

## SUBCHAPTER E—EXPLOSIVE LICENSE AND PERMIT PROCEEDINGS

### PARTS 700–770 [RESERVED]

### PART 771—RULES OF PRACTICE IN EXPLOSIVE LICENSE AND PERMIT PROCEEDINGS

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## Subpart A—Scope and Construction of Regulations

### § 771.1 Scope of part.

Regulations in this part govern procedures and practices for disapproving applications for licenses and permits and denying renewal of or revocation of such licenses or permits under 18 U.S.C. chapter 40.

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### § 771.2 Liberal construction.

Regulations in this part shall be liberally construed to secure just, expeditious, and efficient determination of the issues presented. The Rules of Civil Procedure for the U.S. District Courts (28 U.S.C. appendix) are not controlling, but may act as a guide in any situation not provided for or controlled by this part and shall be liberally construed or relaxed when necessary.

### § 771.3 Forms prescribed.

(a) The Director is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in each form shall be furnished as required by this part.

(b) Requests for forms should be made to the ATF Distribution Center or through the ATF website at <http://www.atf.gov>.

## Subpart B—Definitions

### § 771.5 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meaning provided in this subpart. Words in the plural form shall include the singular, and *vice versa*, and words importing the masculine gender shall include the feminine.

*Administrative law judge.* The person appointed pursuant to 5 U.S.C. 3105, designated to preside over any administrative proceedings under this part.

*Applicant.* Any person who has filed an application for a license or permit under 18 U.S.C. chapter 40.

*Application.* Any application for a license or permit, including renewal applications, under 18 U.S.C. chapter 40.

*ATF.* The Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

*Attorney for the Government.* An attorney in the ATF Office of Chief Counsel authorized to represent the Director of Industry Operations in the proceeding.

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*CFR.* The Code of Federal Regulations.

*Contemplated notice.* Includes any notice contemplating the revocation or denial of renewal of a license or permit.

*Director.* The Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

*Director of Industry Operations.* The principal ATF official in a Field Operations division responsible for administering regulations in this part.

*Ex parte communication.* An oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but not including requests for status reports.

*Initial decision.* The decision of the Director of Industry Operations in a proceeding concerning the revocation of, denial of renewal of, or denial of application for a license or permit. This decision becomes the agency's final decision in the absence of an appeal.

*Final decision.* The definitive decision of ATF, *e.g.*, the agency's decision in the absence of an appeal or the Director's decision following an appeal to the Director.

*License.* Subject to applicable law, entitles the licensee to transport, ship, and receive explosive materials in interstate or foreign commerce, and to engage in the business specified by the license, at the location described on the license.

*Licensee.* Any importer, manufacturer, or dealer licensed under the provisions of 18 U.S.C. chapter 40 and 27 CFR part 555.

*Limited permit.* A permit issued to a person authorizing him to receive for his use explosive materials from a licensee or permittee in his State of residence on no more than six occasions during the 12-month period in which the permit is valid. A limited permit does not authorize the receipt or transportation of explosive materials in interstate or foreign commerce.

*Other term.* Any other term defined in the Federal explosives laws (18 U.S.C. chapter 40), the regulations promulgated thereunder (27 CFR part 555), or the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), where used in this

part, shall have the meaning assigned to it therein.

*Permittee.* Any user of explosives for a lawful purpose who has obtained either a user permit or a limited permit under 18 U.S.C. chapter 40 and 27 CFR part 555.

*Person.* Any individual, corporation, company, association, firm, partnership, society, or joint stock company.

*Recommended decision.* The advisory decision of the administrative law judge in any proceeding regarding the revocation of, denial of renewal of, or denial of application for a license or permit. ATF must act on a recommended decision with its own initial or final decision.

*User-limited permit.* A user permit valid only for a single purchase transaction. Recipients of a user-limited permit must obtain a new permit for any subsequent purchase transaction.

*User permit.* A permit issued to a person authorizing him to—

(1) Acquire for his own use explosive materials from a licensee in a State other than the State in which he resides or from a foreign country; and

(2) Transport explosive materials in interstate or foreign commerce.

*Willfulness.* The plain indifference to, or purposeful disregard of, a known legal duty. Willfulness may be demonstrated by, but does not require, repeat violations involving a known legal duty.

### Subpart C—General

#### § 771.25 Communications and pleadings.

(a) All communications to the Government regarding the procedures set forth in this part and all pleadings, such as answers, motions, requests, or other papers or documents required or permitted to be filed under this part, relating to a proceeding pending before an administrative law judge, shall be addressed to the administrative law judge at his post of duty and the Attorney for the Government. Communications concerning proceedings not pending before an administrative law judge should be addressed to the Director of Industry Operations or Director, as the case may be.

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(b) Except to the extent required for the disposition of ex parte matters as authorized by law, no ex parte communications shall be made to or from the administrative law judge concerning the merits of the adjudication. If the administrative law judge receives or makes an ex parte communication not authorized by law, the administrative law judge shall place on the record of the proceeding:

- (1) All such written communications;
- (2) Memoranda stating the substance of all such oral communications; and
- (3) All written responses and memoranda stating the substance of all oral responses to paragraphs (b)(1) and (2) of this section.

## § 771.26 Service on applicant, licensee, or permittee.

All orders, notices, motions, and other formal documents required to be served under the regulations in this part may be served by mailing a signed, original copy thereof to the designated representative of the applicant, licensee, or permittee by certified mail, with request for return receipt card, at the representative's business address, by personal service, or as otherwise agreed to by the parties. If the applicant, licensee, or permittee has not yet designated a representative, all orders, notices, motions, and other formal documents required to be served under the regulations in this part may be served by mailing a signed, original copy thereof to the applicant, licensee, or permittee at the address stated on his application, license, or permit, or at his last known address, or by delivery of such original copy to the applicant, licensee, or permittee personally, or in the case of a corporation, partnership, or other unincorporated association, by delivering the same to an officer, or manager, or general agent thereof, or to its attorney of record. Such personal service may be made by any employee of the Department of Justice designated by the Attorney General or by any employee of ATF. A certificate of mailing and the return receipt card, or certificate of service signed by the person making such service, shall be filed as a part of the record.

