

FEDERAL TRADE COMMISSION**16 CFR Parts 1, 2, 3, and 4****Rules of Practice Amendments**

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission amends its Rules of Practice to adapt them to the Federal Trade Commission Act Amendments of 1994. This action conforms the Commission's Rules of Practice to certain statutory changes and provides guidance to the public.

EFFECTIVE DATE: July 21, 1995.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On August 26, 1994, the President signed into law the "Federal Trade Commission Act Amendments of 1994," Pub. L. 103-312, 108 Stat. 1691 (1994 Amendments), by which the Congress reauthorized the Federal Trade Commission and further defined or altered the Commission's authority. The 1994 Amendments make it necessary or appropriate to revise certain of the agency's Rules of Practice. These rule revisions relate solely to agency practice and, thus, are not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(a)(2), nor to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2). The Paperwork Reduction Act, 44 U.S.C. 3501, does not apply because these revisions do not contain requirements for information collection subject to approval of the Office of Management and Budget. Although the rule revisions are effective immediately, the Commission welcomes comment on them and will consider further revision, as appropriate.

I. Analysis**1. Deletion of Section 1.17**

Section 1.17 is being removed in accordance with section 3 of the 1994 Amendments, which deletes section 18(h) of the FTC Act, 15 U.S.C. 57a. That section permitted the Commission to provide, in certain circumstances, compensation for attorney's fees and other costs incurred by participants in rulemaking proceedings.

2. Addition to Section 2.7

Section 7 of the 1994 Amendments broadens the Commission's investigatory authority by authorizing it to issue civil investigative demands

(CIDs) for tangible things, and to use CIDs in antitrust investigations. The Commission is adding a new subsection (2) to § 2.7(b) of the rules, to extend CID authority to tangible items. The new subsection parallels existing rules that apply to demands for other materials. Cross-references in other subsections are renumbered. No rule change is necessary to implement the extension of the Commission's authority to use CIDs in antitrust investigations.

3. Revisions Relating to Stays of Orders

The 1994 Amendments make any cease and desist order that is adjudicated under section 5 of the FTC Act effective 60 days after service, except for divestiture provisions,¹ unless the order is stayed by the Commission or a court. The Commission is adding a new § 3.56 to incorporate this statutory change and to establish procedural rules for stay applications. Section 3.56 requires that applications must be submitted within 30 days of service of the order. This time limit will help ensure that a Commission resolution of the request for a stay can be made before the order goes into effect and before a petition for judicial review must be filed. The rule also specifies that applications shall state the reasons for a stay and shall be supported by affidavits or other sworn statements, with attachments from the record where relevant.

In addition, applications must address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest. These questions are based on the traditional four-part test that courts, as well as agencies governed by the Administrative Procedure Act, have applied in determining requests for stays of orders. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *In re Chicago Mercantile Exchange, Board of Trade of the City of Chicago*, and

¹ Pursuant to amended section 5(g) of the FTC Act, the automatic stay still applies to "an order provision requiring a person, partnership or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order has been filed * * *." Divestiture provisions retain the automatic stay because of their substantial impact on business operations. *See* S. Rep. No. 130, 103d Cong., 1st Sess. 11 (1993); H. Rep. No. 138, 103d Cong., 1st Sess. 13 (1993). Other provisions of the order are not automatically stayed. The Commission notes that order paragraphs containing divestiture provisions may also contain other provisions, such as hold-separate requirements or asset-preservation provisions, which do not have the same impact as divestiture requirements and which, therefore, are not automatically stayed.

Investment Company Institute, Securities Exchange Act Release No. 26811 (May 12, 1989). The Commission previously has stated that this four-part test is the appropriate standard for stay applications under the FTC Act. *See* Order Denying Respondent's Motion to Stay Enforcement, *Trans Union Corp.*, D. 9255 (Dec. 5, 1994).

Section 3.56 also requires that service of applications be made in the same fashion as in adjudicative proceedings, to ensure that applications are filed with the Secretary of the Commission as well as the relevant staff. An answer to an application may be filed within 5 business days of receipt of the application, and a reply (limited to new matters raised in the answer) may be filed within 3 business days of receipt of the answer. These short time frames take into account that the Commission will undertake to rule on the application within 30 days, after which, if the Commission has not acted, or the application is denied, the applicant may request a stay from the court in which an appeal is pending. Specifically allowing replies, and limiting them to new matters raised in the answer, will deter submission of repetitious filings.

