the Commission may withdraw its acceptance of the agreement if, within thirty (30) days after such acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.

§ 2.34 Disposition.

(a) Within thirty (30) days after the filing of an affirmative reply under § 2.32, an executed agreement conforming with the requirements of § 2.33 may be submitted to the Commission through the operating Bureau in which the matter is then pending.

(b) Upon receiving such an agreement, the Commission may: (1) Accept it; (2) reject it and issue its complaint and set the matter down for adjudication in regular course; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein on the public record for a period of thirty (30) days, during which it will receive and consider any comments or views concerning the order that may be filed by any interested persons. Within ten (10) days thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances require), and decision, in disposition of the proceeding.

(c) If an agreement is not so submitted, or if at any time it appears to the operating Bureau in which the matter is then pending that the execution of a satisfactory agreement is unlikely, such Bureau, after notification to the proposed respondents of its intention to do so, shall submit the matter to the Commission, together with any written offers of settlement which the proposed respondents desire to have the Commission consider. The Commission will thereupon take such action as may be appropriate.

(d) After a complaint has been issued, the consent order procedure described in this part will not be available. However, in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order. In such event, the Commission will treat the matter as being in a nonadjudicative status and may consult with and receive advice from its staff members and others. This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the hearing examiner on a stipulation of facts and an agreed order.

[34 F.R. 12992, Aug. 12, 1967]

§ 2.35 Notice of proposed adjudicative proceeding included in public records.

Notices and proposed forms of complaints and orders under § 2.31 are included in the public records of the Commission and will be the subject of releases through the Commission's Office of Public Information. Ordinarily, there will be no additional release if and when a complaint is issued under the Commission's adjudicative procedures. All negotiations and communications under §§ 2.32, 2.33, and 2.34 will constitute a part of the confidential records of the Commission, except to the extent otherwise specifically provided therein.

[35 F.R. 10584, June 30, 1970]

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

Subpart B—Pleadings

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

Subpart D—Discovery; Compulsory Process

AUTHORITY: The provisions of this Part 3 issued under sec. 6, 33 Stat. 721; 15 U.S.C. 46, unless otherwise noted.

SOURCE: The provisions of this Part 3 appear at 32 F.R. 8449, June 13, 1967, unless otherwise noted.

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

§ 3.1 Scope of the rules in this part.

The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the hearing examiner and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay.

§ 3.2 Nature of adjudicative proceedings.

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5, and 6 of the Fair Packaging and Labeling Act. It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; hearings for the purpose of inquiring into the manner and extent of compliance with outstanding orders; proceedings for the promulgation of industry guides or trade regulation rules; proceedings for fixing quantity limits under section 2(a) of the Clayton Act; investigations under section 5 of the Export Trade Act; rulemaking proceedings under the Fair Packaging and Labeling Act up to the time when the Commission determines under § 1.16(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed; or the promulgation of substantive rules and regulations, determinations of classes of products exempted from statutory requirements, the establishment of name guides, or inspections and industry counseling, under sections 4(d) and 6(a) of the Wool Products Labeling Act of 1939, sections 7, 8(b), and 8(c) of the Fur Products Labeling Act, sections 5(c) and 5(d) of the Flammable Fabrics Act, and section 7(c), 7(d), and 12(b) of the Textile Fiber Products Identification Act.

Subpart B—Pleadings

§ 3.11 Commencement of proceedings.

(a) *Complaint.* Except as provided in § 3.13, an adjudicative proceeding is commenced by the issuance and service of a complaint by the Commission.

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

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

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

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

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

(c) *Motion for more definite statement.* Where a reasonable showing is

made by a respondent that he cannot frame a responsive answer based on the allegations contained in the complaint, he may move for a more definite statement of the charges against him before filing an answer. Such a motion shall be filed within ten (10) days after service of the complaint and shall point out the defects complained of and the details desired.

§ 3.12 Answer.

