

## Consumer Product Safety Commission

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analyses of impact on particular age groups among consumers. In such cases, the EIS shall not duplicate the other documents, but rather shall cite and summarize from them. A list of background documents and sources of data cited in the EIS shall appear at the end of every EIS.

### PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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AUTHORITY: Consumer Product Safety Act (secs. 15, 20, 27 (15 U.S.C. 2064, 2069, 2076)), the Flammable Fabrics Act (sec. 5, 15 U.S.C. 1194), the Federal Trade Commission Act (15 U.S.C. 45)), unless otherwise noted.

SOURCE: 45 FR 29215, May 1, 1980, unless otherwise noted.

#### Subpart A—Scope of Rules, Nature of Adjudicative Proceedings, Definitions

##### § 1025.1 Scope of rules.

The rules in this part govern procedures in adjudicative proceedings relating to the provisions of section 15 (c), (d), and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064 (c),

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(d), (f); 2066(b)), section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), and sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)), except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. These Rules may also be used for such other adjudicative proceedings as the Commission, by order, shall designate. A basic intent of the Commission in the development of these rules has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. To accomplish this objective, broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved. A major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties. It is anticipated that in any adjudicative proceedings for the assessment of civil penalties there will be less need for discovery since most factual matters will already be known by the parties. Therefore, the Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those time limitations generally applicable under these Rules. For example, the 150-day limitation for discovery, as provided in § 1025.31(g), should be shortened, consistent with the extent of discovery reasonably necessary to prepare for the hearing.

[45 FR 29215, May 1, 1980, as amended at 47 FR 46846, Oct. 21, 1982]

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### § 1025.2 Nature of adjudicative proceedings.

Adjudicative proceedings shall be conducted in accordance with Title 5, United States Code, sections 551 through 559, and these Rules. It is the policy of the Commission that adjudicative proceedings shall be conducted expeditiously and with due regard to the rights and interests of all persons affected and in locations chosen with due regard to the convenience of all parties. Therefore, the Presiding Officer and all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.

### § 1025.3 Definitions.

As used in this part:

(a) *Application* means an *ex parte* request by a party for an order that may be granted or denied without opportunity for response by any other party.

(b) *Commission* means the Consumer Product Safety Commission or a quorum thereof.

(c) *Commissioner* means a Commissioner of the Consumer Product Safety Commission.

(d) *Complaint Counsel* means counsel for the Commission's staff.

(e) *Motion* means a request by a party for a ruling or order that may be granted or denied only after opportunity for responses by all other parties.

(f) *Party* means any named person or any intervenor in any proceedings governed by these Rules.

(g) *Person* means any individual, partnership, corporation, unincorporated association, public or private organization, or a federal, state or municipal governmental entity.

(h) *Petition* means a written request, addressed to the Commission or the Presiding Officer, for some affirmative action.

(i) *Presiding Officer* means a person who conducts any adjudicative proceedings under this part, and may include an administrative law judge qualified under Title 5, United States Code, section 3105, but shall not include a Commissioner.

(j) *Respondent* means any person against whom a complaint has been issued.

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(k) *Secretary* means the Secretary of the Consumer Product Safety Commission.

(l) *Staff* means the staff of the Consumer Product Safety Commission.

Additional definitions relating to prohibited communications are in § 1025.68.

### Subpart B—Pleadings, Form, Execution, Service of Documents

#### § 1025.11 Commencement of proceedings.

(a) *Notice of institution of enforcement proceedings.* Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission, and signed by the Associate Executive Director for Compliance and Enforcement.

(b) *Form and content of complaint.* The complaint shall contain the following:

(1) A statement of the legal authority for instituting the proceedings, including the specific sections of statutes, rules and regulations involved in each allegation.

(2) Identification of each respondent or class of respondents.

(3) A clear and concise statement of the charges, sufficient to inform each respondent with reasonable definiteness of the factual basis or bases of the allegations of violation or hazard. A list and summary of documentary evidence supporting the charges shall be attached.

(4) A request for the relief which the staff believes is in the public interest.

(c) *Notice to the public.* Once issued, the complaint shall be submitted without delay to the FEDERAL REGISTER for publication.

#### § 1025.12 Answer.

(a) *Time for filing.* A respondent shall have twenty (20) days after service of a complaint to file an answer.

(b) *Contents of answer.* The answer shall contain the following:

(1) A specific admission or denial of each allegation in the complaint. If a respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, the respondent shall so state. Such statement shall have the effect of a denial.

Allegations that are not denied shall be deemed to have been admitted.

(2) A concise statement of the factual or legal defenses to each allegation of the complaint.

(c) *Default.* Failure of a respondent to file an answer within the time provided, unless extended, shall constitute a waiver of the right to appear and contest the allegations in the complaint, and the Presiding Officer may make such findings of fact and conclusions of law as are just and reasonable under the circumstances.

#### § 1025.13 Amendments and supplemental pleadings.

The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay.

#### § 1025.14 Form and filing of documents.

(a) *Filing.* Except as otherwise provided in these Rules, all documents submitted to the Commission or the Presiding Officer shall be addressed to, and filed with, the Secretary. Documents may be filed in person or by mail and shall be deemed filed on the day of filing or mailing.

(b) *Caption.* Every document shall contain a caption setting forth the name of the action, the docket number, and the title of the document.

(c) *Copies.* An original and three (3) copies of all documents shall be filed. Each copy must be clear and legible.

(d) *Signature.* (1) The original of each document filed shall be signed by a representative of record for the party or participant; or in the case of parties or participants not represented, by the party or participant; or by a partner, officer or other appropriate official of any corporation, partnership, or unincorporated association, who files an appearance on behalf of the party or participant.

(2) By signing a document, the signer represents that the signer has read it and that to the best of the signer's knowledge, information and belief, the statements made in it are true and that it is not filed for purposes of delay.

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(e) *Form.* (1) All documents shall be dated and shall contain the address and telephone number of the signer.

(2) Documents shall be on paper approximately  $8\frac{1}{2} \times 11$  inches in size. Print shall not be less than standard elite or 12 point type. Pages shall be fastened in the upper left corner or along the left margin.

(3) Documents that fail to comply with this section may be returned by the Secretary.

## § 1025.15 Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared as a holiday by the President or the Congress of the United States.

(b) *Additional time after service by mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the document is served by mail, three (3) days shall be added to the prescribed period.

(c) *Extensions.* For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by these rules or by order of the Commission or the Presiding Officer, except for those sections governing the filing of interlocutory appeals and appeals from Initial Decisions and those sections expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by these rules or by order of the Commission or the Presiding Officer.

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## § 1025.16 Service.

(a) *Mandatory service.* Every document filed with the Secretary shall be served upon all parties to any proceedings, i.e., Complaint Counsel, respondent(s), and party intervenors, as well as the Presiding Officer. Every document filed with the Secretary shall also be served upon each participant, if the Presiding Officer or the Commission so directs.

(b) *Service of complaint, ruling, petition for interlocutory appeal, order, decision, or subpoena.* A complaint, ruling, petition for interlocutory appeal, order, decision, or subpoena shall be served in one of the following ways:

(1) *By registered or certified mail.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his/her/its residence or principal office or place of business and sent by registered or certified mail; or

(2) *By delivery to an individual.* A copy of the document may be delivered to the person to be served; or to a member of the partnership to be served; or to the president, secretary, or other executive officer, or a director of the corporation or unincorporated association to be served; or to an agent authorized by appointment or by law to receive service; or

(3) *By delivery to an address.* If the document cannot be served in person or by mail as provided in paragraph (b)(1) or (b)(2) of this section, a copy of the document may be left at the principal office or place of business of the person, partnership, corporation, unincorporated association, or authorized agent with an officer or a managing or general agent; or it may be left with a person of suitable age and discretion residing therein, at the residence of the person or of a member of the partnership or of an executive officer, director, or agent of the corporation or unincorporated association to be served; or

(4) *By publication in the FEDERAL REGISTER.* A respondent that cannot be served by any of the methods already described in this section may be served by publication in the FEDERAL REGISTER and such other notice as may be directed by the Presiding Officer or the Commission, where a complaint has

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issued in a class action pursuant to § 1025.18.

(c) *Service of other documents.* Except as otherwise provided in paragraph (b) of this section, when service of a document starts the running of a prescribed period of time for the submission of a responsive document or the occurrence of an event, the document may be served as provided in paragraph (b) of this section or by ordinary first-class mail, properly addressed, postage prepaid.

(d) *Service on a representative.* When a party has appeared by an attorney or other representative, service upon that attorney or other representative shall constitute service upon the party.

(e) *Certificate of service.* The original of every document filed with the Commission and required to be served upon all parties to any proceedings, as well as participants if so directed by the Presiding Officer, shall be accompanied by a certificate of service signed by the party making service, stating that such service has been made upon each party and participant to the proceedings. Certificates of service may be in substantially the following form:

I hereby certify that I have served the attached document upon all parties and participants of record in these proceedings by mailing, postage prepaid, (or by delivering in person) a copy to each on

(Signature)

For

(f) *Date of service.* The date of service of a document shall be the date on which the document is deposited with the United States Postal Service, postage prepaid, or is delivered in person.

### § 1025.17 Intervention.

(a) *Participation as an intervenor.* Any person who desires to participate as a party in any proceedings subject to these rules shall file a written petition for leave to intervene with the Secretary and shall serve a copy of the petition on each party.

(1) A petition shall ordinarily be filed not later than the convening of the first prehearing conference. A petition filed after that time will not be granted unless the Presiding Officer determines that the petitioner has made a

substantial showing of good cause for failure to file on time.

(2) A petition shall:

(i) Identify the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene,

(ii) Set forth the interest of the petitioner in the proceedings,

(iii) State how the petitioner's interest may be affected by the results of the proceedings, and

(iv) State any other reasons why the petitioner should be permitted to intervene as a party, with particular reference to the factors set forth in paragraph (d) of this section. Any petition relating only to matters outside the jurisdiction of the Commission shall be denied.

(3) Any person whose petition for leave to intervene is granted by the Presiding Officer shall be known as an "intervenor" and as such shall have the full range of litigating rights afforded to any other party.

(b) *Participation by a person not an intervenor.* Any person who desires to participate in the proceedings as a non-party shall file with the Secretary a request to participate in the proceedings and shall serve a copy of such request on each party to the proceedings.

(1) A request shall ordinarily be filed not later than the commencement of the hearing. A petition filed after that time will not be granted unless the Presiding Officer determines that the person making the request has made a substantial showing of good cause for failure to file on time.

(2) A request shall set forth the nature and extent of the person's alleged interest in the proceedings. Any request relating only to matters outside the jurisdiction of the Commission shall be denied.