The Commission is also adding a provision to § 4.7(e) concerning *ex parte* communications, specifying that the requirements of Rule 4.7 are to be observed with respect to stay applications. In § 4.7(f), the Commission clarifies that the *ex parte* rules are not applicable to communications regarding preparations for judicial review.

In addition, the Commission is revising Rule 2.41 pertaining to the filing of compliance reports, to state that neither the filing of an application for a stay nor of a petition for review will operate to delay the required date for filing a compliance report. Compliance reports will be delayed only to the extent that an order is stayed automatically by statute, by order of the Commission or a court, or as otherwise permitted under the rules.

Finally, the Commission is clarifying that applications for stays and subsequent, related filings (as well as petitions for reconsideration) will be placed on the public record, pursuant to § 4.9(b). Requests for confidential treatment of material submitted with stay applications will be determined as provided in § 4.9(c)(1).

4. Revisions Affecting Custody of Tangible Things

Section 8 of the 1994 Amendments amended section 20 of the FTC Act regarding the Commission's custody of tangible things. To accommodate submissions of tangible items, the

Commission is making a number of technical revisions to § 3.45, 4.9, 4.10, 4.11, and 4.12.² The most prevalent change is that, where appropriate, the word "material" is substituted for "documents," "documents and testimony," and "information".

Some portions of the rules, most notably in § 4.10(a), are based on the Freedom of Information Act (FOIA), 5 U.S.C. 552, which has been interpreted not to cover tangible items.³ Thus, references to "records" in provisions that are founded on the FOIA are not intended to be read any broader than the FOIA itself. However, other provisions of the rules use "records" and "public records" in a manner indicating, by their context, that tangible items should be included. To avoid potential confusion over whether the word "record" does or does not include tangible items, the revisions distinguish between a "record," which includes only compilations of information, such as in a document or transcript, and "the public record," a term of art that could include anything available to the public, including tangible items. Thus, in some cases, the word "records" is changed to "material" to indicate that tangible items are included, and the phrase, "public records" is changed to "the public record" in places where that term of art is more appropriate.

Some rule provisions arise from section 21 of the FTC Act and already refer to "material." The definition of "material" in section 21(a) of the FTC Act was amended by the 1994 Amendments to include tangible items. Thus, those provisions may be read to include tangible items. In addition, because the definition of "material" in section 21(a) also includes transcripts of oral testimony, the Commission is deleting the parenthetical references to transcripts of oral testimony because they are superfluous. These deletions are not intended to exclude transcripts of oral testimony from the word "material." On the contrary, the Commission intends "material" to include transcripts of oral testimony wherever that term is used.

² Unrelated to the 1994 Amendments, the Commission is deleting the second sentence of § 3.45(c) because it is unnecessary. The Commission also is making some minor editorial changes to the general paragraphs in § 4.9(a), which are not substantive but merely clarify the Commission's organization of its materials. The Commission also is correcting some of the categorizations and parenthetical cross-references in § 4.9(b).

³ *Matthews v. United States Postal Serv.*, No. 92-1208, slip op. at 4, n. 3 (W.D. Mo. Apr. 14, 1994) (computer hardware not "record"); *Nichols v. United States*, 325 F. Supp. 130, 135-36 (D.Kan. 1971) (guns, bullets, and clothing held not "records"); *aff'd on other grounds*, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972).

List of Subjects

16 CFR Part 1

Administrative practice and procedure, Advisory opinions, Rulemaking, Trade regulation rules.

16 CFR Part 2

Administrative practice and procedure, Investigations.

16 CFR Part 3

Administrative practice and procedure, Investigations.