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## § 771.27 Service on the Director of Industry Operations or Director.

Pleadings, motions, notices, and other formal documents may be served by certified mail, by personal service, or as otherwise agreed to by the parties, on the Director of Industry Operations (or upon the Attorney for the Government on behalf of the Director of Industry Operations), or on the Director, if the proceeding is before him for review on appeal.

### TIME

## § 771.28 Computation.

In computing any period of time prescribed or allowed by this part, the day of the act, event, or default after which the designated period of time is to run is not to be included. The last day of the period to be computed is to be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the next day that is not a Saturday, Sunday, or Federal holiday. Pleadings, requests, or other papers or documents required or permitted to be filed under this part must be received for filing at the appropriate office within the time limits, if any, for such filing.

## § 771.29 Continuances and extensions.

For good cause shown, the administrative law judge, Director, or Director of Industry Operations, as the case may be, may grant continuances and, as to all matters pending before him, extend any time limit prescribed by the regulations in this part (except where the time limit is statutory).

### REPRESENTATION AT HEARINGS

## § 771.30 Personal representation.

Any individual or member of a partnership may appear for himself, or for such partnership, and a corporation or association may be represented by a bona fide officer of such corporation or association, upon showing of adequate authorization.

## § 771.31 Attorneys and other representatives.

An applicant, licensee, or permittee may represent himself, or be represented by an attorney, a certified

public accountant, or any other person, specifically designated in a duly executed power of attorney that shall be filed in the proceeding by the applicant, licensee, or permittee. The applicant, licensee, or permittee shall file waivers, if applicable, under the Privacy Act of 1974 and 26 U.S.C. 6103(c) (confidentiality and disclosure of returns and return information). The Director of Industry Operations may be represented in proceedings by an attorney in the Office of Chief Counsel who is authorized to execute and file motions, briefs, and other papers in the proceeding on behalf of the Director of Industry Operations, in the attorney's own name as "Attorney for the Government."

#### **Subpart D—Compliance and Settlement**

##### **§ 771.35 Opportunity for compliance.**

No license or permit shall be revoked or denied renewal unless, prior to the institution of proceedings, facts or conduct warranting such action shall have been called to the attention of the licensee or permittee by the Director of Industry Operations in writing in a contemplated notice, and the licensee or permittee shall have been accorded an opportunity to demonstrate or achieve compliance with all lawful requirements as set forth in section 9(b) of the Administrative Procedure Act. In cases in which the Director of Industry Operations alleges in his contemplated notice, with supporting reasons, willful violations or that the public interest requires otherwise, this section does not apply and the issuance of a contemplated notice is unnecessary.

##### **§ 771.36 Settlement.**

Any proposals of settlement should be made to the Director of Industry Operations, but may be made through the Attorney for the Government. Where necessary, the date of the hearing may be postponed pending consideration of such proposals when they are made in good faith and not for the purpose of delay. If proposals of settlement are submitted, and they are considered unsatisfactory, the Director of Industry Operations may reject the proposals

and may, either directly or through the Attorney for the Government, inform the licensee or permittee of any conditions on which the alleged violations may be settled. If the proposals of settlement are considered satisfactory to the Director of Industry Operations, the licensee or permittee shall be notified thereof and the proceeding shall be dismissed.

##### **§ 771.37 Notice of contemplated action.**

Where the Director of Industry Operations has not ascertained whether the licensee or permittee has willfully violated the Federal explosives laws and where he believes the matter has the potential to be settled informally, *i.e.*, without formal administrative proceedings, he shall, in accordance with section 5(b) of the Administrative Procedure Act, prior to the issuance of a notice of revocation or denial of renewal, give the licensee or permittee a contemplated notice of such action and an opportunity to show why the license or permit should not be revoked or denied renewal. The notice should inform the licensee or permittee of the charges on which the notice would be based, if issued, and afford him a period of 15 days from the date of the notice, or such longer period as the Director of Industry Operations deems necessary, in which to submit proposals of settlement to the Director of Industry Operations. Where informal settlement is not reached promptly because of inaction by the applicant, licensee, or permittee or proposals are made for the purpose of delay, a notice shall be issued in accordance with § 771.42 or § 771.43, as appropriate. The issuance of a notice of contemplated action does not entitle the recipient to a hearing before an administrative law judge.

##### **§ 771.38 Licensee's or permittee's failure to meet requirements within reasonable time.**

If the licensee or permittee fails to meet the requirements of applicable laws and regulations in this part within such reasonable time as may be specified by the Director of Industry Operations, proceedings for revocation or denial of renewal of the license or permit shall be initiated.

**§ 771.39 Authority of Director of Industry Operations to proceed with revocation or denial action.**

Where the evidence is conclusive and the nature of the violation is such as to preclude any settlement, the violation is of a continuing character that necessitates immediate action to protect the public interest, or the Director of Industry Operations believes that any informal settlement of the alleged violation will not ensure future compliance with applicable laws and regulations in this part, or in any similar case where the circumstances are such as to clearly preclude informal settlement, and the Director of Industry Operations so finds and states the reasons therefor in the notice, the Director of Industry Operations may proceed with the revocation or denial of renewal.

**Subpart E—Revocation or Denial**

**§ 771.40 Denial of initial application.**

Whenever the Director of Industry Operations has reason to believe that an applicant for an original license or permit is not eligible to receive a license or permit under the provisions of § 555.49 of this chapter, the Director of Industry Operations shall issue a notice of denial on ATF Form 5400.11 (Notice of Denial of Application for License or Permit) (F 5400.11). The notice will set forth the matters of fact and law relied upon in determining that the application should be denied and will afford the applicant 15 days from the date of receipt of the notice in which to request a hearing to review the denial. If no request for a hearing is filed within that time, a copy of the application, marked “Disapproved,” will be returned to the applicant.

