § 3.43 to read as follows:

### § 3.43 Evidence.

(a) *Burden of proof.* Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to § 3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay. Statements or testimony by a party-opponent, if relevant, shall be admitted.

(c) *Admissibility of third party documents.* Extrinsic evidence of authenticity as a condition precedent to admissibility of documents received from third parties is not required with respect to the original or a duplicate of a domestic record of regularly conducted activity by that third party

that otherwise meets the standards of admissibility described in paragraph (b) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(2) was kept in the course of the regularly conducted activity; and

(3) was made by the regularly conducted activity as a regular practice.

(d) *Presentation of evidence.*

(1) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the Administrative Law Judge, may be required for a full and true disclosure of the facts.

(2) The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(3) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

(e) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding

(f) *Official notice.* “Official notice” may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known within the Commission’s expertise or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the

evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

(g) *Objections.* Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(h) *Exceptions.* Formal exception to an adverse ruling is not required.

(i) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he or she expects to prove by the answer of the witness, or the Administrative Law Judge may, in his or her discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

■ 23. Revise § 3.44 to read as follows:

#### § 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. The live oral testimony of each witness shall be video recorded digitally, and the video recording and the written transcript of the testimony shall be made part of the record. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The

original uncorrected pages shall be retained in the files of the Commission.

(c) *Closing of the hearing record.* Upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record after giving the parties 3 business days to determine if the record is complete or needs to be supplemented. The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in § 3.44(b).

■ 24. Revise § 3.45 to read as follows:

#### § 3.45 In camera orders.

(a) *Definition.* Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera treatment of material.* A party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days notice of the proposed use of such material. Each such motion must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear. The Administrative Law Judge shall order that such material, whether admitted or rejected, be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information. "Sensitive personal information" shall include, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. For material other than sensitive personal information, a finding

that public disclosure will likely result in a clearly defined, serious injury shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); see also *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The party submitting material for which *in camera* treatment is sought must provide, for each piece of such evidence and affixed to such evidence, the name and address of any person who should be notified in the event that the Commission intends to disclose *in camera* information in a final decision. No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including:

- (1) A description of the material;
- (2) A statement of the reasons for granting *in camera* treatment; and
- (3) A statement of the reasons for the date on which *in camera* treatment will expire, except in the case of sensitive personal information, which shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law. For *in camera* material other than sensitive personal information, an expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period. If an *in camera* order is silent as to duration, without explanation, then it will expire 3 years after its date of issuance. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation "*In Camera* Record under § 3.45," and the date on which *in camera* treatment expires. If the Administrative Law Judge has determined that *in camera* treatment should be granted for an indeterminate period, the notation should state that fact. Parties are not required to provide documents subject to *in camera* treatment, including documents obtained from third parties, to any individual or entity other than the Administrative Law Judge, counsel for other parties, and, during an appeal, the Commission or a federal court.

(c) *Release of in camera material.* *In camera* material constitutes part of the confidential records of the Commission and is subject to the provisions of § 4.11 of this chapter.

(d) *Briefs and other submissions referring to in camera or confidential information.* Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to *in camera* or other confidential information or general statements based on the content of such information.

(e) *When in camera or confidential information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked “*In Camera*” or “Subject to Protective Order,” as appropriate, on the first page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to *in camera* or confidential material must be supported by record citations to relevant evidentiary materials and associated Administrative Law Judge *in camera* or other confidentiality rulings to confirm that *in camera* or other confidential treatment is warranted for such material. In addition, the document must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear, and providing the name and address of any person who should be notified of the Commission’s intent to disclose in a final decision any of the *in camera* or otherwise confidential information in the document. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked “Public Record” on the first page and omitting the *in camera* and confidential information and attachment that appear in the complete version,

shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served by the party on the other parties in accordance with the rules in this part. The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* version.

(f) *When in camera or confidential information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the Administrative Law Judge shall file 2 versions of the ruling or recommendation. A complete version shall be marked “*In Camera*” or “Subject to Protective Order,” as appropriate, on the first page and shall be served upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version, to be filed within 5 days after the filing of the complete version, shall omit the *in camera* and confidential information that appears in the complete version, shall be marked “Public Record” on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

(g) *Provisional in camera rulings.* The Administrative Law Judge may make a provisional grant of *in camera* status to materials if the showing required in § 3.45(b) cannot be made at the time the material is offered into evidence but the Administrative Law Judge determines that the interests of justice would be served by such a ruling. Within 20 days of such a provisional grant of *in camera* status, the party offering the evidence or an interested third party must present a motion to the Administrative Law Judge for a final ruling on whether *in camera* treatment of the material is appropriate pursuant to § 3.45(b). If no such motion is filed, the Administrative Law Judge may either exclude the evidence, deny *in camera* status, or take such other action as is appropriate.