16 CFR Part 4

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

Accordingly, the Federal Trade Commission amends title 16, Chapter I, subchapter A of the Code of Federal Regulations, as follows:

PART 1—GENERAL PROCEDURES

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

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

§ 1.17 [Removed and reserved]

2. Section 1.17 is removed and reserved.

PART 2—NONADJUDICATIVE PROCEDURES

3. The authority for part 2 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46.

§ 2.7 [Amended]

4. In the last sentence of § 2.7(b)(1), remove the reference "20(c)(10)" and add, in its place, "20(c)(11)".

§ 2.7 [Amended]

5. In the last sentence of § 2.7(b)(2), remove the reference "20(c)(11)" and add, in its place, "20(c)(13)".

§ 2.7 [Amended]

6. In the last sentence of § 2.7(b)(3), remove the reference "20(c)(12)" and add, in its place, "20(c)(14)".

7. In § 2.7, paragraphs (b)(2) and (b)(3) are redesignated as paragraphs (b)(3) and (b)(4), respectively, and new paragraph (b)(2) is added to read as follows:

§ 2.7 Compulsory process in investigations.

* * * * *

(b) *Civil investigative demands.* * * *

(2) Civil investigative demands for tangible things will describe each class of tangible things to be produced with such definiteness and certainty as to

permit such things to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the custodian to whom such things shall be submitted. Submission of tangible things in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

* * * * *

8. Section 2.41(a) is revised to read as follows:

§ 2.41 Reports of compliance.

(a) In every proceeding in which the Commission has issued an order pursuant to the provisions of section 5 of the Federal Trade Commission Act or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules in this chapter, a report in writing, signed by the respondent, setting forth in detail the manner and form of his compliance with the order, and shall thereafter file with the Commission such further signed, written reports of compliance as it may require. Reports of compliance shall be under oath if so requested. Where the order prohibits the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from its use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, or in any other case where the circumstances so warrant, the order may provide for an interim report stating whether and how respondents intend to comply to be filed within ten (10) days after service of the order. Neither the filing of an application for stay pursuant to § 3.56, nor the filing of a petition for judicial review, shall operate to postpone the time for filing a compliance report under the order or this section. If the Commission, or a court, determines to grant a stay of an order, or portion thereof, pending judicial review, or if any order provision is automatically stayed by statute, no compliance report shall be due as to those portions of the order that are stayed unless ordered by the court. Thereafter, as to orders, or portions thereof, that are stayed, the time for filing a report of compliance shall begin

to run de novo from the final judicial determination, except that if no petition for certiorari has been filed following affirmation of the order of the Commission by a court of appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition. Staff of the Bureau of Competition and Consumer Protection will review such reports of compliance and may advise each respondent whether the staff intends to recommend that the Commission take any enforcement action. The Commission may, however, institute proceedings, including certification of facts to the Attorney General pursuant to the provisions of section 5(l) of the Federal Trade Commission Act (15 U.S.C. 45(l)) and section 11(1) of the Clayton Act, as amended (15 U.S.C. 21(1)), to enforce compliance with an order, without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order or without prior notice of any kind to a respondent.

* * * * *

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

9. The authority for part 3 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

10. In § 3.45 paragraphs (a), (b), and (c) are revised 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.* The Administrative Law Judge may order material, or portions thereof, offered into evidence, whether admitted or rejected, to be placed in camera on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their 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). 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. Any party desiring, in connection with the preparation and presentation of the case, to disclose in camera material to experts, consultants, prospective witnesses, or witnesses, shall make application to the Administrative Law Judge setting forth the justification therefor. The Administrative Law Judge, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. 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, if any, on which in camera treatment expires.

(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.

* * * * *

11. Section 3.56 is added to subpart F to read as follows:

§ 3.56 Effective date of orders; application for stay.

(a) Other than consent orders, an order to cease and desist under section 5 of the FTC Act becomes effective upon the sixtieth day after service, except as provided in section 5(g)(3) of the FTC Act, and except for divestiture provisions, as provided in section 5(g)(4) of the FTC Act.

(b) Any party subject to a cease and desist order under section 5 of the FTC Act, other than a consent order, may

apply to the Commission for a stay of all or part of that order pending judicial review. If, within 30 days after the application was received by the Commission, the Commission either has denied or has not acted on the application, a stay may be sought in a court of appeals where a petition for review of the order is pending.

(c) An application for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The application shall address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) An application for stay shall be filed within 30 days of service of the order on the party. Such application shall be served in accordance with the provisions of § 4.4(b) of this part that are applicable to service in adjudicative proceedings. Any party opposing the application may file an answer within 5 business days after receipt of the application. The applicant may file a reply brief, limited to new matters raised by the answer, within 3 business days after receipt of the answer.

