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## FEDERAL TRADE COMMISSION

### 16 CFR Parts 2, 3, and 4

#### Revisions to Rules of Practice

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rules.

**SUMMARY:** The Commission is revising certain of its rules of practice to promote fairness, flexibility and efficiency in its investigations, studies, and adjudicative proceedings. These rule revisions include a revision to the rule governing the status of cases in administrative adjudication following a district court's denial of preliminary injunctive relief in an ancillary proceeding. Other changes include revisions to the list of Commission officials who have authority to modify the terms and timeframe for compliance with compulsory process, and a change to the deadline for the Commission to dispose of petitions to limit or quash compulsory process. In addition, the Commission is updating its procedures for accessing public records and list of exempt Privacy Act systems.

**DATES:** These rule revisions are effective on March 23, 2015.

**FOR FURTHER INFORMATION CONTACT:** Josephine Liu, Attorney, (202) 326-2170, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580. For information about the revisions to 16 CFR part 4, contact G. Richard Gold, Attorney, (202) 326-3355, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** The Federal Trade Commission is revising certain rules in parts 2 and 3 of its rules of practice that govern investigations and adjudicative proceedings, and is revising other rules in part 4 of its rules of practice.

The Commission is amending Rules 2.7 and 2.10 to provide the Office of Policy Planning (“OPP”) Director and Deputy Directors with the authority to modify the terms of compliance with compulsory process, alter the meet-and-confer prerequisite, and extend the deadline for filing a petition to limit or quash compulsory process. This change reflects OPP’s role in frequently conducting and leading studies under section 6(b) of the FTC Act. The Commission is also revising Rule 2.10(c) to impose a 40-day deadline for disposing of petitions to limit or quash compulsory process.

In part 3 of its Rules, the Commission is amending Rule 3.26 to make clear that administrative litigation will be suspended if respondents file a qualifying motion for withdrawal or dismissal after a district court denies preliminary injunctive relief in an ancillary proceeding brought under section 13(b) of the FTC Act. As discussed below, the Commission will continue to follow the 1995 Policy Statement Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction<sup>1</sup> and consider the specific circumstances of each case when deciding whether to pursue administrative litigation. In addition, the Commission is revising the Part 3 rules to correct typographical errors, ensure consistency between sections, clarify paragraph headings, and make other technical changes.

In part 4 of its Rules, the Commission is revising the procedures and contact information for accessing public records in Rule 4.9, making a technical correction to Rule 4.11, and updating the names of exempt Privacy Act systems in Rule 4.13.

Because these rule revisions relate solely to agency procedure and practice, publication for notice and comment is not required under the Administrative Procedure Act. 5 U.S.C. 553(b).<sup>2</sup> These rule revisions are effective on March 23, 2015.

<sup>1</sup> *Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement*, 60 FR 39741 (Aug. 3, 1995).

<sup>2</sup> For this reason, the requirements of the Regulatory Flexibility Act are also inapplicable. 5 U.S.C. 601(2), 604(a). Likewise, the amendments do not modify any FTC collections of information within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

#### I. Revisions to Rules of Practice for Nonadjudicative Investigations (Part 2)

In 2012, the Commission undertook an extensive revision of its rules governing the conduct of its investigations.<sup>3</sup> The Commission is now revising certain of those rules to promote fairness, flexibility, and efficiency in FTC investigations, which includes studies conducted under section 6(b) of the FTC Act.

##### *Rules 2.7(l) and 2.10(a)(5): Officials With Authority To Modify Compulsory Process and Extend the Deadline for Petitions To Quash*

The Commission is revising Rules 2.7(l) and 2.10(a)(5) to reflect the fact that the FTC’s Office of Policy Planning frequently conducts and leads section 6(b) studies. The Commission is amending Rule 2.7(l) to include the Office of Policy Planning Director and Deputy Directors among the identified Commission officials authorized to modify the terms of compliance with orders to file special reports under section 6(b) of the FTC Act and other forms of compulsory process. Commission rules provide that the officials designated in Rule 2.7(l) also have the power to modify the manner and form of production of electronically stored information (in Rule 2.7(j)), and alter the meet-and-confer prerequisite for filing a petition to limit or quash compulsory process (in Rule 2.7(k)). Consistent with these amendments, the Commission is also revising Rule 2.10(a)(5) to state that the Office of Policy Planning Director and Deputy Directors are authorized to extend the deadline for filing a petition to limit or quash. The revised rules will better reflect Commission practice and provide further flexibility and efficiency for 6(b) studies and other investigations.