(a) *Time for filing.* A respondent shall have thirty (30) days after service of the complaint within which to file an answer thereto: *Provided, however,* That the filing of a motion for a more definite statement of the charges shall alter this period of time as follows, unless a different time is fixed by the hearing examiner: (1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or thirty (30) days after service of the complaint, whichever is later; (2) if the motion 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.

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

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

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

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

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings and conclusions under § 3.46 and the right to appeal the initial decision to the Commission under § 3.52.

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

§ 3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.

(a) *Notice of hearing.* When the Commission, acting under § 1.16(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before a hearing examiner for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the FEDERAL REGISTER containing a statement of:

(1) The provisions of the rule or order to which objections have been filed;

(2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a rule or order, and any person who files objections sufficient to warrant the

holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the hearing examiner and a showing of good cause, any interested person may be designated by the hearing examiner as a party.

§ 3.14 Intervention.

Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

§ 3.15 Amendments and supplemental pleadings.

(a) *Amendments*—(1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing examiner may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the hearing examiner only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings.* The hearing examiner may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.

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

§ 3.21 Prehearing conferences.

(a) *When appropriate.* The hearing examiner in any case may, and upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days he shall, direct counsel for all parties to meet with him for a conference to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Necessity or desirability of amendments to pleadings, subject, however, to the provisions of § 3.15;

(3) Stipulations, admissions of fact and of the contents and authenticity of documents;

(4) Expedition in the discovery and presentation of evidence, including, but not limited to, restriction of the number of expert, economic, or technical witnesses;

(5) Matters of which official notice will be taken and matters which may be resolved by reliance upon trade regulation rules pursuant to § 1.12(c) of this chapter; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to the provisions of § 3.34(b).

(c) *Reporting.* Prehearing conferences, in the discretion of the hearing examiner, need not be stenographically reported as provided in § 3.44(b), and whether reported or not shall not be public unless all parties so agree.

(d) *Order.* The hearing examiner shall enter in the record an order which recites the results of the conference. Such order shall include the hearing examiner's rulings upon matters considered at the conference, together with appropriate directions to the parties. The hearing examiner's order shall control the subsequent course of the proceeding, unless modified to prevent manifest injustice.

§ 3.22 Motions.

(a) *Presentation and disposition.* During the time a proceeding is before a hearing examiner, all motions therein, except those filed under § 3.42(g), shall be addressed to the hearing examiner, and if within his authority shall be ruled upon by him. Any motion upon which the hearing examiner has no authority to rule shall be certified by him to the Commission with his recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

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

(c) *Answers.* Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the hearing examiner or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the hearing examiner or the Commission.

(d) *Motions for extensions.* As a matter of discretion, the hearing examiner or the Commission may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(e) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the hearing examiner is terminated, the hearing examiner shall file an initial decision in accordance with the provisions of § 3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the hearing examiner shall enter his ruling on the record and take it into account in his initial decision. When a moton to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged fallure to establish a prima facie case, the hearing examiner may, if he so elects, defer ruling thereon until the close of the case for the reception of evidence.

§ 3.23 Interlocutory appeals.

(a) *Request for permission.* Except as provided in §§ 3.35(b), 3.36(d), and 3.42(d), interlocutory appeals from rulings of a hearing examiner may be filed only after permission is first obtained from the Commission. Any request for such permission shall be in writing, not to exceed ten (10) pages in length, and shall be filed within five (5) days after notice of the ruling complained of. Permission wfll not be granted except upon a showing that the ruling complained of involves substantial rights and will materlally affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

(b) *Form of appeal.* Interlocutory appeals shall be in the form of a brief, not to exceed thirty (30) pages in length, and shall be filed within five (5) days after notice of permission to file. Answer thereto may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission.

[32 F.R. 8449, June 13, 1967, as amended at 33 F.R. 7032, May 10, 1968]

§ 3.24 Summary Decisions.