■ 26. Revise § 3.46 to read as follows:

**§ 3.46 Proposed findings, conclusions, and order.**

(a) *General.* Within 21 days of the closing of the hearing record, each party may file with the Secretary for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order,

together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status pursuant to § 3.45(b), the party shall file 2 versions of the proposals in accordance with the procedures set forth in § 3.45(e). Reply findings of fact, conclusions of law, and briefs may be filed by each party within 10 days of service of the initial proposed findings.

(b) *Exhibit index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence:

- (1) The exhibit number, followed by
- (2) The exhibit’s title or a brief description if the exhibit is untitled;
- (3) The transcript page at which the Administrative Law Judge ruled on the exhibit’s admissibility or a citation to any written order in which such ruling was made;
- (4) The transcript pages at which the exhibit is discussed;
- (5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;
- (6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and
- (7) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

(c) *Witness index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness:

- (1) The name of the witness;
- (2) A brief identification of the witness;
- (3) The transcript pages at which any testimony of the witness appears; and
- (4) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

(d) *Stipulated indices.* As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of proposed findings of fact and conclusions of law is due to be filed.

(e) *Rulings.* The record shall show the Administrative Law Judge’s ruling on each proposed finding and conclusion, except when the order disposing of the

proceeding otherwise informs the parties of the action taken.

■ 27. Revise § 3.51 to read as follows:

**§ 3.51 Initial decision.**

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order pursuant to § 3.46, within 85 days of the closing the hearing record pursuant to § 3.44(c) where the parties have waived the filing of proposed findings, or within 14 days after the granting of a motion for summary decision following a referral of such motion from the Commission. The Administrative Law Judge may extend any of these time periods by up to 30 days for good cause. The Commission may further extend any of these time periods for good cause. Except in cases subject to § 3.52(a), once issued, the initial decision shall become the decision of the Commission 30 days after service thereof upon the parties or 30 days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content, format for filing.* (1) An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence. The initial decision shall include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f).

(2) The initial decision shall be prepared in a common word processing format, such as WordPerfect or

Microsoft Word, and shall be filed by the Administrative Law Judge with the Office of the Secretary in both electronic and paper versions.

(3) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he or she shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge; termination of jurisdiction.* (1) At any time from the close of the hearing record pursuant to § 3.44(c) until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his or her initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

■ 28. Revise § 3.52 to read as follows:

**§ 3.52 Appeal from initial decision.**

(a) *Automatic review of cases in which the Commission sought preliminary relief in federal court; timing.* For proceedings with respect to which the Commission has sought preliminary relief in federal court under 15 U.S.C. 53(b), the Commission will review the initial decision without the filing of a notice of appeal.

(1) In such cases, any party may file objections to the initial decision or order of the Administrative Law Judge by filing its opening appeal brief, subject to the requirements in paragraph (c), within 20 days of the issuance of the initial decision. Any party may respond to any objections filed by another party by filing an answering brief, subject to the requirements of paragraph (d), within 20 days of service of the opening brief. Any party may file a reply to an answering brief, subject to the requirements of paragraph (e), within 5 days of service of the answering brief. Unless the Commission determines there shall be no oral argument, it will schedule oral argument within 10 days after the deadline for the filing of any

reply briefs. The Commission will issue its final decision pursuant to § 3.54 within 45 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 45 days after the deadline for the filing of any reply briefs.

(2) If no objections to the initial decision are filed, the Commission may in its discretion schedule oral argument within 10 days after the deadline for the filing of objections, and will issue its final decision pursuant to § 3.54 within 45 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 45 days after the deadline for the filing of objections.

(b) *Review in all other cases; timing.* (1) In all cases other than those subject to paragraph (a), any party may file objections to the initial decision or order of the Administrative Law Judge by filing a notice of appeal with the Secretary within 10 days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within 5 days after service of the first notice, or within 10 days after service of the initial decision, whichever period expires last.

(2) In such cases, any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief, subject to the requirements in paragraph (c), within 30 days of the issuance of the initial decision. Any party may respond to the opening appeal brief by filing an answering brief, subject to the requirements of paragraph (d), within 30 days of service of the opening brief. Any party may file a reply to an answering brief, subject to the requirements of paragraph (e), within 7 days of service of the answering brief. Unless the Commission determines there shall be no oral argument, it will schedule oral argument within 15 days after the deadline for the filing of any reply briefs. The Commission will issue its final decision pursuant to § 3.54 within 100 days after oral argument. If no oral argument is scheduled, the Commission will issue its final decision pursuant to § 3.54 within 100 days after the deadline for the filing of any reply briefs.

(c) *Appeal brief.* (1) The opening appeal brief shall contain, in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged),

textbooks, statutes, and other material cited, with page references thereto;

(ii) A concise statement of the case, which includes a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(iii) A specification of the questions intended to be urged;

(iv) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(v) A proposed form of order for the Commission's consideration instead of the order contained in the initial decision.

(2) The brief shall not, without leave of the Commission, exceed 14,000 words.

(d) *Answering brief.* The answering brief shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the appellant's appeal brief. The answering brief shall not, without leave of the Commission, exceed 14,000 words.