##### *Rule 2.10(c): Disposition of Petitions To Limit or Quash Compulsory Process*

The Commission revised Rule 2.10 in 2012 to eliminate the two-step procedure for rulings on petitions to limit or quash compulsory process by requiring the full Commission to rule on the petition in the first instance. The rule also imposed a 30-day deadline for disposition of the petition. The Commission received no comments regarding this provision, and adopted it as proposed, noting that if the Commission did not meet the deadline, the petition would not be automatically granted or denied.<sup>4</sup> To enable sufficient time for full Commission review of the merits of the petition, the Commission

<sup>3</sup> See *Rules of Practice*, 77 FR 59294 (2012).

<sup>4</sup> 77 FR 59300.

is revising Rule 2.10(c) to impose a 40-day deadline. The extra 10 days for Commission review do not pose a substantial hardship to recipients of compulsory process because Rule 2.10(b) continues to provide that the timely filing of a petition to limit or quash stays the remaining amount of time permitted for compliance.

## II. Revisions to Rules of Practice for Adjudicative Proceedings (Part 3)

### Rule 3.26

Rule 3.26 sets out two procedures that facilitate Commission consideration of whether to pursue administrative merger litigation following judicial denial of preliminary injunctive relief in an ancillary proceeding brought under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b).<sup>5</sup> As explained further below, the rule allows respondents to file a motion to withdraw the administrative case from adjudication or a motion to dismiss the administrative complaint. Such motions can only be filed within a certain time after the district court has denied the preliminary injunction or after the court of appeals has denied the Commission's motion for relief pending appeal.

In revising Rule 3.26, the Commission is also making clear it will continue to consider the specific circumstances of each case when deciding whether to proceed with administrative litigation, as outlined in a 1995 Policy Statement<sup>6</sup> issued in conjunction with the original version of the rule.<sup>7</sup> As discussed below, the revisions ensure that, if respondents file either type of motion in accordance with the rule, the administrative litigation will be suspended unless and until the Commission rules that maintenance of the litigation would serve the public interest. These revisions follow the approach of the original version of the rule.

Rule 3.26, as first issued in 1995, provided that a motion for withdrawal would generally result in an automatic withdrawal and that a motion for

dismissal would result in an automatic stay. The procedure for a withdrawal enabled *ex parte* communications (otherwise prohibited by Rule 4.7) while the matter was withdrawn from Part 3 administrative adjudication. During this period, complaint counsel and respondents (and third parties) could communicate informally with Commissioners to discuss the matter without the constraints of the adjudicative rules. In addition, because such communications would not be on the record of the administrative proceeding, counsel could discuss the case without concern that their statements might compromise their litigation position if the case were returned to adjudication.

The alternative procedure in the 1995 Rule provided for an automatic stay of the adjudication if a respondent filed a motion to dismiss the administrative complaint and to brief the matter on the public record. The *ex parte* restrictions remained in place.

Because of the long delays that often resulted from the filing of motions under the 1995 Rule, the Commission revised the rule in 2009.<sup>8</sup> The 2009 rule continued to allow respondents to file either type of motion but no longer provided that such a motion would result in an automatic withdrawal or an automatic stay. Although it was revising the 1995 rule, the Commission indicated, however, that it would continue to adhere to the case-by-case approach articulated in the 1995 Policy Statement in determining whether to continue with administrative litigation challenging a merger after a district court had denied preliminary injunctive relief. In addition, the Commission authorized motions under Rule 3.26 to be filed at an earlier time following the district court's denial of preliminary injunctive relief and required the Commission to dispose of such motions within 30 days.