**§ 771.41 Denial of renewal application or revocation of license or permit.**

If, following the opportunity for compliance under § 555.71 of this chapter, or without opportunity for compliance under § 555.71 of this chapter as circumstances warrant, the Director of Industry Operations finds that the licensee or permittee is not likely to comply with applicable laws or regulations in this part or is otherwise not eligible to continue operations authorized under his license or permit, the Di-

rector of Industry Operations shall issue a notice of denial of the renewal application or revocation of the license or permit, ATF F 5400.11 (Notice of Denial of Application for License or Permit) or ATF Form 5400.10 (Notice of Revocation of License or Permit) (F 5400.10), as appropriate. The notice will set forth the matters of fact constituting the violations specified, dates, places, and the sections of law and regulations violated. In the case of the revocation of a license or permit, the notice will specify the date on which the action is effective, which date will be on or after the date the notice is served on the licensee or permittee. The notice will also advise the licensee or permittee that he may, within 15 days after receipt of the notice, request a hearing and, if applicable, a stay of the effective date of the revocation of his license or permit.

**§ 771.42 Grounds for revocation of licenses or permits.**

Whenever the Director of Industry Operations has reason to believe that any holder of a license or permit has willfully violated any provision of 18 U.S.C. chapter 40 or 27 CFR part 555 or has become ineligible to continue operations authorized under the license or permit, the Director of Industry Operations shall issue a notice for the revocation of such license or permit, as the case may be.

**§ 771.43 Grounds for denial of applications for licenses or permits.**

If, upon examination of any application (including a renewal application) for a license or permit, the Director of Industry Operations has reason to believe that the applicant is not entitled to such license or permit, the Director of Industry Operations shall issue a denial of the application. An applicant is not eligible for a license or permit if he fails to meet the requirements of 18 U.S.C. 843(b) and § 555.49 of this chapter.

**Subpart F—Hearing Procedure**

NOTICES

**§ 771.55 Content.**

(a) Notices for the revocation or denial of renewal of a license or permit

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shall be promptly issued by the Director of Industry Operations and shall set forth:

(1) The sections of law and regulations relied upon for authority and jurisdiction;

(2) The specific grounds upon which the revocation or denial is based, *i.e.*, the matters of fact constituting the violations specified, dates, places, and sections of law and regulations violated;

(3) In the case of a revocation, the date on which the action is effective; and

(4) That the licensee or permittee has 15 days from receipt of the notice within which to request a hearing before an administrative law judge.

(b) Notices for the denial of an initial application for a license or permit shall set forth:

(1) The sections of law and regulations relied upon for authority and jurisdiction;

(2) The specific grounds upon which the denial is based, *i.e.*, the matters of fact and law relied upon for the disapproval of the application; and

(3) That the application will be disapproved unless a hearing is requested within 15 days from receipt of the notice.

### § 771.56 Forms.

Notices shall be issued on the following forms:

(a) ATF Form 5400.9, "Order After Denial or Revocation Hearing," for all revocations or denials of renewal of licenses or permits pursuant to 18 U.S.C. chapter 40 after a hearing has been held and a Recommended Decision has been issued by the administrative law judge;

(b) Form 5400.10, "Notice of Revocation for License or Permit," for all revocations of licenses or permits pursuant to 18 U.S.C. chapter 40, except as provided for in paragraph (a) of this section;

(c) Form 5400.11, "Notice of Denial of Application for License or Permit," for the denial of renewal or original applications for licenses or permits pursuant to 18 U.S.C. chapter 40, except as provided for in paragraph (a) of this section;

(d) Form 5400.12, "Notice of Contemplated Denial or Revocation of Li-

cense or Permit," for the contemplated revocation or denial of renewal application of licenses or permits pursuant to 18 U.S.C. chapter 40; or

(e) Such other forms as the Director may prescribe.

### § 771.57 Execution and disposition.

A signed original of the applicable form shall be served on the licensee or permittee. If a hearing is requested, a copy shall be sent to the administrative law judge designated to conduct the hearing. Any remaining copies shall be retained for the office of the Director of Industry Operations.

### § 771.58 Designated place of hearing.

The designated place of hearing shall be determined by the administrative law judge, taking into consideration the convenience and necessity of the parties and their representatives.

#### REQUEST FOR HEARING

### § 771.59 Initial application proceedings.

(a) If the applicant for an initial license or permit desires a hearing, he shall file a request in writing with the Director of Industry Operations within 15 days after receipt of notice of the disapproval, in whole or in part, of the application.

(b) On receipt of the request, the Director of Industry Operations shall forward a copy of the request, together with a copy of the notice, to the Office of Chief Counsel for the assignment of an administrative law judge.

(c) After the Office of Chief Counsel notifies the Director of Industry Operations or the Attorney for the Government of the assignment of an administrative law judge, the Director of Industry Operations shall notify the licensee or permittee of the assignment, if the administrative law judge has not already done so.

### § 771.60 Revocation or denial of renewal proceedings.

(a) If the licensee or permittee desires a hearing, he shall file a request, in writing, with the Director of Industry Operations within 15 days after receipt of the notice or within such time

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as the Director of Industry Operations may allow.

(b) Where a licensee or permittee requests a hearing, the Director of Industry Operations shall forward a copy of the request, together with a copy of the notice, to the Office of Chief Counsel for the assignment of an administrative law judge.

(c) After the Office of Chief Counsel notifies the Director of Industry Operations or the Attorney for the Government of the assignment of an administrative law judge, the Director of Industry Operations shall notify the licensee or permittee of the assignment, if the administrative law judge has not already done so.

(d) In the case of a revocation, a licensee or permittee may include a request for a stay of the effective date of revocation with the request for a hearing.

(e) On receipt of a request for a stay of the effective date of a revocation, the Director of Industry Operations shall timely advise the licensee or permittee whether the stay is granted.

(1) If the stay is granted, the matter shall be referred to an administrative law judge pursuant to paragraph (b) of this section.

(2) If the stay is denied, the licensee or permittee may request an immediate hearing. In this event, the Director of Industry Operations shall immediately refer the matter to the Office of Chief Counsel for the assignment of an administrative law judge, who shall set a date and place for hearing, which date shall be no later than 10 days from the date the licensee or permittee requested the immediate hearing.