(3) Any person who files a request to participate in the proceedings as a non-party and whose request is granted by the Presiding Officer shall be known as a "Participant" and shall have the right to participate in the proceedings to the extent of making a written or oral statement of position, filing proposed findings of fact, conclusions of law and a post hearing brief with the Presiding Officer, and filing an appellate brief before the Commission if an appeal is taken by a party or review is

ordered by the Commission in accordance with § 1025.53 or § 1025.54, as applicable, of these rules.

(c) *Response to petition to intervene.* Any party may file a response to a petition for leave to intervene after the petition is filed with the Secretary, with particular reference to the factors set forth in paragraph (d) of this section.

(d) *Ruling by Presiding Officer on petition.* In ruling on a petition for leave to intervene, the Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

(1) The nature of the petitioner's interest, under the applicable statute governing the proceedings, to be made a party to the proceedings;

(2) The nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products;

(3) The nature and extent of the petitioner's property, financial or other substantial interest in the proceedings;

(4) Whether the petitioner would be aggrieved by any final order which may be entered in the proceedings;

(5) The extent to which the petitioner's intervention may reasonably be expected to assist in developing a sound record;

(6) The extent to which the petitioner's interest will be represented by existing parties;

(7) The extent to which the petitioner's intervention may broaden the issues or delay the proceedings; and

(8) The extent to which the petitioner's interest can be protected by other available means.

If the Presiding Officer determines that a petitioner has failed to make a sufficient showing to be allowed to intervene as a party, the Presiding Officer shall view such petition to intervene as if it had been timely filed as a request to participate in the proceedings as a participant pursuant to paragraph (b) of this section.

(e) *Ruling by Presiding Officer on request.* In ruling on a request to participate as a participant, the Presiding Officer, in the exercise of his/her discretion, shall be mindful of the Commission's mandate under its enabling legislation (see 15 U.S.C. 2051 *et seq.*) and

its affirmative desire to afford interested persons, including consumers and consumer organizations, as well as governmental entities, an opportunity to participate in the agency's regulatory processes, including adjudicative proceedings. The Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

(1) The nature and extent of the person's alleged interest in the proceedings;

(2) The possible effect of any final order which may be entered in the proceedings on the person's interest; and

(3) The extent to which the person's participation can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution of all matters in controversy in the proceedings.

The Presiding Officer may deny a request to participate if he/she determines that the person's participation cannot reasonably be expected to assist the Presiding Officer or the Commission in rendering a fair and equitable resolution of matters in controversy in the proceedings or if he/she determines that the person's participation would unduly broaden the issues in controversy or unduly delay the proceedings.

(f) *Designation of single representative.* If the Presiding Officer determines that a petitioner pursuant to paragraph (a) of this section or a person requesting to participate pursuant to paragraph (b) of this section is a member of a class of prospective intervenors or participants, as applicable, who share an identity of interest, the Presiding Officer may limit such intervention or participation, as applicable, through designation of a single representative by the prospective intervenors or participants, as applicable, or, if they are unable to agree, by designation of the Presiding Officer.

#### § 1025.18 Class actions.

(a) *Prerequisites to a class action.* One or more members of a class of respondents may be proceeded against as representative parties on behalf of all respondents if:

(1) The class is so numerous or geographically dispersed that joinder of all members is impracticable;

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(2) There are questions of fact or issues of law common to the class;

(3) The defenses of the representative parties are typical of the defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class.

(b) *Composition of class.* A class may be composed of:

(1) Manufacturers, distributors, or retailers, or a combination of them, of products which allegedly have the same defect, or

(2) Manufacturers, distributors, or retailers, or a combination of them, of products which allegedly fail to conform to an applicable standard, regulation, or consumer product safety rule, or

(3) Manufacturers, distributors, or retailers, or a combination of them, who have themselves allegedly failed to conform to an applicable standard, regulation, or consumer product safety rule.

When appropriate, a class may be divided into subclasses and each subclass shall be treated as a class.

(c) *Notice of commencement.* A complaint issued under this section shall identify the class, the named respondents considered to be representative of the class, and the alleged defect or non-conformity common to the products manufactured, imported, distributed or sold by the members of the class. The complaint shall be served upon the parties in accordance with §1025.16.

(d) *Proper class action determination.* Upon motion of Complaint Counsel and as soon as practicable after the commencement of any proceedings brought as a class action, the Presiding Officer shall determine by order whether the action is a proper class action. It is a proper class action if the prerequisites of paragraph (a) of this section are met and if the Presiding Officer finds that:

(1) The prosecution of separate actions against individual members of the respondent class might result in (i) inconsistent or varying determinations with respect to individual members of the class which might produce incompatible or conflicting results, or (ii) determinations with respect to individual members of the class which would, as a practical matter, be dispositive of the

interests of the other members who are not parties to the proceedings or would substantially impair or impede the ability of the absent members to protect their interests; or

(2) The Commission has acted on grounds generally applicable to the class, thereby making appropriate an order directed to the class as a whole.

In reaching a decision, the Presiding Officer shall consider the interests of members of the class in individually controlling the defense of separate actions, the extent and nature of any proceedings concerning the controversy already commenced against members of the class, the desirability or undesirability of concentrating the litigation in one adjudication, and the difficulties likely to be encountered in the management of a class action, as well as the benefits expected to result from the maintenance of a class action.

(e) *Revision of class membership.* Upon motion of any party or any member of the class, or upon the Presiding Officer's own initiative, the Presiding Officer may revise the membership of the class.

(f) *Orders in conduct of class actions.* In proceedings to which this section applies, the Presiding Officer may make appropriate orders:

(1) Determining the course of the proceedings or prescribing measures to prevent undue repetition and promote the efficient presentation of evidence or argument;

(2) Requiring (for the protection of the members of the class, or otherwise for the fair conduct of the action) that notice be given, in such manner as the Presiding Officer may direct, of any step in the action, of the extent of the proposed order, or of the opportunity for members to inform the Presiding Officer whether they consider the representation to be fair and adequate, or of the opportunity for class members to intervene and present defenses;

(3) Requiring that the pleadings be amended to eliminate allegations concerning the representation of absent persons; or

(4) Dealing with other procedural matters.

The orders may be combined with a prehearing order under §1025.21 of these

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rules and may be altered or amended as may be necessary.

(g) *Scope of final order.* In any proceedings maintained as a class action, any Decision and Order of the Presiding Officer or the Commission under § 1025.51 or § 1025.55, as applicable, whether or not favorable to the class, shall include and describe those respondents whom the Presiding Officer or the Commission finds to be members of the class.

(h) *Notice of results.* Upon the termination of any adjudication that has been maintained as a class action, the best notice practicable of the results of the adjudication shall be given to all members of the class in such manner as the Presiding Officer or the Commission directs.

### § 1025.19 Joinder of proceedings.

Two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purpose of hearing or Commission review. A motion for consolidation may be filed by any party to such proceedings not later than thirty (30) days prior to the hearing and served upon all parties to all proceedings in which joinder is contemplated. The motion may include a request that the consolidated proceedings be maintained as a class action in accordance with § 1025.18 of these rules. The proceedings may be consolidated to such extent and upon such terms as may be proper. Such consolidation may also be ordered upon the initiative of the Presiding Officer or the Commission. Single representatives may be designated by represented parties, intervenors, and participants with an identity of interests.

## Subpart C—Prehearing Procedures, Motions, Interlocutory Appeals, Summary Judgments, Settlements

### § 1025.21 Prehearing conferences.

(a) *When held.* Except when the presiding officer determines that unusual circumstances would render it impractical or valueless, a prehearing conference shall be held in person or by conference telephone call within fifty

(50) days after publication of the complaint in the FEDERAL REGISTER and upon ten (10) days' notice to all parties and participants. At the prehearing conference any or all of the following shall be considered:

- (1) Petitions for leave to intervene;
- (2) Motions, including motions for consolidation of proceedings and for certification of class actions;
- (3) Identification, simplification and clarification of the issues;
- (4) Necessity or desirability of amending the pleadings;
- (5) Stipulations and admissions of fact and of the content and authenticity of documents;
- (6) Oppositions to notices of depositions;
- (7) Motions for protective orders to limit or modify discovery;
- (8) Issuance of subpoenas to compel the appearance of witnesses and the production of documents;
- (9) Limitation of the number of witnesses, particularly to avoid duplicate expert witnesses;
- (10) Matters of which official notice should be taken and matters which may be resolved by reliance upon the laws administered by the Commission or upon the Commission's substantive standards, regulations, and consumer product safety rules;
- (11) Disclosure of the names of witnesses and of documents or other physical exhibits which are intended to be introduced into evidence;
- (12) Consideration of offers of settlement;
- (13) Establishment of a schedule for the exchange of final witness lists, prepared testimony and documents, and for the date, time and place of the hearing, with due regard to the convenience of the parties; and
- (14) Such other matters as may aid in the efficient presentation or disposition of the proceedings.

(b) *Public notice.* The Presiding Officer shall cause a notice of the first prehearing conference, including a statement of the issues, to be published in the FEDERAL REGISTER at least ten (10) days prior to the date scheduled for the conference.

(c) *Additional conferences.* Additional prehearing conferences may be convened at the discretion of the Presiding



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Officer, upon notice to the parties, any participants, and to the public.

(d) *Reporting.* Prehearing conferences shall be stenographically reported as provided in §1025.47 of these rules and shall be open to the public, unless otherwise ordered by the Presiding Officer or the Commission.

(e) *Prehearing orders.* The Presiding Officer shall issue a final prehearing order in each case after the conclusion of the final prehearing conference. The final prehearing order should contain, to the fullest extent possible at that time, all information which is necessary for controlling the course of the hearing. The Presiding Officer may require the parties to submit a jointly proposed final prehearing order, such as in the format set forth in appendix I.

### § 1025.22 Prehearing briefs.

Not later than ten (10) days prior to the hearing, unless otherwise ordered by the Presiding Officer, the parties may simultaneously serve and file prehearing briefs which should set forth:

(a) A statement of the facts expected to be proved and of the anticipated order of proof;

(b) A statement of the issues and the legal arguments in support of the party's contentions with respect to each issue; and

(c) A table of authorities relied upon.

### § 1025.23 Motions.

(a) *Presentation and disposition.* During the time a matter in adjudication is before the Presiding Officer, all motions, whether oral or written, except those filed under §1025.42(e), shall be addressed to the Presiding Officer, who shall rule upon them promptly, after affording an opportunity for response.

(b) *Written motions.* All written motions shall state with particularity the order, ruling, or action desired and the reasons why the action should be granted. Memoranda, affidavits, or other documents supporting a motion shall be served and filed with the motion. All motions shall contain a proposed order setting forth the relief sought. All written motions shall be filed with the Secretary and served upon all parties, and all motions ad-

dressed to the Commission shall be in writing.

(c) *Opposition to motions.* Within ten (10) days after service of any written motion or petition or within such longer or shorter time as may be designated by these Rules or by the Presiding Officer or the Commission, any party who opposes the granting of the requested order, ruling or action may file a written response to the motion. Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion. Unless otherwise permitted by the Presiding Officer or the Commission, there shall be no reply to the response expressing opposition to the motion.