Since 2009, the Commission has continued to be guided by the 1995 Policy Statement when determining whether to proceed with administrative litigation. For example, in *Laboratory Corporation of America*, the district court denied the Commission's request for preliminary injunctive relief, the respondents then moved to withdraw the matter from administrative adjudication, and the Commission granted the respondents' motion for withdrawal six days after it was filed.<sup>9</sup>

Less than a month later, after carefully considering the factors outlined in the Policy Statement, the Commission voted unanimously to end the administrative litigation.<sup>10</sup> The Policy Statement will continue to guide the Commission in the future.

The Commission has now decided to return to the automatic mechanisms in the 1995 rule. The new rule now provides for an automatic withdrawal or automatic stay, depending on the type of motion filed. Because the Commission is retaining the deadlines in the 2009 rule for the filing of motions and specifying deadlines for Commission determinations of the motions, an automatic withdrawal or stay is not likely to disrupt the resolution of the matter.

First, respondents may move to have the administrative case withdrawn from adjudication. The Commission is retaining the provision in the 2009 rule that motions for withdrawal can be filed jointly or separately, so long as all of the respondents agree to seek withdrawal. The administrative case will automatically be withdrawn two days after the motion is filed, unless complaint counsel files an objection asserting that the procedural requirements have not been satisfied,<sup>11</sup> in which case the Commission will

*Am.*, Docket No. 9345, <https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110324labcorpcommorder.pdf> (Mar. 23, 2011). In *Phoebe Putney*, the other merger matter since the 2009 rule change in which the Commission lost a motion for preliminary injunction, the respondents did not invoke Rule 3.26. Rather, the Commission granted an unopposed motion to stay the Part 3 proceedings after the Eleventh Circuit granted an injunction pending appeal; and the Commission subsequently lifted its stay after prevailing in the Supreme Court. See *Order Granting Respondents' Unopposed Motion to Stay Proceeding*, *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348, [https://www.ftc.gov/system/files/documents/cases/130222ccnoa\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/130222ccnoa_0.pdf) (July 15, 2011); *Order Granting Complaint Counsel's Motion to Lift Stay*, *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348, <https://www.ftc.gov/sites/default/files/documents/cases/2013/03/130314phoebeordermotion.pdf> (Mar. 14, 2013).

<sup>10</sup> See Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Lab. Corp. of Am.*, Docket No. 9345, [http://www.ftc.gov/system/files/documents/public\\_statements/568671/110422labcorpcommstmt.pdf](http://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf) (Apr. 21, 2011); Concurring Statement of Commissioner Brill, *In re Lab. Corp. of Am.*, Docket No. 9345, [http://www.ftc.gov/system/files/documents/public\\_statements/568681/110422labcorpstntbrill.pdf](http://www.ftc.gov/system/files/documents/public_statements/568681/110422labcorpstntbrill.pdf) (Apr. 21, 2011).

<sup>11</sup> As the Commission noted in 1995, the procedural requirements might not be satisfied if the Rule 3.26 motion is filed untimely, or if there is a question as to whether a particular court order constitutes a denial of preliminary injunctive relief. 60 FR 39640 n.3. Rule 3.26 is intended for situations where the court refuses to grant the Commission any form of preliminary relief. If, for example, the court denies the Commission's request for a preliminary injunction halting a proposed merger but nonetheless imposes a "hold separate" order, Rule 3.26 would not be available.

<sup>5</sup> Although Rule 3.26 applies to any type of administrative litigation where the Commission has sought a preliminary injunction, the Commission typically seeks such relief during a challenge to an un consummated merger, acquisition, joint venture or similar transaction.

<sup>6</sup> *Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction*, *supra* note 1, at 39743. The Commission indicated in 1995 that the principles of the Policy Statement would apply also in the context of consumer protection litigation and non-merger competition litigation.

<sup>7</sup> *Administrative Litigation Following the Denial of a Preliminary Injunction*, 60 FR 39640 (Aug. 3, 1995).

<sup>8</sup> *Rules of Practice*, 74 FR 1804, 1811–12 (Jan. 13, 2009).

<sup>9</sup> See *Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice*, *In re Lab. Corp. of*

decide whether to withdraw the case from adjudication.