PART 4—MISCELLANEOUS RULES

12. The authority for part 4 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46.

13. Section 4.7 is amended by adding a new sentence at the end of paragraph (e) and by revising the first sentence of paragraph (f) to read as follows:

§ 4.7 Ex parte communications.

* * * * *

(e) * * * In addition, the prohibitions of this section shall apply with respect to communications concerning an application for stay filed with the Commission pursuant to § 3.56 from the time that the application is filed until its disposition.

(f) The prohibitions of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation, the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; preparations for judicial review of a Commission order; a

proceeding outside the scope of § 3.2, including a matter in state or federal court or before another governmental agency; * * *

14. In § 4.9, the heading and paragraphs (a)(1) through (a)(3) are revised to read as follows:

§ 4.9 The public record.

(a) General. (1) Materials on the public record of the Commission are available for public inspection and copying either routinely or upon request.

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

(3) Location. Materials on the public record are available for inspection at the principal office of the Commission, and copies of some of those records are available at the regional offices, on each business day from 9 a.m. to 5 p.m.

* * * * *

§ 4.9 [Amended]

15. Section 4.9(b) is amended by revising the heading and introductory text, the heading of paragraph (b)(3), the heading and text of paragraphs (b)(5) and (b)(6), and the heading of paragraph (b)(8) to read as follows:

* * * * *

(b) *Categories.* Except to the extent material is confidential, as provided in paragraph (c) of this section, the public record of the Commission includes, but is not necessarily limited to:

* * * * *

(3) *Rulemaking* (16 CFR 1.7 through 1.26). * * *

* * * * *

(5) *Adjudicative proceedings, stay applications, requests to reopen, and litigated orders.* (16 CFR 2.51, 3.1 through 3.24, 3.31 through 3.56, 3.71 through 3.72, 4.7)—Except for transcripts of matters heard in camera pursuant to § 3.45 and material filed in camera pursuant to §§ 3.22, 3.24, 3.45, 3.46, 3.51 and 3.52.

(i) The versions of pleadings and transcripts of prehearing conferences to the extent made available under § 3.21(e), motions, certifications, orders, and the transcripts of hearings (including public conferences), testimony, oral arguments, and other material made a part thereof, and exhibits and material received in evidence or made a part of the public record in adjudicative proceedings;

(ii) Initial decisions of administrative law judges;

(iii) Orders and opinions in interlocutory matters;

(iv) Final orders and opinions in adjudications, and rulings on stay applications, including separate statements of Commissioners;

(v) Petitions for reconsideration, and answers thereto, filed pursuant to § 3.55;

(vi) Applications for stay, answers thereto, and replies, filed pursuant to § 3.56;

(vii) Petitions, applications, pleadings, briefs, and other records filed by the Commission with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in connection with judicial review of Commission actions, and opinions and orders of the courts in disposition thereof;

(viii) Records of ex parte communications in adjudicative proceedings and stay applications;

(ix) Petitions to reopen proceedings and orders to determine whether orders should be altered, modified, or set aside in accordance with § 2.51; and

(x) Decisions reopening proceedings, and orders to show cause under § 3.72.

(6) *Consent Agreements* (16 CFR 2.31 through 2.34, 3.25). (i) Agreements containing orders, after acceptance by the Commission pursuant to §§ 2.34 and 3.25(f) of this chapter;

(ii) Comments filed under §§ 2.34 and 3.25(f) of this chapter concerning proposed consent agreements; and

(iii) Final decisions and orders issued after the comment period prescribed in §§ 2.34 and 3.25(f), including separate statements of Commissioners.

* * * * *

(8) *Access to Documents and Meetings* (16 CFR 4.8, 4.11, 4.13, 4.15). * * *

* * * * *

§ 4.9 [Amended]

16. Section 4.9(c) is amended by revising the heading, the first sentence of paragraph (c)(1), and paragraphs (c)(2) and (c)(3) to read as follows:

* * * * *

(c) *Confidentiality and in camera material.* (1) Persons submitting material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. * * *

(2) Motions seeking in camera treatment of material submitted in connection with a proceeding under part 3 of these rules, except stay applications under § 3.56, shall be filed with the Administrative Law Judge who

is presiding over the proceeding. Requests for confidential treatment of material submitted in connection with a stay application shall be made in accordance with § 4.9(c)(1).