(d) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or a motion for other relief is granted, with the result that the proceedings before the Presiding Officer are terminated, the Presiding Officer shall issue an Initial Decision and Order in accordance with the provisions of §1025.51. If such a motion is granted as to all issues alleged in the complaint in regard to some, but not all, respondents or is granted as to any part of the allegations in regard to any or all respondents, the Presiding Officer shall enter an order on the record and consider the remaining issues in the Initial Decision. The Presiding Officer may elect to defer ruling on a motion to dismiss until the close of the case.

### § 1025.24 Interlocutory appeals.

(a) *General.* Rulings of the Presiding Officer may not be appealed to the Commission prior to the Initial Decision, except as provided in this section.

(b) *Exceptions.* (1) Interlocutory appeals to Commission. The Commission may, in its discretion, consider interlocutory appeals where a ruling of the Presiding Officer:

(i) Requires the production of records claimed to be confidential;

(ii) Requires the testimony of a supervisory official of the Commission other than one especially knowledgeable of the facts of the matter in adjudication;

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(iii) Excludes an attorney from participation in any proceedings pursuant to § 1025.42(b);

(iv) Denies or unduly limits a petition for intervention pursuant to the provisions of § 1025.17.

(2) Procedure for interlocutory appeals. Within ten (10) days of issuance of a ruling other than one ordering the production of records claimed to be confidential, any party may petition the Commission to consider an interlocutory appeal of a ruling in the categories enumerated above. The petition shall not exceed fifteen (15) pages. Any other party may file a response to the petition within ten (10) days of its service except where the order appealed from requires the production of records claimed to be confidential. The response shall not exceed fifteen (15) pages. The Commission shall decide the petition or may request such further briefing or oral presentation as it deems necessary.

(3) If the Presiding Officer orders the production of records claimed to be confidential a petition for interlocutory appeal shall be filed within five (5) days of the entry of the order. Any opposition to the petition shall be filed within five (5) days of service of the petition. The order of the Presiding Officer shall be automatically stayed until five (5) days following the date of entry of the order to allow an affected party the opportunity to file a petition with the Commission for an interlocutory appeal pursuant to § 1025.24(b)(2). If an affected party files a petition with the Commission pursuant to § 1025.24(b)(2) within the 5-day period, the stay of the Presiding Officer's order is automatically extended until the Commission decides the petition.

(4) *Interlocutory appeals from all other rulings*—(i) *Grounds*. Interlocutory appeals from all other rulings by the Presiding Officer may proceed only upon motion to the Presiding Officer and a determination by the Presiding Officer in writing that the ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or that subsequent review will be an inadequate

remedy. The Presiding Officer's certification shall state the reasons for the determination.

(ii) *Form*. If the Presiding Officer makes the determination described in paragraph (b)(4)(i) of this section, a petition for interlocutory appeal under this subparagraph may be filed in accordance with paragraph (b)(2) of this section.

(c) *Proceedings not stayed*. Except as otherwise provided under this section, a petition for interlocutory appeal shall not stay the proceedings before the Presiding Officer unless the Presiding Officer or the Commission so orders.

### § 1025.25 Summary decisions and orders.

(a) *Motion*. Any party may file a motion, with a supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. Complaint Counsel may file such a motion at any time after thirty (30) days following issuance of a complaint, and any other party may file a motion at any time after issuance of a complaint. Any such motion by any party shall be filed at least twenty (20) days before the date fixed for the adjudicative hearing.

(b) *Response to motion*. Any other party may, within twenty (20) days after service of the motion, file a response with a supporting memorandum.

(c) *Grounds*. A Summary Decision and Order shall be granted if the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.

(d) *Legal effect*. A Summary Decision and Order upon all the issues being adjudicated shall constitute the Initial Decision of the Presiding Officer and may be appealed to the Commission in accordance with § 1025.53 of these rules. A Summary Decision, interlocutory in character, may be rendered on fewer than all issues and may not be appealed prior to issuance of the Initial Decision.

(e) *Case not fully adjudicated on motion*. A Summary Decision and order

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that does not dispose of all issues shall include a statement of those material facts about which there is no substantial controversy and of those material facts that are actually and in good faith controverted. The Summary Order shall direct such further proceedings as are appropriate.

### § 1025.26 Settlements.

(a) *Availability.* Any party shall have the opportunity to submit an offer of settlement to the Presiding Officer.

(b) *Form.* Offers of settlement shall be filed *in camera* and the form of a consent agreement and order, shall be signed by the respondent or respondent's representative, and may be signed by any other party. Each offer of settlement shall be accompanied by a motion to transmit the proposed agreement and order to the Commission. The motion shall outline the substantive provisions of the agreement and state reasons why it should be accepted by the Commission.

(c) *Contents.* The proposed consent agreement and order which constitute the offer of settlement shall contain the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of the Commission order;

(3) Provisions that the allegations of the complaint are resolved by the consent agreement and order;

(4) A description of the alleged hazard, noncompliance, or violation;

(5) If appropriate, a listing of the acts or practices from which the respondent shall refrain; and

(6) If appropriate, a detailed statement of the corrective action(s) which the respondent shall undertake. In proceedings arising under Section 15 of the Consumer Product Safety Act, 15 U.S.C. 2064, this statement shall contain all the elements of a "Corrective Action Plan," as outlined in the Commission's Interpretation, Policy, and Procedure for Substantial Product Hazards, 16 CFR part 1115.

(d) *Transmittal.* The Presiding Officer may transmit to the Commission for decision all offers of settlement and accompanying memoranda that meet the

requirements enumerated in paragraph (c) of this section. The Presiding Officer shall consider whether an offer of settlement is clearly frivolous, duplicative of offers previously made and rejected by the Commission or contrary to establish Commission policy. The Presiding Officer may, but need not, recommend acceptance of offers. Any party may object to the transmittal to the Commission of a proposed consent agreement by filing a response opposing the motion.

(e) *Stay of proceedings.* When an offer of settlement has been agreed to by all parties and has been transmitted to the Commission, the proceedings shall be stayed until the Commission has ruled on the offer. When an offer of settlement has been made and transmitted to the Commission but has not been agreed to by all parties, the proceedings shall not be stayed pending Commission decision on the offer, unless otherwise ordered by the Presiding Officer or the Commission.

(f) *Commission ruling.* The Commission shall rule upon all transmitted offers of settlement. If the Commission accepts the offer, the Commission shall issue an appropriate order, which shall become effective upon issuance.

(g) *Commission rejection.* If the Commission rejects an offer of settlement, the Secretary, in writing, shall give notice of the Commission's decision to the parties and the Presiding Officer. If the proceedings have been stayed, the Presiding Officer shall promptly issue an order notifying the parties of the resumption of the proceedings, including any modifications to the schedule resulting from the stay of the proceedings.

(h) *Effect of rejected offer.* Neither rejected offers of settlement, nor the fact of the proposal of offers of settlement are admissible in evidence.

## Subpart D—Discovery, Compulsory Process

### § 1025.31 General provisions governing discovery.

(a) *Applicability.* The discovery rules established in this subpart are applicable to the discovery of information among the parties in any proceedings.

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Parties seeking information from persons not parties may do so by subpoena in accordance with §1025.38 of these rules.

(b) *Discovery methods.* Parties may obtain discovery by one or more of the following methods:

- (1) Written interrogatories;
- (2) Requests for production of documents or things;
- (3) Requests for admission; or
- (4) Depositions upon oral examination.

Unless the Presiding Officer otherwise orders under paragraph (d) of this section, the frequency of use of these methods is not limited.

(c) *Scope of discovery.* The scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is within the Commission's statutory authority and is relevant to the subject matter involved in the proceedings, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Privilege.* Discovery may be denied or limited, or a protective order may be entered, 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.

(3) *Hearing preparation: materials.* Subject to the provisions of paragraph (c)(4) of this section, 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 his attorney

or consultant) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without unique 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 Presiding Officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(4) *Hearing preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(i)(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify, and to provide a summary of the grounds for each opinion.

(B) Upon motion, the Presiding Officer may order further discovery by other means upon a showing of substantial cause and may exercise discretion to impose such conditions, if any, as are appropriate in the case.

(ii) A party may 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 trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Presiding Officer may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 for the time spent in responding to discovery.

(d) *Protective orders.* Upon motion by a party and for good cause shown, the Presiding Officer may make any order

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which justice requires to protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery shall not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery shall be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) That certain matters shall not be inquired into or that the scope of discovery shall be limited to certain matters;
- (5) That discovery shall be conducted with no one present except persons designated by the Presiding Officer;
- (6) That a trade secret or other confidential research, development, or commercial information shall not be disclosed or shall be disclosed only in a designated way or only to designated parties; and
- (7) That responses to discovery shall be placed *in camera* in accordance with § 1025.45 of these rules.

If a motion for a protective order is denied in whole or in part, the Presiding Officer may, on such terms or conditions as are appropriate, order that any party provide or permit discovery.

(e) *Sequence and timing of discovery.* Discovery may commence at any time after filing of the answer. Unless otherwise provided in these Rules or by order of the Presiding Officer, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement that response to include information later obtained.

(g) *Completion of discovery.* All discovery shall be completed as soon as practical but in no case longer than one hundred fifty (150) days after issuance of a complaint, unless otherwise ordered by the Presiding Officer in

exceptional circumstances and for good cause shown. All discovery shall be commenced by a date which affords the party from whom discovery is sought the full response period provided by these Rules.

(h) *Service and filing of discovery.* All discovery requests and written responses, and all notices of deposition, shall be filed with the Secretary and served on all parties and the Presiding Officer.

(i) *Control of discovery.* The use of these discovery procedures is subject to the control of the Presiding Officer, who may issue any just and appropriate order for the purpose of ensuring their timely completion.

### § 1025.32 Written interrogatories to parties.

(a) *Availability; procedures for use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or unincorporated association or governmental entity, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of the Presiding Officer, be served upon any party after the filing of an answer.

(b) *Procedures for response.* Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. Each answer shall be submitted in double-spaced typewritten form and shall be immediately preceded by the interrogatory, in single-spaced typewritten form, to which the answer is responsive. The answers are to be signed by the person making them, and the objections signed by the person or representative 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 service of the interrogatories. The Presiding Officer may allow a shorter or longer time for response. The party submitting the interrogatories may move for an order under § 1025.36 of

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these rules with respect to any objection to, or other failure to answer fully, an interrogatory.

(c) *Scope of interrogatories.* Interrogatories may relate to any matters which can be inquired into under §1025.31(c), and the answers may be used to any extent permitted under these rules. An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory would involve an opinion or contention which relates to fact or to the application of law to fact, but the Presiding Officer may order that such an interrogatory need not be answered until a later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary of those records, and the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the 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.