Second, any respondent may file a motion for dismissal that will be briefed on the public record. The administrative case will automatically be stayed until 7 days after the Commission rules on the motion for dismissal, and all deadlines established by the rules will be tolled for the amount of time the proceeding is stayed.

As noted above, the Commission is retaining the 2009 rule's timing requirements for such motions but simplifying the wording in Rule 3.26(b). If the Commission does not file a motion with the court of appeals for relief pending appeal within 7 days following the district court's denial of a preliminary injunction, the Rule 3.26 motion must be filed within 14 days after the denial of the preliminary injunction. If the Commission files a motion with the court of appeals for relief pending appeal, the Rule 3.26 motion must be filed within 14 days after, but no earlier than, denial by the court of appeals of the Commission's motion for relief pending appeal.

In addition, in order to expedite these proceedings, the Commission is specifying deadlines for deciding motions under Rule 3.26. If respondents file a motion for withdrawal under Rule 3.26(c) and complaint counsel files an objection, the Commission must rule on the motion within 10 days of the objection. If respondents file a motion for dismissal under Rule 3.26(d), the Commission is retaining the requirement of the current rule that the Commission decide such motions within 30 days.

The Commission is retaining current Rule 3.26(e), which sets out the requirements for memoranda filed in support of or in opposition to these motions, and retaining with minor changes Rule 3.26(f), which sets out the requirements for filings that contain *in camera* materials.

Finally, the Commission is making one other, minor modification to the rule: the timeframe for complaint counsel to respond to motions for dismissal has been shortened from 14 days to 7 days.

#### *Technical Changes to Other Part 3 Rules*

The Commission is making a number of non-substantive changes to the part 3 rules to correct typographical errors, ensure consistency in the terminology and the requirements in different sections of the rules, clarify paragraph headings, and delete or restore material that was inadvertently retained or deleted when the Commission last amended the rules in 2011.

Rule 3.22(a) is being amended to clarify that Rule 3.22(a) does not govern the presentation and timing requirements for motions under Rule 3.26. Similarly, Rule 3.22(b) is being revised to reflect the fact that, under the Commission's rules, the filing of certain motions automatically stays the proceedings. In particular, motions under Rule 3.26(d) as revised by this notice and some motions under existing Rule 3.25(c) will result in automatic stays. For the same reasons, the Commission is amending Rule 3.41(f) by adding a cross-reference to Rule 3.26, to make clear that Rule 3.41(f) does not govern in situations where Rule 3.26 applies.

Rule 3.23(b) is being amended to clarify that a party opposing interlocutory review may file an answer to both (1) the initial request for determination that is filed with the ALJ, and (2) the subsequent application for review that is filed with the Commission. Existing Rule 3.23(b) could create confusion about whether the first type of answer is permitted, because the rule does not expressly authorize answers to initial requests but nonetheless mentions the deadline for filing such answers.

The general discovery provisions were previously amended in 2009 to prohibit filing discovery materials with the Secretary, except in certain circumstances. See 16 CFR 3.31(h). To ensure consistency with the 2009 amendment, the Commission is now (1) eliminating the requirement in Rule 3.32(a) and (b) that requests for admissions and responses thereto be filed with the Secretary, and (2) revising the paragraph heading for Rule 3.33(c)(2) and clarifying the text of that paragraph. The Commission is also eliminating redundant text for two numbers mentioned in Rule 3.32(a) and (b), as well as correcting a typographical error in the last sentence of Rule 3.32(b).

To maintain consistency in how the terms "prehearing" and "subpoenas" are used throughout the part 3 rules, the Commission is revising Rules 3.35(b)(2) and 3.42(c)(2).

The Commission is revising Rule 3.45(e) to reflect the fact that the parties who submit documents containing *in camera* or confidential information must comply with all of the Commission's rules governing the filing and service of documents—including those located in 16 CFR part 4—not just with the Commission's part 3 rules. In addition, Rule 3.45(f) is being revised to delete two sentences that were inadvertently not deleted when the Commission amended the rule in 2011. Similarly, Rule 3.52(a)(2) is being

revised to restore a clause that was inadvertently deleted after the 2011 amendments.

