§ 337.6 [Amended]

2. Section 337.6(e) is removed and reserved.

By order of the Board of Directors.

Dated at Washington, D.C., this 26th day of March, 2001.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

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FEDERAL TRADE COMMISSION

16 CFR Parts 2, 3 and 4

Rules of Practice

AGENCY: Federal Trade Commission (FTC).

ACTION: Interim rules with request for comments.

SUMMARY: The Commission is updating and making other technical corrections and changes to its regulations on Organization, Procedures and Rules of Practice.

DATES: These rule amendments will be effective May 18, 2001. Comments must be received on or before May 4, 2001. These amendments will govern all Commission adjudicatory proceedings commenced on or after May 18, 2001. They will also govern all pending Commission adjudicatory proceedings commenced before May 18, 2001 unless, in the opinion of the Administrative Law Judge (ALJ) or the Commission, the application of one or more amended rules in a particular proceeding would not be feasible or would work injustice.

ADDRESSES: Written comments must be submitted with 20 copies to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: John Graubert, Office of General Counsel, FTC, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2186, jgraubert@ftc.gov.

SUPPLEMENTARY INFORMATION: The Commission has periodically examined and revised its rules of practice in the interest of clarifying the rules and making the Commission's procedures more efficient and less burdensome for all parties.[1] The Commission is further amending parts 2, 3 and 4 of its rules, 16 CFR parts 2, 3 and 4, to update and make other technical clarifications, corrections, and changes to the rules, as follows.

Reports of Compliance

To facilitate the processing and review of compliance reports, Rule 2.41(a) is being amended to provide (1) that an original and one copy of each such compliance report should be filed with the Secretary of the Commission, and (2) that, at the same time, one additional copy should be filed with the Associate Director for Enforcement in the Bureau of Consumer Protection (for consumer protection orders) or with the Assistant Director for Compliance in the Bureau of Competition (for competition orders).

Pretrial and Discovery

Responsive Motions: Rule 3.12(a): In federal court practice, Federal Rule of Civil Procedure 12(a)(4) provides that the filing of a ''motion permitted under this rule'' tolls the period for answering a complaint. Commission Rule 3.12(a) generally follows the federal rule but mentions only a motion for a more definite statement. Although other motions, such as motions to dismiss, are undoubtedly rare at the outset of FTC administrative proceedings, there is no reason to exclude such dispositive motions from the rule. Making Rule 3.12(a) consistent with Fed. R. Civ. P. 12(a)(4) will spare the parties and ALJ the additional inconvenience of arranging extensions of time to answer in individual cases where such motions are filed.

Initial Pretrial Conferences: Rule 3.21(b): Under the Commission's 1996 Rule amendments, the ALJs must hold a scheduling conference not later than seven (7) days after the last answer is filed. Although the 1996 amendments were designed to expedite administrative litigation, this is one instance in which some additional time might actually make the proceedings more efficient. As a practical matter, particularly in cases when service on one or more respondents is complicated for any reason (e.g., overseas service), it has proved difficult to predict when the last answer will be filed and difficult to schedule and plan for a scheduling conference in this narrow seven-day window. Moreover, two days after the initial scheduling conference, no matter how hastily convened, the ALJ is required to issue a prehearing scheduling order based in part on the results of the conference. *See* Rule 3.21(c). Because the Commission wants the parties to exchange disclosures and have meaningful discussions about the proceeding before the scheduling conference in order to identify and attempt to narrow the issues in the case, which will also assist the ALJ in crafting a meaningful pretrial order, the Commission will make a modest enlargement of the period in Rule 3.21(b) from seven to fourteen (14) days.

Adjudicative Motions: Rule 3.22: When the Commission amended the Part 3 Rules in 1996, it approved a change to Rule 3.22(b) to require ''that all motions in adjudicative proceedings include the name, address, and telephone number of counsel, and attach a draft order containing the proposed relief.'' *See* 61 FR 50640, 50644. This language was inadvertently omitted from the revised Rule itself, as published in the **Federal Register** and later incorporated into the Code of Federal Regulation (although part of this requirement is contained in Rule 4.2(e)(1)). In addition to making this change in Rule 3.22, the amended rule will also require counsel to provide a fax number and e-mail address, if any, along with name, address and phone number.

Summary Decision: Rule 3.24(a)(2): The rule currently provides that a decision shall be rendered ''within thirty (30) days.'' For clarity, the Rule is being amended to specify that the decision is due within thirty (30) days after the opposition or any final brief ordered by the ALJ is filed.

Expert Discovery: Rule 3.31(c)(4)(i): Under the Commission's current rule, discovery of experts is handled principally by interrogatory. Further discovery, including depositions, requires an order from the ALJ. The amended Rule, reflecting the development of practice in recent years under the Federal Rules of Civil Procedure, generally provides for disclosure of expert opinions and depositions of experts. Rule 3.31(c)(4)(B)(iii), regarding payment of expert fees for certain discovery, is deleted. The ALJ can address any issues regarding fees or costs under Paragraph (d) of this rule.

Depositions: Rule 3.33(a): The amended Rule incorporates a provision modeled on Federal Rule of Civil Procedure 30(b)(7), which permits the parties to stipulate or the court to order that a deposition may be taken by telephone or other remote electronic means.

Foreign Discovery: Rule 3.36: Since the 1996 amendments to the Rules, parties may issue subpoenas for depositions or production of documents without prior approval or supervision from the ALJs, except when the discovery request seeks information or testimony from another governmental agency. For discovery involving other

[1] *See, e.g.*, 61 FR 50640 (Sept. 26, 1996); 50 FR 41485 (Oct. 11, 1985).

government agencies, the parties have to file a motion with the ALJ, who determines whether the request is reasonable in scope and whether the information sought cannot be reasonably obtained by other means. *See* Rule 3.36(b). For all other discovery, the parties obtain subpoena forms identifying the Part 3 matter at issue (but executed in blank as to the subpoena target) from the Secretary's office, and deliver them on their own. *See* Rule 3.34(a). These subpoenas include the seal of the agency, are signed by the Secretary, and bear every indication of being official agency documents.

Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law.[2] In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36. Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, such discovery should only occur if a judge determines that the request is reasonable and that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.[3]

Parties seeking foreign discovery must also make a good faith demonstration before the ALJ that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served. This does not mean that the ALJs will be expected to make rulings on questions of foreign law. This showing, together with the other requirements of Rule 3.36(b), will merely assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns.

There is no comparable need at this time for rule revisions regarding discovery requests served within the United States that may require production of documents located abroad (in foreign offices of multinational corporations, for example). Cases arising under similar statutory provisions confirm that such discovery requests are authorized by the FTC Act and are not likely to present the same extraterritoriality concerns as actual service of discovery requests abroad.[4]

Rule 3.36 is also being amended to add a new subsection (c), to make it clear that each subpoena issued pursuant to an order of the ALJ under Rule 3.36 shall be signed by the Secretary, but must have attached to it, and be served in conjunction with, a copy of the Order authorizing its issuance.

Rule 3.34, the rule providing for issuance of subpoenas in blank, is amended to make clear that that procedure does not apply to discovery requests covered by Rule 3.36. Finally, the reference to § 3.31*(b)*(1) in § 3.36(b)(2) to § 3.31*(c)*(1).

Orders Compelling Witness Testimony: Rule 3.39(a): For completeness, this rule should specifically include Directors and Deputy Directors of Bureaus, Assistant Directors in the Bureau of Competition, Associate Directors in the Bureau of Consumer Protection, and Regional Directors and Assistant Regional Directors of Commission Regional Offices, to reflect the current organization of the Bureaus.

Filing of Documents Other Than Correspondence

In order to facilitate the filing, receipt, and processing of documents submitted to the Commission, in both adjudicative and nonadjudicative proceedings—and to accommodate the need to secure electronic copies of such documents in a routine, systematic, and efficient manner—Rule 4.2 has been amended in a number of respects:

Copies: Rule 4.2(c): The present Rule 4.2(c) requires the filing of an original and twenty (20) copies of ''all documents before the Commission'' and certain motions before an ALJ, and an original and ten (10) copies of all other documents before an ALJ. In light of the rule amendments regarding electronic filing, discussed below, and to reduce the burden of the filing process as much as possible, this rule is amended to require the filing of a paper original and twelve (12) copies of documents filed before the Commission, and the paper original and only one (1) paper copy of each document filed before an ALJ in an adjudicative proceeding. The current Rule 4.2(c) also requires the filing of ''an original and one copy of compliance reports'' and the filing of ''one (1) copy of admissions and answers thereto.'' As noted above, the first requirement has been transferred to Rule 2.41, which deals with the filing of compliance reports, and therefore need no longer appear in Rule 4.2(c). Similarly, the second requirement replicates the requirement covering admissions and answers thereto already set forth in Rule 3.32, and therefore need no longer appear in Rule 4.2(c) as well. In addition, Rule 4.2(c) currently requires parties filing motions to provide copies to the ALJ at the time such motions are filed with the Secretary. Because this requirement already appears in Rule 3.22, and is being added to Rule 4.4(b), it may also be removed from Rule 4.2(c).

Electronic Filing: Rule 4.2: The Rule is amended in a number of respects to reflect current practices and technology. First, the amended rule requires the submission to the Commission of electronic copies of pleadings, motions, briefs, and all other filings in adjudicative proceedings—whether before the Commission or an ALJ—and of all other formal filings before the Commission, such as petitions to limit or quash and appeals from rulings thereon; requests to reopen or modify; and applications for approval of proposed divestitures, acquisitions, or similar transactions.

The Commission notes that other agencies have had electronic filing requirements for many years,[5] and that the burden of this proposal on the public is likely to be negligible at this point. The use of electronic word-processing equipment is virtually universal, certainly among parties appearing before the Commission. In case of extreme hardship, however, the Secretary is empowered to excuse a party from this requirement. The rule follows the format requirements used in the Commission's request for nominations for the Advisory Committee on Online Access and

[2] *See CFTC* v. *Nahas,* 738 F.2d 487 (D.C. Cir. 1984) (district court lacks jurisdiction to enforce a CFTC investigative subpoena served on a foreign citizen in a foreign nation); *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson,* 636 F.2d 1300 (D.C. Cir. 1980) (FTC Act does not authorize service of subpoenas abroad by registered mail). These issues are less likely to arise with Civil Investigative Demands served at the behest of Commission staff, because section 20(c)(7)(b) of the FTC Act specifically provides for foreign service of CIDs.

[3] *See, e.g.,* Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C (95)130 (Final) (July 1995) at Appendix ¶ 8(a)–(c); U.S. Dept. of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations § 4.2 (April 1995).

[4] *See FMC* v. *DeSmedt,* 366 F.2d 464 (2d Cir.), *cert. denied,* 385 U.S. 974 (1966); *accord CAB* v. *Deutsche Lufthansa Aktiengesellschaft,* 591 F.2d 951 (D.C. Cir. 1979).

[5] *See, e.g.,* 49 CFR 1104.3(a) (Surface Transportation Board).

Security, which requested that submissions be accompanied by an electronic copy in ASCII format, WordPerfect or Microsoft Word. *See* 64 FR 71457 (Dec. 21, 1999). This covers the two most popular word-processing programs. Documents written on other systems can be readily converted into one of the three requested options.

The amended rule further provides that an electronic copy of each public filing in an adjudicative proceeding shall be submitted to the Commission by e-mail, while an electronic copy of an *in camera* or otherwise confidential filing shall be submitted to the Commission on a diskette attached to the paper original of the filing. The amended rule requires certification that a paper copy with an original signature is being filed on the same day by other means, thus preserving the availability of sanctions under Rule 4.2(e). A paper copy is also still required because many exhibits and appendices cannot currently be transmitted electronically in a feasible or efficient manner.

Second, the amended rule permits the filing of other public documents, such as public comments, in either paper or electronic form. If an electronic version is filed, it should be submitted by e-mail, rather than diskette. This method of filing makes the document-handling system more efficient and secure, eliminating problems caused by possible loss or mis-labeling of a diskette. Documents which contain nonpublic information—other than those filed formally before the Commission, or before an ALJ in adjudicative proceedings—must be filed in paper from only, and must clearly be labeled as confidential.

The Commission's experience with electronic filing under the amended rules will assist in preparing for compliance with the Government Paperwork Elimination Act, Title XVII of Public Law 105–277 (Oct. 21, 1998), by the Act's effective date in October 2003.

Service: Rule 4.4: In order to assure that complaint counsel receive copies of pleadings as expeditiously as possible, the amended rule adds ''lead complaint counsel'' to the list of parties to be served in Rule 4.4(b). A copy must also be filed with the ALJ.

Rules 4.4(a)(3) and 4.4(b) are expanded to provide explicitly for service by overnight courier.

Secretarial Service of Complaint Counsel Documents: The current practice of having the Secretary serve documents filed by complaint counsel does not appear to be based on any rule or statutory requirement. This procedure adds delay and administrative burden with no apparent countervailing benefit. Although changing this practice does not require a rule change, and has been accomplished by a Notice to Staff and a public announcement, the requirement for a certificate of service in Rule 4.4(c) is now uniformly applicable to all parties—including both complaint counsel and all respondents—as indicated by deletion of the phrase ''by a party respondent or intervenor'' from this paragraph. Also, the option of providing an ''acknowledgment of service'' in lieu of proof of service is rarely used, serves little purpose, and has been deleted.

Trials

Evidence: Rule 3.43: In *Lenox, Inc.,* 73 F.T.C. 578, 603–04 (1968), the Commission articulated its position that, because respondents are in the best position to determine the authenticity of documents kept in their own files, respondents bear the burden of producing evidence to rebut a presumption that documents produced from their files are authentic. For the same reason the Commission also adopted a rebuttable presumption that such documents were kept in the regular course of business, for purposes of admissibility. This position has been repeated in subsequent cases, and applied to documents produced by any corporation (including third parties).

Nevertheless, in some proceedings counsel continue to raise objections to the authenticity of their own documents (without producing affirmative evidence calling authenticity into question) until the ALJ is forced to make a ruling enforcing the *Lenox* presumption. This practice wastes time and energy. Expressly writing the *Lenox* presumption into the rules might deter some of these objections.

Accordingly, the amended rule creates a second paragraph in Rule 3.43(b) providing that a document generated and produced by any person engaged in commerce is presumptively authentic, and presumptively was prepared and kept in the regular course of business of the person generating or producing the document, unless the person introduces evidence tending to rebut such a presumption. This rule does not apply to Commission records. Public records are subject to separate, specific rules in the Federal Rules of Evidence, *see* Fed. R. Evid. 803(8–10), and the Commission thinks it appropriate to treat Commission records separately as well. For example, to the extent the *Lenox* presumptions place a burden on a producing party to demonstrate that a particular document should not be attributed to that party, such a presumption is neither necessary nor appropriate in the case of the Commission. The Commission has made clear that it is bound only by the formal majority vote of the Commissioners, and not by representations of staff. *See, e.g., In re TRW, Inc., et al.,* 88 F.T.C. 544, 544–45 (Interlocutory Order, Oct. 13, 1976).

In camera Treatment: Rules 3.45(d) and 3.46(b) & (c): The current rules and practices regarding *in camera* treatment of evidence are causing a number of problems. First, parties have become extremely lax in complying with the existing rules regarding *in camera* treatment. Parties frequently file documents stamped ''*in camera*'' and assume *in camera* treatment will be maintained even though the party has neither sought nor obtained a ruling granting such treatment. Parties also routinely ignore or only partially observe the requirement that post-trial exhibit and witness lists clearly identify which materials and testimony are *in camera.* The ALJs and the Secretary need clearer authority to enforce compliance with the existing rules by, among other sanctions, denying *in camera* status to or rejecting documents that do not comply with the rules.

Second, the ALJs need a defined procedure for dealing with mid-trial requests for *in camera* treatment that cannot be decided immediately because, for example, notice to a third party is required. The ALJs typically extend temporary protection in such cases pursuant to their general authority to regulate the course of the proceedings, but this procedure should be set forth in the rules of practice. This written procedure specifies, for example, how and when the issue will be brought back before the ALJ for a final determination. This will help assure that a party (or third party) in fact makes the required evidentiary showing to support all the *in camera* designations in the record.

Finally, even if all the current requirements are met it is often difficult for Office of General Counsel staff (OGC) and the Commissioners' offices to ascertain what materials are legitimately part of the *in camera* record when the Commission's opinions are ready for release. Several additional steps described below will assist the Commissioners in preparing opinions for public release, while adding only minimal burden to the parties.

(1) *Changes to Ensure Compliance With Existing Rules:* (a) Rule 3.46 requires a party to indicate in post-trial submissions the *in camera* status of exhibits and witness testimony offered by that party and received into

evidence.[6] This information is an invaluable aid for the ALJ and Commission in reviewing the evidentiary record. The parties, however, frequently fail to comply with these requirements. This failure impedes OGC's *in camera* review of the Commission's final opinion because staff must search the entire record for *in camera* rulings, including bench rulings, to determine the *in camera* status of evidentiary materials discussed in the opinion.

To avoid such difficulties, the Commission is amending rule 3.42(c) to state explicitly that the ALJ may reject written submissions that fail to comply with the rules in this Part, including Rule 3.46.

(b) As noted above, parties sometimes submit material marked ''*in camera''* even though they have never sought or obtained a ruling from the ALJ that such treatment is appropriate. These submitters may well assume that their self-designated *in camera* submissions will not thereafter be disclosed to the public. Absent an affirmative ALJ ruling granting such materials *in camera* status, however, the Commission may be free to place these materials on the public record, and to disclose them in its final opinion, without advance notification.

Here the program may lie in part in an arguable gap in rule 3.45(b). The Rule indicates that an order is required to withhold material from the public record, and provides citations to the legal standards on which the ALJ's ruling is to be based. But the Rule does not explicitly require the party seeking *in camera* status to make a motion for such an order. The requirement of a motion would seem to be fairly evident, if not implicit, and in fact most parties do make such a motion. Parties that do not, however, may avoid (intentionally or unintentionally) ever making the required evidentiary showing that *in camera* treatment is appropriate and obtaining a corresponding order. The Commission therefore is now making the requirement of a motion for *in camera* treatment explicit in rule 3.45(b). The Commission is also making explicit a requirement that parties who seek to use material obtained from a third party subject to confidentiality restrictions demonstrate that the third party has been given adequate notice and opportunity to seek protection on its own behalf. Failure to comply with these requirements subjects the noncomplying party to the additional sanctions adopted in rule 3.42(c).

(c) Parties have also incorrectly asserted *in camera* status for pre-trial motions or other documents that are not being ''offered into evidence.'' The *in camera* rules do not apply to such documents. *See* Rule 3.45(b). Motions that seek pretrial or procedural rulings, and that contain confidential matter, should be handled under the procedures for protective orders, *see* Rule 3.31(d), and should not be confused with *in camera* matters. One aspect of the *in camera* rules that should equally apply in the protective order context, however, is the requirement that parties submit both a public (redacted) and confidential) version of the relevant documents. Such a requirement is now added to Rule 3.22(b) by adding the words ''or is subject to confidentiality protections pursuant to a protective order'' after ''*in camera* status pursuant to § 3.45(b).'' Corresponding changes are made in Rules 3.22(c) and 3.45(d), (e) & (f).

Parties must also mark their confidential filings with brackets or similar conspicuous markings to indicate the material for which they are claiming confidential treatment, so that Commission staff who use the confidential versions of filings in preparing or reviewing decisions in the litigation are aware of which material may be subject to protective order. This complements a similar rule change for trial submissions discussed below.

(2) *Provisional Rulings:* The current Rule 3.45(b) fails to accommodate situations in which the ALJ cannot rule on *in camera* issues at the time evidence is offered. This problem arises most frequently when a party offers into evidence at trial third party materials obtained through discovery and the third party is not present to request *in camera* treatment. As a matter of practice, the ALJ will grant provisional *in camera* status so that the testimony can continue uninterrupted and will instruct the introducing party to notify the third party of the provisional grant and the need to file an application for *in camera* treatment if it wants *in camera* treatment extended beyond a temporary period.

There is no statutory impediment to this practice.[7] Provisional grants of *in camera* treatment, moreover, serve a useful purpose, allowing the case to proceed without sidebar interruptions or delays addressing peripheral confidentiality issues. The rule is accordingly amended to provide express authority for this practice and specify a time period—twenty (20) days—within which the party offering the evidence must take whatever steps are necessary to present the matter to the ALJ for a final ruling. This might include notifying any affected third party submitters and giving them the opportunity to appear and make the appropriate showing. If the 20-day time period elapses without a motion to support the *in camera* claim, the ALJ can exclude the evidence or deny *in camera* status as appropriate in particular cases.

(3) *Aids for the Release of Commission Opinions and Formerly In Camera Material:* There are a number of relatively small measures that could greatly assist the process of determining which portions of Commission opinions must be withheld from the public record, and, in turn, of putting on the public record material for which *in camera* or other confidentiality protection has expired:

(a) Submitters of *in camera* material must provide, for each piece of such evidence and affixed to such evidence, a name and address of record for notification purposes in the event the Commission intends to release the *in camera* material in a final adjudicative opinion, and must also update this information if necessary throughout the proceeding. This measure should minimize unnecessary delay while staff attempts to determine whom to notify of a proposed release, when that information is not apparent from the *in camera* document. For summaries, tables and other evidentiary compilations the submitter should make clear which entity is to be notified with respect to each separate reference to *in camera* material.

(b) A party or nonparty submitter must mark its *in camera* submissions, either with highlighting, brackets or some other conspicuous marking, to show which material is claimed to be confidential. In addition, each such submission should include as an

[6] A party's first statement of proposed findings of fact and conclusions of law must include both an exhibit index and a witness index specifying, among other things, each of that party's exhibits that have been accorded *in camera* treatment, 16 CFR 3.46(b)(7), and any portions of witness testimony offered by that party which the ALJ received *in camera. Id.* at 3.46(c)(4).

[7] The Administrative Procedure Act (''APA''), 5 U.S.C. 551 *et seq.*, empowers the ALJs, *inter alia,* to regulate the course of the hearing. *Id.* at section 556(c)(5); *see also* 16 CFR 3.42(c)(6) (conforming rule of practice). The APA specifies the content of an adjudicative record (i.e., transcript of testimony, exhibits and all papers and requests filed in the proceeding), and requires that it be made available to the *parties.* 5 U.S.C. 556. Under the APA, the only adjudicative materials that agencies must routinely make available for public inspection and copying are final opinions, including concurring and dissenting opinions, and orders in adjudications. *Id.* at section 552(a)(2). Similarly, the FTC Act requires only that the Commission's ''report'' stating its findings be served on the parties. 15 U.S.C. 45(b).

attachment a set of pages consisting only of those pages on which the highlighted, bracketed, or otherwise marked material appears. Individuals involved in preparing the Commission's final adjudicative opinion primarily rely on the complete, *in camera* versions of parties' briefs, proposed findings of fact and conclusions of law and other written submissions, as well as the *in camera* version of the ALJ's initial decision. It has not always been apparent from such documents, however, which portions of the document are actually *in camera.*

In camera review would be greatly facilitated if the *in camera* portions of party submissions and the ALJ's initial decision were easily identifiable. Moreover, the inclusion of a separate set of pages consisting only of the pages on which *in camera* or otherwise confidential material appears would greatly facilitate the later placement of that material on the public record, once its *in camera* or otherwise confidential status has expired. Requiring the parties to enclose *in camera* excerpts in brackets, and to include such a separate attachment, should impose no significant additional burden, because they must already identify such excerpts when preparing the public versions of their submissions.

(c) *in camera* discussions in written submissions must include record citations to the relevant *in camera* evidentiary materials and associated ALJ *in camera* rulings. OGC and Commissioners' staff sometimes cannot link purported *in camera* excerpts to a specific ALJ ruling granting such treatment, either because there was no such ruling or because the record is not sufficiently clear.

(d) The rule provides that *in camera* orders lacking an expiration date will expire three years after issuance.[8] Most ALJ *in camera* orders include an expiration date, as required by Rule 3.45(b)(3). However, in rare instances, *in camera* orders have been silent as to their duration. To avoid the undesirable result that an exhibit or testimony would be accorded indeterminate *in camera* treatment without adequate justification, the Commission believes an automatic, default expiration of *in camera* treatment after three years would strike an appropriate balance between maintaining the confidentiality of sensitive materials that would result in competitive injury if disclosed, and public access to the underlying basis for Commission decisions.

Expiration of *in camera* treatment three years after the ALJ's designation would discourage blanket grants of confidentiality by reminding the moving parties that they bear a special burden of showing why *in camera* treatment should be accorded for any longer period of time. *See General Foods,* 95 F.T.C. at 353 & n.2 (and cases cited therein); *see also E.I. DuPont de Nemours & Co.,* 1990 FTC LEXIS 134, *2 (April 25, 1990) (applicants seeking *in camera* treatment must demonstrate ''at the outset that the need for confidentiality of the material is not likely to decrease over time'').

Consent Agreement Settlements: Rule 3.25(c): As the Commission held in *Textron, Inc.,* D. 9226 (April 14, 1993), the Secretary's authority to withdraw a matter from adjudication upon execution of a consent agreement by respondent and complaint counsel should apply only when the matter is still pending before an ALJ, not if the matter is before the Commission. The Rule is amended to reflect this holding by inserting the words ''and the matter is still pending before an Administrative Law Judge'' before ''the Secretary shall issue an order'' in Rule 3.25(c). A sentence is also added to the end of Rule 3.25(c) providing that if the matter is pending before the Commission, the Commission may, on motion, in its discretion, withdraw the matter from adjudication in order to consider a proposed consent agreement.

Closing the Record: Rule 3.44(c): The second sentence of Rule 3.44(c) contains a clerical error and should read ''The Administrative Law Judge shall retain the *discretion* to permit or order correction of the record as provided in § 3.44(b).''

Appeals

Scope of review: Rule 3.51(c)(3): Rule 3.51(c)(3) provides that the initial decision of an ALJ ''shall be supported by reliable, probative and substantial evidence.'' The term ''substantial evidence'' in this rule is meant to refer to the standard for agency decisions in section 556(d) of the Administrative Procedure Act, which deals with the quantum of evidence (in most cases a preponderance) needed to support findings of fact.[9] The phrase in this context should not be confused with the ''substantial evidence'' standard for judicial review of agency action, which is more deferential and may not require support by a ''preponderance'' of the evidence.[10]

Removing the ''substantial evidence'' language from § 3.51(c)(3) should help eliminate such confusion. The parties' burdens of proof are still clearly governed by the case law and both section 556(d) of the APA and Commission Rule 3.43(a). Also, the Rule is streamlined by consolidating the remainder of subsection (c)(3) into subsection (c)(1), which also deals with the content of initial decisions.

Form of Briefs: Rules 3.52 and 4.2: The Commission has a longstanding interest, as no doubt other parties do as well, in trying to make briefs clearer and more concise. Much time and paper has also been spent trying to address outdated typeface and format rules.[11] The complexity of the typical Part 3 case makes it very difficult to impose rigid rules that would limit and simplify briefs. The Commission is attempting to address these concerns, however, by adopting three changes to conform the Commission's rules more closely to the Federal Rules of Appellate Procedure and the local rules of many federal circuit courts:

1. Specification that the present requirement of a ''concise statement of the case'' in Rule 3.52(b)(2) means a concise summary of argument and concise statement of facts, following the model of Federal Rule of Appellate Procedure 28(a)(6)–(8) and (b);

2. The outmoded typeface, paper size, margin and page limit provisions of Rule 3.52 are eliminated and replaced with word count limitations, as the Federal Rules of Appellate Procedure currently provide; and

3. The rule now specifically provides that requests for extensions of the word limit are disfavored and will not be granted absent compelling circumstances.

The first amendment is intended to encourage parties to organize and present their arguments clearly and cogently. Although Rule 3.52(b) does presently require a ''concise statement of the case,'' as well as a ''specification

[8] The Commission observed in *General Foods,* 95 F.T.C. 352, 353 (1980), that it ''has usually denied *in camera* treatment for data'' that is more than three years old. (citing cases). ALJs routinely rely on this time frame when disposing of *in camera* applications. *See, e.g., International Ass'n of Conference Interpreters,* 123 F.T.C. 465, 469 (1996).

[9] *See Steadman* v. *SEC,* 450 U.S. 91, 98 (1981).

[10] *See Cellular Tel. Co.* v. *Town of Oyster Bay,* 166 F. 3d 490, 492, 494 (2d. Cir. 1999); *but cf. Standard Oil Co. of California,* 84 F.T.C. 1401, 1446-47 (1974) (initial decision incorrectly applying appellate review standard to complaint counsel's case).

[11] Several parties have filed special pleadings seeking relief from the requirements of or otherwise complaining about the typeface requirements. *See, e.g.,* Motion for an Extension of 30 Days to File Appeal Brief and for Leave to Use Alternate Typeface, *In re Summit Technology &VISX, Inc.,* Docket No. 9286 (June 28, 1999); Order Granting Permission to File Brief in Times New Roman, 12-Point Type, *Toys-''R''-Us, Inc.,* Docket No. 9278 (Dec. 9, 1997); Order Denying Complaint Counsel's Motion To Require Respondents To File Brief Complying With Rule 3.52(e), *Id.* (Nov. 12, 1997).

of the questions intended to be urged,'' the FRAP standards are somewhat more specific and are widely understood by the bar. Specifically referring to and incorporating these standards should lead to more uniform, concise and comprehensible briefs.

The word count limitations provide a simple, easily enforceable standard for the length of briefs. They give the parties an incentive to make their briefs legible, avoiding devices such as smaller fonts, excessive single-space footnotes or shaving of margins and spacing to get under a page limit. Consistent with the practice in most appellate courts, the rule excludes the cover, table of contents, table of authorities, glossaries, and appendices containing only sections of statutes or regulations, and the attachments required by Rule 3.45(e), if any, as well as the ''proposed form of order,'' but includes footnotes and all other citations. The parties would be required to certify that their submission complies with the applicable word count.

The conversion from page to word counts also provides an opportunity to reconsider the appropriate length for briefs filed with the Commission. Our present limit of 90 pages for a typewritten brief is higher than several of our sister agencies, such as the SEC (60 pages) or CFTC (50 pages), but lower than the FERC (100 pages). The Federal Rules of Appellate Procedure impose a general limitation of 30 pages or 14,000 words for principal briefs. Views on the appropriate page limits differ: some point to the complexity of recent Part 3 cases and the extent of the Commission's *de novo* review authority and say a 90 page brief is virtually unavoidable; others say that whatever the complexity of a case, effective advocacy requires stating the case in many fewer pages.

Although it is true that the Commission's Part 3 cases tend to be complex, concerns about the length of briefs are more compelling. The Commission accordingly sets the limit at 75 pages for principal briefs, which converts to 18,750 words using the D.C. Circuit standard of approximately 250 words per page. The page limitations for other briefs are reduced by a comparable amount.

The page limitations for briefs in cross appeals merit particular scrutiny. Under the present rules, by filing a cross-appeal a party more than doubles the number of pages to which that party is entitled—from 90 to 205 pages. In contrast, under the Federal Rules of Appellate Procedure, a party filing a cross appeal is permitted one additional 15-page brief, a fifty-percent increase in pages. The new word limits for cross appeals are as follows:

Appellant's opening brief—18,750 words (75 pages)
Appellee/cross appellant's answering brief—26,250 words (105 pages)
Appellant's reply—18,750 words (75 pages)
Reply of cross-appellant—11,250 words (45 pages)

This system still leaves each party with an equal number of pages, as in the current rule, but cuts the total number of pages by the equivalent of 110 pages.

Miscellaneous Matters

The Office of the Secretary: Two other additions to the Rules will assist the smooth functioning of the Office of the Secretary. First, in addition to the ''Rule 11''-type authority already in the Rule, the Secretary should have the same authority as most court clerks to reject documents for filing that fail to comply with Commission rules, such as the failure to attach proof of service to a filing in an adjudicative proceeding, as required by Rule 4.4(c). Such authority is now placed in a new Rule 4.2(g).

Second, the Commission is formally promulgating a 5:00 rule—that is, that documents must be received by the Secretary's office before 5:00 p.m. Eastern time to be deemed filed that day. Any documents received at the agency after 5:00 p.m. will be deemed filed the following day. This rule, added as Rule 4.3(d), will be consistent with our current general practice, and with Rule 0.3, which provides that the offices of the Commission are open each business day from 8:30 a.m. to 5 p.m.

The public record and nonpublic materials: The Commission is amending Rule 4.9, which describes the public record of the Commission, to implement portions of the Muhammed Ali Boxing Reform Act, Public Law 106–210, 114 Stat. 321 (2000) (to be codified at 15 U.S.C. 6301 note, 6307a–6307h). That statute provides, inter alia, that professional boxing sanctioning organizations [12] must file with the Commission, no later than January 31 of each year, the following information: (1) A complete description of the organization's ratings criteria, policies, and general sanctioning fee schedule; (2) the organization's bylaws; (3) the appeals procedures that a boxer may use to challenge his rating; and (4) the names and business addresses of all organization officials who vote on the boxers' ratings.[13] The Act also requires the Commission to make such filings ''available to the public.'' [14] The Commission is therefore amending Rule 4.9 by adding a new § 4.9(b)(10)(xiii) to provide that such filings are part of its public record. In addition, the Commission will routinely place such filings on its web site, www.ftc.gov, along with the statement that the Commission has not reviewed or approved the filings.

Finally, Rule 4.10(g), which provides a procedure whereby the Commission may disclose certain confidential material in Commission administrative or court proceedings only after notice to the submitter, is amended by clarifying in subsection (1) that a person or entity that submits material voluntarily in lieu of process must designate such material as confidential in order to gain the protections of this Rule.

The Administrative Procedure Act does not require prior public notice and comment on these amendments because they relate solely to rules of agency, organization, procedure or practice. 5 U.S.C. 553(b)(A). For this reason, the Regulatory Flexibility Act also does not require an initial or final regulatory flexibility analysis. *See* 5 U.S.C. 603, 604. To the extent these amendments relate to agency information collection activities, they are exempt from review under the Paperwork Reduction Act. *See* 44 U.S.C. 3518(c); 5 CFR 1320.4 (collections during the conduct of civil or administrative proceedings or investigations). The Commission nevertheless welcomes comment on these amendments and will consider further revision, if appropriate.

List of Subjects

16 CFR Part 2

Administration practice and procedure, Investigations, Reporting and Recordkeeping Requirements.

16 CFR Part 3

Administration practice and procedure, Claims, Equal Access to Justice, Lawyers.

[12] The statute defines a ''sanctioning organization'' as an organization that ''sanctions professional boxing matches in the United States; (A) between boxers who are residents of different states; or (B) that are advertised, otherwise promoted, or broadcast (including closed circuit television) in interstate commerce.'' Section 7(a)(14), 114 Stat. at 328.

[13] Section 11(d), 114 Stat. at 323 (codified at 15 U.S.C. 6307c). In lieu of filing such information with the Commission, sanctioning organizations may instead disclose it on a web site, so long as the web site is readily accessible to the general public using generally available search engines, and so long as the site contains all of the above information. Id. at 324.

[14] 114 Stat. at 324.

16 CFR Part 4

Administration practice and procedure, Freedom of Information Act, Privacy Act, Sunshine Act.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter I, Subchapter A, of the Code of Federal Regulations, as follows:

PART 2—NONADJUDICATIVE PROCEDURES

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

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

2. Amend § 2.41(a) to add a new second sentence to read as follows:

§ 2.41 Reports of compliance.

(a) * * * An original and one copy of each such report shall be filed with the Secretary of the Commission, and one copy of each such report shall be filed with the Associate Director for Enforcement in the Bureau of Consumer Protection (for consumer protection orders) or with the Assistant Director for Compliance in the Bureau of Competition (for competition orders). * * *

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

3. The authority citation for Part 3 continues to read as follows:

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

4. Revise § 3.12(a) to read as follows:

§ 3.12 Answer.

(a) *Time for filing.* A respondent shall file an answer within twenty (20) days after being served with the complaint; *Provided, however,* That the filing of a motion permitted under these Rules shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order or denial or thirty (30) days after service of the complaint, whichever is later;

(2) If a motion for more definite statement of the charges is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

* * * * *

5. Amend § 3.21 by revising the first sentence of paragraph (b) to read as follows:

§ 3.21 Prehearing procedures.

* * * * *

(b) *Scheduling conference.* Not later than fourteen (14) days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference * * *

* * * * *

6. Amend § 3.22 by revising paragraph (b) and the second sentence of paragraph (c) to read as follows:

§ 3.22 Motions.

* * * * *

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. They 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 two 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(c) 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.

(c) *Answers.* * * * 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 two versions of the answer in accordance with the procedures set forth in § 3.45(e). * * *

* * * * *

7. Amend § 3.24 by revising the fourth and fifth sentences of paragraph (a)(2) as follows:

§ 3.24 Summary decisions.

(a) * * * (2) * * * 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 two versions of the document in accordance with the procedures set forth in § 3.45(e). The decision sought by the moving party shall be rendered within thirty (30) days after the opposition or any final brief ordered by the Administrative Law Judge is filed, if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law.* * *

* * * * *

8. Amend § 3.25 by revising paragraph (c) as follows:

§ 3.25 Consent agreement settlements.

* * * * *

(c) If the proposed consent agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director, and the matter is still pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. If the matter is pending before the Commission, the Commission in its discretion may, on motion, issue an order withdrawing from adjudication those portions of the matter that a proposed consent agreement would resolve for the purpose of considering the proposed consent agreement.

* * * * *

9.–10. Amend § 3.31 as follows:

a. By adding the following paragraph (b)(3),

b. Revising paragraph (c)(4)(i) introductory text, and

c. Removing paragraph (c)(4)(iii).

The addition and revision read as follows:

§ 3.31 General provisions.

* * * * *

(b) *Initial disclosures.** * *

(3) In addition to the disclosures required by paragraphs (b)(1) and (2), of this section, the parties shall disclose to each other the identity of any person who may be used at trial to present evidence as an expert. Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons

therefor; the data 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 ten 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 four years. These disclosures shall be made at the times and in the sequence directed by the Administrative Law Judge. In the absence of other directions from the Administrative Law Judge or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut proposed expert testimony on the same subject matter identified by another party under this paragraph, within 30 days after the disclosure made by the other party.

* * * * *

(c) * * *

(4) *Hearing Preparation: Experts.* (i) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under § 3.31(b)(3), the deposition shall not be conducted until after the report is provided.

* * * * *

11. Amend § 3.33 by adding a sentence to the end of paragraph (a) to read as follows:

§ 3.33 Depositions.

(a) *In general.* * * * 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.

* * * * *

12. Amend § 3.34 by revising the heading and last sentence of paragraph (c) to read as follows:

§ 3.34 Subpoenas.

* * * * *

(c) *Motions to quash; limitation on subpoenas subject to § 3.36.* * * * 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, or subpoenas to be served in a foreign country, which may be authorized only in accordance with § 3.36.

13. Revise § 3.36 to read as follows:

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

(a) *Forms.* an application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a subpoena requiring access to documents or other tangible things, for the purposes described in § 3.37(a), in the possession, custody, or control 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 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 satisfy the same requirements for a subpoena under § 3.34 or a request for production or access under § 3.37, together with a specific 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) The information or material sought cannot reasonably be obtained by other means; and

(4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery 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 is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

(c) *Execution.* If an ALJ 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.

14. Amend § 3.39 by revising the first sentence of paragraph (a), introducing text 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 dependent to testify or provide other information and granting immunity under 18 U.S.C. 6002, Directors and Deputy Directors of Bureaus, Assistant Directors in the Bureau of Competition, Associate Directors in the Bureau of Consumer Protection, and Regional Directors and Assistant Regional Directors of Commission Regional Offices having responsibility for presenting evidence in support of the complaint are authorized to determine: * * *

15. Amend § 3.42 as follows:

a. Removes the ''and'' at the end of paragraph (c)(10);

b. Redesignating present paragraph (c)(11) as paragraph (c)(12) and

c. adding new paragraph (c)(11) the additional reads as follows:

§ 3.42 Presiding officials.

* * * * *

(c) * * *

(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

* * * * *

16. Amend § 3.43 by revising paragraph (b) to read as follows:

§ 3.34 Evidence.

* * * * *

(b) *Admissibility; exclusion of relevant evidence; mode and order of interrogation and presentation.* (1) 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 presentations of cumulative evidence. 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.

(2) 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. *See Lenox, Inc.,* 73 F.T.C. 578, 603–04 (1968.

* * * * *

17. Amend § 3.44 by revising the last sentence of paragraph (c) to read as follows:

§ 3.44 Record.

* * * * *

(c) *Closing of the hearing record.* * * * The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in § 3.44(b).

* * * * *

18. 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 ten (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* in 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 three 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.

(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 finds, 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 two 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 ALJ *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 five (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 two 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 five (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 twenty (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.

19. Amend § 3.46 by revising the last sentence of paragraph (b)(7) and the last sentence of paragraph (c)(4) to read as follows:

§ 3.46 Proposed findings, conclusions and order.

* * * * *

(b) * * *

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

(c) * * *

(4) * * * A statement identifying any portion of the witness' testimony that was received *in camera,* and a citation to the *in camera* ruling.

* * * * *

20. Amend § 3.51 by removing paragraph (c)(3) and adding a sentence to the beginning of paragraph (c)(1) to read as follows:

§ 3.51 Initial decision.

* * * * *

(c) *Content.* (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. * * *

* * * * *

21. 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 ten (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 five (5) days after service of the first notice, or within ten (10) days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* The appeal shall be in the form of a brief, filed within thirty (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 18,750 words, including all footnotes and other substantive matter but excluding the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(c) *Answering brief.* Within thirty (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 18,750 words. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 26,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(d) *Reply brief.* Within seven (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 18,750 words. If the appellee has cross-appealed, any party who is the subject of the cross-appeal may, within thirty (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 18,750 words. The appellee who has cross-appealed may, within seven (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 11,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e). No further briefs may be filed except by leave of the Commission.

(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, that party shall file two 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 brief, the statements made in it are true; that it is not interposed for delay; that it complies with the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with the other rules in this part. If a brief is not signed or is signed with intent to defeat and 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 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. The purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored.

(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 field 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.

(k) *Extension of word count limitation.* Extensions of word count limitation 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

22. Revise the authority citation for Part 4 to read as follows:

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

23. Revise § 4.2 to read as follows:

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

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided*, *however,* That informal applications or requests may be submitted directly to the official in charge of any Bureau, Division, or Office of the Commission, or to the Administrative Law Judge.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Paper and electronic copies of and service of filings before the Commission, and of filings before an ALJ in adjudicative proceedings.* (1) Except as otherwise provided, each document filed before the Commission, whether in an adjudicative or a nonadjudicative proceeding, shall be filed the Secretary of the Commission, and shall include a paper original, twelve (12) paper copies, and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word). Except as otherwise provided, each document filed by a party in an adjudicative proceeding before an ALJ shall be filed with the Secretary of the Commission, and shall include a paper original, one (1) paper copy and an electronic copy (in ASCII format, WordPerfect, or Microsoft Word).

(2) The first page of the paper original of each such document shall be clearly labeled either public, or *in camera* or confidential. If the document is labeled *in camera* or confidential, it must include as an attachment either a motion requesting *in camera* or otherwise confidential treatment, in the form prescribed by § 3.45(b), or a copy of a Commission, ALJ, or federal court order granting such treatment. The document must also include as a separate attachment a set of only those pages of document on which the *in*

camera or otherwise confidential material appears.

(3) The electronic copy of each such public document shall be filed by e-mail, as the Secretary shall direct, in a manner that is consistent with technical standards, if any, that the Judicial Conference of the United States establishes, except that the electronic copy of each such document containing *in camera* or otherwise confidential material shall be placed on a diskette so labeled, which shall be physically attached to the paper original, and not transmitted by e-mail. The electronic copy of all documents shall include a certification by the filing party that the copy is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

(4) A paper copy of each such document in an adjudicative proceeding shall be served by the party filing the document or person acting for that party on all other parties pursuant to § 4.4, at or before the time the paper original is filed.

(d) *Paper and electronic copies of all other documents filed with the Commission.* Except as otherwise provided, each document to which paragraph (c) of this section does not apply, such as public comments in Commission proceedings, may be filed with the Commission in either paper or electronic form. If such a document contains nonpublic information, it must be filed in paper form with the Secretary of the Commission, and the first page of the document must be clearly labeled confidential. If the document does not contain any nonpublic information, it may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) by e-mail, as the Commission or the Secretary may direct.

(e) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceedings shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by § 3.52(e).

(f) *Signature.* (1) The original of each document filed shall have a hand signed signature by an attorney of record or 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 document 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; and that to the best of this or her knowledge, information, and belief, it complies with the rules in this part. If a document is not signed or is signed with intent to defeat the purposed of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

(g) *Authority to reject documents for filing.* The Secretary of the Commission may reject a document for filing that fails to comply with Commission's rules. In cases of extreme hardship, the Secretary may excuse compliance with a rule regarding the filing of documents if the Secretary determines that the non-compliance would not interfere with the functions of the Commission.

24. Amend § 4.3 by adding new paragraph (d) to read as follows:

§ 4.3 Time.

* * * * *

(d) *Date of filing.* Documents must be received in the office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day.

25. Amend § 4.4 by revising paragraph (a)(3), by revising the first and second sentences of paragraph (b) and by revising paragraph (c) to read as follows:

§ 4.4 Service.

(a) * * *

(3) All documents served in adjudicative proceedings under the Commissions' Rules of Practice, 16 CFR Part 3, other than complaints and initial, interlocutory, and final decisions and orders, may be served by personal delivery (including delivery by courier), or by first-class mail, and shall be deemed served on the day of the personal delivery or the day of mailing.

* * * * *

(b) *By other parties.* Service of documents by parties other than the Commission shall be by delivering copies thereof as follows: Upon the Commission, by personal delivery (including delivery by courier) or delivery by first-class mail to the Office of the Secretary of the Commission and, in adjudicative proceedings under the Commission's Rules of Practice, 16 CFR Part 3, to the lead complaint counsel, that Assistant Director in the Bureau of Competition, the Associate Director in the Bureau of Consumer Protection, or the Director of the Regional Office of compliant counsel, with a copy to the Administrative Law Judge. Upon a party other than the Commission or Commission counsel, service shall be by personal delivery (including delivery by courier) or delivery by first-class mail with a copy to the Administrative Law Judge. * * *

(c) *Proof of service.* In an adjudicative proceeding under the Commission's Rules of Practice, 16 CFR Part 3, papers presented for filing shall contain proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service must appear on or be affixed to the papers filed.

26. Amend § 4.9 by redesignating current paragraphs (b)(10)(xiii) and (b)(10)(xiv) as paragraph (b)(10)(xiv) and (b)(10)(xv) and adding a new paragraph (b)(10)(xiii) to read as follows:

§ 4.9 The Public Record.

* * * * *

(b) *Categories* * * *

(10) *Miscellaneous* * * *

(xiii) Annual filings by professional boxing sanctioning organizations as required by the Muhammed Ali Boxing Reform Act, 15 U.S.C. 6301 note, 6307a–6307h;

* * * * *

27. Amend § 4.10 by revising paragraph (g)(1) to read as follows:

§ 4.10 Nonpublic material.

* * * * *

(g) Material obtained by the Commission:

(1) Through compulsory process and protected by section 21(b) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(b) or voluntarily in lieu thereof and designated by the submitter as confidential and protected by section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(f), and § 4.10(d) of this part; or

* * * * *

Dated: Approved by the Commission on March 27, 2001.

By direction of the Commission.

Donald S. Clark,

Secretary.

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