#### § 1025.33 Production of documents and things.

(a) *Scope.* Any party may serve upon any other party a request:

(1) To produce and permit the party making the request, or someone acting on behalf of that party, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and any other data compilation from which information can be obtained, translated, if necessary, by the party in possession through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of §1025.31(c) and which are in the posses-

sion, custody, or control of the party upon whom the request is served, or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection (including photographing), or sampling any designated object or operation within the scope of §1025.31(c).

(b) *Procedure for request.* The request may be served at any time after the filing of an answer without leave of the Presiding Officer. The request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item or category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts.

(c) *Procedure for response.* The party upon whom the request is served shall respond in writing within thirty (30) days after service of the request. The Presiding Officer may allow a shorter or longer time for response. The response shall state, with respect to each item or category requested, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to only part of an item or category, that part shall be specified. The party submitting the request may move for an order under §1025.36 with respect to any objection to or other failure to respond to the request or any part thereof, or to any failure to permit inspection as requested.

(d) *Persons not parties.* This section does not preclude an independent action against a person not a party for production of documents and things.

#### § 1025.34 Requests for admission.

(a) *Procedure for request.* A party may serve upon any other party a written request for the admission, for the purposes of the pending proceedings only, of the truth of any matters within the scope of §1025.31(c) set forth in the request that relate to statements 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 made available for inspection and copying. The request may, without leave of the Presiding Officer, be served upon any party after filing of the answer. Each matter about which an admission is requested shall be separately set forth.

(b) *Procedure for response.* The matter about which an admission is requested will be deemed admitted unless within thirty (30) days after service of the request, or within such shorter or longer time as the Presiding Officer may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's representative and stating the reasons for the objections. The answer shall specifically admit or 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. When good faith requires that a party qualify an answer or deny only a part of the matter to which an admission is requested, the party shall specify the portion that 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 a fact unless the party states that he/she has made reasonable inquiry and that the information known or readily available to him/her is insufficient to enable him/her to admit or deny a fact. A party who considers that a matter to which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request but may deny the matter or set forth reasons why the party cannot admit or deny it. The party who has requested an admission may move to determine the sufficiency of any answer or objection in accordance with § 1025.36 of these Rules. If the Presiding Officer determines that an answer does not comply with the requirements of this section, he/she may order that the matter be deemed admitted or that an amended answer be served.

(c) *Effect of admission.* Any matter admitted under this section is conclu-

sively established unless the Presiding Officer on motion permits withdrawal or amendment of such admission. The Presiding Officer may permit withdrawal or amendment when the presentation of the merits of the action will be served thereby and the party who obtained the admission fails to satisfy the Presiding Officer that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. Any admission made by a party under this section is for the purposes of the pending adjudication only and is not an admission by that party for any other purposes, nor may it be used against that party in any other proceedings.

#### § 1025.35 Depositions upon oral examination.

(a) *When depositions may be taken.* At any time after the first prehearing conference, upon leave of the Presiding Officer and under such terms and conditions as the Presiding Officer may prescribe, any party may take the deposition of any other party, including the agents, employees, consultants, or prospective witnesses of that party at a place convenient to the deponent. The attendance of witnesses and the production of documents and things at the deposition may be compelled by subpoena as provided in § 1025.38 of these rules.

(b) *Notice of deposition—(1) Deposition of a party.* A party desiring to take a deposition of another party to the proceedings shall, after obtaining leave from the Presiding Officer, serve written notice of the deposition on all other parties and the Presiding Officer at least ten (10) days before the date noticed for the deposition. The notice shall state:

(i) The time and place for the taking of the deposition;

(ii) The name and address of each person to be deposed, if known, or if the name is not known, a general description sufficient to identify him/her; and

(iii) The subject matter of the expected testimony. If a subpoena *duces tecum* is to be served on the person to be deposed, the designation of the materials to be produced, as set forth in

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the subpoena, shall be attached to or included in the notice of deposition.

(2) *Deposition of a non-party.* A party desiring to take a deposition of a person who is not a party to the proceedings shall make application for the issuance of a subpoena, in accordance with §1025.38 of these rules, to compel the attendance, testimony, and/or production of documents by such non-party. The party desiring such deposition shall serve written notice of the deposition on all other parties to the proceedings, after issuance of the subpoena. The date specified in the subpoena for the deposition shall be at least twenty (20) days after the date on which the application for the subpoena is made to the Presiding Officer.

(3) *Opposition to notice.* A person served with a notice of deposition may oppose, in writing, the taking of the deposition within five (5) days of service of the notice. The Presiding Officer shall rule on the notice and any opposition and may order the taking of all noticed depositions upon a showing of good cause. The Presiding Officer may, for good cause shown, enlarge or shorten the time for the taking of a deposition.

(c) *Persons before whom depositions may be taken.* Depositions may be taken before any person who is authorized to administer oaths by the laws of the United States or of the place where the examination is held. No deposition shall be taken before a person who is a relative, employee, attorney, or representative of any party, or who is a relative or employee of such attorney or representative, or who is financially interested in the action.

(d) *Taking of deposition—(1) Examination.* Each deponent shall testify under oath, and all testimony shall be recorded. All parties or their representatives may be present and participate in the examination. Evidence objected to shall be taken subject to any objection. Objections shall include the grounds relied upon. The questions and answers, together with all objections made, shall be recorded by the official reporter before whom the deposition is taken. The original or a verified copy of all documents and things produced for inspection during the examination of the deponent shall, upon a request of

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any party present, be marked for identification and made a part of the record of the deposition.

(2) *Motion to terminate or limit examination.* At any time during the deposition, upon motion of any party or of the deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the Presiding Officer may order the party conducting the examination to stop the deposition or may limit the scope and manner of taking the deposition as provided in §1025.31(d) of these rules.

(3) *Participation by parties not present.* In lieu of attending a deposition, any party may serve written questions in a sealed envelope on the party conducting the deposition. That party shall transmit the envelope to the official reporter, who shall unseal it and read the questions to the deponent.

(e) *Transcription and filing of depositions—(1) Transcription.* Upon request by any party, the testimony recorded at a deposition shall be transcribed. When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature and shall be read to or by the deponent, unless such examination and signature are waived by the deponent. Any change in form or substance which the deponent desires to make shall be entered upon the deposition by the official reporter with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the deponent waives signature or is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within thirty (30) days of its submission to him/her, the official reporter shall sign the deposition and state on the record the fact of the waiver of signature or of the illness or absence of the deponent or of the refusal to sign, together with a statement of the reasons therefor. The deposition may then be used as fully as though signed, in accordance with paragraph (i) of this section.

(2) *Certification and filing.* The official reporter shall certify on the deposition that it was taken under oath and that the deposition is a true record of the



testimony given and corrections made by the deponent. The official reporter shall then seal the deposition in an envelope endorsed with the title and docket number of the action and marked "Deposition of [name of deponent]" and shall promptly file the deposition with the Secretary. The Secretary shall notify all parties of the filing of the deposition and shall furnish a copy of the deposition to any party or to the deponent upon payment of reasonable charges.

(f) *Costs of deposition.* The party who notices the deposition shall pay for the deposition. The party who requests transcription of the deposition shall pay for the transcription.

(g) *Failure to attend or to serve subpoena; expenses.* If a party who notices a deposition fails to attend or conduct the deposition, and another party attends in person or by a representative pursuant to the notice, the Presiding Officer may order the party who gave the notice to pay to the attending party the reasonable expenses incurred. If a party who notices a deposition fails to serve a subpoena upon the deponent and as a result the deponent does not attend, and if another party attends in person or by a representative because that party expects the deposition to be taken, the Presiding Officer may order the party who gave notice to pay to the attending party the reasonable expenses incurred.

(h) *Deposition to preserve testimony—*  
(1) *When available.* By leave of the Presiding Officer, a party may take the deposition of his/her own witness for the purpose of perpetuating the testimony of that witness. A party who wishes to conduct such a deposition shall obtain prior leave of the Presiding Officer by filing a motion. The motion shall include a showing of substantial reason to believe that the testimony could not be presented at the hearing. If the Presiding Officer is satisfied that the perpetuation of the testimony may prevent a failure of justice or is otherwise reasonably necessary, he/she shall order that the deposition be taken.

(2) *Procedure.* Notice of a deposition to preserve testimony shall be served at least fifteen (15) days prior to the deposition unless the Presiding Officer

authorizes less notice when warranted by extraordinary circumstances. The deposition shall be taken in accordance with the provisions of paragraph (d) of this section. Any deposition taken to preserve testimony shall be transcribed and filed in accordance with paragraph (e) of this section.

(i) *Use of depositions.* At the hearing or upon a petition for interlocutory appeal, any part or all of a deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition, in accordance with any of the following:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of anyone who at the time of the taking of the deposition was an officer, director, managing agent, or person otherwise designated to testify on behalf of a public or private corporation, partnership or unincorporated association or governmental entity which is a party to the proceedings, may be used by any adverse party for any purpose.

(3) The deposition of a witness may be used by any party for any purpose if the Presiding Officer finds:

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally during the hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may move to introduce any other part of the deposition.

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### § 1025.36 Motions to compel discovery.

If a party fails to respond to discovery, in whole or in part, the party seeking discovery may move within twenty (20) days for an order compelling an answer, or compelling inspection or production of documents, or otherwise compelling discovery. For purposes of this section, an evasive or incomplete response is to be treated as a failure to respond. When taking depositions, the discovering party shall continue the examination to the extent possible with respect to other areas of inquiry before moving to compel discovery.

### § 1025.37 Sanctions for failure to comply with discovery orders.

If a party fails to obey an order to provide or permit discovery, the Presiding Officer may take such action as is just, including but not limited to the following:

(a) Infer that the admission, testimony, document or other evidence would have been adverse to the party;

(b) Order that for the purposes of the proceedings, the matters regarding which the order was made or any other designated facts shall be taken to be established in accordance with the claim of the party obtaining the order;

(c) Order that the party withholding discovery not introduce into evidence or otherwise rely, in support of any claim or defense, upon the documents or other evidence withheld;

(d) Order that the party withholding discovery not introduce into evidence, or otherwise use at the hearing, information obtained in discovery;

(e) Order that the party withholding discovery forfeit its right to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(f) Order that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order was issued, be stricken, or that decision on the pleadings be rendered against the party, or both; and

(g) Exclude the party or representative from the proceedings, in accordance with § 1025.42(b) of these rules.

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Any such action may be taken by order at any point in the proceedings.

### § 1025.38 Subpoenas.

(a) *Availability.* A subpoena shall be addressed to any person not a party for the purpose of compelling attendance, testimony, and production of documents at a hearing or deposition, and may be addressed to any party for the same purposes.

(b) *Form.* A subpoena shall identify the action with which it is connected; shall specify the person to whom it is addressed and the date, time, and place for compliance with its provisions; and shall be issued by order of the Commission and signed by the Secretary or by the Presiding Officer. A subpoena *duces tecum* shall specify the books, papers, documents, or other materials or data-compilations to be produced.