In Rule 3.46(c)(4), an erroneous reference to the public or nonpublic status of each "exhibit" in the witness index is being replaced with "witness testimony."

### **III. Revisions to Miscellaneous Rules (Part 4)**

#### *Rule 4.9: The Public Record*

The Commission's public record regulation, 16 CFR 4.9, sets out procedures and contact information for accessing public record materials. The Commission is amending Rule 4.9(a)(1), (2), (3), (4), and 10(viii), 16 CFR 4.9(a)(1), (2), (3), (4), and (10)(viii), to reflect updates to these procedures and contact information. The revised rule states that these materials are available either electronically at the FTC's Web site, [www.ftc.gov](http://www.ftc.gov), or for older materials not on the Web site, through telephonic requests with the FTC's Reading Room at (202) 326-2222, extension 2.

Under the prior policy, the FTC's Consumer Response Center (CRC) maintained an in-person physical reading room at the Headquarters building, where members of the public could inspect records and file public record requests. Once requests were received, the CRC worked with the Commission's Records and Filings Office, which researched public record requests, retrieved documents from storage, and provided them to CRC staff and authorized contractors to distribute to the requestors to review and make copies in the physical reading room.

The CRC no longer maintains a physical reading room. To obtain a copy of any public records not available on the agency's Web site, members of the public can call the Reading Room, which is now staffed by the FTC's Library.

#### *Rule 4.11: Disclosure Requests*

The Commission is amending Rule 4.11(a)(1)(i)(F) to conform with recent changes made to Rule 4.8(d)(3), which granted Freedom of Information Act requesters twenty calendar days to respond to Commission notification when there was no fee agreement for processing a request and the estimated costs exceed \$25.<sup>12</sup>

#### *Rule 4.13: Privacy Act Rules*

The Commission is making technical corrections and updates to its Privacy Act rules at 16 CFR 4.13(m). Paragraph

<sup>12</sup> See 79 FR 15680, 15685 (Mar. 21, 2014). The Commission is also amending Rule 4.11(a)(1)(i)(A) to make a minor grammatical change.

(m) sets out systems of records that are exempt from certain Privacy Act provisions. The exempt systems contain:

(1) Investigatory materials maintained by an agency component in connection with any activity relating to criminal law enforcement, exempt under subsection (j)(2) of the Privacy Act (see paragraph (m)(1) of the rules);

(2) investigatory materials compiled for law enforcement purposes, exempt under subsection (k)(2) of the Privacy Act (see paragraph (m)(2) of the rules); or

(3) investigatory materials compiled to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only where disclosure would reveal the identity of a confidential source of information, exempt under subsection (k)(5) of the Privacy Act (see paragraph (m)(3) of the rules).

These Privacy Act systems are exempted from certain Privacy Act restrictions and procedural requirements (e.g., access by the subject individual) due to the investigatory nature of the records contained in those systems. As permitted by the Privacy Act, these exemptions help ensure that the Commission may efficiently and effectively perform investigations and other authorized duties and activities. In this case, the Commission is updating the names and numbering of the exempt Privacy Act systems to conform them to the current system names in the system of records notices (SORNs) previously published for these exempt systems by the FTC.<sup>13</sup> The revised rule also lists certain FTC personnel-related Privacy Act systems that are exempt under Government-wide SORNs published by the Office of Personnel Management and Department of Labor but were inadvertently omitted from the list of exempt systems in the FTC's Privacy Act rule.<sup>14</sup> These amendments to the agency's Privacy Act rules are purely technical and are not intended to expand or modify the substantive coverage or applicability of the Privacy Act exemptions to the FTC's Privacy Act systems or the records they contain.

<sup>13</sup> The current SORNs for all 40 FTC Privacy Act systems of records are posted on the FTC public Web site, at <http://www.ftc.gov/about-ftc/foia/foia-reading-rooms/privacy-act-systems>.

<sup>14</sup> These systems are II-3—Worker's Compensation—FTC, II-4—Employment Application-Related Records—FTC, and II-6—Discrimination Complaint System—FTC.

