

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

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

ACTION: Proposed rule amendments; request for public comment.

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

DATES: Written comments must be received on or before November 6, 2008.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to “Parts 3 and 4 Rules of Practice Rulemaking—

P072104” to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (<http://www.ftc.gov/os/publiccomments.shtm>) — and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records and other individually identifiable health information. In addition, comments should not include any “[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.9(c).¹

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

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

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

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

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION: This discussion contains the following sections:

- I. Introduction
- II. Section-By-Section Analysis of the Proposed Rule Revisions
- III. Invitation to Comment
- IV. Proposed Rule Revisions

I. Introduction*A. Need for Reform of the Commission’s Adjudicatory Process*

The Commission has periodically reviewed its rules and procedures governing the process of administrative adjudication at the Commission (“Part 3 Rules”) to determine if its administrative adjudication process can be improved, and has made changes it considered appropriate. In particular, the Commission’s Part 3 adjudicatory process has long been criticized as being too protracted. *See, e.g., FTC v. Freeman Hosp.*, 911 F.Supp. 1213, 1228 n.8 (W.D. Mo. 1995) (“The average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed.”), *aff’d*, 69 F.3d 260 (8th Cir. 1995); *see also National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974) (remarking upon the “leisurely course typical of FTC proceedings”); J. Robert Robertson, *FTC Part III*

Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare, 20 Antitrust 12 (Spring 2006); *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 116 n.167 (1989) (“It is disappointing that the Commission . . . continues to have problems of delay.”).

Protracted Part 3 proceedings have at least three undesirable consequences. First, in merger cases, such protracted proceedings may result in parties abandoning transactions before their antitrust merits can be adjudicated. Second, protracted Part 3 proceedings may result in substantially increased litigation costs for the Commission and respondents whose transactions or practices are challenged. For example, protracted discovery schedules and pretrial proceedings can result in nonessential discovery and motion practice that can be very costly to both the Commission and respondents. Third, protracted Part 3 proceedings do not necessarily result in decisions that are more just or fair. To the contrary, there is some truth to the adage that frequently “justice delayed, is justice denied.”

To address these concerns, the Commission has periodically engaged in reform efforts to minimize delay and improve the quality of the administrative decisionmaking process in a fair manner fully consistent with the Administrative Procedure Act (“APA”)² without prejudicing the due process rights of the parties in these proceedings. For example, in 1994 the Commission adopted a guideline to expedite the preparation and issuance of final orders and opinions from an initial decision. *See* (<http://www.ftc.gov/os/adjpro/adjproprepprocedures.pdf>). In 1996, the Commission adopted the “fast track” procedure in Rule 3.11A and other changes. 61 FR 50640 (Sept. 26, 1996). In 2001, the Commission issued another package of approximately twenty rule changes, 66 FR 17622 (Apr. 3, 2001),³ and has implemented other rule changes throughout the past decade.

More recently, Commission staff engaged in a broad and systematic internal review to further improve its Part 3 practices and procedures in light of the Commission’s recent adjudicatory experiences. The goal of this effort was for significant improvement in the Part 3 process through comprehensive review rather than piecemeal modifications of a limited number of rules, to ensure that the rules are consistent with one another and that they are workable in practice. Discussions involved input from various Bureaus within the Commission, the Office of the General Counsel, the Office of the Administrative Law Judges, an evaluation of the rules and procedures of the federal courts and other agencies’ adjudicative procedures, as well as the legal standards imposed by the APA.

The Commission believes that any adjudicative process should balance three factors: the public interest in a high quality decisionmaking process; the interests of justice in an expeditious resolution of litigated matters; and the very real interest of the parties in litigating matters economically without unnecessary expense. For example, in principle, high quality expeditious

adjudications may impose costs on the parties or the agency that they may not need to bear if the demands of a given case permit a more leisurely adjudicative process. Alternatively, attempts to increase efficiency or decrease costs to those involved could lead to trade offs in the quality of the ultimate result. The Commission believes that these comprehensive proposed rule revisions would strike an appropriate balance between the need for fair process and quality decisionmaking, the desire for efficient and speedy resolution of matters, and the potential costs imposed on the Commission and the parties.

B. Respective Roles of the Commission and the Administrative Law Judge

The Commission was established by Congress and President Woodrow Wilson in 1914 to be an expert, specialized agency providing guidance to consumers and the business community on sophisticated questions involving unfair methods of competition, later expanded to issues involving unfair or deceptive acts or practices.⁴ To accomplish this goal, it was provided the authority not only to prosecute cases and serve as a “think tank” making policy, but also to adjudicate its own cases and render decisions.⁵ Congress determined that the Commission could use its expertise and administrative adjudicative powers as a “uniquely effective vehicle for the development of antitrust law in complex settings in which the agency’s expertise [could] make a measurable difference.”⁶ Certainty, consistency and accuracy in Commission decisions could serve as a tool not only to improve the resolution of individual cases, but to provide broad guidance to industry and the public and help set the policy agenda.⁷

In the influential 1941 report by the Attorney General that became the basis for the subsequently enacted APA, the Attorney General identified numerous advantages to administrative adjudications: for example, the potential for uniformity of decisions, efficiency, and the inability of courts to handle the

volume of suits heard by administrative agencies.⁸ One of the most critical advantages, and a cornerstone characteristic of administrative agencies, is expertise. The Congress and the Executive have long recognized that the ability of agencies to devote continuous time, supervision, and expertise to complex problems calling for specialized knowledge is a critical advantage and an important reason for the creation of administrative agencies.⁹ With its expertise and unique institutional tools, the Commission was created to be—and continues to function as—a forum for expert adjudication.

The Attorney General’s Final Report also described the role of hearing examiners (the predecessor to ALJs) in all agencies that use them. The report observed that the hearing examiner “plays an essential part of the process of hearing and deciding” given the difficulty for busy agency heads to fulfill these roles.¹⁰ Specifically, the Report discussed the importance of having a presiding officer, such as an ALJ, hear the evidence and make an initial decision or recommendation because agency heads may lack the time to “read the voluminous records and winnow out the essence of them.”¹¹ The Attorney General’s Manual on the APA further explained that a general statutory purpose of the APA was to “enhance[] the status and role of hearing officers” and, because the APA vests in the ALJs the enumerated powers to the extent that such powers have been given to the agency itself, “an agency is without power to withhold such powers from its hearing officers.”¹² ALJs have wide ranging authority under the APA.¹³

At the same time, the APA specifies that such authority is “subject to the published rules of the agency,” which “is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by [ALJs].”¹⁴ Thus, the Supreme Court “has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.” *Vermont*

² 5 U.S.C. 551 *et seq.*

³ As discussed below in the section-by-section summary of the proposed rule revisions, the Commission is proposing certain rule revisions to rules it implemented previously that had lengthened the process. For example, it is proposing to revise Rule 3.12(a) (as amended in the 2001 revisions), which permits the tolling of the period to answer the complaint until resolution of certain motions, because parties have other procedural means available to them that would not unduly delay the proceedings. Similarly, the Commission is proposing a modest reduction in the period of time to schedule an initial pretrial conference under Rule 3.21(b) that had been enlarged in the 2001 revisions.

⁴ *Final Report of the Attorney General’s Committee on Administrative Procedure* 16 (1941) [hereinafter *Attorney General’s Final Report*]; *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L.J.* 1 (2003) (discussing the formation and history of the FTC); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 *Antitrust L.J.* 319 (2003) (discussing the evolution of administrative adjudication at the FTC).

⁵ Hoffman & Royall, *supra* note 4, at 319.

⁶ *Id.* at 319–20.

⁷ *Id.*

⁸ *Attorney General’s Final Report*, *supra* note 4, at 11–18.

⁹ *Id.* at 15.

¹⁰ *Id.* at 47.

¹¹ *Id.* at 45–46.

¹² *Attorney General’s Manual on the Administrative Procedure Act* 74 (1947) [hereinafter *Attorney General’s Manual*].

¹³ See 5 U.S.C. 556(c).

¹⁴ *Attorney General’s Manual*, *supra* note 12, at 74–75.

Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978). In accordance with the APA, the Commission's rules contemplate an important role for its ALJs not only in ensuring a fair and orderly process but also in assuring the public that the Commission's proceedings are fair. Under Rule 0.14, the Commission delegates to the ALJs "the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice."¹⁵ Further, Rule 3.42(c) provides that presiding officials "shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order," and that they shall have "all powers necessary to that end."¹⁶ The Commission believes that the following proposed rule revisions would ensure the proper balance between the Commission's expertise and the important function to be served by its ALJs.