(c) *How obtained*—(1) *Content of application.* An application for the issuance of a subpoena, stating reasons, shall be submitted in triplicate to the Presiding Officer. The Presiding Officer shall bring the application to the attention of the Commission by forwarding it or by communicating its contents by any other means, e.g., by telephone, to the Commission.

(2) *Procedure for application.* The original and two copies of the subpoena, marked “original,” “duplicate” and “triplicate,” shall accompany the application. The Commission shall rule upon an application for a subpoena *ex parte*, by issuing the subpoena or by issuing an order denying the application.

(d) *Issuance of a subpoena.* The Commission shall issue a subpoena by authorizing the Secretary or the Presiding Officer to sign and date each copy in the lower right-hand corner. The “duplicate” and “triplicate” copies of the subpoena shall be transmitted to the applicant for service in accordance with these Rules; the “original” shall be retained by, or be forwarded to, the Secretary for retention in the docket of the proceedings.

(e) *Service of a subpoena.* A subpoena may be served in person or by registered or certified mail, return receipt requested, as provided in § 1025.16(b) of these rules. Service shall be made by

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delivery of the signed “duplicate” copy to the person named therein.

(f) *Return of service.* A person serving a subpoena shall promptly execute a return of service, stating the date, time, and manner of service. If service is effected by mail, the signed return receipt shall accompany the return of service. In case of failure to make service, a statement of the reasons for the failure shall be made. The “triplicate” copy of the subpoena, bearing or accompanied by the return of service, shall be returned without delay to the Secretary after service has been completed.

(g) *Motion to quash or limit subpoena.* Within five (5) days of receipt of a subpoena, the person to whom it is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should be limited in scope. Any such motion shall be answered within five (5) days of service and shall be ruled on immediately. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

(h) *Consequences of failure to comply.* In the event of failure by a person to comply with a subpoena, the Presiding Officer may take any of the actions enumerated in §1025.37 of these rules, or may order any other appropriate relief to compensate for the withheld testimony, documents, or other materials. If in the opinion of the Presiding Officer such relief is insufficient, the Presiding Officer shall certify to the Commission a request for judicial enforcement of the subpoena.

### **§ 1025.39 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) *Applicability to Flammable Fabrics Act only.* This section applies only to proceedings arising under the Flammable Fabrics Act.

(b) *Procedure.* A party who desires the issuance of an order requiring a witness or deponent to testify or provide other information upon being granted immunity from prosecution under title 18, United States Code, section 6002, may make a motion to that effect. The motion shall be made and ruled on in

accordance with §1025.23 of these rules and shall include a showing:

(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 that individual’s privilege against self-incrimination.

(c) *Approval of the Attorney General.* If the Presiding Officer determines that the witness’ testimony appears necessary and that the privilege against self-incrimination may be invoked, he/she may certify to the Commission a request that it obtain the approval of the Attorney General of the United States for the issuance of an order granting immunity.

(d) *Issuance of order granting immunity.* Upon application to and approval by the Attorney General of the United States, and after the witness has invoked the privilege against self-incrimination, the Presiding Officer shall issue the order granting immunity unless he/she determines that the privilege was improperly invoked.

(e) *Sanctions for failure to testify.* Failure of a witness to testify after a grant of immunity or after a denial of a motion for the issuance of an order granting immunity shall result in the imposition of appropriate sanctions as provided in § 1025.37 of these rules.

## **Subpart E—Hearings**

### **§ 1025.41 General rules.**

(a) *Public hearings.* All hearings conducted pursuant to these Rules shall be public unless otherwise ordered by the Commission or the Presiding Officer.

(b) *Prompt completion.* Hearings shall proceed with all reasonable speed and, insofar as practicable and with due regard to the convenience of the parties, shall continue without suspension until concluded, except in unusual circumstances or as otherwise provided in these Rules.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the rights to present evidence, to conduct

such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, brief, and argument.

(d) *Rights of participants.* Every participant shall have the right to make a written or oral statement of position and to file proposed findings of fact, conclusions of law, and a post hearing brief, in accordance with §1025.17(b) of these Rules.

(e) *Rights of witnesses.* Any person compelled to testify in any proceedings in response to a subpoena may be accompanied, represented, and advised by legal counsel or other representative, and may purchase a transcript of his/her testimony.

**§ 1025.42 Powers and duties of Presiding Officer.**

(a) *General.* A Presiding Officer shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order. He/she shall have all powers necessary to that end, including the following powers:

- (1) To administer oaths and affirmations;
- (2) To compel discovery and to impose appropriate sanctions for failure to make discovery;
- (3) To rule upon offers of proof and receive relevant, competent, and probative evidence;
- (4) To regulate the course of the proceedings and the conduct of the parties and their representatives;
- (5) To hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes;
- (6) To consider and rule, orally or in writing, upon all procedural and other motions appropriate in adjudicative proceedings;
- (7) To issue Summary Decisions, Initial Decisions, Recommended Decisions, rulings, and orders, as appropriate;
- (8) To certify questions to the Commission for its determination; and
- (9) To take any action authorized by these Rules or the provisions of title 5, United States Code, sections 551–559.

(b) *Exclusion of parties by Presiding Officer.* A Presiding Officer shall have the

authority, for good cause stated on the record, to exclude from participation in any proceedings any party, participant, or representative who violates the requirements of §1025.66 of these rules. Any party, participant or representative so excluded may appeal to the Commission in accordance with the provisions of §1025.24 of these rules. If the representative of a party or participant is excluded, the hearing may be suspended for a reasonable time so that the party or participant may obtain another representative.

(c) *Substitution of Presiding Officer.* In the event of the substitution of a new Presiding Officer for the one originally designated, any motion predicated upon such substitution shall be made within five (5) days.

(d) *Interference.* In the performance of adjudicative functions, a Presiding Officer shall not be responsible to or subject to the supervision or direction of any Commissioner or of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission. All directions by the Commission to a Presiding Officer concerning any adjudicative proceedings shall appear on and be made a part of the record.

(e) *Disqualification of Presiding Officer.* (1) When a Presiding Officer considers himself/herself disqualified to preside in any adjudicative proceedings, he/she shall withdraw by notice on the record and shall notify the Chief Administrative Law Judge and the Secretary of such withdrawal.

(2) Whenever, for good and reasonable cause, any party considers the Presiding Officer to be disqualified to preside, or to continue to preside, in any adjudicative proceedings, that party may file with the Secretary a motion to disqualify and remove, supported by affidavit(s) setting forth the alleged grounds for disqualification. A copy of the motion and supporting affidavit(s) shall be served by the Secretary on the Presiding Officer whose removal is sought. The Presiding Officer shall have ten (10) days to respond in writing to such motion. However, the motion shall not stay the proceedings unless

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otherwise ordered by the Presiding Officer or the Commission. If the Presiding Officer does not disqualify himself/herself, the Commission shall determine the validity of the grounds alleged, either directly or on the report of another Presiding Officer appointed to conduct a hearing for that purpose and, in the event of disqualification, shall take appropriate action by assigning another Presiding Officer or requesting loan of another Administrative Law Judge through the U.S. Office of Personnel Management.

### § 1025.43 Evidence.

(a) *Applicability of Federal Rules of Evidence.* Unless otherwise provided by statute or these rules, the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.

(b) *Burden of proof.* (1) Complaint counsel shall have the burden of sustaining the allegations of any complaint.

(2) Any party who is the proponent of a legal or factual proposition shall have the burden of sustaining that proposition.

(c) *Admissibility.* All relevant and reliable evidence is admissible, but may be excluded by the Presiding Officer if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence.

(d) *Official notice*—(1) *Definition.* Official notice means use by the Presiding Officer or the Commission of facts not appearing on the record and legal conclusions drawn from those facts. An officially noticed fact or legal conclusion must be one not subject to reasonable dispute in that it is either:

(i) Generally known within the jurisdiction of the Commission or

(ii) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(2) *Method of taking official notice.* The Presiding Officer and/or the Commission may at any time take official no-

tice upon motion of any party or upon its own initiative. The record shall reflect the facts and conclusions which have been officially noticed.

(e) [Reserved]

(f) *Offer of proof.* When an objection to proffered testimony or documentary evidence is sustained, the sponsoring party may make a specific offer, either in writing or orally, of what the party expects to prove by the testimony or the document. When an offer of proof is made, any other party may make a specific offer, either in writing or orally, of what the party expects to present to rebut or contradict the offer of proof. Written offers of proof or of rebuttal, adequately marked for identification, shall accompany the record and be available for consideration by any reviewing authority.

### § 1025.44 Expert witnesses.

(a) *Definition.* An expert witness is one who, by reason of education, training, experience, or profession, has peculiar knowledge concerning the subject matter to which his/her testimony relates and from which he/she may draw inferences based upon hypothetically stated facts or offer opinions from facts involving scientific or technical knowledge.

(b) *Method of presenting testimony of expert witness.* Except as may otherwise be ordered by the Presiding Officer, the direct testimony of an expert witness shall be in writing and shall be filed on the record and exchanged between the parties no later than ten (10) days preceding the commencement of the hearing. The written testimony of an expert witness shall be incorporated into the record and shall constitute the direct testimony of that witness. Upon a showing of good cause, the party sponsoring the expert witness may be permitted to amplify the written direct testimony during the hearing.

(c) *Cross-examination and redirect examination of expert witness.* Cross-examination, redirect examination, and recross-examination of an expert witness shall proceed in due course based upon the written testimony and any amplifying oral testimony.

(d) *Failure to file or exchange written testimony.* Failure to file or exchange written testimony of expert witnesses

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as provided in this section shall deprive the sponsoring party of the use of the expert witness and of the conclusions which that witness would have presented, unless the opposing parties consent or the Presiding Officer otherwise orders in unusual circumstances.

### § 1025.45 *In camera* materials.

(a) *Definition.* *In camera* materials are documents, testimony, or other data which by order of the Presiding Officer or the Commission are kept confidential and excluded from the public record.

(b) *In camera* treatment of documents and testimony. The Presiding Officer or the Commission shall have authority, when good cause is found on the record, to order documents or testimony offered in evidence, whether admitted or rejected, to be received and preserve *in camera*. The order shall specify the length of time for *in camera* treatment and shall include:

(1) A description of the documents or testimony;

(2) The reasons for granting *in camera* treatment for the specified length of time; and

(3) The terms and conditions imposed by the Presiding Official, if any, limiting access to or use of the *in camera* material.

(c) *Access and disclosure to parties.* (1) Commissioners and their staffs, Presiding Officers and their staffs, and Commission staff members concerned with judicial review shall have complete access to *in camera* materials. Any party to the proceedings may seek access only in accordance with paragraph (c)(2) of this section.

(2) Any party desiring access to, or disclosure of, *in camera* materials for the preparation and presentation of that party's case shall make a motion which sets forth its justification. The Presiding Officer or the Commission may grant such motion for good cause shown and shall enter a protective order prohibiting unnecessary disclosure and requiring any other necessary safeguards. The Presiding Officer or the Commission may examine the *in camera* materials and excise any portions prior to disclosure of the materials to the moving party.