**List of Subjects**

*16 CFR Parts 2 and 3*

Administrative practice and procedure.

*16 CFR Part 4*

Administrative practice and procedure, Freedom of information, Public record.

For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, chapter I, subchapter A of the Code of Federal Regulations as follows:

**PART 2—NONADJUDICATIVE PROCEDURES**

- 1. The authority citation for part 2 continues to read as follows:

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

- 2. Amend § 2.7 by revising paragraph (l) to read as follows:

**§ 2.7 Compulsory process in investigations.**

\* \* \* \* \*

(l) *Delegations.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics and the Office of Policy Planning, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are all authorized to modify and, in writing, approve the terms of compliance with all compulsory process, including subpoenas, CIDs, reporting programs, orders requiring reports, answers to questions, and orders requiring access. If a recipient of compulsory process has demonstrated satisfactory progress toward compliance, a Commission official identified in this paragraph may, at his or her discretion, extend the time for compliance with Commission compulsory process. The subpoena power conferred by section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) and section 5 of the Webb-Pomerene (Export Trade) Act (15 U.S.C. 65) are specifically included within this delegation of authority.

- 3. Amend § 2.10 by revising paragraphs (a)(5) and (c) to read as follows:

**§ 2.10 Petitions to limit or quash Commission compulsory process.**

(a) \* \* \*

(5) *Extensions of time.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics and the Office of Policy Planning, their

Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file petitions to limit or quash Commission compulsory process.

\* \* \* \* \*

(c) *Disposition and review.* The Commission will issue an order ruling on a petition to limit or quash within 40 days after the petition is filed with the Secretary. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice to the petitioner of the order.

\* \* \* \* \*

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

- 4. The authority citation for part 3 continues to read as follows:

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

- 5. Amend § 3.22 by revising the first three sentences of paragraph (a) and paragraph (b) to read as follows:

**§ 3.22 Motions.**

(a) *Presentation and disposition.* Motions filed under § 4.17 of this chapter shall be directly referred to and ruled on by the Commission. Motions to dismiss filed before the evidentiary hearing (other than motions to dismiss under § 3.26(d)), 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. Except as otherwise provided by an applicable rule, 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. \* \* \*

(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 or unless otherwise provided by an applicable rule.

\* \* \* \* \*

- 6. Amend § 3.23 by revising paragraph (b) to read as follows:

**§ 3.23 Interlocutory appeals.**

\* \* \* \* \*

(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 request for determination 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. An answer may be filed within 3 days after the application for review is filed.

\* \* \* \* \*

■ 7. 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 adjudicative proceeding.

(b) A motion under this section shall be addressed to the Commission and must be filed within 14 days after, but no earlier than:

(1) A district court has denied the Commission's request for a preliminary injunction, if the Commission has not filed a motion for relief pending appeal with the court of appeals within 7 days following the district court's denial of a preliminary injunction; or

(2) A court of appeals has denied a Commission motion for relief pending appeal.

(c) *Withdrawal from adjudication.* Following denial of court relief as specified in paragraph (b) of this section, respondents may move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether the public interest warrants further litigation. Although all

respondents must consent to the filing of such a motion, a motion under this paragraph (c) may be filed jointly or separately by each of the respondents in the adjudicative proceeding. At the time respondents file a motion under this paragraph (c), respondents must also electronically transmit a copy to complaint counsel. The Secretary shall issue an order withdrawing the matter from adjudication 2 days after such a motion is filed, except that, if complaint counsel file an objection asserting that the conditions of paragraph (b) of this section have not been met, the Commission shall decide the motion within 10 days after the objection is filed.

(d) *Consideration on the record of a motion to dismiss.* (1) In lieu of a motion to withdraw the adjudicative proceeding from adjudication under paragraph (c) of this section, any respondent 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.

(2) *Stay.* The filing of a motion under this paragraph (d) shall stay the proceeding until 7 days following the disposition of the motion by the Commission, and all deadlines established by these rules shall be tolled for the amount of time the proceeding is so stayed.

(3) *Answer.* Complaint counsel may file a response within 7 days after such motion is filed.