### **§ 771.61 Notice of hearing.**

Once a request for a hearing has been referred to the administrative law judge, the administrative law judge shall set a time and place for a hearing and shall serve notice thereof upon the parties at least 10 days in advance of the hearing date.

#### **NON-REQUEST FOR HEARING**

### **§ 771.62 Initial application.**

In the case of an initial application, if the applicant does not request a hearing within 15 days, or within such

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additional time as the Director of Industry Operations may in his discretion allow, the Director of Industry Operations will return a copy of the application, marked "Disapproved," to the applicant, accompanied by a brief statement including the findings upon which the denial is based.

### **§ 771.63 Revocation or denial of renewal.**

In the case of a revocation or denial of renewal of an application, if the licensee or permittee does not request a hearing within 15 days, or within such additional time as the Director of Industry Operations may in his discretion allow, the Director of Industry Operations shall make the initial decision in the case pursuant to § 771.78(b).

#### **RESPONSES TO NOTICES**

### **§ 771.64 Answers.**

(a) Where the licensee or permittee requests a hearing in accordance with §§ 771.59 and 771.60, a written response to the relevant notice may be filed with the administrative law judge and served on the Director of Industry Operations within 15 days after the licensee or permittee receives service of the designation of the administrative law judge.

(b) Where no hearing is requested, the licensee or permittee may file a written answer to the relevant notice with the Director of Industry Operations within 15 days after service of the notice.

(c) An answer shall contain a concise statement of the facts that constitute the grounds for defense. A hearing, if requested, may be limited to the issues contained in the notice and the answer. The administrative law judge or Director of Industry Operations, as the case may be, may, as a matter of discretion, waive any requirement of this section.

(d) Answers need not be filed in initial application proceedings.

### **§ 771.65 Responses admitting facts.**

If the licensee or permittee desires to waive the hearing on the allegations of fact set forth in the notice and does not contest the facts, the answer may consist of a statement that the licensee



or permittee admits all material allegations of fact charged in the notice to be true. The Director of Industry Operations shall base the decision on the notice and such answer, although such an answer shall not affect the licensee's or permittee's right to submit proposed findings of fact and conclusions of law or right to appeal.

**§ 771.66 Initial conferences.**

(a) In any proceeding, the administrative law judge, upon his own motion or upon the motion of one of the parties or their qualified representatives, may in the administrative law judge's discretion direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider:

- (1) Simplification of the issues;
- (2) The necessity of amendments to the pleadings;
- (3) The possibility of obtaining stipulations, admissions of facts, and documents;
- (4) The possibility of both parties exchanging information or scheduling discovery;
- (5) A date on which both parties will simultaneously submit lists of proposed hearing exhibits;
- (6) Limiting the number of expert witnesses;
- (7) Identifying and, if practicable, scheduling all witnesses to be called; however, there is no requirement in these proceedings for the parties to submit pre-hearing statements or statements of proposed testimony by witnesses; and
- (8) Such other matters as may aid in the disposition of the proceeding.

(b) As soon as practicable after such conference, the administrative law judge shall issue an order that recites the action taken, the amendments allowed to the pleadings, and the agreements made by the parties or their qualified representatives as to any of the matters considered. The order shall also limit the issues for hearing to those not disposed of by admission or agreement. Such order shall control the subsequent course of the proceedings, unless modified for good cause by a subsequent order. After discovery is complete, the order may be amended or supplemented if necessary.

**FAILURE TO APPEAR**

**§ 771.67 Initial applications.**

Where the applicant on an initial application for a license or permit has requested a hearing and does not appear at the appointed time and place, evidence has not been offered to refute or explain the grounds upon which disapproval of the application is contemplated, and no good cause has been shown for the failure to appear, the applicant shall be considered to have waived the hearing. When such waiver occurs, a default judgment against the applicant will be entered and the administrative law judge shall recommend disapproval of said application.

**§ 771.68 Revocation or denial of renewal.**

If, on the date set for a hearing concerning the revocation or denial of renewal of a license or permit, the licensee or permittee does not appear, no evidence has been offered, and no good cause has been shown for the failure to appear, the Attorney for the Government will proceed ex parte and offer for the record sufficient evidence to make a *prima facie* case. At such hearing, documents, statements, and affidavits may be submitted in lieu of testimony of witnesses.

**WAIVER OF HEARING**

**§ 771.69 Withdrawal of request for hearing.**

At any time prior to the assignment of an administrative law judge, the licensee or permittee may, by filing written notice with the Director of Industry Operations, withdraw his request for a hearing. If such a notice is filed after assignment to the administrative law judge and prior to issuance of his recommended decision the Director of Industry Operations shall move the administrative law judge to dismiss the proceedings as moot. If such a notice is filed either after issuance of a notice of denial or notice of revocation and before assignment of the administrative law judge, or after issuance by the administrative law judge of his recommended decision and prior to the Director of Industry Operations' order

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disapproving the application or denying the renewal of or revoking the license or permit, the Director of Industry Operations shall, by order, dismiss the proceeding.

### **§ 771.70 Adjudication based upon written submissions.**

The licensee or permittee may waive the hearing before the administrative law judge and stipulate that the matter will be adjudicated by the Director of Industry Operations based upon written submissions. Written submissions may include stipulations of law or facts, proposed findings of fact and conclusions of law, briefs, or any other documentary material. The pleadings, together with the written submissions of both the licensee or permittee and the attorney for the Government, shall constitute the record on which the initial decision shall be based. The election to contest the denial or revocation without a hearing under this section does not affect the licensee's or permittee's right to appeal to the Director pursuant to § 555.79 of this chapter or to the United States Court of Appeals for the circuit in which the licensee or permittee resides or has his principal place of business pursuant to § 555.80 of this chapter.

#### **SURRENDER OF LICENSE OR PERMIT**

### **§ 771.71 Before citation.**

If a licensee or permittee surrenders the license or permit before the notice of revocation or denial of renewal, the Director of Industry Operations may accept the surrender. But if the evidence, in the opinion of the Director of Industry Operations, warrants issuance of a notice for revocation or denial of renewal, the surrender shall be refused and the Director of Industry Operations shall issue the notice.