(d) *Segregation of in camera materials.* *In camera* materials shall be segregated from the public record and protected from public view.

(e) *Public release of in camera materials.* *In camera* materials constitute a part of the confidential records of the Commission and shall not be released to the public until the expiration of *in camera* treatment.

(f) *Reference to in camera materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of *in camera* materials. However, such refraining shall not preclude general references to such materials. To the extent that parties consider necessary the inclusion of specific details of *in camera* materials, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked "Confidential, Contains *In Camera* Material," which shall be placed *in camera* and become part of the *in camera* record. Those documents shall be served only on parties accorded access to the *in camera* materials by these rules, the Presiding Officer, or the Commission.

### § 1025.46 Proposed findings, conclusions, and order.

Within a reasonable time after the closing of the record and receipt of the transcript, all parties and participants may file, simultaneously unless otherwise directed by the Presiding Officer, post-hearing briefs, including proposed findings of fact and conclusions of law, as well as a proposed order. The Presiding Officer shall establish a date certain for the filing of the briefs, which shall not exceed fifty (50) days after the closing of the record except in unusual circumstances. The briefs shall be in writing and shall be served upon all parties. The briefs of all parties shall contain adequate references to the record and authorities relied upon. Replies shall be filed within fifteen (15) days of the date for the filing of briefs unless otherwise established by the Presiding Officer. The parties and participants may waive either or both submissions.

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### § 1025.47 Record.

(a) *Reporting and transcription.* Hearings shall be recorded and transcribed by the official reporter of the Commission under the supervision of the Presiding Officer. The original transcript shall be a part of the record of proceedings. Copies of transcripts are available from the reporter at a cost not to exceed the maximum rates fixed by contract between the Commission and the reporter. In accordance with Section 11 of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. appendix I), copies of transcripts may be made by members of the public or by Commission personnel, when available, at the Office of the Secretary at reproduction costs as provided in § 1025.49.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner described in this section. The Presiding Officer may order corrections, either on his/her own motion or on motion of any party. The Presiding Officer shall determine the corrections to be made and shall so order. Corrections shall be interlineated or otherwise inserted in the official transcript so as not to obliterate the original text.

### § 1025.48 Official docket.

The official docket in any adjudicatory proceedings shall be maintained in the Office of the Secretary and be available for public inspection during normal business hours of the Commission.

### § 1025.49 Fees.

(a) *Fees for deponents and witnesses.* Any person compelled to appear in person in response to a subpoena or notice of deposition shall be paid the same attendance and mileage fees as are paid witnesses in the courts of the United States, in accordance with title 28, United States Code, section 1821. The fees and mileage referred to in this paragraph shall be paid by the party at whose instance deponents or witnesses appear.

(b) *Fees for production of records.* Fees charged for production or disclosure of records contained in the official docket shall be in accordance with the Com-

mission's "Procedures for Disclosures or Production of Information Under the Freedom of Information Act," title 16, Code of Federal Regulations, § 1015.9.

## Subpart F—Decision

### § 1025.51 Initial decision.

(a) *When filed.* The Presiding Officer shall endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later.

(b) *Content.* The Initial Decision shall be based upon a consideration of the entire record and shall be supported by reliable, probative, and substantial evidence. The Initial Decision shall include:

(1) Findings and conclusions, as well as the reasons or bases for such findings and conclusions, upon the material questions of fact, material issues of law, or discretion presented on the record, and should, where practicable, be accompanied by specific page citations to the record and to legal and other materials relied upon; and

(2) An appropriate order.

(c) *By whom made.* The Initial Decision shall be made and filed by the Presiding Officer who presided over the hearing, unless otherwise ordered by the Commission.

(d) *Reopening of proceedings by Presiding Officer; termination of jurisdiction.*

(1) At any time prior to, or concomitant with, the filing of the Initial Decision, the Presiding Officer may reopen the proceedings for the reception of further evidence.

(2) Except for the correction of clerical errors, or where the proceeding is reopened by an order under paragraph (d)(1) of this section, the jurisdiction of the Presiding Officer is terminated upon the filing of the Initial Decision, unless and until such time as the matter may be remanded to the Presiding Officer by the Commission.

### § 1025.52 Adoption of initial decision.

The Initial Decision and Order shall become the Final Decision and Order of the Commission forty (40) days after issuance unless an appeal is noted and perfected or unless review is ordered by

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the Commission. Upon the expiration of the fortieth day, the Secretary shall prepare, sign, and enter an order adopting the Initial Decision and Order, unless otherwise directed by the Commission.

### § 1025.53 Appeal from initial decision.

(a) *Who may file notice of intention.* Any party may appeal an Initial Decision to the Commission, provided that within ten (10) days after issuance of the Initial Decision such party files and serves a notice of intention to appeal.

(b) *Appeal brief.* An appeal is perfected by filing a brief within forty (40) days after service of the Initial Decision. The appeal brief must be served upon all parties. The appeal brief shall contain, in the order indicated, the following:

(1) A subject index of the matters in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(2) A concise statement of the case;

(3) A statement containing the reasons why the party believes the Initial Decision is incorrect;

(4) The argument, presenting clearly the points of fact and law relied upon to support each reason why the Initial Decision is incorrect, with specific page references to the record and the legal or other material relied upon; and

(5) A proposed form of order for the Commission's consideration in lieu of the order contained in the Initial Decision.

(c) *Answering brief.* Within thirty (30) days after service of the appeal brief upon all parties, any party may file an answering brief which 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. Such brief shall present clearly the points of fact and law relied upon in support of the reasons the party has for each position urged, with specific page references to the record and legal or other materials relied upon.

(d) *Participant's brief.* Within thirty (30) days after service of the appeal

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brief upon all parties, any participant may file a brief on appeal, presenting clearly the position urged.

(e) *Cross appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of cross appeal within ten (10) days of the date on which the first notice of appeal was filed. Cross appeals shall be included in the answering brief and shall conform to the requirements for form, content, and filing specified in paragraph (b) of this section for an appeal brief. If an appeal is noticed but not perfected, no cross appeal shall be permitted and the notice of cross appeal shall be deemed void.

(f) *Reply brief.* A reply brief shall be limited to rebuttal of matters presented in answering briefs, including matters raised in cross-appeals. A reply brief shall be filed and served within fourteen (14) days after service of an answering brief, or on the day preceding the oral argument, whichever comes first.

(g) *Oral argument.* The purpose of an oral argument is to emphasize and clarify the issues. The Commission may order oral argument upon request of any party or upon its own initiative. A transcript of oral arguments shall be prepared. A Commissioner absent from an oral argument may participate in the consideration of and decision on the appeal.

### § 1025.54 Review of initial decision in absence of appeal.

The Commission may, by order, review a case not otherwise appealed by a party. Should the Commission so order, the parties shall, and participants may, file briefs in accordance with § 1025.53, except that the Commission may, in its discretion, establish a different briefing schedule in its order. The Commission shall issue its order within forty (40) days after issuance of the Initial Decision. The order shall set forth the issues which the Commission will review and may make provision for the filing of briefs. If the filing of briefs is scheduled by the Commission, the order shall designate which party or parties shall file the initial brief and which party or parties may thereafter file an answering brief, or the order



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may designate the simultaneous filing of briefs by the parties.

### § 1025.55 Final decision on appeal or review.

(a) *Consideration of record.* Upon appeal from or review of an Initial Decision, the Commission shall consider the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision.

(b) *Rendering of final decision.* In rendering its decision, the Commission shall adopt, modify, or set aside the findings, conclusions, and order contained in the Initial Decision, and shall include in its Final Decision a statement of the reasons for its action and any concurring or dissenting opinions. The Commission shall issue an order reflecting its Final Decision.

(c) Except as otherwise ordered by the Commission, the Commission shall endeavor to file its Decision within ninety (90) days after the filing of all briefs or after receipt of transcript of the oral argument, whichever is later.

### § 1025.56 Reconsideration.

Within twenty (20) days after issuance of a Final Decision and Order by the Commission, any party may file a petition for reconsideration of such decision or order, setting forth the relief desired and the grounds in support of the petition. Any petition filed under this section must be confined to new questions raised by the decision or order upon which the petitioner had no previous opportunity to argue. Any party desiring to oppose such a petition shall file an opposition to the petition within ten (10) days after service of the petition. The filing of a petition for reconsideration shall not stay the effective date of the Final Decision and Order or toll the running of any statutory time period affecting the Decision or Order unless specifically ordered by the Commission.

### § 1025.57 Effective date of order.

(a) *Orders in proceedings arising under the Consumer Product Safety Act.* An

order of the Commission in proceedings arising under the Consumer Product Safety Act becomes effective upon receipt, unless otherwise ordered by the Commission.

(b) *Orders in proceedings arising under the Flammable Fabrics Act—(1) Consent orders.* An order in proceedings arising under the Flammable Fabrics Act, which has been issued following the Commission's acceptance of an offer of settlement in accordance with § 1025.26 of these rules, becomes effective upon receipt of notice of Commission acceptance, unless otherwise ordered by the Commission.

(2) *Litigated orders.* All other orders in proceedings arising under the Flammable Fabrics Act become effective upon the expiration of the statutory period for court review specified in Section 5(c) of the Federal Trade Commission Act, title 15, United States Code, section 45(c), or, if a petition for review has been filed, upon a court's affirmation of the Commission's order.

(c) *Consequences of failure to comply with effective order.* A respondent against whom an order has been issued who is not in compliance with such order on or after the date the order becomes effective is in violation of such order and is subject to an immediate action for the civil or criminal penalties provided for in the applicable statute.

### § 1025.58 Reopening of proceedings.

(a) *General.* Any proceedings may be reopened by the Commission at any time, either on its own initiative or upon petition of any party to the proceedings.

(b) *Exception.* Proceedings arising under the Flammable Fabrics Act shall not be reopened while pending in a United States court of appeals on a petition for review after the transcript of the record has been filed, or while pending in the Supreme Court of the United States.

(c) *Commission-originated reopening—(1) Before effective date of order.* At any time before the effective date of a Commission order, the Commission may, upon its own initiative and without prior notice to the parties, reopen any proceedings and enter a new decision or order to modify or set aside, in whole

or in part, the decision or order previously issued.

(2) *After effective date of order.* Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision or order be altered, modified, or set aside in whole or in part, the Commission shall serve upon all parties to the original proceedings an order to show cause, stating the changes the Commission proposes to make in the decision or order and the reasons such changes are deemed necessary. Within thirty (30) days after service of an order to show cause, any party to the original proceedings, may file a response. Any party not responding to the order to show cause within the time allowed shall be considered to have consented to the proposed changes.

(d) *Petition for reopening.* Whenever any person subject to a final order is of the opinion that changed conditions of fact or law require that the decision or order be altered, modified, or set aside, or that the public interest so requires, that person may petition the Commission to reopen the proceedings. The petition shall state the changes desired and the reasons those changes should be made, and shall include such supporting evidence and argument as will, in the absence of any opposition, provide the basis for a Commission decision on the petition. The petition shall be served upon all parties to the original proceedings. Within thirty (30) days after service of the petition, Complaint Counsel shall file a response. Any other party to the original proceedings also may file a response within that period.

(e) *Hearings—(1) Unopposed.* Where an order to show cause or petition to reopen is not opposed, or is opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and responses, or it may serve upon the parties a notice of hearing containing the date when the matter will be heard. The proceedings normally will be limited to the filing of briefs but may include oral argument when deemed necessary by the Commission.

(2) *Factual issues.* When the pleadings raise substantial factual issues, the

Commission may direct such hearings as it deems appropriate. Upon conclusion of the hearings, and after opportunity for the parties to file post-hearing briefs containing proposed findings of fact and conclusions of law, as well as a proposed order, the Presiding Officer shall issue a Recommended Decision, including proposed findings and conclusions, and the reasons, as well as a proposed Commission order. If the Presiding Officer recommends that the Commission's original order be reopened, the proposed order shall include appropriate provisions for the alteration, modification or setting aside of the original order. The record and the Presiding Officer's Recommended Decision shall be certified to the Commission for final disposition of the matter.

(f) *Commission disposition.* Where the Commission has ordered a hearing, upon receipt of the Presiding Officer's Recommended Decision, the Commission shall make a decision and issue an order based on the hearing record as a whole. If the Commission determines that changed conditions of fact or law or the public interest requires, it shall reopen the order previously issued; alter, modify, or set aside the order's provisions in whole or in part; and issue an amended order reflecting the alterations, modifications, or deletions. If the Commission determines that the original order should not be reopened, it shall issue an order affirming the original order. A decision stating the reasons for the Commission's order shall accompany the order.

### Subpart G—Appearances, Standards of Conduct

#### § 1025.61 Who may make appearances.

A party or participant may appear in person, or by a duly authorized officer, partner, regular employee, or other agent of the party or participant, or by counsel or other duly qualified representative, in accordance with § 1025.65.

#### § 1025.62 Authority for representation.

Any individual acting in a representative capacity in any adjudicative proceedings may be required by the Presiding Officer or the Commission to

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show his/her authority to act in such capacity. A regular employee of a party who appears on behalf of the party may be required by the Presiding Officer or the Commission to show his/her authority to so appear.

### § 1025.63 Written appearances.

(a) *Filing.* Any person who appears in any proceedings shall file a written notice of appearance with the Secretary or deliver a written notice of appearance to the Presiding Officer at the hearing, stating for whom the appearance is made and the name, address, and telephone number (including area code) of the person making the appearance and the date of the commencement of the appearance. The written appearance shall be made a part of the record.

(b) *Withdrawal.* Any person who has previously appeared in any proceedings may withdraw his/her appearance by filing a written notice of withdrawal of appearance with the Secretary. The notice of withdrawal of appearance shall state the name, address, and telephone number (including area code) of the person withdrawing the appearance, for whom the appearance was made, and the effective date of the withdrawal of the appearance. Such notice of withdrawal shall be filed within five (5) days of the effective date of the withdrawal of the appearance.

### § 1025.64 Attorneys.

Any attorney at law who is admitted to practice before any United States court or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Commission. An attorney's own representation that he/she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise directed by the Presiding Officer or the Commission.

### § 1025.65 Persons not attorneys.

(a) *Filing and approval of proof of qualifications.* Any person who is not an attorney at law may be admitted to appear in any adjudicative proceedings as a representative of any party or participant if that person files proof to the satisfaction of the Presiding Officer

that he/she possesses the necessary knowledge of administrative procedures, technical, or other qualifications to render valuable service in the proceedings and is otherwise competent to advise and assist in the presentation of matters in the proceedings. An application by a person not an attorney at law for admission to appear in any proceedings shall be submitted in writing to the Secretary, not later than thirty (30) days prior to the hearing. The application shall set forth in detail the applicant's qualifications to appear in the proceedings.

(b) *Exception.* Any person who is not an attorney at law and whose application has not been approved shall not be permitted to appear in Commission proceedings. However, this provision shall not apply to any person who appears before the Commission on his/her own behalf or on behalf of any corporation, partnership, or unincorporated association of which the person is a partner or general officer.

### § 1025.66 Qualifications and standards of conduct.

(a) *Good faith transactions.* The Commission expects all persons appearing in proceedings before the Commission or the Presiding Officer to act with integrity, with respect, and in an ethical manner. Business transacted before and with the Commission or the Presiding Officer shall be conducted in good faith.

(b) *Exclusion of parties, participants, or their representatives.* To maintain orderly proceedings, the Commission or the Presiding Officer may exclude parties, participants, or their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition in § 1025.68 against certain *ex parte* communications.

(c) *Exclusions from the record.* The Presiding Officer or the Commission may disregard and order the exclusion from the record of any written or oral submissions or representations which are not made in good faith or which are unfair, incomplete, or inaccurate.

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(d) *Appeal by excluded party.* An excluded party, participant, or representative may petition the Commission to entertain an interlocutory appeal in accordance with § 1025.24 of these rules. If, after such appeal, the representative of a party or participant is excluded, the hearing shall, at the request of the party or participant, be suspended for a reasonable time so that the party or participant may obtain another representative.

### § 1025.67 Restrictions as to former members and employees.

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employee restrictions applicable to former Commission members and employees, as set forth in the Commission's "Post Employment Restrictions Applicable to Former Commission Officers and Employees", 16 CFR part 1030, subpart L, shall govern the activities of former Commission members and employees in matters connected with their former duties and responsibilities.

(b) *Participation as witness.* A former member or employee of the Commission may testify in any proceeding subject to these Rules concerning his/her participation in any Commission activity. This section does not constitute a waiver by the Commission of any objection provided by law to testimony that would disclose privileged or confidential material. The provisions of 18 U.S.C. 1905 prohibiting the disclosure of trade secrets also applies to testimony by former members and employees.

(c) *Procedure for requesting authorization to appear.* In cases to which paragraph (a) of this section is applicable, a former member or employee of the Commission may request authorization to appear or participate in any proceedings or investigation by filing with the Secretary a written application disclosing the following information:

(1) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceedings or investigation during his/her service with the Commission;

(2) Whether the files of the proceedings or investigation came to his/her attention;

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(3) Whether he/she was employed in the directorate, division, or other organizational unit within the Commission in which the proceedings or investigation is or has been pending;

(4) Whether he/she worked directly or in close association with Commission personnel assigned to the proceedings or investigation and, if so, with whom and in what capacity; and

(5) Whether during service with the Commission, he/she was engaged in any matter concerning the person involved in the proceedings or investigation.

(d) *Denial of request to appear.* The requested authorization shall not be given in any case:

(1) Where it appears that the former member or employee, during service with the Commission, participated personally and substantially in the proceedings or investigation; or

(2) Where the Commission is not satisfied that the appearance or participation will not involve any actual or apparent impropriety; or

(3) In any case which would result in a violation of title 18, United States Code, section 207.

### § 1025.68 Prohibited communications.

(a) *Applicability.* This section is applicable during the period commencing with the date of issuance of a complaint and ending upon final Commission action in the matter.

(b) *Definitions*—(1) *Decision-maker.* Those Commission personnel who render decisions in adjudicative proceedings under these rules, or who advise officials who render such decisions, including:

(i) The Commissioners and their staffs;

(ii) The Administrative Law Judges and their staffs;

(iii) The General Counsel and his/her staff, unless otherwise designated by the General Counsel.

(2) *Ex parte communication.* (i) Any written communication concerning a matter in adjudication which is made to a decision-maker by any person subject to these Rules, which is not served on all parties; or

(ii) Any oral communication concerning a matter in adjudication which is made to a decision-maker by any person subject to these Rules, without

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advance notice to all parties to the proceedings and opportunity for them to be present.

(c) *Prohibited ex parte communications.* Any oral or written *ex parte* communication relative to the merits of any proceedings under these Rules is a prohibited *ex parte* communication, except as otherwise provided in paragraph (d) of this section.

(d) *Permissible ex parte communications.* The following communications shall not be prohibited under this section.

(1) *Ex parte* communications authorized by statute or by these rules. (See, for example, § 1025.38 which governs applications for the issuance of subpoenas.)

(2) Any staff communication concerning judicial review or judicial enforcement in any matter pending before or decided by the Commission.

(e) *Procedures for handling prohibited ex parte communication*—(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee shall be forwarded to the Secretary rather than to a decision-maker. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretary. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a decision-maker, he/she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion; and

(ii) In the event of a prohibited oral *ex parte* communication, the decision-maker shall forward to the Secretary a signed and dated statement containing such of the following information as is known to him/her.

(A) The title and docket number of the proceedings;

(B) The name and address of the person making the communication and his/her relationship (if any) to the par-

ties and/or participants to the proceedings;

(C) The date and time of the communication, its duration, and the circumstances (e.g., telephone call, personal interview, etc.) under which it was made;

(D) A brief statement of the substance of the matters discussed; and

(E) Whether the person making the communication persisted in doing so after being advised that the communication was prohibited.

(3) *Filing.* All communications and statements forwarded to the Secretary under this section shall be placed in a public file which shall be associated with, but not made a part of, the record of the proceedings to which the communication or statement pertains.

(4) *Service on parties.* The Secretary shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if other circumstances satisfy the Secretary that service of the communication or statement would be unduly burdensome, he/she, in lieu of service, may notify all parties in writing that the communication or statement has been made and filed and that it is available for inspection and copying.

(5) *Service on maker.* The Secretary shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A person subject to these Rules who makes, a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

## Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

AUTHORITY: Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. 504 and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

SOURCE: 47 FR 25513, June 14, 1982, unless otherwise noted.

### § 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called “the EAJA” in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adjudicative proceedings before the Commission. An eligible party may receive an award when it prevails over Commission complaint counsel, unless complaint counsel’s position in the proceeding was substantially justified or special circumstances make an award unjust. This subpart describes the parties eligible for awards and the proceedings covered. The rules also explain how to apply for awards and the procedures and standards that the Commission will use to make them.

(b) *When the EAJA applies.* The EAJA applies to any adversary adjudicative proceeding pending before the Commission at any time between October 1, 1981 and September 30, 1984. This includes proceedings commenced before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

(c) *Proceedings covered.* (1) The EAJA and this rule apply to adversary adjudicative proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any component of the Commission is represented by an attorney or other representative who enters an appearance and participates in the proceeding. The rules in this subpart govern adversary adjudicative proceedings relating to the provisions of sections 15 (c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15

U.S.C. 2064 (c) (d) and (f); 2066(b)), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), and section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern administrative adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)). *See* 16 CFR 1025.1.