(3) To the extent that any material or portions of material otherwise falling within § 4.9(b) contain information that is not required to be made public under § 4.10 of this part, the General Counsel may determine to withhold such materials from the public record.

17. Section 4.10 is amended by revising the heading, paragraph (a) introductory text, paragraphs (a)(8) through (a)(11), and paragraphs (d), (e), (f), and (g), introductory text and concluding text, to read as follows:

§ 4.10 Nonpublic material.

(a) The following records and other material of the Commission are not required to be made public pursuant to 5 U.S.C. 552.

* * * * *

(8) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission:

(i) In an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission; and

(ii) Which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, et seq., or which is provided voluntarily in place of compulsory process in such an investigation. See section 21(f) of the Federal Trade Commission Act.

(9) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. See section 21(b)(3)(C) of the Federal Trade Commission Act.

(10) Such other material of the Commission as may from time to time be designated by the Commission as confidential pursuant to statute or Executive Order. This exempts from disclosure any information that has been designated nonpublic pursuant to criteria and procedures prescribed by Executive Order and that has not been subsequently declassified in accordance with applicable procedures. The exemption also preserves the full force and effect of statutes that restrict public access to specific government records or material.

(11) Material in an investigation or proceeding that involves a possible

violation of criminal law, when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings. When a request is made for records under § 4.11(a), the Commission may treat the records as not subject to the requirements of the Freedom of Information Act.

* * * * *

(d) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), no material which is marked or otherwise identified as confidential and which is within the scope of § 4.10(a)(8) and no material which is within the scope of § 4.10(a)(9) which is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information without the consent of the person who produced the material. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), material not within the scope of § 4.10(a)(8) or § 4.10(a)(9) which is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of § 4.10(a)(2), and only if the submitter is provided at least 10 days' notice of the intent to disclose the material involved.

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of § 4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

- (1) * * *
- (2) * * *
- (3) * * *

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or in camera

order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

18. Section 4.11 is amended by revising the heading, the first sentence in paragraph (b), the first, second and third sentences in paragraph (c), the heading in paragraph (e), and paragraphs (e)(1) through (e)(5) to read as follows:

§ 4.11 Disclosure requests.

* * * * *

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, et seq., is authority to withhold information from Congress. * * *

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government shall be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies shall be addressed to the General Counsel. With respect to requests under this paragraph, the General Counsel or the appropriate liaison officer is delegated the authority to dispose of them or may refer them to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. * * *

* * * * *

(e) *Material and information requested by subpoena in cases or matters to which the agency is not a party.* (1) The procedures specified in this section will apply to all subpoenas directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees and current or former special government employees of the Commission, if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply to subpoenas directed to the agency. For purposes of this section, the term "subpoena"

includes any compulsory process in a case or matter to which the agency is not a party; the term "nonpublic" includes any material or information which, under § 4.10, is not required to be made public; the term "employees," except where otherwise specified, includes "special government employees" and other agency employees; and the term "special government employees" includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with a subpoena shall promptly advise the General Counsel of the service of the subpoena, the nature of the material or information sought, and all relevant facts and circumstances.

(3) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether agency records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *Touhy v. Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account factors such as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

* * * * *

19. Section 4.12 is amended by revising paragraphs (a) and (c) to read as follows:

§ 4.12 Disposition of material submitted to the Commission.

(a) *Material submitted to the Commission.* (1) Any person who has submitted material to the Commission may obtain, on request, the return of material submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation.

(2) Such request shall be in writing, addressed to the custodian designated pursuant to § 2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the material requested. A request for return of material may be filed at any time, but material will not be returned nor will commitments to return material be undertaken prior to the time described in this paragraph.

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(c) *Disposition of material not returned.* Subsequent to the time prescribed in paragraph (a) of this section, the staff will examine all submitted material and Commission-made copies of documents located in a reasonable search of the Commission's

files and will determine, consistent with the Federal Records Act, 44 U.S.C. 3301, which materials are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all material determined not to be appropriate for preservation in accordance with applicable regulations of the National Archives and Records Administration.

By direction of the Commission.

Donald S. Clark,

Secretary.

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