(e) *Reply brief.* The reply brief shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 7,000 words. The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs. No further briefs may be filed except by leave of the Commission.

(f) *In camera information.* If a party includes in any brief to be filed under this section information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality provisions pursuant to a protective order, the party shall file 2 versions of the brief in accordance with the procedures set forth in § 3.45(e). The time period specified by this section within which a party may file an answering or reply brief will begin to run upon service on the party of the *in camera* or confidential version of a brief.

(g) *Signature.* (1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a

corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; that it complies with the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with all the other rules in this part. If a brief is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the brief has not been filed.

(h) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal or review to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his or her brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported.

(i) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief "Order Correcting Transcript" whenever a joint motion to correct transcript is received.

(j) *Briefs of amicus curiae.* A brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for

leave. A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable. Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an amicus curiae to participate in oral argument will be granted only for extraordinary reasons. An amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief.

(k) *Word count limitation.* The word count limitations in this section include headings, footnotes and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Extensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.

#### PART 4—MISCELLANEOUS RULES

■ 1. The authority citation for part 4 continues to read as follows:

**Authority:** 15 U.S.C. 46, unless otherwise noted.

■ 2. Revise § 4.2 to read as follows:

#### § 4.2 Requirements as to form, and filing of documents other than correspondence.

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided, however,* That informal applications or requests may be submitted directly to the official in charge of any Bureau, Division, or Office of the Commission, or to the Administrative Law Judge.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Paper and electronic copies of and service of filings before the Commission, and of filings before an ALJ in adjudicative proceedings.* (1) Except as otherwise provided, each document filed before the Commission, whether in an adjudicative or a nonadjudicative proceeding, shall be filed with Secretary of the Commission, and shall include a paper original, 12 paper copies, and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word). Except as otherwise provided, each document filed by a party in an adjudicative proceeding before an ALJ shall be filed with the Secretary of the Commission, and shall include a paper original, 1 paper copy and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word).

(2) The first page of the paper original of each such document shall be clearly labeled either public, or *in camera* or confidential. If the document is labeled *in camera* or confidential, it must include as an attachment either a motion requesting *in camera* or otherwise confidential treatment, in the form prescribed by § 3.45(b), or a copy of a Commission, ALJ, or federal court order granting such treatment. The document must also include as a separate attachment a set of only those pages of the document on which the *in camera* or otherwise confidential material appears.

(3) The electronic copy of each such public document shall be filed by e-mail, as the Secretary shall direct, in a manner that is consistent with technical standards, if any, that the Judicial Conference of the United States establishes, except that the electronic copy of each such document containing *in camera* or otherwise confidential material shall be placed on a diskette so labeled, which shall be physically attached to the paper original, and not transmitted by e-mail. The electronic copy of all documents shall include a certification by the filing party that the copy is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

(4) Sensitive personal information, as defined in § 3.45(b), shall not be

included in, and must be redacted or omitted from, filings where the filing party determines that such information is not relevant or otherwise necessary for the conduct of the proceeding.

(5) A paper copy of each such document in an adjudicative proceeding shall be served by the party filing the document or person acting for that party on all other parties pursuant to § 4.4, at or before the time the paper original is filed.

(d) *Paper and electronic copies of all other documents filed with the Commission.* Except as otherwise provided, each document to which paragraph (c) of this section does not apply, such as public comments in Commission proceedings, may be filed with the Commission in either paper or electronic form. If such a document contains nonpublic information, it must be filed in paper form with the Secretary of the Commission, and the first page of the document must be clearly labeled confidential. If the document does not contain any nonpublic information, it may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) by e-mail, as the Commission or the Secretary may direct.

(e) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by § 3.52(e).

(f) *Signature.* (1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a document constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; and that to the best of his or her

knowledge, information, and belief, it complies with the rules in this part. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

(g) *Authority to reject documents for filing.* The Secretary of the Commission may reject a document for filing that fails to comply with the Commission's rules. In cases of extreme hardship, the Secretary may excuse compliance with a rule regarding the filing of documents if the Secretary determines that the non-compliance would not interfere with the functions of the Commission.

■ 3. Amend § 4.3 by revising paragraph (b) as follows:

**§ 4.3 Time.**

\* \* \* \* \*

(b) Extensions. For good cause shown, the Administrative Law Judge may, in any proceeding before him or her: (1) Extend any time limit prescribed or allowed by order of the Administrative Law Judge or the Commission (if the Commission order expressly authorizes the Administrative Law Judge to extend time periods); or (2) extend any time limit prescribed by the rules in this chapter, except those governing motions directed to the Commission, interlocutory appeals and initial decisions and deadlines that the rules expressly authorize only the Commission to extend. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge, provided, however, that in a proceeding pending before an Administrative Law Judge, any motion on which he or she may properly rule shall be made to the Administrative Law Judge. Notwithstanding the above, where a motion to extend is made after the expiration of the specified period, the motion may be considered where the untimely filing was the result of excusable neglect.

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By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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