(2) The Commission may designate a proceeding not listed in paragraph (c)(1) of this section as an adversary adjudicative proceeding for purposes of the EAJA by so stating in an order initiating the proceeding or designating the matter for hearing. The Commission’s failure to designate a proceeding as an adversary adjudicative proceeding shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA. Whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(3) If a proceeding includes both matters covered by the EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3) and 16 CFR 1025.3(f). The applicant must show that it meets all conditions of eligibility set out in this paragraph and in §1025.71.

(2) The types of eligible applicants are:

(i) Individuals with a net worth of not more than \$1 million;

(ii) Sole owners of unincorporated businesses who have a net worth of not more than \$5 million including both personal and business interests, and not more than 500 employees;

(iii) Charitable or other tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) which have not more than 500 employees;

(iv) Any other partnership, corporation, association, or public or private

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organization with a net worth of not more than \$5 million and which have not more than 500 employees.

(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an “individual” rather than as a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The number of employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. For this purpose, *affiliate* means (i) An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or (ii) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest. However, the presiding officer may determine that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the presiding officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(8) An applicant that represents himself/herself regardless of whether he is licensed to practice law may be awarded all such expenses and fees available to other prevailing eligible parties. See 16 CFR 1025.61 and 1025.65 of the Commission’s rules.

(e) *Standards for awards.* (1) An eligible prevailing applicant may receive an

award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of Commission complaint counsel over which the applicant has prevailed was substantially justified. Complaint counsel bear the burden of proof that an award should not be made to an eligible prevailing applicant. Complaint counsel may avoid the granting of an award by showing that its position was reasonable in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission is authorized to pay expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the presiding officer shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(5) Fees may be awarded to eligible applicants only for service performed after the issuance of a complaint and the commencement of the adjudicative proceeding in accordance with 16 CFR 1025.11(a).

(g) *Rulemaking on maximum rates for attorney fees.* (1) If warranted by an increase in the cost of living or by special circumstances, the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this subpart. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 533.

(2) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(e). The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. The petition should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within a reasonable time after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

(h) *Presiding officer.* The presiding officer in a proceeding covered by this regulation is a person as defined in the Commission's Rules, 16 CFR 1025.3(i), who conducts an adversary adjudicative proceeding.

**§ 1025.71 Information required from applicant.**

(a) *Contents of application.* (1) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The applica-

tion shall show that the applicant has prevailed and identify the position of complaint counsel in the adjudicative proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(2) The application shall also include a verified statement that the applicant's net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if it attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section.

(3) The application shall state the amount of fees and expenses for which an award is sought.

(4) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(5) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) *Net worth exhibit; confidential treatment.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1025.70(d)(6) of this subpart) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The presiding officer may require an applicant



to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit or to public disclosure of any other information submitted, and believes there are legal grounds for withholding it from disclosure, may move to have that information kept confidential and excluded from public disclosure in accordance with § 1025.45 of the Commission rules for *in camera* materials, 16 CFR 1025.45. This motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9).

(3) Section 6(a)(2) of the Consumer Product Safety Act, 15 U.S.C. 2055(a)(2), provides that certain information which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, or subject to 5 U.S.C. 552(b)(4) shall not be disclosed. This prohibition is an Exemption 3 statute under the Freedom of Information Act, 5 U.S.C. 552(b)(3). Material submitted as part of an application for which *in camera* treatment is granted shall be available to other parties only in accordance with 16 CFR 1025.45(c) of the Commission Rules and, if applicable, section 6(a)(2) of the CPSA. If the presiding officer determines that the information should not be withheld from disclosure because it does not fall within section 6(a)(2) of the CPSA, he shall place the information in the public record but only after notifying the submitter of the information in writing of the intention to disclose such document at a date not less than 10 days after the date of receipt of notification. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's established procedures under the Freedom of Information Act (*see* 16 CFR part 1015).

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report,

test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding officer may require the applicant to provide vouchers, receipts; or other substantiation for any expenses claimed.

(d) *When an application may be filed.*

(1) An application may be filed whenever the applicant has prevailed in a proceeding covered by this subpart or in a significant and discrete substantive portion of the proceeding. However, an application must be filed no later than 30 days after the Commission's final disposition of such a proceeding.

(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(3) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(4) For purposes of this subpart, final disposition means the later of:

(i) The date on which an initial decision by the presiding officer becomes final, *see* 16 CFR 1025.52;

(ii) The date on which the Commission issues a final decision (*See* 16 CFR 1025.55);

(iii) The date on which the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding (*See* 16 CFR 1025.56; or

(iv) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

(e) *Where an application must be filed.* The application for award and expenses must be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207 in accordance with the application requirements of this section.

**§ 1025.72 Procedures for considering applications.**

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as provided in the Commission's Rules of Practice, 16 CFR 1025.11–1025.19.

(b) *Answer to application.* (1) Within 30 days after service of an application for an award of fees and expenses, complaint counsel in the underlying administrative proceeding upon which the application is based may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the presiding officer upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of Commission counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall in-

clude with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the presiding officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the Commission's standard settlement procedure (*See* 16 CFR 1115.20(b), 1118.20, 1025.26, and 1605.3). If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the presiding officer may order further proceedings. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the presiding officer order further proceedings under this paragraph shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Initial decision.* The presiding officer shall endeavor to issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and

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status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the complaint counsel's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision of this Commission will only address the allocable portion for which this Commission is responsible to the eligible prevailing party.

(h) *Agency review.* (1) Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with 16 CFR 1025.54, 1025.55 and 1025.56.

(2) If neither the applicant nor Commission complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued.

(3) If an appeal from or review of an initial decision under this subpart is taken, the Commission shall endeavor to issue a decision on the application within 90 days after the filing of all briefs or after receipt of transcripts of the oral argument, whichever is later, or remand the application to the presiding officer for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a verified statement that the applicant will not seek review of the decision in the United States courts. (Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.) The Commission will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the appli-

cant or any other party to the proceeding. Comments and accompanying material may be seen in or copies obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, during working hours Monday through Friday.

### APPENDIX I TO PART 1025—SUGGESTED FORM OF FINAL PREHEARING ORDER

#### *Case Caption*

A final prehearing conference was held in this matter, pursuant to Rule 21 of the Commission's Rules of Practice for Adjudicative Proceedings (16 CFR 1025.21), on the day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_ o'clock, \_\_\_\_ stm.

Counsel appeared as follows:

For the Commission staff:

For the Respondent(s):

Others:

1. Nature of Action and Jurisdiction. This is an action for \_\_\_\_\_ and the jurisdiction of the Commission is invoked under United States Code, Title \_\_\_\_\_, Section \_\_\_\_\_ and under the Code of Federal Regulations, Title \_\_\_\_\_, Section \_\_\_\_\_. The jurisdiction of the Commission is (not) disputed. The question of jurisdiction was decided as follows:

2. Stipulations and Statements. The following stipulation(s) and statement(s) were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

(b) A concise summary of the ultimate facts as claimed by each party. (Complaint Counsel must set forth the claimed facts, specifically; for example, if a violation is claimed, Complaint Counsel must assert specifically the acts of violation complained of; each respondent must reply with equal clarity and detail.)

(c) Written stipulation(s) or statement(s) setting forth the qualifications of the expert witnesses to be called by each party;

(d) Written list(s) of the witnesses whom each party *will* call, written list(s) of the additional witnesses whom each party *may* call, and a statement of the subject matter on which each witness will testify;

(e) An agreed statement of the contested issues of fact and of law, or separate statements by each party of any contested issues of fact and law not agreed to;

(f) A list of all depositions to be read into evidence and statements of any objections thereto;

(g) A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects that will be used in opening statements or closing arguments but will not be offered in evidence. If any other such objects are to be used by any party, those objects will be submitted to opposing counsel

at least three days prior to the hearing. If there is then any objection to their use, the dispute will be submitted to the Presiding Officer at least one day prior to the hearing;

(h) Written waivers of claims or defenses which have been abandoned by the parties.

The foregoing were modified at the pretrial conference as follows:

(To be completed at the conference itself. If none, recite "none".)

3. Complaint Counsel's Evidence. 3.1 The following exhibits were offered by Complaint Counsel, received in evidence, and marked as follows:

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

3.2 The following exhibits were offered by Complaint Counsel and marked for identification. There was reserved to the respondent(s) (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

4. Respondent's Evidence. 4.1 The following exhibits were offered by the respondent(s), received in evidence, and marked as herein indicated:

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

4.2 The following exhibits were offered by the respondent(s) and marked for identification. There was reserved to Complaint Counsel (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

5. Party Intervenor's Evidence. 5.1 The following exhibits were offered by the party intervenor(s), received in evidence, and marked as herein indicated:

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

5.2 The following exhibits were offered by the party intervenor(s) and marked for identification. There was reserved to Complaint Counsel and respondent(s) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

NOTE: If any other exhibits are to be offered by any party, such exhibits will be sub-

mitted to opposing counsel at least ten (10) days prior to hearing, and a supplemental note of evidence filed into this record.

6. Additional Actions. The following additional action(s) were taken:

(Amendments to pleadings, agreements of the parties, disposition of motions, separation of issues of liability and remedy, etc., if necessary)

7. Limitations and Reservations. 7.1 Each of the parties has the right to further supplement the list of witnesses not later than ten (10) days prior to commencement of the hearing by furnishing opposing counsel with the name and address of the witness and general subject matter of his/her testimony and by filing a supplement to this pretrial order. Thereafter, additional witnesses may be added only after application to the Presiding Officer, for good cause shown.

7.2 Rebuttal witnesses not listed in the exhibits to this order may be called only if the necessity of their testimony could not reasonably be foreseen ten (10) days prior to trial. If it appears to counsel at any time before trial that such rebuttal witnesses will be called, notice will immediately be given to opposing counsel and the Presiding Officer.

7.3 The probable length of hearing is \_\_\_ days. The hearing will commence on the \_\_\_ day of \_\_\_, 19\_\_\_, at \_\_\_ o'clock \_\_\_ m. at \_\_\_.

7.4 Prehearing briefs will be filed not later than 5:00 p.m. on \_\_\_\_\_. (Insert date not later than ten (10) days prior to the hearing.) All anticipated legal questions, including those relating to the admissibility of evidence, must be covered by prehearing briefs.

This prehearing order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. It will control the course of the hearing, and it may not be amended except by consent of the parties and the Presiding Officer, or by order of the Presiding Officer to prevent manifest injustice.

Presiding Officer. \_\_\_\_\_

Dated: \_\_\_\_\_

Approved as to Form and Substance

Date: \_\_\_\_\_

Complaint Counsel. \_\_\_\_\_

Attorney for Respondent(s) \_\_\_\_\_

\* Attorney for Intervenors \_\_\_\_\_

\*NOTE: Where intervenors appear pursuant to §1025.17 of these Rules, the prehearing order may be suitably modified; the initial page may be modified to reflect the intervention.