(4) *Ruling by Commission.* Within 30 days after the deadline for filing a response, the Commission shall rule on any motion under this paragraph (d).

(e) *Form.* Memoranda in support of or in opposition to motions authorized by this section 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 the adjudicative proceeding, 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 objection or response under this section will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

■ 8. Amend § 3.32 by revising paragraphs (a) and (b) to read as follows:

**§ 3.32 Admissions.**

(a) At any time after 30 days after issuance of a complaint, or after publication of notice of an adjudicative hearing in a rulemaking proceeding under § 3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth.

(b) The matter is admitted unless, within 10 days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it.

\* \* \* \* \*

■ 9. Amend § 3.33 by revising paragraph (c)(2) to read as follows:

§ 3.33 Depositions.

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

■ 10. Amend § 3.35 by revising paragraph (b)(2) to read as follows:

§ 3.35 Interrogatories to parties.

\* \* \* \* \*

(b) \* \* \*

(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 prehearing conference.

\* \* \* \* \*

■ 11. Amend § 3.41 by revising paragraph (f) to read as follows:

§ 3.41 General hearing rules.

\* \* \* \* \*

(f) Collateral federal court actions. (1) The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding:

(i) Unless a court of competent jurisdiction, or the Commission for good cause, so directs; or

(ii) Except as provided in § 3.26.

(2) A stay shall toll any deadlines set by the rules.

■ 12. Amend § 3.42 by revising paragraph (c)(2) to read as follows:

§ 3.42 Presiding officials.

\* \* \* \* \*

(c) \* \* \*

(2) To issue subpoenas and orders requiring answers to questions;

\* \* \* \* \*

■ 13. Amend § 3.45 by revising the first two sentences of paragraph (e) and paragraph (f) to read as follows:

§ 3.45 In camera orders.

\* \* \* \* \*

(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 paragraph (b) of this section 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 every page and shall be filed with the Secretary and served by the party on the other parties in accordance with the Commission's rules. \* \* \*

(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 paragraph (b) of this section 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 every 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 every page, shall be served upon the parties, and shall be included in the public record of the proceeding.

\* \* \* \* \*

■ 14. Amend § 3.46 by revising paragraph (c)(4) to read as follows:

§ 3.46 Proposed findings, conclusions, and order.

\* \* \* \* \*

(c) \* \* \*

(4) A statement whether the witness testimony has been accorded in camera treatment, and a citation to the in camera ruling.

\* \* \* \* \*

■ 15. Amend § 3.52 by revising paragraph (a)(2) to read as follows:

§ 3.52 Appeal from initial decision.

(a) \* \* \*

(2) If no objections to the initial decision are filed, the Commission may in its discretion hold oral argument within 10 days after the deadline for the filing of objection, 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.

\* \* \* \* \*

PART 4—MISCELLANEOUS RULES

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

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

■ 17. Amend § 4.9 by revising paragraphs (a)(1), (2), (3), (4) introductory text, (4)(i) and (a)(10)(viii) to read as follows:

§ 4.9 The public record.

(a) General. (1) Materials on the public record of the Commission are available for public inspection and copying either from the Commission's Web site or upon request.

(2) Materials that are exempt from mandatory public disclosure, or are otherwise not available from the Commission's public record, may be made available only upon request under the procedures set forth in § 4.11, or as provided in §§ 4.10(d) through (g), 4.13, and 4.15(b)(3), or by the Commission.

(3) Electronic access to public records. The majority of recent Commission public records are available for review electronically on the Commission's Web site on the Internet, www.ftc.gov. Copies of records that the Commission is required to make available to the public electronically, pursuant to 5 U.S.C. 552(a)(2), may be obtained in that format from http://www.ftc.gov/foia/readingroom.shtm.

(4) Requesting public records—(i) Procedures. Certain older public records may not be available at the FTC Web site. Any person may request copies of such records by contacting the FTC Reading Room by telephone at (202) 326-2222, extension 2. These requests shall specify as clearly and accurately as reasonably possible the records desired. For records that cannot be specified with complete clarity and particularity, requesters shall provide descriptions sufficient to enable qualified Commission personnel to locate the records sought. The Commission, the Supervisor of the Consumer Response Center, the General Counsel, or the deciding official (as designated by the General Counsel) may decide to provide only one copy of any public record and may refuse to provide copies to the requester if the records have been published or are publicly available at places other than the Commission's offices.