These proposed rule provisions can be considered an important first step, but not the end of the process. To expedite such reforms, the Commission intends to establish an internal Standing Rules Committee to address potential rule changes that may be needed in the future, with this standing committee's recommendations to be reviewed annually by the Commission. We recognize that, if adopted, the amended rules' use in actual litigation, the comments invited by this document, as well as future events, may reveal the need for further amendments, and that a standing committee could ensure that the Commission's rules remain current. The Commission also announces today its intention to make best efforts to expedite its preparation and disposition of final orders and opinions in its review of initial decisions in adjudicatory proceedings. The Commission understands that public concern about Part 3 delay is not limited to the proceedings before the ALJ, but extends to the delay occasionally incurred by Commission resolution of appeals of initial decisions. The Commission intends to expedite all phases of the Part 3 process.

C. Overview of Proposed Rule Revisions

The Commission staff's effort has culminated in comprehensive and systematic proposed rule changes. We believe that administrative rules that

bring the Commission's expertise into play earlier and more often during the Part 3 process will likely further the Congressional purpose that the Commission be a proper forum for expert adjudication and ensure the high quality of the Commission's decisionmaking. For ease of reference, the proposed revisions discussed in the following section can be organized into certain categories, generally designed to improve the quality of decisionmaking or to expedite the Part 3 process by imposing stricter deadlines throughout the prehearing or hearing process, or by giving the Commission the authority to intercede earlier in the proceedings.

Tighter time limits. Several of the proposed rule revisions allow the ALJ or the Commission to impose tighter time periods during the adjudicatory process. For example, Rule 3.1 would provide that the ALJ or the Commission may shorten any time periods set in the rules provided that no party will be unfairly prejudiced. Rule 3.11 would require that the date of the evidentiary hearing be set in the notice accompanying the complaint, which would be 5 months from the date of the complaint in merger cases and 8 months from the date of the complaint in non-merger cases, unless the Commission orders otherwise. Rule 3.12 would require the respondent to file its answer within 14 days of service of the complaint, instead of 20. Rule 3.21 would impose strict deadlines on prehearing procedures, including requiring that the parties' initial meet and confer session and the initial scheduling conference take place shortly after the answer is filed. Rule 3.51 would be amended to eliminate the authority of the ALJ to extend the one-year deadline for filing initial decisions, and would provide that any extensions be approved by the Commission only where it finds there are "extraordinary circumstances."

Earlier Commission involvement. Other proposed rule revisions are intended to ensure that the Commission is appropriately involved earlier in the adjudicatory process. For example, Rules 3.22 and 3.24 would provide authority to the Commission to decide in the first instance all dispositive prehearing motions, including motions for summary decision, unless it refers the motion to the ALJ, while at the same time ensuring that the underlying proceedings are not stayed pending resolution of the dispositive motion absent a Commission order. The proposed revisions are intended to avoid the substantial delay that can result from an erroneous ruling by the ALJ on legal and policy issues that are within the Commission's expertise. Rule

3.42 would expressly provide authority for the Commission or an individual Commissioner to preside over discovery and other prehearing proceedings before transferring the matter to the ALJ.

Discovery and motion practice reforms. Other proposed rule changes are intended to expedite and improve the quality of the proceedings by making the discovery process and motion practice more efficient. For example, Rule 3.22 would impose word count limits on both dispositive and nondispositive motions. Rule 3.31 would limit the scope of the search for discoverable materials for complaint counsel, respondents, and third parties to minimize the burden and costs of searching for materials that are likely either duplicative or privileged, unless there has been a sufficient showing of need. Rule 3.31 would also expressly limit waivers resulting from the inadvertent disclosure of privileged materials. Rule 3.31 would further require the ALJ to issue a standard protective order that is intended to limit delay from negotiations and disputes arising from case-specific orders and to ensure that privileged information, competitively sensitive information, and personally sensitive information are treated consistently in all Part 3 cases. A new Rule 3.31A would govern expert discovery and would impose strict deadlines, to begin essentially at the end of fact discovery, to identify expert witnesses and to submit expert reports and rebuttal expert reports, and would limit each side to 5 expert witnesses unless there are "extraordinary circumstances." Rule 3.36 would impose a heightened requirement for subpoenas issued to component offices of the Commission that are not involved in the litigation. Rule 3.37 would specify procedures governing the exchange of relevant "electronically stored information," and Rule 3.38 would be amended to impose strict deadlines and word count limits to resolve motions to compel discovery.

Hearings. Other proposed rule revisions are intended to expedite and streamline the evidentiary hearing. For example, Rule 3.41 would limit the length of hearings to 210 hours—the equivalent of 30 seven-hour trial days—unless there is a showing of "good cause," would limit each side to one half of the trial time, and would limit the length of opening and closing arguments. Rule 3.43 would be revised to expressly permit at the hearing the use of hearsay evidence—including prior testimony—if sufficiently reliable, as well as the admission of relevant statements or testimony by a party-opponent and the self-authentication

¹⁵ 16 CFR 0.14.

¹⁶ 16 CFR 3.42(c).

and admission of third party documents. Rule 3.44 would require that witness testimony be video recorded digitally and made part of the official record so that the Commission, if appropriate, can make an independent assessment of witness demeanor. Rule 3.46 would impose strict deadlines for the simultaneous filing of proposed findings, conclusions, and supporting briefs.

Initial decision and Commission review. As noted above, Rule 3.51 would maintain the one-year deadline for the issuance of the initial decision (except where the Commission otherwise orders), but would require that the initial decision be issued within 70 days of the last filed proposed findings. Rule 3.52 would be revised to shorten the lengths of principal briefs on appeal to the Commission to 14,000 words and reply briefs to 7,000 words, lengths consistent with the approach taken in the Federal Rules of Appellate Procedure, unless otherwise permitted by the Commission. In this regard, the Commission notes that it has the benefit of all the briefs, legal memoranda, and proposed findings of fact that the parties have submitted to the ALJ.

Finally, the Commission intends to make certain technical revisions throughout the rules including, for example, eliminating the convention of specifying numbers in both written and numerical form, and substituting gender-neutral language.

The proposed rule revisions relate solely to agency practice and, thus, are not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(a)(2). Although the proposed rule revisions are exempt from these requirements, the Commission invites comment on them before deciding whether to adopt them. The proposed revisions are also not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2) and the requirements of the Paperwork Reduction Act, 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4 (exempting information collected during the conduct of administrative proceedings or investigations).

II. Section-By-Section Analysis of the Proposed Rule Revisions

The following is a section-by-section analysis of the proposed revisions to Part 3 of the Commission's Rules, and the proposed revision to Rule 4.3, which would allow for extensions in certain circumstances of the time limits in the Part 3 Rules.

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

Section 3.1: Scope of the rules in this part.

The Rule would be amended to state that the Part 3 Rules generally apply only to "formal" adjudicative proceedings. This change, if adopted, would clarify that the Part 3 Rules generally apply only to the types of adjudication governed by the adjudication provisions in the APA.¹⁷ These provisions only govern cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹⁸ Rule 3.2, as amended, would specify further the types of adjudicative proceedings that are subject to the Part 3 Rules.

The Rule would be amended further to allow the ALJ or the Commission to shorten time periods set by the Rule, provided that the shortened time periods would not unfairly prejudice any party. This authority could be used in proceedings where expedited procedures would serve the public interest (e.g., unconsummated mergers) or where the issues do not require elaborate discovery or evidentiary hearings (e.g., cases where the parties agree that a copious evidentiary record already exists that merely needs to be supplemented).

Section 3.2: Nature of adjudicative proceedings.

The technical revisions to this Rule would clarify that Commission consideration of consent orders—in addition to negotiations of consent orders—are not adjudicative proceedings. The proposed changes also omit from the list of excluded items proceedings under specific statutes that have rarely occurred in recent decades.

Subpart B—Pleadings

Section 3.11: Commencement of proceedings.

The proposed Rule amendment specifies that the actual date for the evidentiary hearing would be 5 months from the date the complaint is issued in merger cases and 8 months from the date of the complaint in all other cases. The proposed change would also give the Commission discretion to determine a different date for the evidentiary hearing when it issues the complaint. As amended, Rule 3.21(c), discussed below, would provide that the hearing date can be extended by the

Commission for good cause after the complaint is issued.

In most cases where the issues are not exceptionally complex and the premerger process has been complete, the Commission believes a 5-month complaint-to-evidentiary-hearing process should be feasible. Considering the "safety valve" built into the proposed Rule and the ability of respondents' counsel to engage in pre-complaint meetings with the Commissioners where they might advocate for longer post-complaint discovery periods, the proposed Rule would appear to be flexible enough to accommodate the exceptional case. Similarly, the Commission believes a 8-month complaint-to-evidentiary-hearing process is feasible for all other cases. Here too, the amended language, if adopted, would be broad enough to allow the Commission either to set a later hearing date at the time it issues the complaint or, under amended Rule 3.21(c), to entertain a request for more time upon a showing of good cause post-complaint.

Proposed Rule 3.11 would also delete paragraph (c), which has allowed the respondent to file a motion for more definite statement. If a respondent elects to file such a motion, or any other motion, it tolls the deadline for respondent to file an answer to the complaint that would result in substantial delay in the proceedings. The proposed Rule revision would still provide the respondent an opportunity to raise similar objections and to file a motion to dismiss, but under the proposed amendment to Rule 3.22(b) discussed below, the Commission's consideration of the motion would not stay proceedings before the ALJ unless the Commission so orders.

These proposed amendments to Rule 3.11 are intended to expedite cases by requiring the Commission to set a fixed deadline for the start of the evidentiary hearing and the ALJ and the parties to adhere to the deadline.

Section 3.12: Answer.

The proposed Rule amendment would shorten the current deadline in paragraph (a) for filing an answer from 20 to 14 days, a time period that should be sufficient for parties who, during the course of the precomplaint investigation, have become familiar with the issues. The proposed Rule revision would also eliminate the provision in paragraph (a) that allows the filing of any motion to toll the deadline for respondent to file an answer to the complaint, which had been added by the Commission in its

¹⁷ 5 U.S.C. 554, 556–57.

¹⁸ 5 U.S.C. 554.

2001 Rule amendments.¹⁹ The Commission believes the Rule, if amended as proposed in this document, would result in an earlier prehearing conference, earlier discovery, and a more expeditious closure to the proceeding.

The proposed changes to paragraphs (b) and (c) would remove the ALJ's authority to render an initial decision when the allegations of the complaint are admitted or there is a default. Instead, the Commission would render its final decision on the basis of the facts alleged in the complaint. One rationale for the provision of "hearing officers" (the predecessor to ALJs) in the APA was to alleviate the burden on agency heads of hearing evidence and reviewing a voluminous record.²⁰ When those burdens do not exist, it will likely be more efficient for the Commission to issue a final opinion and order without the intermediate step of an ALJ's initial decision.

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

Section 3.21: Prehearing procedures.

As amended, Rule 3.21(a) would require that the parties' initial meet-and-confer session take place within 5 days of the answer and would require the parties to discuss electronically stored information (ESI) at that time, including the scope of and the time period for the exchange of ESI and the format for exchanging such information. This change is intended to help expedite the case and facilitate resolution of production issues in ways that minimize costs. Rule 3.21(a) would also be modified by deleting a phrase that suggested that the parties should discuss a proposed hearing date because, under proposed Rule 3.11, such a date will already have been set by the Commission when it issued the complaint, and under proposed Rule 3.21(c), that date could be modified by the Commission upon a showing of good cause. Rule 3.21(a), as amended, would also specify broad subjects to be discussed at the parties' meet and confer session(s) before the scheduling conference.

Revised paragraph (b) would advance the deadline for the scheduling conference from 14 days after the answer is filed to 10 days after the answer is filed. Although the Commission extended the deadline to 14 days in 2001,²¹ it believes the 10-day

deadline is reasonable for most cases. In extraordinary circumstances, the scheduling conference can be postponed. Revised paragraph (b) would include additional items to be discussed at the scheduling conference, such as stages of the proceeding that may be expedited. The proposed revisions contemplate that the parties would inform the ALJ of the results of their meeting(s) pursuant to paragraph (a) regarding their proposed discovery plan, including the disclosure of ESI, and that the ALJ would incorporate in the scheduling order a discovery plan that he or she deems appropriate.

Revised paragraph (c)(1) would specify that the ALJ's scheduling order will establish a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission. The Rule would also state that the Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint. The proposed deadline for the prehearing scheduling conference and order and the more detailed requirements for both are intended to help keep the prehearing proceedings on track and enable the parties to contribute to a high quality record on which the ALJ can base his or her decisions.

Revised paragraph (c)(2) would be revised to authorize the ALJ to extend, upon a showing of good cause, any deadline in the scheduling order other than the date of the evidentiary hearing.

Revised paragraph (f) would state that the ALJ shall hold additional prehearing and status conferences or enter additional orders as may be needed to "ensure the just and expeditious disposition of the proceeding and to avoid unnecessary cost."

Section 3.22: Motions.

Revised Rule 3.22(a) would give the Commission the opportunity to rule on motions to strike, motions for summary decision, and prehearing motions to dismiss, but the Commission may refer such motions back to the ALJ. This proposal allows the Commission to decide legal questions and articulate applicable law when the parties raise purely legal issues. In addition, an early ruling on a dispositive motion may expedite resolution of a matter and save litigants resources where the legal issue is the primary dispute. The Commission followed a similar approach in *South Carolina State Board of Dentistry* when it retained jurisdiction to hear motions to dismiss. See *In re South Carolina State Bd. of Dentistry*, 136 F.T.C. 229 (2004). This proposal codifies that approach, giving the Commission more

flexibility to determine the law and resolve matters expeditiously. The revised Rule would also provide that rulings on motions to dismiss based on alleged failure to establish a *prima facie* case shall be deferred until after the hearing record is closed. The current provision for a recommended ruling by the ALJ when certifying to the Commission a motion outside his or her authority to decide would be eliminated.

The Commission anticipates that new paragraphs (b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise, and would require the ALJ to decide motions within 14 days of briefing of the motion.

Re-designated paragraph (c) would impose word count limits on motion papers. Dispositive motions would be limited to 10,000 words (approximately 40 double-spaced pages), and non-dispositive motions would be limited to 2,500 words (approximately 10 double-spaced pages).

Re-designated paragraph (d) would be modified to provide an automatic right of reply in support of dispositive motions. Further, paragraph (d) would state that: "Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the ALJ's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." There would also be a 5-day filing deadline for any authorized reply to a motion.

Current paragraph (e) would be eliminated, and current paragraph (f) would be redesignated as paragraph (g).

Section 3.23: Interlocutory appeals.

The revised Rule would continue to permit the parties to seek discretionary review of certain interlocutory rulings by the ALJ. Paragraph (a) would leave unchanged the types of rulings that the parties can ask the Commission to review without a determination by the ALJ that interlocutory review is appropriate. Paragraph (b) would continue to permit interlocutory appeals of other rulings only on a determination that the ruling "involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy."

¹⁹ 66 FR 17622 (Apr. 3, 2001).

²⁰ See Attorney General's Final Report, *supra* note 4, 45–46.

²¹ 66 FR 17622 (Apr. 3, 2001).

In order to reduce delay, the revised Rule would require the ALJ to make his or her determination whether the application for review involves such a controlling question within three days after the filing by a party of a request for such a determination. It would eliminate the requirement that the ALJ provide a written justification for his or her determination. The revised Rule would allow the party to file its application for review with the Commission if the ALJ does not make a timely ruling on its request for a determination on the appropriateness of review.

Because the pendency of an application for review may leave a cloud over the proceeding before the ALJ, the revised Rule would also provide a default if the Commission fails to act quickly on the application. The revised Rule would provide that, unless the Commission decides to entertain the appeal within three days after the filing of the application and answer, the request for discretionary review will be deemed to be denied. This would not constitute an affirmance of the ALJ's ruling on the merits. Also, to avoid unnecessary delay, the revised Rule would set shorter deadlines for the filing of applications and answers and, to reduce burdens, impose tighter limits than the current Rule on the length of these filings. The Commission, however, would retain authority to direct additional briefing.

Section 3.24: Summary decisions.

The revised Rule would accommodate the proposed amendment to Rule 3.22 providing that dispositive motions will be decided initially by the Commission unless referred by the Commission to the ALJ. At the same time, it would also require that motions be filed not later than 30 days before the evidentiary hearing, rather than 20 days as in the current Rule. It would extend the deadline for filing affidavits in opposition to a summary decision motion from 10 to 14 days. Because the moving party may have had months to prepare its motion and supporting papers, the revised Rule would allow slightly more time than the current Rule for the opposing party to compile, authenticate, and perform the other research necessary to respond. Finally, the proposed Rule would eliminate the 30-day deadline for ruling on the motion but allow the Commission to set a deadline for decision when referring a summary decision motion, or any other dispositive motion, to the ALJ. In any event, under revised Rule 3.22(b), the filing of a motion under this Rule would not stay the proceeding before the ALJ.

Rule 3.26: Motions following denial of preliminary injunctive relief.

The Commission adopted the current version of Rule 3.26 in connection with a 1995 policy statement, which explained the process the Commission follows in deciding whether to pursue administrative litigation of a merger case following the denial of a preliminary injunction.²² The statement noted that the "Commission was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions" and that it was expected that "an administrative agency was especially suited to resolving difficult antitrust questions, and that the FTC should be the principal fact finder in the process."²³

According to the statement, "[i]n any given case, the evidence, arguments, and/or opinion from the preliminary injunction hearing may, or may not, suggest that further proceedings would be in the public interest. The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis."²⁴ The Commission adopted Rule 3.26 to provide a formal mechanism for making this determination.

The Commission proposes to revise provisions in the Rule that grant an automatic withdrawal from adjudication of the Part 3 case upon the filing of a motion to withdraw from adjudication or an automatic stay upon the filing of a motion to dismiss. An automatic withdrawal from adjudication or stay might well be appropriate if the denial of preliminary injunctive relief typically warranted terminating the Part 3 case. But the Part 3 proceeding is the suitable forum for deciding the merits, *see FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875-76 (D.C. Cir. 2008) ("[A] district court must not require the FTC to prove the merits, because, in a [5 U.S.C.] § 53(b) preliminary injunction proceeding, a court 'is not authorized to determine whether the antitrust laws ... are about to be violated.' That responsibility lies with the FTC.") (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)). Thus, the Commission believes the norm should be that the Part 3 case can proceed even if a court denies preliminary relief. If that is the norm,

routine withdrawals from adjudication or stays of proceedings before the ALJ could unnecessarily delay the typical Part 3 case in which ancillary relief has been denied. The proposed Rule would allow the Part 3 case to proceed unless the Commission determines, on the facts of the particular case, that a withdrawal or stay is appropriate.

The revised Rule would also make explicit that a motion to dismiss or withdraw may be filed only after the Commission has an opportunity to seek reconsideration and appellate review of a denial of injunctive relief.²⁵ The revision would also prescribe the same word count limits for memoranda supporting or opposing these motions as for motions to dismiss filed under Rule 3.22(a) and eliminate the special limitation for printed filings.

Subpart D—Discovery; Compulsory Process

Section 3.31: General discovery provisions.

Paragraph (b) of Rule 3.31 would be amended to specify that the documents to be disclosed as part of the parties' mandatory initial disclosures include declarations or affidavits, as well as transcripts of investigational hearings and depositions, and that initial disclosures also include ESI. The reference to ESI would update the term "data compilations" and would parallel the 2006 amendment to Fed. R. Civ. Proc. 26(a)(1)(B). The proposed limitations on disclosure of ESI in paragraph (c)(3) follow Fed. R. Civ. P. 26(b)(2)(B). In particular, the proposed provision in paragraph (c)(3) that a party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost is anticipated to reduce delays and costs to the parties.

As discussed below, the Commission proposes to treat expert discovery in a new Rule 3.31A, and therefore the provisions in paragraphs (b) and (c) of Rule 3.31 governing expert discovery would be eliminated.

The proposed changes to paragraph (c)(2) would limit the scope of discovery for complaint counsel, respondents, and third parties who receive a discovery request. Complaint counsel would only need to search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including

²² 60 FR 39741 (Aug. 3, 1995).

²³ *Id.*

²⁴ *Id.*

²⁵ See *In re Equitable Resources, Inc.*, No. 9322, 2007 F.T.C. LEXIS 49 (May 30, 2007); 60 FR 39640, 39641 (Aug. 3, 1995).

the Bureau of Economics. The ALJ could authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to § 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules would be required to search for materials generated and transmitted between an entity's counsel (including counsel's legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the ALJ determines there is good cause to provide such materials. These materials are frequently duplicative of materials held by the parties and moreover, are almost always protected by the deliberative process or attorney-client privileges, or as work product.

Paragraph (d) would be revised to direct the ALJ to issue a standard protective order (provided as an appendix to this Rule) governing the use of confidential materials obtained in discovery. The Commission believes a standard order would eliminate the delay resulting from negotiations and disputes over case-specific orders and improve quality and reduce agency costs by ensuring that discovery materials are handled uniformly and in a manner that is fully consistent with the FTC's statutory obligations with respect to materials it receives from private parties.

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

The FTC Act requires the Commission to protect "privileged or confidential" information.²⁶ By providing that the Commission would not treat genuinely inadvertent disclosures as waivers of privilege claims, this proposed Rule, together with the relevant provisions of the FTC Act, is intended to assure respondents and third parties alike that if otherwise privileged materials end up in the hands of the FTC, they will not readily find their way into the public

record. In this regard, the protective order would expressly include privileged information in the order's definition of "confidential materials" subject to the protective order.

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

The revised Rule would also make technical revisions to the current Rule.

Section 3.31A: Expert discovery.

New Rule 3.31A would mandate a schedule for the disclosure of potential expert witnesses, the production of expert reports, and the start and completion of expert depositions. This Rule would incorporate and revise certain provisions now contained in current Rule 3.31(b) and (c). The scheduling provisions are intended to provide for expert discovery in a more orderly and expeditious manner than what has occurred in past proceedings.

The Rule would not permit expert discovery to begin until fact discovery is essentially completed. The Commission believes that discovery of experts, including the production of expert reports, will be less than thorough if facts potentially relevant to their opinions have yet to be discovered. The Rule would also limit the number of expert witnesses to 5 per side, but would allow a party to seek leave to call additional expert witnesses in extraordinary circumstances. It has been the Commission's experience that 5 expert witnesses per side is sufficient for each party to present its case.

The Rule would require that each expert who will testify at the evidentiary hearing produce a written report, thereby eliminating the ALJ's authority to dispense with them. Preparation of a written expert report is a common requirement in federal courts and, given the Commission's goal of expedited proceedings, should be required here during the discovery period to allow the parties more effective and targeted discovery.

The Rule would provide that complaint counsel submit their initial expert reports first, followed by respondents' expert reports. Respondents' reports, of course, can rebut material in complaint counsel's initial expert reports. The revised Rule would also explicitly authorize complaint counsel to call rebuttal

experts and, if complaint counsel exercises this option, would require the experts to prepare rebuttal expert reports. Thus, the Rule would allow complaint counsel's experts an opportunity to respond to respondents' expert reports.

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

Section 3.33: Depositions.

Paragraph (b) would be added to allow the ALJ, upon a party's motion, to prevent the taking of a deposition if the deposition would not meet the scope of discovery standard under Rule 3.31(c) or if the value of the deposition would be outweighed by considerations of unfair prejudice, confusion of the issues, evidence that would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence (as set forth under Rule 3.43(b)). Paragraph (b) would also clarify that the fact that a witness testifies in an investigative hearing does not preclude the deposition of that witness.

Paragraph (c) would be revised to stop the practice of filing notices of deposition with the Office of the Secretary, the ALJ or otherwise providing such notices to the Commission, except as provided in proposed Rule 3.31(i). Such notices serve no purpose for the ALJ or the agency, and receipt of these notices causes unnecessary processing costs for the Commission.

Revised Rule 3.43, as discussed below, would provide for the admission of hearsay evidence in the evidentiary hearing if the evidence is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair." If meeting this standard, depositions, investigational hearings, and other prior testimony may be admitted. Consistent with this proposed revision, current Rule 3.33(g)(1) would be eliminated because it contains hearsay-based limitations for the use of depositions. Paragraphs (g)(2) and (3) would be renumbered accordingly.

²⁶ FTC Act, 6(f), 21(d)(1)(B), 15 U.S.C. 46(f), 57b-2(d)(1)(B).

Section 3.34: Subpoenas.

Paragraphs (a) and (b), as amended, would authorize counsel for a party to sign and issue a subpoena on a form provided by the Secretary. These revisions are intended to expedite the commencement of hearings by speeding the issuance of discovery and hearing subpoenas. The definition of "documents" would also be revised to be parallel to Fed. R. Civ. P. 45(c)(1).

Revisions to paragraph (c) would reflect revised Rule 3.36, discussed below, which would require a special showing of need for subpoenas directed to the offices of the Commissioners, the General Counsel, Bureaus and Offices not involved in the matter, the ALJs, or the Secretary.

Section 3.35: Interrogatories to parties.

New paragraph (a)(3) would provide that interrogatories should not be filed with the Office of the Secretary, the ALJ or otherwise provided to the Commission except as provided in proposed Rule 3.31(i).

Paragraph (b)(2), as revised, would eliminate the requirement that a party seek an order from the ALJ when not answering a contention interrogatory before the end of discovery. If a party poses a contention interrogatory that is capable of being answered at an earlier time, there is no reason it could not move to compel a more expeditious response.

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

Paragraph (a) currently requires a special showing of need for subpoenas to other agencies and foreign subpoenas. The revised Rule would require a special showing of need for subpoenas directed to the offices of the Commissioners, the General Counsel, Bureaus and Offices not involved in the matter, the ALJs, and the Secretary. None of these offices is likely to possess relevant, discoverable information that is not available from other sources. Given the lack of useful additional information likely to be available from these offices, the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification. These revisions would reduce the cost and time devoted to searches for information that is likely to be privileged or that is unlikely to lead to the discovery of admissible evidence.

The revisions to paragraph (b)(3) would require a showing of "compelling need" as the corresponding standard for witness testimony. Because the Commission is proposing to revise Rule 3.34 to eliminate specific showings for hearing subpoenas, the reference to that Rule would be eliminated from the first sentence of paragraph (b). The reference to Rule 3.37 would be moved to a new paragraph (b)(5).

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

The existing Rule substantially follows Fed. R. Civ. P. 34. The revised Rule would include the current federal rule's provisions on electronic discovery. The revised Rule would also provide that requests under this section not be filed with the Office of the Secretary, the ALJ or otherwise provided to the Commission, except as provided in proposed Rule 3.31(i).

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

The revised Rule would impose short deadlines for responses to and rulings on motions to compel. It would impose a 2,500 word limit, which translates into approximately 10 double-spaced pages, for motions and answers. This limit should be sufficient to enable parties to address several discovery issues in one filing.

The revised Rule would consolidate the sanctions for failure to comply with discovery and disclosure requirements and add as a sanction the inability to call a witness who was not disclosed under Rule 3.31(b) or an expert not disclosed under proposed Rule 3.31A.

Section 3.38A: Withholding requested material.

The revised Rule would modify the existing requirement that a privilege/work-product log must always contain specific information for each item being withheld. The Commission intends to substitute the more flexible requirement in Fed. R. Civ. P. 26(b)(5)(A) that the schedule of withheld items "describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." This proposed requirement would permit parties to describe withheld items by categories, but only if the description "will enable other parties to assess the claim." Unless such descriptions are sufficient,

item-by-item descriptions would be required.

The revised Rule would also clarify that the log need not describe any material outside the scope of the duty to search set forth in revised Rule 3.31(c)(2) except to the extent that the ALJ has authorized additional discovery as provided in that Rule. These exclusions, if adopted, will reduce the burden and time devoted to preparing a detailed log without eliminating information about materials most likely to be relevant to the litigation.

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

The Commission is proposing technical revisions to the existing Rule.

All in all, the proposed revisions to the discovery Rules are designed to encourage the parties to cooperate in the discovery process, "automate" the discovery process to the greatest extent possible, and provide effective sanctions against those who violate a discovery obligation. The Commission's expectation is that the revised Rules would work to improve the quality of the discovery process and would ultimately reduce the costs and delays that are incurred when parties engage in unnecessary gamesmanship. For example, the Commission believes that the sanction of prohibiting a party from calling a fact or expert witness who should have been disclosed earlier would reduce the need for last-minute discovery that could delay the hearing and thereby eliminate the extra costs associated with such discovery and improve the quality of the discovery process.

Subpart E—Hearings**Section 3.41: General hearing rules.**

In order to expedite proceedings, revised Rule 3.41(b) would require that the evidentiary hearing commence on the date set in the notice accompanying the complaint. It also would limit the length of the hearing to 210 hours, the equivalent of 30 seven-hour trial days, unless extended by the Commission for good cause, and establish reasonable time allocations for both sides.

Section 3.42: Presiding officials.

Revised Rule 3.42(a) would make explicit provision for the Commission retaining jurisdiction over a matter during some or all of the prehearing proceedings and designating one or more Commissioners to preside. The Commission has followed this course in several recent cases. The APA, 5 U.S.C. 556(b), allows the agency itself or one or

more of its members to preside, and the Commission can see no reason why the Commission or an individual Commissioner may not preside over the beginning phases of the proceeding even where the Commission or the individual Commissioner does not preside over the hearing or issue the initial decision. In appropriate cases, early Commission involvement has the potential for improving the quality of the final product, expediting the proceeding, and ultimately reducing the costs of the litigation.

Section 3.43: Evidence.

The Commission proposes to amend this Rule to define hearsay evidence and to provide expressly in paragraph (b) for the use and admission of hearsay evidence in Commission proceedings if the evidence “is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.” The existing Rule states that “[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded.” This modification does not represent a change in the current rule; rather it emphasizes that the stricter hearsay rules in the Federal Rules of Evidence do not determine admissibility of evidence in administrative litigation. The ALJ, in the first place, and ultimately the Commission must independently assess the reliability of the evidence itself.

Administrative agencies like the FTC “have never been restricted by the rigid rules of evidence,”²⁷ and should evaluate the admissibility of hearsay evidence based on whether “it bear[s] satisfactory indicia of reliability . . . [is] probative and its use fundamentally fair.”²⁸ The ALJ, and on appeal the Commission, are capable of assessing the reliability and weight to be given hearsay evidence by, for example, determining the independence or possible bias of an out-of-court declarant, the context in which the hearsay material was created, whether the statement was sworn to, and

²⁷ *FTC v. Cement Inst.*, 333 U.S. 683, 705–06 (1948).

²⁸ *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980); see also *Richardson v. Perales*, 402 U.S. 389, 407–08 (1971); *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (hearsay admissible in administrative proceedings if “reliable and credible”); 5 U.S.C. 556(d) (APA provides that “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.”).

whether it is corroborated or contradicted by other forms of direct evidence.

In that regard, proposed paragraph (b) would provide that depositions, investigational hearings, and prior testimony in Commission and other proceedings shall be admissible even if they are or contain hearsay, provided that the testimony is otherwise sufficiently reliable and probative. The revised Rule would also make clear that relevant statements or testimony by a party-opponent are admitted since such statements are not hearsay.

The Commission believes that the revision regarding hearsay evidence will improve the quality of Commission decisions by enabling the ALJ and the Commission to decide cases with a more complete record, which would not exclude relevant, material, and reliable evidence, including prior testimony, merely because it is hearsay.

Proposed new paragraph (c), which is analogous to Fed. R. Evid. 902(11), is intended to facilitate the admissibility of third party documents by self-authentication through a written declaration of the third party document custodian.

Proposed new paragraph (d)(1) would adopt the standard for the presentation of evidence at an oral hearing under 5 U.S.C. 556(d), including the right to present both sworn oral and documentary evidence, to offer rebuttal evidence, and to conduct reasonable cross-examination. Of particular note, this paragraph would permit sufficient “cross-examination as, in the discretion of the Commission or the ALJ, may be required for a full and true disclosure of the facts,” a standard that does not impose an absolute or unlimited right of cross-examination.²⁹

Finally, re-designated paragraph (f) would define what constitutes “official notice.” The current Rule does not define official notice or what constitutes such notice. Further, the revised Rule would provide that a party may controvert an officially noticed fact either by opposing the other party’s request to do so or after it has been noticed by the ALJ or the Commission.

Other paragraphs in the current Rule would be re-designated.

Section 3.44: Record.

Paragraph (a) would be amended to require that witness testimony be preserved as a digital video recording that would be made part of the official

record. Video recordings are permitted and frequently taken in depositions,³⁰ but federal courts do not typically record proceedings. Section 5(b) of the FTC Act does not preclude video recording testimony, merely requiring that the “testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission.” The purpose of the proposed Rule revision is to provide a record for the Commissioners who are not present at the hearing, but are ultimately responsible for deciding the outcome of the case, to be able to make an independent assessment of the demeanor of the witnesses when that is appropriate. Courts have recognized the “added value of demeanor evidence” from video recording.³¹ The Commission believes that the video recording requirement would improve the quality of Commission decisions whenever witness demeanor is a significant issue.

Paragraph (c), as revised, would delete the word “immediately” at the beginning of the first sentence to allow the Commission or ALJ to provide the parties with three business days to review the record to determine if it is complete or needs to be supplemented.

Section 3.45: In camera orders.

Paragraph (b), as revised, would add a paragraph making clear that parties have no obligation to file or provide *in camera* versions of filings with sensitive materials with anyone other than opposing counsel and the ALJ during the proceedings, as well as with the Commission or federal courts during any appeals.

Section 3.46: Proposed finding, conclusions, and order.

Revised paragraph (a), if adopted, would expressly provide for the simultaneous filing of proposed findings of fact, conclusions of law, and supporting briefs within 21 days of the close of the hearing record, and the filing of optional proposed reply findings within 10 days of the filing of the initial proposed findings. The current Rule does not impose any deadlines or specify the order of these filings. This change, if adopted, is expected to expedite the post-hearing phase.

Subpart F—Decision

Section 3.51: Initial decision.

Paragraph (a) would be amended to establish the deadline for issuing the

²⁹ See, e.g., *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 351 (1st Cir. 2004); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063 (5th Cir. 1982).

³⁰ See, e.g., Fed. R. Civ. P. 30(b)(3)(A).

³¹ See *FTC v. Tarriff*, No. 08-MC-217, 2008 WL 2230062, at *5 (D.D.C. June 2, 2008).

initial decision by the filing of proposed findings and conclusions (and supporting exhibits) rather than by the closing of the hearing record. The current Rule requires that the initial decision be filed within 90 days after the close of the record. The revised Rule would require that the initial decision be filed within 70 days of the last filed proposed findings and conclusions (or 85 days of the closing of the hearing record if the parties waive filing proposed findings and conclusions).

The revised Rule would maintain the over-all requirement that the initial decision be issued within one year after the issuance of the complaint. The revised Rule, however, would no longer authorize the ALJ to grant consecutive 60-day extensions upon a finding of "extraordinary circumstances." Instead, only the Commission could grant extensions if it finds there are "extraordinary circumstances and if appropriate in the public interest." The Commission believes that eliminating the authority of ALJs to grant extensions of the one-year deadline would permit the Commission to prevent protracted delays, while still providing ample time for the ALJ to review the evidence and issue the initial decision.

New paragraph (c)(2) would require that the initial decision be filed in a word processing format that is accessible to the Commission on review.

Section 3.52: Appeal from initial decision.

Paragraphs (b) and (c) would be amended to reduce the word limit for the principal appellate briefs from 18,750 words to 14,000 words (approximately 55 double-spaced pages) to minimize unnecessarily lengthy briefs. The Commission anticipates that the shortened limits would lead to more focused arguments. The proposed length is the same as that permitted in Fed. R. App. P. 32(a)(7). Paragraph (c) would also be revised to reduce the word limit for cross-appeal briefs to 16,500 words, the same as in Fed. R. App. P. 28.1(e)(2).

While lengthier appellate briefs could be justified by the Commission's obligation to review the record *de novo*, this is offset by the fact that the Commission has ready access to the briefs and proposed findings submitted by the parties to the ALJ. Further, parties will not be prejudiced because they may request permission to extend the word count limits, which may be appropriate where the case involves a particularly large record or complex legal issues. However, as noted in paragraph (k), the Commission will not lightly permit such extensions.

Paragraph (d) would be amended to reduce the length of reply briefs to half of the principals' briefs, or 7,000 words, consistent with Fed. R. App. P. 32(a)(7). This paragraph would also make explicit that parties cannot raise new arguments or matters in reply briefs that could have been raised earlier, based on concerns that reply briefs have often gone beyond "a rebuttal of matters" in the appellee's brief.

Paragraph (h) would be revised by striking the last two sentences as unnecessary.

Paragraph (j) would be amended to impose a word count limit on *amicus* briefs to "no more than one-half the maximum length authorized by these rules for a party's principal brief," consistent with the approach taken by Fed. R. App. P. 29(d).

Finally, revised paragraph (k) would specify the contents of the brief that will count toward the word count limit, similar to that imposed by Fed. R. App. P. 32(a)(7)(B)(iii).

Rule 4.3: Time.

Revised Rule 4.3(b), if adopted, would specify that the ALJ may extend a time period set by a Commission order only if the order expressly authorizes the ALJ to do so. It would also add time limits regarding motions directed to the Commission to the list of extensions that only the Commission may grant. The revised Rule would also clarify that the ALJ may not enlarge any deadline that a rule specifically authorizes only the Commission to extend.

III. Invitation to Comment

The Commission invites interested members of the public to submit written comments addressing the issues raised above. Such comments must be filed by November 6, 2008, and must be filed in accordance with the instructions in the **ADDRESSES** section of this document.

IV. Proposed Rule Revisions

List of Subjects in 16 CFR Part 3

Administrative practice and procedure.

List of Subjects in 16 CFR Part 4

Administrative practice and procedure.

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

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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

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

■ 2. Revise § 3.1 to read as follows:

§ 3.1 Scope of the rules in this part.

The rules in this part govern procedure in formal adjudicative proceedings. To the extent practicable and consistent with requirements of law, the Commission's policy is to conduct such proceedings expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay. Except as otherwise provided by law, the Commission, at any time, or the Administrative Law Judge at any time prior to the filing of his or her initial decision, may shorten any time limit prescribed by these Rules of Practice, provided that the shortened time limit would not unfairly prejudice the rights of any party.

■ 3. Revise § 3.2 to read as follows:

§ 3.2 Nature of adjudicative proceedings.

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

■ 4. Revise § 3.11 to read as follows:

§ 3.11 Commencement of proceedings.

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

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

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

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

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

(4) Notice of the specific date, time and place for the evidentiary hearing.

Unless a different date is determined by the Commission, the date of the evidentiary hearing shall be 5 months from the date of a complaint issued pursuant to sections 7 and 11(b) of the Clayton Act, 15 U.S.C. 18 and 21(b), and 8 months from the date of issuance of a complaint in all other proceedings.

■ 5. Revise § 3.12 to read as follows:

§ 3.12 Answer.

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

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

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

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

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

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that he or she admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the

proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

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

■ 6. Revise § 3.21 to read as follows:

§ 3.21 Prehearing procedures.

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

(b) *Scheduling conference.* Not later than 10 days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address: (1) their factual and legal theories; (2) the current status of any pending motions; (3) a schedule of proceedings that is consistent with the date of the evidentiary hearing set by the Commission; (4) steps taken to preserve evidence relevant to the issues raised by the claims and defenses; (5) the scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information; (6)

issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and (7) other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

(c) *Prehearing scheduling order.* (1) Not later than 2 days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission, including a plan of discovery that addresses the deposition of fact witnesses, timing of expert discovery, and the production of documents and electronically stored information, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference. The Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint.

(2) The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

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

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence,

exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

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

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

■ 7. Revise § 3.22 to read as follows:

§ 3.22 Motions.

(a) *Presentation and disposition.* Motions filed under § 3.26 or § 4.17 shall be directly referred to and ruled on by the Commission. Motions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission, unless the Commission in its discretion refers the motion to the Administrative Law Judge. If the Commission refers the motion to the Administrative Law Judge, it may set a deadline for the ruling by the Administrative Law Judge, and a party may seek review of the ruling of the Administrative Law Judge in accordance with § 3.23. During the time a proceeding is before an Administrative Law Judge, all other motions shall be addressed to and ruled upon, if within his or her authority, by the Administrative Law Judge. The Administrative Law Judge shall certify to the Commission a motion to disqualify filed under § 3.42(g) if the Administrative Law Judge does not disqualify himself or herself within 10 days. The Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). When a motion to dismiss is made at the close of the evidence offered in support

of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed. All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

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

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

(d) *Responses.* Within 10 days after service of any written motion, or within such longer or shorter time as may be

designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the opposing party shall file 2 versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. The reply may be conditionally filed with the motion seeking leave to reply. Any reply to a dispositive motion, or any permitted reply to any other motion, shall be filed within 5 days after service of the last answer to that motion.

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

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

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

participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

■ 8. Revise § 3.23 to read as follows:

§ 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

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

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

(3) Grants or denies an application for intervention pursuant to the provisions of § 3.14. Appeal from such rulings may be sought by filing with the Commission an application for review within 3 days after notice of the Administrative Law Judge's ruling. An answer may be filed within 3 days after the application for review is filed. The Commission upon its own motion may enter an order staying compliance with a discovery demand authorized by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of memoranda of law if deemed appropriate by the Commission.

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

for review is filed. The Administrative Law Judge shall issue a ruling on the request for determination within 3 days. The party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge has issued the requested determination or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.

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

(d) Unless the Commission, within 3 days after the filing of an application for review, decides to entertain the appeal, the application shall be deemed to be denied.

(e) Proceedings not stayed.

Application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

■ 9. Revise § 3.24 to read as follows:

§ 3.24 Summary decisions.

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

(2) Any other party may, within 14 days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise

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

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

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

(5) If on motion under this rule a summary decision is not rendered upon

the whole case or for all the relief asked and a trial is necessary, the Commission (or, when appropriate, the Administrative Law Judge) shall issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

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

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

■ 10. Revise § 3.26 to read as follows:

§ 3.26 Motions following denial of preliminary injunctive relief.

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

(b) A motion under this section shall be addressed to the Commission and

filed with the Secretary of the Commission. Such a motion must be filed within 14 days after and may not be filed sooner than:

(1) A district court has denied preliminary injunctive relief, all opportunity has passed for the Commission to seek reconsideration of the denial or to appeal it, and the Commission has neither sought reconsideration of the denial nor appealed it; or

(2) A court of appeals has denied injunctive relief pending appeal.

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

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

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

(f) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *in camera* materials for purposes of this paragraph and the party shall file 2 versions of the document in accordance with the

procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

■ 11. Revise § 3.31, to read as follows:

§ 3.31 General discovery provisions.

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

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

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

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

(c) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these

rules, the scope of discovery is as follows:

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

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

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

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

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

(3) *Electronically stored information.* A party need not provide discovery of electronically stored information from

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

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

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

(d) *Protective orders; order to preserve evidence.* In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section. The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(e) *Supplementation of disclosures and responses.* A party who has made a mandatory initial disclosure under

§ 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

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

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

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

(g) *Ex parte rulings on applications for compulsory process.* Applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to § 3.34 may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission.

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

(i) *Restriction on filings.* Unless otherwise ordered by the Administrative Law Judge in his or her discretion, mandatory initial and supplemental disclosures, interrogatories, depositions, requests for documents, requests for admissions, and answers and responses

thereto shall be served upon other parties but shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission, except to support or oppose a motion or to offer as evidence.

Appendix A to § 3.31: Standard Protective Order

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

It is hereby ordered that this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information.

“Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identified by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party.

“Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

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

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

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

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

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

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

of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

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

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

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the

Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

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

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

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

■ 12. Add § 3.31A to read as follows:

§ 3.31A Expert discovery.

(a) The parties shall serve each other with a list of experts they intend to call as witnesses at the hearing not later than 1 day after the close of fact discovery, meaning the close of discovery except for depositions and other discovery permitted under § 3.24(a)(4), and discovery for purposes of authenticity and admissibility of exhibits. Complaint counsel shall serve the other parties with a report prepared by each of its expert witnesses not later than 14 days after the close of fact discovery. Each respondent shall serve each other party with a report prepared by each of its expert witnesses not later than 28 days after the close of fact discovery. Complaint counsel shall serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 38 days after the close of fact discovery. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances. Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years. A rebuttal report need not include any information already included in the initial report of the witness. Aside from any required information, a rebuttal report shall be limited to rebuttal of matters set forth in respondents' expert reports. If material outside the scope of fair rebuttal is presented, respondents may seek appropriate relief, including striking of all or part of the report or leave to submit a surrebuttal report. No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section.

(b) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the Administrative Law Judge, a deposition of any expert witness shall be

conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a).

Depositions of expert witnesses shall be completed not later than 65 days after the close of fact discovery. Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate. A party, however, may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness at hearing.

■ 13. Revise § 3.33 to read as follows:

§ 3.33 Depositions.

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

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

investigative hearing does not preclude the deposition of that witness.

(c) *Notice.*

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

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

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

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

(1) The name and address of the person who is to answer them, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of § 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being

served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him or her. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him or her, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under § 3.33(g)(3)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his or her remarks, stating with specificity the alleged errors in the transcript.

(g) *Objections; errors and irregularities.*

(1) *Objections to admissibility.* Subject to the provisions of paragraph (g)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(2) *Effect of errors and irregularities in depositions—(i) As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written

objection is promptly served upon the party giving the notice.

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

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

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

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

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

■ 14. Revise § 3.34 to read as follows:

§ 3.34 Subpoenas.

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

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit

inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term "documents" includes written materials, electronically stored information, and tangible things. A subpoena duces tecum may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas subject to § 3.36.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by § 3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas requiring the appearance of, or the production of documents in the possession, custody, or control of, an official or employee of a governmental agency other than the Commission, the Commissioners, the General Counsel, the Bureaus and Offices not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or subpoenas to be served in a foreign country, which may be authorized only in accordance with § 3.36.

■ 15. Revise § 3.35 to read as follows:

§ 3.35 Interrogatories to parties.

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

or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs.

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

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

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

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but such an interrogatory need not be answered until after

designated discovery has been completed or until a pre-trial conference or other later time.

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

■ 16. Revise § 3.36, to read as follows:

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

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

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

(1) The material sought is reasonable in scope;

(2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant;

(3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means or, if for purposes of compelling a witness to appear at the evidentiary hearing, the movant has a compelling need for the testimony;

(4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or

will be met before the subpoena is served; and

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

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

■ 17. Revise § 3.37, to read as follows:

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

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

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

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

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

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form; and

(iii) A party need not produce the same electronically stored information in more than one form.

■ 18. Revise § 3.38 to read as follows:

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

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

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

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

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

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

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

(4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert or fact witness,

or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses or other discovery;

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

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

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

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

§ 3.38A Withholding requested material.

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

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

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

■ 20. Revise § 3.39 to read as follows:

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

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under title 18, section 6002, United States Code, Directors and Assistant Directors of Bureaus and Regional Directors and

Assistant Regional Directors of Commission Regional Offices who supervise complaint counsel responsible for presenting evidence in support of the complaint are authorized to determine:

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

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

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

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

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

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

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

§ 3.41 General hearing rules.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public

unless an *in camera* order is entered by the Administrative Law Judge pursuant to § 3.45(b) of this chapter or unless otherwise ordered by the Commission.

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

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

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

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

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

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

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

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection,

motion, argument, and all other rights essential to a fair hearing.

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(e) Requests for an order requiring a witness to testify or provide other information and granting immunity under title 18, section 6002, of the United States Code, shall be disposed of in accordance with § 3.39.

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

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

■ 22. Revise § 3.42 to read as follows:

§ 3.42 Presiding officials.

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges; and the term *Administrative Law Judge* as used in this part means and applies to the Commission or any of its members when so sitting. The Commission or one or more members of the Commission may preside over discovery and other prehearing proceedings and then transfer the matter to an Administrative Law Judge to preside over any remaining prehearing proceedings and the evidentiary hearing and to issue an initial decision.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the Administrative Law Judge designated.

(c) *Powers and duties.* Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

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

(3) To take depositions or to cause depositions to be taken;

(4) To compel admissions, upon request of a party or on their own initiative;

(5) To rule upon offers of proof and receive evidence;

(6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;

(8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

(9) To make and file initial decisions;

(10) To certify questions to the Commission for its determination;

(11) To reject written submissions that fail to comply with rule requirements, or deny *in camera* status without prejudice until a party complies with all relevant rules; and

(12) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, United States Code.

(d) *Suspension of attorneys by Administrative Law Judge.* The Administrative Law Judge shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his or her directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred may appeal to the Commission in accordance with the provisions of § 3.23(a). The appeal shall not operate to suspend the hearing unless otherwise ordered by the Administrative Law Judge or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

(e) *Substitution of Administrative Law Judge.* In the event of the substitution of a new Administrative Law Judge for the one originally designated, any motion predicated upon such substitution shall be made within 5 days thereafter.

(f) *Interference.* In the performance of their adjudicative functions, Administrative Law Judges shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the

Commission to Administrative Law Judges concerning any adjudicative proceedings shall appear in and be made a part of the record.

(g) *Disqualification of Administrative Law Judges.* (1) When an Administrative Law Judge deems himself or herself disqualified to preside in a particular proceeding, he or she shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal.

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him or her, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law Judge does not disqualify himself or herself within 10 days, he or she shall certify the motion to the Commission, together with any statement he or she may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(h) *Failure to comply with Administrative Law Judge's directions.* Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, together with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

■ 23. Revise § 3.43 to read as follows:

§ 3.43 Evidence.

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

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted.

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

(c) *Admissibility of third party documents.* Extrinsic evidence of authenticity as a condition precedent to admissibility of documents received from third parties is not required with respect to the original or a duplicate of a domestic record of regularly conducted activity by that third party that otherwise meets the standards of admissibility described in paragraph (b) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record: (1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) was kept in the course of the regularly conducted activity; and (3) was made by the regularly conducted activity as a regular practice.

(d) *Presentation of evidence.*

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

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

- (i) Make the interrogation and presentation effective for the ascertainment of the truth;
- (ii) Avoid needless consumption of time; and
- (iii) Protect witnesses from harassment or undue embarrassment.

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

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

(f) *Official notice.* "Official notice" may be taken of any material fact that is not subject to reasonable dispute in that it is either (1) generally known within the Commission's expertise, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

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

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

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

■ 24. Revise § 3.44 to read as follows:

§ 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically

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

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

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

■ 25. Revise § 3.45 to read as follows:

§ 3.45 In camera orders.

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

(b) *In camera treatment of material.* A party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days notice of the proposed use of such material. Each such motion must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear. The Administrative Law Judge may order that such material, whether admitted or rejected, be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment. This finding shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The party submitting material for which *in camera* treatment is sought must provide, for each piece of such evidence and affixed to such evidence, the name and address of any person who should be notified in the event that the Commission intends to disclose *in camera* information in a final decision. No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including:

- (1) A description of the material;
- (2) A statement of the reasons for granting *in camera* treatment; and
- (3) A statement of the reasons for the date on which *in camera* treatment will expire. Such expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period. If an *in camera* order is silent as to duration, without explanation, then it will expire 3 years after its date of issuance. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding,

the notation “*In Camera* Record under § 3.45,” and the date on which *in camera* treatment expires. If the Administrative Law Judge has determined that *in camera* treatment should be granted for an indeterminate period, the notation should state that fact.

Parties are not required to provide documents subject to *in camera* treatment, including documents obtained from third parties, to any individual or entity other than the Administrative Law Judge, counsel for other parties, and, during an appeal, the Commission or a federal court.

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

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

(e) *When in camera or confidential information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked “*In Camera*” or “Subject to Protective Order,” as appropriate, on the first page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to *in camera* or confidential material must be supported by record citations to relevant evidentiary materials and associated Administrative Law Judge *in camera* or other confidentiality rulings to confirm that *in camera* or other confidential treatment is warranted for such material. In addition, the document must include an attachment containing a copy of each page of the document in question on which *in camera* or

otherwise confidential excerpts appear, and providing the name and address of any person who should be notified of the Commission’s intent to disclose in a final decision any of the *in camera* or otherwise confidential information in the document. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked “Public Record” on the first page and omitting the *in camera* and confidential information and attachment that appear in the complete version, shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served by the party on the other parties in accordance with the rules in this part. The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* version.

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

(g) *Provisional in camera rulings.* The Administrative Law Judge may make a provisional grant of *in camera* status to materials if the showing required in § 3.45(b) cannot be made at the time the material is offered into evidence but the Administrative Law Judge determines that the interests of justice would be served by such a ruling. Within 20 days of such a provisional grant of *in camera* status, the party offering the evidence or an interested third party must present a motion to the Administrative Law Judge for a final ruling on whether *in camera*

treatment of the material is appropriate pursuant to § 3.45(b). If no such motion is filed, the Administrative Law Judge may either exclude the evidence, deny *in camera* status, or take such other action as is appropriate.

■ 26. Revise § 3.46 to read as follows:

§ 3.46 Proposed findings, conclusions, and order.

(a) *General.* Within 21 days of the closing of the hearing record, each party may file with the Secretary for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status pursuant to § 3.45(b), the party shall file 2 versions of the proposals in accordance with the procedures set forth in § 3.45(e). Reply findings of fact, conclusions of law, and briefs may be filed by each party within 10 days of service of the initial proposed findings.

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

(1) The exhibit number, followed by
(2) The exhibit's title or a brief description if the exhibit is untitled;

(3) The transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made;

(4) The transcript pages at which the exhibit is discussed;

(5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;

(6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and

(7) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

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

(1) The name of the witness;

(2) A brief identification of the witness;

(3) The transcript pages at which any testimony of the witness appears; and

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

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

(e) *Rulings.* The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

■ 27. Revise § 3.51 to read as follows:

§ 3.51 Initial decision.

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order pursuant to § 3.46, or within 85 days of the closing of the hearing record pursuant to § 3.44(c) where the parties have waived the filing of proposed findings. The

Administrative Law Judge, for good cause, may extend these time periods by 30 days. The Administrative Law Judge shall file an initial decision within 14 days after a default or the granting of a motion for summary decision. The Commission may extend any of these time limits. In no event shall the Administrative Law Judge file an initial decision later than 1 year after the issuance of the administrative complaint. Extensions of the 1-year deadline may be granted by the Commission upon a finding of extraordinary circumstances and if appropriate in the public interest. Once issued, the initial decision shall become the decision of the Commission 30 days after service thereof upon the parties or 30 days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

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

Commission shall be deemed to have been waived.

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

(2) The initial decision shall be prepared in a common word processing format, such as WordPerfect or Word, and shall be filed by the Administrative Law Judge with the Office of the Secretary in both electronic and paper versions.

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

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

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

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

■ 28. Revise § 3.52 to read as follows:

§ 3.52 Appeal from initial decision.

(a) *Who may file; notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission by filing a notice of appeal with the

Secretary within 10 days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within 5 days after service of the first notice, or within 10 days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* (1) The appeal shall be in the form of a brief, filed within 30 days after service of the initial decision, and shall contain, in the order indicated, the following:

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

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

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

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

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

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

(c) *Answering brief.* Within 30 days after service of the appeal brief, the appellee 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, as well as arguments in response to the appellant's appeal brief. However, if the appellee is also cross-appealing, its answering brief shall also contain its arguments as to any issues the party is raising on cross-appeal, including the points of fact and law relied upon in support of its position on each question, with specific page references to the record and legal or other material on which the party relies in support of its cross-appeal, and a proposed form of order for the Commission's consideration instead of the order contained in the initial decision. If the

appellee does not cross-appeal, its answering brief shall not, without leave of the Commission, exceed 14,000 words. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 16,500 words.

(d) *Reply brief.* Within 7 days after service of the appellee's answering brief, the appellant may file a reply brief, which shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 7,000 words. If the appellee has cross-appealed, any party who is the subject of the cross-appeal may, within 30 days after service of such appellee's brief, file a reply brief, which shall be limited to rebuttal of matters in the appellee's brief and shall not, without leave of the Commission, exceed 7,000 words. The appellee who has cross-appealed may, within 7 days after service of a reply to its cross-appeal, file an additional brief, which shall be limited to rebuttal of matters in the reply to its cross-appeal and shall not, without leave of the Commission, exceed 7,000 words. The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs.

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

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

(2) Signing a brief constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; that it complies all the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with all the other rules in this part. If a brief is not signed or is signed with intent to defeat the

purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the brief has not been filed.

(g) *Designation of appellant and appellee in cases involving cross-appeals.* In a case involving an appeal by complaint counsel and one or more respondents, any respondent who has filed a timely notice of appeal and as to whom the Administrative Law Judge has issued an order to cease and desist shall be deemed an appellant for purposes of paragraphs (b), (c), and (d) of this section. In a case in which the Administrative Law Judge has dismissed the complaint as to all respondents, complaint counsel shall be deemed the appellant for purposes of paragraphs (b), (c), and (d) of this section.

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

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

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

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

(k) *Word count limitation.* The word count limitations in this section include headings, footnotes and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with

respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e). Extensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.

PART 4—MISCELLANEOUS RULES

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

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

- 2. Amend § 4.3 by revising paragraph (b) as follows:

§ 4.3 Time.

* * * * *

(b) *Extensions.* For good cause shown, the Administrative Law Judge may, in any proceeding before him or her: (1) extend any time limit prescribed or allowed by order of the Administrative Law Judge or the Commission (if the Commission order expressly authorizes the Administrative Law Judge to extend time periods); or (2) extend any time

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

* * * * *

By direction of the Commission,
Commissioner Rosch not participating.

Donald S. Clark

Secretary

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