### **§ 771.72 After citation.**

If a licensee or permittee surrenders the license or permit after notice, but prior to the referral to an administrative law judge and prior to an initial decision, the Director of Industry Operations may accept the surrender of the license or permit and dismiss the proceeding as moot. If a licensee or permittee surrenders the license or permit

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after notice and after the referral to the administrative law judge, but prior to the issuance of a recommended decision, the Director of Industry Operations may accept the surrender of the license or permit and shall move the administrative law judge to dismiss the proceedings as moot. In either case, if, in the opinion of the Director of Industry Operations, the evidence is such as to warrant revocation or denial of renewal, as the case may be, the surrender of the license or permit shall be refused, and the proceeding shall continue.

#### **MOTIONS**

### **§ 771.73 General.**

All motions shall be made and addressed to the administrative law judge before whom the proceeding is pending, and copies of all motion papers shall be served upon the other party or parties. The administrative law judge may dispose of any motion without oral argument, but he may, if he so desires, set it down for hearing and request argument. The administrative law judge may dispose of such motion prior to the hearing on the merits or he may postpone the disposition until the hearing on the merits. No appeal may be taken from any ruling on a motion until the whole record is certified for review. Examples of typical motions may be found in the Rules of Civil Procedure referred to in § 771.2.

### **§ 771.74 Prior to hearing.**

All motions that should be made prior to the hearing, such as a motion directed to the sufficiency of the pleadings or of preliminary orders, shall be filed in writing with the Director of Industry Operations or the administrative law judge if the matter has been referred to him, and shall briefly state the order or relief applied for and the grounds for such motion.

### **§ 771.75 At hearing.**

Motions at the hearing may be made in writing to the administrative law judge or stated orally on the record.

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### HEARING

#### § 771.76 General.

If a hearing is requested, it shall be held at the time and place stated in the notice of hearing unless otherwise ordered by the administrative law judge.

#### § 771.77 Initial applications.

(a) The administrative law judge who presides at the hearing on initial applications shall recommend a decision to the Director of Industry Operations. The administrative law judge shall certify the complete record of the proceedings before him and shall immediately forward the complete certified record to the Director of Industry Operations. The administrative law judge shall also send one copy of his recommended decision to the applicant or the applicant's representative, one copy to the Attorney for the Government, and one copy to the Director of Industry Operations, who shall make the initial decision as provided in § 771.107. The applicant may be directed by the Director of Industry Operations to produce such records as may be deemed necessary for examination. All hearings on applications shall be open to the public subject to such restrictions and limitations as may be consistent with orderly procedure.

(b) If no hearing is requested, the return of the application marked "Disapproved" is the Director of Industry Operations' initial decision.

#### § 771.78 Revocation or denial of renewal.

(a) The administrative law judge who presides at the hearing in proceedings for the revocation or denial of renewal of licenses or permits shall make a recommended decision to the Director of Industry Operations. The administrative law judge shall certify the complete record of the proceedings before him and shall immediately forward the complete certified record to the Director of Industry Operations. The administrative law judge shall also send one copy of his recommended decision to the licensee or permittee or the licensee's or permittee's representative, one copy to the Attorney for the Government, and one copy to the Director of Industry Operations, who shall make

the initial decision as provided in § 771.109.

(b) If no hearing is requested, the Director of Industry Operations shall make the initial decision.

### BURDEN OF PROOF

#### § 771.79 Initial applications.

In hearings on the initial denial of applications, the burden of proof is on the Government to show by a preponderance of the evidence that the Director of Industry Operations had reason to believe that the applicant is not entitled to a permit or license.

#### § 771.80 Revocation or denial of renewal.

In hearings on the revocation or denial of renewal of a license or permit, the burden of proof is on the Government to show that the Director of Industry Operations had reason to believe that the licensee or permittee is not entitled to a permit or license, as may be the case. The Government must meet this proof by a preponderance of the evidence.

### GENERAL

#### § 771.81 Stipulations at hearing.

If there has been no initial conference under § 771.66, the administrative law judge may at the beginning of the hearing require that the parties attempt to arrive at such stipulations as will eliminate the necessity of taking evidence with respect to allegations of fact about which there is no substantial dispute. The administrative law judge should take similar action, where appropriate, throughout the hearing and should call and conduct any conferences that he deems advisable with a view to the simplification, clarification, and disposition of any of the issues involved in the hearing.

#### § 771.82 Evidence.

The Federal Rules of Evidence are not binding on these proceedings. However, any relevant evidence that would be admissible under the rules of evidence governing civil proceedings in matters not involving trial by jury in the Courts of the United States shall be admissible. The administrative law

judge may relax such rules in any hearing when in his judgment such relaxation would not impair the rights of either party and would more speedily conclude the hearing or would better serve the ends of justice. However, the administrative law judge shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, depositions, or duly authenticated copies of records and documents; to submit rebuttal evidence; and to conduct such reasonable cross-examination as may be required for a full and true disclosure of the facts.

(a) *Witnesses.* The administrative law judge shall have the right in his discretion to limit the number of witnesses whose testimony may be merely cumulative and shall, as a matter of policy, not only exclude irrelevant, immaterial, or unduly repetitious evidence but shall also limit the cross-examination of witnesses to that required for a full and true disclosure of the facts so as not to unnecessarily prolong the hearing and unduly burden the record. Opinion or expert testimony shall be admitted when the administrative law judge is satisfied that the witness is properly qualified as defined by Federal Rules of Evidence 701 or 702.

(b) *Documentary evidence.* Material and relevant evidence shall not be excluded because it is not the best evidence unless its authenticity is challenged, in which case reasonable time shall be given to establish its authenticity. When only portions of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the administrative law judge and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the whole of the original document should be made available for examination and for use by opposing counsel for purposes of cross-examination. Compilations, charts, summaries of data, and photocopies of documents may be admitted in evidence if the pro-

ceedings will thereby be expedited, and if the material upon which they are based is available for examination by the parties. Objections to the evidence shall be in short form, stating the grounds relied upon. The transcript shall not include argument or debate on objections, except as ordered by the administrative law judge, but shall include the rulings thereon. Where official notice is taken of a material fact not appearing in the evidence in the record, any party shall, on timely request, be afforded an opportunity to controvert such fact.