\* \* \* \* \*

(10) \* \* \*

(viii) The Commission's annual report submitted after the end of each fiscal year, summarizing its work during the year (with copies obtainable from the Superintendent of Documents, U.S.

Government Publishing Office, Washington, DC 20402) and any other annual reports made to Congress on activities of the Commission as required by law;

\* \* \* \* \*

■ 18. Amend § 4.11 by revising paragraphs (a)(1)(i)(A) and (F) to read as follows:

**§ 4.11 Disclosure requests.**

(a) *Freedom of Information Act*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and transmitted by one of the following means: by mail to the following address: Freedom of Information Act Request, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580; by facsimile transmission to (202) 326-2477; by email message to the FOIA email account at [foia@ftc.gov](mailto:foia@ftc.gov); or by the form located on the FTC's FOIA Web site, <https://www.ftc.gov/ftc/foia.htm>.

\* \* \* \* \*

(F) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to § 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees within 20 calendar days and is not granted a fee waiver, the request will be denied.

\* \* \* \* \*

■ 19. Amend § 4.13 by revising paragraph (m) to read as follows:

**§ 4.13 Privacy Act rules.**

\* \* \* \* \*

(m) *Specific exemptions.* (1) Pursuant to 5 U.S.C. 552a(j)(2), investigatory materials maintained by an agency component in connection with any activity relating to criminal law enforcement in the following systems of records are exempt from all subsections of 5 U.S.C. 552a, except (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(j)(2):

(i) I-7—Office of Inspector General Investigative Files—FTC.

(ii) [Reserved]

(2) Pursuant to 5 U.S.C. 552a(k)(2), investigatory materials compiled for law enforcement purposes in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of 5 U.S.C. 552a, and

from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(2):

(i) I-1—Nonpublic Investigational and Other Nonpublic Legal Program Records—FTC.

(ii) I-2—Disciplinary Action Investigatory Files—FTC.

(iii) I-4—Clearance Application and Response Files—FTC.

(iv) I-5—Matter Management System—FTC.

(v) I-7—Office of Inspector General Investigative Files—FTC.

(vi) I-8—Stenographic Reporting Services Request System—FTC.

(vii) II-3—Worker's Compensation—FTC.

(viii) II-6—Discrimination Complaint System—FTC.

(ix) IV-1—Consumer Information System—FTC.

(x) V-1—Freedom of Information Act Requests and Appeals—FTC.

(xi) V-2—Privacy Act Requests and Appeals—FTC.

(xii) VII-6—Document Management and Retrieval System—FTC.

(3) Pursuant to 5 U.S.C. 552a(k)(5), investigatory materials compiled to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only where disclosure would reveal the identity of a confidential source of information, in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(5):

(i) II-4—Employment Application-Related Records—FTC.

(ii) II-11—Personnel Security, Identity Management and Access Control Records System—FTC.

By direction of the Commission.

**Janice Podoll Frankle,**

*Acting Secretary.*

[FR Doc. 2015-06406 Filed 3-20-15; 8:45 am]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 882**

[Docket No. FDA-2015-M-0619]

**Medical Devices; Neurological Devices; Classification of the Limited Output Transcutaneous Piezoelectric Stimulator for Skin Reactions Associated With Insect Bites**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA) is classifying the limited output transcutaneous piezoelectric stimulator for skin reactions associated with insect bites into class II (special controls). The special controls that will apply to the device are identified in this order and will be part of the codified language for the limited output transcutaneous piezoelectric stimulator for skin reactions associated with insect bites' classification. The Agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

**DATES:** This order is effective March 23, 2015. The classification was applicable on November 7, 2014.

**FOR FURTHER INFORMATION CONTACT:** Michael Hoffman, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1434, Silver Spring, MD 20993-0002, 301-796-6476, [michael.hoffman@fda.hhs.gov](mailto:michael.hoffman@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines