Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Please identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting or signing the comment (if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://docketsinfo.dot.gov/*.

**Small Business Regulatory Enforcement Fairness Act**

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question about this document, you may contact your local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

**List of Subjects**

*14 CFR Part 91*

Agriculture, Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Noise control, Reporting and recordkeeping requirements.

*14 CFR Part 135*

Air taxis, Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

**The Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations as follows:

## PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180).

■ 2. Revise § 91.175(f)(3) to read as follows:

**§ 91.175 Takeoff and landing under IFR.**

* * * * *

(f) * * *

(3) Except as provided in paragraph (f)(4) of this section, no pilot may takeoff under IFR from a civil airport having published obstacle departure procedures (ODPs) under part 97 of this chapter for the takeoff runway to be used, unless the pilot uses such ODPs or an alternative procedure or route assigned by air traffic control.

* * * * *

## PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 3. The authority citation for part 135 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 41706, 44113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 45101–41505.

■ 4. In § 135.161, revise paragraphs (a)(1) and (a)(3) to read as follows:

**§ 135.161 Communication and navigation equipment for aircraft operations under VFR over routes navigated by pilotage.**

(a) * * *

(1) Communicate with at least one appropriate station from any point on the route, except in remote locations and areas of mountainous terrain where geographical constraints make such communication impossible.

* * * * *

(3) Receive meteorological information from any point en route, except in remote locations and areas of mountainous terrain where geographical constraints make such communication impossible.

* * * * *

Issued in Washington, DC, on March 16, 2009.

**Lynne A. Osmus,**

*Acting Administrator.*

[FR Doc. E9–10089 Filed 4–30–09; 8:45 am]

**BILLING CODE 4910–13–P**

## FEDERAL TRADE COMMISSION

### 16 CFR Parts 3 and 4

### Rules of Practice

**AGENCY:** Federal Trade Commission (''Commission'' or ''FTC'').

**ACTION:** Final rule.

**SUMMARY:** The FTC is amending Rules 3.1, 3.25, 3.31(g), and 4.2, and rescinding Rule 3.11A, of its Rules of Practice, 16 CFR Parts 3 and 4. Other than these revisions, it is adopting as final all other amendments to the Part 3 and Part 4 Rules that were published as interim final rules on January 13, 2009. 74 Fed. Reg. 1804.

**DATES:** This rule is effective on May 1, 2009, and will govern all Commission adjudicatory proceedings that are commenced on or after that date.

**FOR FURTHER INFORMATION CONTACT:** Michael D. Bergman, Attorney, (202) 326–3184, or Lisa M. Harrison, Assistant General Counsel, (202) 326–3204, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington DC 20580.

**SUPPLEMENTARY INFORMATION:** On January 13, 2009, the Commission published comprehensive amendments to Part 3 and various amendments to Part 4 of its Rules of Practice, 16 CFR Parts 3 and 4, in order to further expedite its adjudicatory 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. The Commission requested comments on the interim final rules and set a deadline of February 12, 2009, for any such comments. The Commission received no comments on its interim rules. Other than the rule provisions discussed below, the Commission is adopting the interim rules as final. While no comments were submitted, the Commission has determined, upon further deliberation, that four rule provisions should be amended and that one rule be rescinded. These amendments are discussed below.[1]

*Section 3.1: Scope of the rules in this part; expedition of proceedings.*

The interim rule amendments that the Commission is adopting today as final will substantially expedite Part 3 proceedings. The expedited deadlines apply to all Part 3 matters and are accelerated further for administrative cases where the Commission is also seeking preliminary injunctive relief from a federal district court under Section 13(b) of the Federal Trade

[1] The final rule amendments are not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2). The rule revisions to Part 3 are also not subject to the requirements of the Paperwork Reduction Act, which contains an exemption for information collected during the conduct of administrative proceedings or investigations. 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4. To the extent that Rule 4.2 applies to filings that do not fall within this exception, OMB has approved the collection of information, along with other applications and notices to the Commission, and has assigned control number 3084–0047. The revisions to Rule 4.2 do not substantially or materially modify this collection of information.

Commission Act (''FTC Act''), 15 U.S.C. 53(b), which typically occurs (but is not limited to) when the Commission is challenging an unconsummated merger. The Commission is therefore further revising Rule 3.1 to emphasize that the expedited scheduling of a proceeding in which the Commission has sought or is seeking relief under Section 13(b) shall take priority over other proceedings, and is adding ''expedition of proceedings'' to the title of this Rule to reflect the importance of expedition to the Part 3 Rules.

*Section 3.11A: Fast-track proceedings.*

In light of the amendments made final today, the Commission is rescinding Rule 3.11A, which had established ''fast-track'' procedures for administrative cases when there was a collateral federal court proceeding under Section 13(b). The Commission has used Rule 3.11A to determine at the initiation of the litigation if an administrative proceeding is appropriate for fast-track procedures and to notify the respondent if such a determination had been made. The respondent could then choose the fast track procedures if the district court entered a preliminary injunction against it or if the Commission otherwise determined that the evidentiary record in the district court proceeding would materially facilitate resolution of the administrative proceeding.

The newly-revised Part 3 Rules published in the **Federal Register** on January 13, 2009 and made final today impose accelerated deadlines particularly for those cases in which the Commission is also seeking relief under Section 13(b). By doing so, the new rules obviate the need for the fast-track rule in its current form. Moreover, in the time since Rule 3.11A was promulgated in 1996, respondents have rarely elected fast-track procedures. The Commission has therefore determined to rescind Rule 3.11A. The Commission will continue to evaluate the effectiveness of its newly-issued Part 3 Rules particularly for unconsummated merger cases in which a parallel proceeding under Section 13(b) has been brought, and will consider alternative approaches to determine how best to expedite such unconsummated merger cases in Part 3.

*Section 3.25: Consent agreement settlements.*

Rule 3.25 governs motions for withdrawal of a matter or portions of a matter from adjudication to allow the Commission to consider a proposed consent agreement. The Commission is revising the standards for granting such motions, and adding provisions to avoid any unnecessary delay in the determination. Paragraph (c) retains language in former paragraph (c) providing that, while a case is pending before an ALJ, the Secretary of the Commission will automatically withdraw the matter or portions of the matter if a respondent files a motion to withdraw accompanied by a proposed consent agreement conforming to Rule 2.32 that has also been executed by complaint counsel and approved by the Bureau Director. If respondent's consent agreement was not so executed and approved, then former Rule 3.25(d) established a process whereby the ALJ would decide, depending on the likelihood of settlement, whether to certify the motion (with his or her written recommendation) to the Commission, which would then determine whether to grant the motion for withdrawal.

The Commission is revising Rule 3.25 to ensure that the process for withdrawal does not unduly delay a Part 3 proceeding and to provide the Commission with greater latitude in its ability to withdraw matters or portions of matters from adjudication in order to consider a settlement proposal. As revised, Rule 3.25(c) requires that the ALJ shall certify the motion so long as he or she determines that there is a reasonable possibility of settlement. The previous ''likelihood of settlement'' language imposed too strict a standard given the important benefits that a consent agreement provides for an efficient resolution of a matter. Further, the Commission has changed ''may certify'' to ''shall certify,'' thereby removing any suggestion that there might be good cause not to certify the motion once the ALJ has determined that there is a reasonable possibility of settlement.[2] The Commission is also making a corresponding change to Rule 3.25(b) that allows a respondent's motion for withdrawal to be accompanied by a consent proposal, even if the consent proposal does not conform to the requirements of Rule 2.32 or has not been executed by respondent.

Rule 3.25(c) now imposes a five-day deadline upon the ALJ to determine whether he or she will certify the motion. The rule also now allows only the Commission to order a stay of the proceedings once the ALJ has certified the motion to withdraw. While the Commission should retain the discretion to stay a matter or portions of a matter for extraordinary circumstances, the Commission believes that the majority of situations would not warrant a stay during this period.

In addition, the Commission has eliminated the requirement that the Commission find a ''likelihood of settlement'' before issuing an order withdrawing a matter or portions of a matter from adjudication. The Commission should have the discretion to withdraw a matter or portions of a matter if it determines that there is sufficient prospect for settlement (even if not necessarily a ''likelihood'') to warrant a suspension of the adjudication. Rather than including a specific standard, the revised rule leaves it to the Commission's discretion whether to issue the order. Finally, the revisions to Rule 3.25(d) clarify that if the matter is pending before the Commission (rather than an ALJ) when the motion and accompanying consent proposal are filed, the Commission in its discretion may grant the motion for withdrawal.

*Section 3.31(g): Inadvertent production.*

Section 3.31 concerns general discovery provisions. In its interim rules, the Commission issued a new provision governing the inadvertent production of privileged or protected information, which read: ''(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.''

As explained in the rule commentary, the Commission determined that this provision was necessary to limit the risk of subject matter waiver resulting from inadvertent disclosure of privileged or protected information as long as parties have taken reasonable measures to protect the information, thereby limiting the time and costs incurred by parties to avoid waiver. The Commission stated that, by treating genuinely inadvertent disclosures as not waiving privilege

[2] The Commission has also amended the rule to enable the ALJ, in his or her discretion, to determine whether to supplement the determination that there is a reasonable possibility of settlement with a recommendation as to whether the Commission should grant the motion to withdraw.

claims, the rule revision, along with relevant provisions of the FTC Act that protect ''privileged or confidential'' information,[3] would ensure that privileged and protected materials obtained by the Commission from both respondents and third parties would not be publicly disclosed.

Interim Rule 3.31(g), however, lacks some of the protections provided by new Fed. R. Evid. 502.[4] That rule was designed to provide a ''predictable, uniform set of standards under which parties can determine the consequences of disclosure of a communication or information covered by the attorney-client privilege or work-product protection.''[5] The Rule was enacted for one of the very same reasons that prompted the Commission to issue interim Rule 3.31(g): Widespread concerns that the litigation costs necessary to protect against privileged or work product materials have become excessive due to concerns that any disclosure—even if inadvertent or minor—will operate as a waiver of protections not only for the inadvertently disclosed communication or information but of the protections for all related communications or information. This concern is particularly aggravated in current practice by the enormous amount of electronically stored information that needs to be reviewed in discovery.

Fed. R. Evid. 502(b), governing inadvertent disclosures, provides that:

> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
> 1) the disclosure is inadvertent;
> 2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Civ. P. 26(b)(5)(B), in turn, provides that:

> If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

The Advisory Committee noted that the rule of evidence adopted the approach of a majority of courts regarding when an inadvertent disclosure results in a waiver, and is flexible enough to consider various factors such as ''the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and the overriding issue of fairness.''[6] Relevant considerations concerning the reasonableness of precautions taken include the number of documents to be reviewed, the time constraints for production, whether certain advanced analytical software application and linguistic tools were used for document screening, and the implementation of an efficient pre-litigation records management system. The Advisory Committee also noted that Fed. R. Evid. 502(b) does not require the producing party to engage in full-scale post-production review to determine whether there had been an inadvertent disclosure, but does require the producing party to follow up on any ''obvious indications'' that such protected materials had been produced inadvertently.

The Commission concludes that the standards in Fed. R. Evid. 502(b) in combination with the incorporated provisions from Fed. R. Civ. P. 26(b)(5)(B), including the reasonableness of efforts to prevent disclosure, steps taken by the privilege holder to rectify the error, and the subsequent obligations imposed on the receiving party after receiving the information, are sensible and should be incorporated into the Commission's Part 3 rules. The new federal rule was the result of extensive deliberations regarding limitations on waiver and was approved by Congress as the appropriate model for federal and state judicial proceedings. The Commission concludes that its provisions are equally appropriate for its administrative proceedings whether the disclosure occurs during a Part 3 proceeding or during a Commission precomplaint investigation. The rule does not address any additional obligations that may be imposed by state bar rules or opinions on attorneys who receive materials that appear to be subject to a privilege claim. Further, while Fed. R. Evid. 502 is expressly limited to the disclosure of information protected by the attorney-client privilege or work product doctrine, the Commission concludes that the principles underlying that provision reasonably should extend in Part 3 proceedings to other applicable privileges, such as the deliberative process privilege. The Commission adopts the federal provisions into its final Rule 3.31(g)(1).

The Commission also concludes that Fed. R. Evid. 502(a)—governing the scope of waiver of privilege for the intentional disclosure of information—is reasonable and should be incorporated into the Commission's Part 3 rules. Fed. R. Evid. 502(a) provides that:

> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
> 1) the waiver is intentional;
> 2) the disclosed and undisclosed communications or information concern the same subject matter; and
> 3) they ought in fairness to be considered together.

The Advisory Committee noted that the voluntary disclosure of privileged or protected information or communications will result in subject matter waiver for undisclosed information only in those unusual circumstances ''in which fairness requires a further disclosure of related protected information in order to prevent a selective and misleading presentation of evidence to the disadvantage of an adversary.'' The Commission's interim Rule 3.31(g), providing that an inadvertent production will waive protection only where a party relies upon the information in its case, similarly was animated by concerns about the unfairness of using selective protected materials to the disadvantage of an adversary. The Commission concludes that the scope of waiver considerations encompassed within Fed. R. Evid. 502(a), which apply to the voluntary production of protected materials, are reasonable and therefore adopts the language of the federal rule in its final Rule 3.31(g)(2).

[3] FTC Act, 6(f), 21(d)(1)(B), 15 U.S.C. 46(f), 57b–2(d)(1)(B).

[4] *See* Pub. L. 110–322 (Sept. 19, 2008), 122 Stat. 3537.

[5] *See* Advisory Committee Notes to Fed. R. Evid. 502.

[6] *See* Advisory Committee Notes to Fed. R. Evid. 502.

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

In its interim rules, the Commission 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 to conduct 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. The Commission intends that these procedures will safeguard the confidentiality of sensitive information in the event that such information must be filed or otherwise used in the proceeding.

The Commission has now determined to revise paragraphs (a) through (d) in a number of respects. First, paragraph (d) has been revised to provide that whenever a petition for certain types of Commission action in non-Part 3 matters is filed—such as a petition to quash or limit a Commission subpoena or civil investigative demand (CID)—and confidential treatment is requested, a redacted public version of both the petition and the showing of justification for confidential treatment required by Rule 4.9(c) must be filed at the same time. A petition that does not satisfy these requirements will be rejected by the Secretary of the Commission, pursuant to Rule 4.2(g), and therefore will not suspend performance by the petitioner of any pending obligations, such as compliance with a pending subpoena or CID. The Commission is taking this step to address problems arising from the recent filing of a number of petitions to quash or limit subpoenas or CIDs which were marked ''confidential'' in their entirety. Because the petitions were so designated, the Commission was unable to make public any part of the petitions at the time they were filed, and was unable to make public its responses to the petitions until after the requests for confidential treatment had been addressed. By requiring a public version of a petition to be filed concurrently with a nonpublic version, the revised rule will enable the Commission to place redacted versions of the petition and the Commission's response on the public record without unnecessary delay. As revised, paragraph (d) will also facilitate Commission evaluation of any given request for confidential treatment under Rule 4.9(c), by requiring the requester to provide a breakdown between the public and the confidential components of any given request at the time the request is filed.

Second, Rule 4.2 has been revised to require *all* filings with the Commission or an ALJ under any Part of Chapter I of Title 16 to be labeled clearly and accurately as ''Public,'' ''*In Camera*,'' or ''Confidential'' at the time they are filed. *See* revised paragraph (b). As a corollary, paragraph (d)(3) has been revised to permit the Secretary to place a document labeled ''Public'' on the public record of the Commission at the time it is filed. A significant number of requests for action filed with the Commission are made public by the requesters when filed, frequently by placing the requests on the Internet. The Commission has no objection to this approach; indeed, public disclosure of a given request at the time it is filed may facilitate the development of a response by encouraging interested parties to file comments. In some cases, however, current Commission rules otherwise provide that such requests remain confidential until the point at which Commission or staff responses are issued. Thus, for example, Rule 1.4 provides that requests for written advice ''will be [made public] immediately after the requesting party has received the advice . . . .'' Revised paragraph (d)(3) will resolve this anomaly.

Third, paragraphs (a) through (d) have been revised in a number of respects to facilitate the development of a new Commission electronic filing system under Part 3 of the Rules of Practice, to be modeled after the systems adopted by a number of federal district courts. *See*, *e.g.*, paragraphs (c)(1), (c)(3), and (d)(1). Once operational, this system will greatly improve the process by which electronic copies of public filings can be received, processed, and posted on the public Commission Website. In addition, the rule has been revised in a number of respects to facilitate adapting Commission procedures to new electronic document formats as they arise, such as the increasingly widespread use of Adobe portable document format, to clarify their scope, and to facilitate compliance with their requirements.

Finally, unnecessary language has been eliminated, and other revisions have been made throughout the rule to clarify and limit the kinds of submissions to which the rule is intended to apply.

**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, by adopting the interim rules published at 74 FR 1804, January 13, 2009, as final, with the following changes:

## 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; expedition of proceedings.**

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. In the event of a scheduling conflict between a proceeding in which the Commission also has sought or is seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and another proceeding, the proceeding in which the Commission also has sought or is seeking relief under Section 13(b) shall take precedence. 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.

**§ 3.11A [Removed]**

■ 3. Remove § 3.11A.

■ 4. Revise § 3.25 to read as follows:

**§ 3.25 Consent agreement settlements.**

(a) The Administrative Law Judge may, in his or her discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering a proposed settlement. Such motion shall be filed with the Secretary of the Commission, as provided in § 4.2. Any

such motion shall be accompanied by a consent proposal; the proposal itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the consent proposal affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this paragraph shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If a consent agreement accompanying the motion has been executed by one or more respondents and by complaint counsel, has been approved by the appropriate Bureau Director, and conforms to § 2.32, and the matter is pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. If a consent proposal is not in the form of a consent agreement executed by a respondent, does not otherwise conform to § 2.32, or has not been executed by complaint counsel, and the matter is pending before the Administrative Law Judge, he or she shall certify the motion and proposal to the Commission upon a written determination that there is a reasonable possibility of settlement. The certification may be accompanied by a recommendation to the Commission as to the disposition of the motion. The Administrative Law Judge shall make a determination as to whether to certify the motion within 5 days after the filing of the motion. The filing of a motion under paragraph (b) of this section and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission shall so order. Upon certification of such motion, the Commission in its discretion may issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal.

(d) If the matter is no longer pending before the Administrative Law Judge, the Commission in its discretion may, upon motion filed under paragraph (b) of this section, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal. Such order may issue whether or not the consent proposal is in the form of a consent agreement executed by a respondent, otherwise conforms to § 2.32, or has been executed by complaint counsel.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraphs (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of the allegations in a matter have been withdrawn from adjudication, the Commission may accept a proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings, or take such other action as it may deem appropriate. If an agreement is accepted, it will be disposed of as provided in § 2.34 of this chapter, except that if, following the public comment period provided for in § 2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of the agreement, it will so notify the parties and will return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

■ 5. Amend § 3.31 by revising paragraph (g) to read as follows:

**§ 3.31 General discovery provisions.**

* * * * *

(g) Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party.

(1)(i) The disclosure of privileged or protected information or communications during a Part 3 proceeding or during a Commission precomplaint investigation shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

(ii) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Administrative Law Judge under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(2) The disclosure of privileged or protected information or communications during a Part 3 proceeding or during a Commission precomplaint investigation shall waive the privilege or protection as to undisclosed information or communications only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

* * * * *

## 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(a) through (d) to read as follows:

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

(a) Filing. (1) All paper and electronic documents filed with the Commission or with an Administrative Law Judge pursuant to part 0, part 1, part 2, or part 3 of this chapter shall be filed with the Secretary of the Commission, except that:

(i) Documents produced in response to compulsory process issued pursuant to part 2 or part 3 of this chapter shall instead be produced to the custodian, deputy custodian, or other person prescribed therein, and in the manner prescribed therein; and

(ii) Comments filed in response to a Commission request for public comment shall instead be filed in the manner prescribed in the **Federal Register** document or other Commission document containing the request for such comment.

(2) All paper and electronic documents filed with the Commission pursuant to parts 4–999 of this chapter shall be filed with the Secretary of the Commission, except as otherwise provided in such part.

(b) Title and public or nonpublic status. All paper and electronic documents filed with the Commission or with an Administrative Law Judge pursuant to any part of this chapter shall clearly show the file or docket number and title of the action in connection with which they are filed.