(c) *Hearsay.* Probative, material, and reliable hearsay evidence is admissible in proceedings under this subpart.

#### **§ 771.83 Closing of hearings; arguments, briefs, and proposed findings.**

Before closing a hearing, the administrative law judge shall inquire of each party whether the party has any further evidence to offer, which inquiry and the response thereto shall be shown in the record. The administrative law judge may hear arguments of counsel and the administrative law judge may limit the time of such arguments at his discretion. The administrative law judge may, in his discretion, allow briefs to be filed on behalf of either party but shall closely limit the time within which the briefs for both parties shall be filed, so as to avoid unreasonable delay. The administrative law judge shall also ascertain whether the parties desire to submit proposed findings and conclusions, together with supporting reasons, and, if so, a period of not more than 15 days (unless extended by the administrative law judge)—after the close of the hearing or receipt of a copy of the record, if one is requested—will be allowed for such purpose.

#### **§ 771.84 Reopening of the hearing.**

The Director, the Director of Industry Operations, or the administrative law judge, as the case may be, may, as to all matters pending before him, in his discretion reopen a hearing—

(a) In case of default under § 771.67 or § 771.68 where the applicant, licensee, or permittee failed to request a hearing or

to appear after one was set, upon petition setting forth reasonable grounds for such failure; and

(b) Where any party desires leave to adduce additional evidence upon petition summarizing such evidence, establishing its materiality, and stating reasonable grounds why such party with due diligence was unable to produce such evidence at the hearing.

#### RECORD OF TESTIMONY

##### § 771.85 Stenographic record.

A stenographic record shall be made of the testimony and proceedings, including stipulations, admissions of fact, and arguments of counsel in all proceedings. A transcript of the evidence and proceedings at the hearing shall be made in all cases.

##### § 771.86 Oath of reporter.

The reporter making the stenographic record shall subscribe an oath before the administrative law judge, to be filed in the record of the case, that he will truly and correctly report the oral testimony and proceedings at such hearing and accurately transcribe the same to the best of his ability.

### Subpart G—Administrative Law Judges

##### § 771.95 Responsibilities of administrative law judges.

In hearings under this subpart, administrative law judges must apply all governing agency rulings and governing agency precedent. They shall be responsible for the conduct of hearings and shall render their decisions as soon as is reasonably possible after the hearing is closed. Administrative law judges shall also be responsible for the preparation, certification, and forwarding of the complete record of proceedings and the administrative work relating thereto and, by arrangement with Directors of Industry Operations and representatives of the Office of Chief Counsel shall have access to facilities and temporary use of personnel at such times and places as are needed in the prompt dispatch of official business.

##### § 771.96 Disqualification.

An administrative law judge shall, at any time, withdraw from any proceeding if he deems himself disqualified. Upon the filing in good faith by the applicant, licensee, permittee, or Attorney for the Government of a timely and sufficient affidavit of facts showing personal bias or otherwise warranting the disqualification of any administrative law judge, if the administrative law judge fails to disqualify himself, the Director shall upon appeal, as provided in § 771.120, determine the matter as a part of the record and decision in the proceeding. If the Director decides the administrative law judge should have deemed himself disqualified, the Director will remand the record for hearing de novo before another administrative law judge. If the Director should decide against the disqualification of the administrative law judge, the proceeding will be reviewed on its merits by the original administrative law judge. The burden is upon the party seeking disqualification to set forth evidence sufficient to overcome the presumption of the administrative law judge's honesty and integrity.

##### § 771.97 Powers.

Administrative law judges shall have authority to:

- (a) Administer oaths and affirmations;
- (b) Issue subpoenas as authorized by law;
- (c) Rule upon offers of proof and receive relevant evidence;
- (d) Take or cause depositions to be taken whenever the ends of justice would be served thereby;
- (e) Regulate the course of the hearing;
- (f) Hold conferences for the settlement or simplification of the issues by consent of the parties;
- (g) Require the attendance at such conferences of at least one representative of each party who has the authority to negotiate concerning resolution of issues in controversy;
- (h) Dispose of procedural requests or similar matters;
- (i) Render recommended decisions in proceedings on applications for licenses

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and permits and on revocation or denial of renewal of licenses or permits;

(j) Call, examine, and cross-examine witnesses, including hostile or adverse witnesses, when the administrative law judge deems such action to be necessary to a just disposition of the case, and introduce into the record documentary or other evidence; and

(k) Take any other action authorized by rule of the Bureau of Alcohol, Tobacco, Firearms, and Explosives consistent with the Administrative Procedure Act. *See* 5 U.S.C. 556(c) and 18 U.S.C. 843.

### **§ 771.98 Separation of functions.**

Administrative law judges shall perform no functions inconsistent with their duties and responsibilities. The Director may assign administrative law judges duties not inconsistent with the performance of their functions as administrative law judges. Except to the extent required for the disposition of ex parte matters as required by law, no administrative law judge shall consult any person or party as to any fact in issue unless there has been notice and opportunity for all parties to participate. The functions of the administrative law judge shall be entirely separated from the general investigative functions of the agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions in any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the administrative law judge's or Director's decision, or in the agency review on appeal, except as a witness or counsel in the proceedings. The administrative law judge may not informally obtain advice or opinions from the parties or their counsel, or from any officer or employee of the ATF, as to the facts or the weight or interpretation to be given to the evidence. The administrative law judge may, however, informally obtain advice on matters of law or procedure in a proceeding from officers or employees who were not engaged in the performance of investigative or prosecuting functions in that proceeding or a factually related proceeding. The administrative law judge may, at any time, consult with

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and obtain instructions from the Director on questions of law and policy. Furthermore, it is not a violation of the separation of functions for the administrative law judge to participate in the questioning of witnesses, where the questioning is for clarification or to move the proceedings along, and where the questioning is not so extensive as to place the administrative law judge in the position of a prosecuting officer.