The first page of each such document shall be clearly and accurately labeled ''Public'', ''In Camera'', or ''Confidential''.

(c) Paper and electronic copies of and service of filings before the Commission or an Administrative Law Judge in adjudicative proceedings.

(1) Each document filed before the Commission or an Administrative Law Judge in an adjudicative proceeding, except documents covered by § 4.2(a)(1)(i), shall be filed with the Secretary of the Commission; shall comply with the requirements of § 4.2(b); and shall include a paper original (in 12-point font with 1-inch margins), one paper copy (if before the Administrative Law Judge) or twelve (12) paper copies (if before the Commission), and an electronic copy in Adobe portable document format or such other format as the Secretary may direct.

(2) If the document is labeled ''In Camera'' or ''Confidential'', it must include as an attachment either a motion requesting in camera or other confidential treatment, in the form prescribed by § 3.45, or a copy of a Commission, Administrative Law Judge, 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 and comply with all other requirements of § 3.45 and any other applicable rules governing in camera treatment.

(3)(i) If the document is labeled ''Public'', the electronic copy shall be filed as the Secretary shall direct, or through such electronic system as the Commission may provide.

(ii) If the document is labeled ''In Camera'' or ''Confidential'', the electronic copy shall be submitted on a compact disc (CD) or digital video disc (DVD) so labeled, which shall be physically attached to the paper original, and shall not be transmitted to the Commission by e-mail or any other electronic system.

(iii) Each electronic copy filed pursuant to § 4.2(c)(1) 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 document filed in accordance with this section 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 original is filed.

(d) Paper and electronic copies of other documents filed with the Commission. Each paper or electronic document filed with the Commission, and not covered by § 4.2(a)(1)(i), § 4.2(a)(1)(ii), or § 4.2(c), shall be filed with the Secretary of the Commission, and shall be clearly and accurately labeled as required by § 4.2(b).

(1) Each such paper document shall be signed, and shall be accompanied by an electronic copy on a compact disc (CD) or digital video disc (DVD) in Adobe portable document format or such other format as the Secretary shall direct.

(2) Each such document filed pursuant to § 2.7(d), § 2.7(f), § 2.41(f), or § 2.51 shall also include twelve (12) paper copies of the signed paper original.

(3) Each such document labeled ''Public'' may be placed on the public record of the Commission at the time it is filed.

(4) If such a document is labeled ''Confidential'', and it is filed pursuant to § 2.7(d), § 2.7(f), § 2.41(f), or § 2.51, it will be rejected for filing pursuant to § 4.2(g), and will not stay compliance with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files:

(i) An explicit request for confidential treatment that includes the factual and legal basis for the request, identifies the specific portions of the document to be withheld from the public record, provides the name and address of the person(s) who should be notified in the event the Commission determines to disclose some or all of the material labeled ''Confidential'', and otherwise conforms to the requirements of § 4.9(c); and

(ii) A redacted public version of the document that is clearly labeled ''Public''.

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By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. E9–9972 Filed 4–30–09: 8:45 am]

**BILLING CODE 6750–01–S**

## DEPARTMENT OF EDUCATION

### 34 CFR Parts 668, 686, 690, and 691

**RIN 1840–AC96**

**[Docket ID ED–2009–OPE–0001]**

## Student Assistance General Provisions; Teacher Education Assistance for College and Higher Education (TEACH) Grant Program; Federal Pell Grant Program; Academic Competitiveness Grant Program and National Science and Mathematics Access To Retain Talent Grant Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Secretary amends the regulations for the Academic Competitiveness Grant (ACG) and National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) Programs. These interim final regulations are needed to implement provisions of the Higher Education Act of 1965 (HEA), as amended by the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA) and the Higher Education Opportunity Act of 2008 (HEOA). The new statutory provisions are effective July 1, 2009. The Secretary also amends the regulations in the Student Assistance General Provisions, and the regulations for the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program and the Federal Pell Grant Program to implement conforming changes based on the statutory amendments to the ACG and National SMART Grant programs.

**DATES:** These regulations are effective July 1, 2009. We must receive your comments on or before June 1, 2009.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under ''How To Use This Site.''