### **§ 771.99 Conduct of hearing.**

The administrative law judge is charged with the duty of conducting a fair and impartial hearing and of maintaining order in form and manner consistent with the dignity of a court proceeding. In the event that counsel or any person or witness in any proceeding shall refuse to obey the orders of the administrative law judge, or be guilty of disorderly or contemptuous language or conduct in connection with any hearing, the administrative law judge may, for good cause stated in the record, suspend the hearing, and, in the case of disorderly or contemptuous language or conduct by an attorney, report the matter to the Department of Justice, Office of Professional Responsibility. *See* 28 CFR 0.39a(a)(9). The refusal of a witness to answer any question that has been ruled to be proper shall be considered by the administrative law judge in determining the weight to be given all the testimony of that witness.

### **§ 771.100 Unavailability of administrative law judge.**

In the event that the administrative law judge designated to conduct a hearing becomes unavailable before the filing of his findings and recommended decision, the Director may assign the case to another administrative law judge for the continuance of the proceeding, in accordance with the regulations in this part in the same manner as if he had been designated administrative law judge at the commencement of the proceeding.

**Subpart H—Decisions****§ 771.105 Administrative law judge's findings and recommended decision.**

Within a reasonable time after the conclusion of the hearing, and as expeditiously as possible, the administrative law judge shall render his recommended decision. All decisions shall become a part of the record and, if proposed findings and conclusions have been filed, shall show the administrative law judge's ruling upon each of such proposed findings and conclusions. Decisions shall consist of:

(a) A brief statement of the issues of fact involved in the proceeding;

(b) The administrative law judge's findings and conclusions, as well as the reasons or basis therefor with record references, upon all the material issues of fact, law, or discretion presented on the record (including, when appropriate, comment as to the credibility and demeanor of the witnesses); and

(c) The administrative law judge's recommended determination as to the revocation or denial at issue.

**§ 771.106 Certification and transmittal of record and decision.**

After reaching his decision, the administrative law judge shall certify the complete record of the proceeding before him and shall immediately forward the complete certified record together with one copy of the administrative law judge's recommended decision to the Director of Industry Operations for initial decision, one copy of the recommended decision to the applicant or the applicant's representative, and one copy of the recommended decision to the Attorney for the Government.

**ACTION BY DIRECTOR OF INDUSTRY OPERATIONS****§ 771.107 Initial application proceedings.**

(a) *Accepting the recommended decision.* If the Director of Industry Operations, after consideration of the record of the hearing and of any proposed findings, conclusions, or exceptions filed with him by the applicant, accepts the recommended decision of

the administrative law judge, the Director of Industry Operations shall by order approve or disapprove of the application in accordance with the recommended decision. If the Director of Industry Operations approves the application, he shall briefly state for the record his reasons therefor. However, if the Director of Industry Operations disapproves of the applications, he shall serve a copy of the administrative law judge's recommended decision on the applicant, informing the applicant of the Director of Industry Operations' contemplated action and affording the applicant not more than 10 days in which to submit proposed findings and conclusions or exceptions to the recommended decision with reasons in support thereof.

(b) *Rejecting the recommended decision.* If, after such consideration referenced in paragraph (a) of this section, the Director of Industry Operations rejects the recommended decision of the administrative law judge, in whole or in part, the Director of Industry Operations shall by order make such findings and conclusions as in his opinion are warranted by the law and facts in the record. Any decision of the Director of Industry Operations ordering the disapproval of an application for a permit shall state the findings and conclusions upon which it is based, including his ruling upon each proposed finding, conclusion, and exception to the administrative law judge's recommended decision, together with a statement of the administrative law judge's findings, conclusions, and reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record. A signed original of the decision of the Director of Industry Operations shall be served upon the applicant and the original copy containing a certificate of service shall be placed in the official record of the proceeding.

**§ 771.108 Director of Industry Operations' decision.**

When the Director of Industry Operations issues an initial decision in accordance with § 771.77 or § 771.107 the decision shall become a part of the record. The decision shall consist of:

(a) A brief statement of the issues involved in the proceedings;

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(b) The Director of Industry Operations' findings and conclusions, as well as the reasons therefor; and

(c) The Director of Industry Operations' determination on the record.

### § 771.109 Revocation or denial of renewal proceedings.

(a) *Accepting the recommended decision.* After consideration of the complete certified record of the hearing, if the Director of Industry Operations agrees with the recommended decision of the administrative law judge, the Director of Industry Operations shall enter an order revoking or denying the renewal of the license or permit or dismissing the proceedings in accordance with the administrative law judge's recommended decision.

(b) *Rejecting the recommended decision.* After consideration of the complete certified record of the hearing, if the Director of Industry Operations disagrees with the recommended decision of the administrative law judge, he may file a petition with the Director for review of the recommended decision, as provided in § 771.120. If the Director of Industry Operations files such a petition, he shall withhold issuance of the order pending the decision of the Director, upon receipt of which he shall issue the order in accordance with the Director's decision. A signed original of the order of the Director of Industry Operations shall be served upon the licensee or permittee or his representative and the original copy containing a certificate of service shall be placed in the official record of the proceeding.

(c) *Decisions pursuant to § 771.78(b).* In a case where the initial decision is made by the Director of Industry Operations in accordance with § 771.78(b), the Director of Industry Operations shall also issue an order revoking or denying the renewal of the license or permit, or dismissing the proceedings in accordance with his initial decision. A signed original of the decision and order of the Director of Industry Operations shall be served upon the licensee or permittee or his representative and the original copy placed in the official record of the proceeding.

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### § 771.110 Revocation or denial of renewal.

Pursuant to § 771.109(a), when the Director of Industry Operations issues an order revoking or denying the renewal of a license or permit, he shall furnish a copy of the order and of the recommended decision on which it is based to the Director. Should such order be subsequently set aside on review by the courts, the Director of Industry Operations will so advise the Director.

### § 771.111 Proceedings involving violations not within the division of issuance of license or permit.

In the event violations occurred at a place not within the field division where the licensee or permittee is located, the Director of Industry Operations of the field division where the licensee or permittee is located will take jurisdiction over any proceeding and will take appropriate action in accordance with this subpart, including issuing the relevant notice.

## Subpart I—Review

### § 771.120 Appeal on petition to the Director.

(a) An appeal to the Director may be made by the applicant, licensee, or permittee, or by the Director of Industry Operations (DIO). For the applicant, licensee, or permittee, such appeal shall be made by filing a petition for review on appeal with the Director within 15 days of the service of the adverse initial decision by the Director of Industry Operations. For the Director of Industry Operations, such appeal shall be taken by filing a petition for review on appeal with the Director within 15 days of the issuance of the administrative law judge's decision recommending against revocation or denial of renewal. The petitioning applicant, licensee, or permittee must submit arguments showing that the Director of Industry Operations' initial decision, and if applicable the underlying administrative law judge's recommended decision, was without reasonable warrant



in fact or contrary to law and regulations. The petitioning DIO must submit arguments showing the administrative law judge's recommended decision was without reasonable warrant in fact or contrary to law and regulations. Nothing in this part shall limit the authority of the Director to review the administrative law judge's decision exercising all the powers that he would have in making the recommended decision.

(b) A copy of the petition shall be filed with the Director of Industry Operations or served on the applicant, licensee, or permittee, as the case may be. In the event of an appeal, the Director of Industry Operations shall immediately certify and forward the complete original record, by certified mail, to the Director, for his consideration and review.

#### § 771.121 Review by Director.

(a) *Modification or reversal.* On appeal, the Director shall afford a reasonable opportunity for the submission of proposed findings, conclusions, or exceptions with reasons in support thereof and an opportunity for oral argument. The Director may alter or modify any finding of the administrative law judge (or of the Director of Industry Operations as the case may be) and may affirm, reverse, or modify the recommended decision of the administrative law judge, or the initial decision of the Director of Industry Operations, or may remand the case for further hearing, but shall not consider evidence that is not a part of the record.

(b) *Affirmance.* Except in the case of a remand, when, on appeal, the Director affirms the initial decision of the Director of Industry Operations or the recommended decision of the administrative law judge, as the case may be, such decision shall be the agency's final decision.

(c) *Recusal.* Appeals and petitions for review shall not be decided by the Director in any proceeding in which the Director has engaged in an investigation or prosecution and in such event the Director shall so state his disqualification in writing and refer the record to the Deputy Director for appropriate action. The Deputy Director may designate an Assistant Director or one of

the Deputy Director's principal aides to consider any proceeding instead of the Director. The original copy of the decision on review shall be placed in the official record of the proceeding, a signed duplicate original shall be served upon the applicant, licensee, or permittee, and a copy shall be transmitted to the Director of Industry Operations.

#### § 771.122 Denial of renewal or revocation.

If the Director orders the denial of an application, a copy of the application marked "Disapproved" will be returned to the applicant by the Director of Industry Operations. If the Director orders a revocation of a license of permit, any stay of revocation will be withdrawn and the revocation will become effective upon the order of the Director of Industry Operations. After the issuance of a denial of a renewal application or a revocation, and pending the final determination of a timely appeal, the licensee or permittee may continue operations, if at all, pursuant to § 555.83 of this chapter.

#### § 771.123 Court review.

(a) If an applicant, licensee, or permittee files an appeal in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, within 60 days after the receipt of the Director's decision, the Director, upon notification that an appeal has been taken, shall prepare the record for submission to the court in accordance with applicable court rules.

(b) If an applicant, licensee, or permittee does not seek review with the Director, but instead seeks review within 60 days after the receipt of the initial decision of the Director of Industry Operations pursuant to § 771.109, the Director of Industry Operations, upon notification that an appeal has been taken, shall prepare the record for submission to the court in accordance with applicable court rules. The Director of Industry Operations shall notify the Director if such an appeal is taken.

(c) The Director, or the Director of Industry Operations, as the case may be, shall certify the correctness of the transcript of the record, forward one

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copy to the attorney for the Government in the review of the case, and file the original record of the proceedings with the original certificate in the appropriate United States Court of Appeals.

### **Subpart J—Miscellaneous**

#### **§ 771.124 Depositions.**

The administrative law judge may take or order the taking of depositions by either party to the proceeding at such time and place as the administrative law judge may designate before a person having the power to administer oaths, upon application therefor and notice to the parties to the action. The testimony shall be reduced to writing by the person taking the deposition, or a person under his direction, and the deposition shall be subscribed by the deponent unless subscribing thereof is waived in writing by the parties.

#### **§ 771.125 Witnesses and fees.**

Witnesses summoned before the administrative law judge may be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

#### **§ 771.126 Discovery.**

The discovery provisions of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are not controlling with respect to agency proceedings under this part.

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However, fundamental fairness requires a party be given the opportunity to know what evidence is offered and a chance to rebut such evidence. Either party may petition the administrative law judge for non-burdensome discovery if the party can demonstrate that the interests of justice require disclosure of these materials.

#### **§ 771.127 Privileges.**

The Administrative Procedure Act, 5 U.S.C. 559, provides that, except as otherwise required by law, privileges relating to procedure or evidence apply equally to agencies and persons. Therefore, an agency may rely on judicially-approved privileges to resist production of its files where appropriate.

### **RECORD**

#### **§ 771.135 What constitutes record.**

The transcript of testimony, pleadings, exhibits, all papers and requests filed in the proceeding, and all findings, decisions, and orders, shall constitute the exclusive record. Where the decision rests on official notice of material fact not appearing in the record, the administrative law judge shall so state in his findings and any party shall, on timely request, be afforded an opportunity to show facts to the contrary.

#### **§ 771.136 Availability.**

A copy of the record shall be available for inspection or copying by the parties to the proceedings during business hours at the office of the administrative law judge or the Director of Industry Operations or, pending administrative review, at the Office of the Director.

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