(a) *Procedure.* (1) Any party to an adjudicatory proceeding may move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. Counsel in support of the complaint may so move at any time after thirty (30) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, must be filed at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. The hearing examiner may, in his discretion, set the

matter for oral argument and call for the submission of briefs or memoranda. The decision sought by the moving party shall be rendered within thirty (30) days 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. Any such decision shall constitute the initial decision of the hearing examiner. A summary decision, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the nature and extent of relief.

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

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

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the hearing examiner shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

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

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by subparagraph (1) of this paragraph, the hearing examiner concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in § 3.42(d). If the hearing examiner concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by subparagraph (1) of this paragraph, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the examiner shall certify the matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

[35 F.R. 5007, Mar. 24, 1970]

Subpart D—Discovery; Compulsory Process

§ 3.31 Admissions as to facts and documents.

(a) At any time after answer has been filed or after publication of notice of an adjudicative hearing in a rulemaking proceeding under § 3.13, any party may serve upon any other party a written request for the admission of the genuineness of any relevant documents described therein, or the admission of the truth of any relevant matters of fact set forth in such request. A copy of any such request shall be filed with the Secretary of the Commission. Copies of the documents described shall be delivered with the request unless copies have already been furnished or are known to be and in the request are stated as being in the possession of the other party.

(b) Each requested admission shall be deemed made unless, within ten (10) days after service of the request, or within such shorter or longer time as the hearing examiner may allow, the party so served serves upon the party making the request, with a copy to the Secretary of the Commission, either (1) a sworn

statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a copy of a request to the hearing examiner for a hearing on the objections at the earliest practicable time. Answers on matters to which such objections are made may be deferred until the objections are determined, but if written objections are made to only a part of a request, the remainder of the request shall be answered within the period designated.

(c) Admissions obtained pursuant to this procedure may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 3.32 Orders requiring access.

Application for issuance of an order requiring any corporation being proceeded against to grant access to files for the purpose of examination and the right to copy documentary evidence shall be made in writing to the hearing examiner, and shall specify as exactly as possible the files to which access is requested, showing the general relevancy of the files and the reasonableness of the scope of the proposed order. Any motion to limit or quash an order requiring such access shall be filed within ten (10) days after service thereof, or, if the date for compliance is less than ten (10) days after service of the order, within such other time as the hearing examiner may allow.

§ 3.33 Depositions.

(a) *When justified.* At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion, may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods. Such order may also be entered in extraordinary circumstances to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence could not be presented through a witness at the hearing. Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden to any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing. Depositions may be taken orally or upon written interrogatories and cross-interrogatories before any person having power to administer oaths who may be designated by the hearing examiner.

(b) *Form of application.* Any party desiring to take a deposition shall make application in writing to the hearing examiner, setting forth the justification therefor, the time when, the place where, and the name and address of the officer before whom the deposition is desired. The application shall include also the name and address of each proposed deponent and the subject matter concerning which each is expected to depose, and shall be accompanied by an application for any subpoenas desired.

(c) *Ruling on application.* Such order as the hearing examiner may issue for taking a deposition shall state the circumstances warranting its being taken, and shall designate the time when, the place where, and the officer before whom it will be taken, and shall show the name and address of each person who is expected to appear and the subject matter with regard to which each is expected to depose. The time designated shall allow not less than five (5) days from date of service of the order when the deposition is to be taken within the United States, and not less than fifteen (15) days when the deposition is to be taken elsewhere.

(d) *Modification of ruling.* After an order is served for taking a deposition, upon motion timely made by any party or by the person to be deposed and for good cause shown, the hearing examiner may order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the order, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired

into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that trade secrets or names of customers need not be disclosed; or the hearing examiner may make any other order which justice requires to protect the party or deponent from annoyance, embarrassment, or oppression, or to prevent the unnecessary disclosure or publication of information contrary to the public interest and beyond the requirements of justice in the particular proceeding.

(e) *Taking of deposition.* Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made (but not including argument or debate), shall be reduced to writing and certified by the officer before whom the deposition was taken. Thereafter, the officer shall forward the deposition and one (1) copy thereof to the party at whose instance the deposition was taken, and shall forward one (1) copy thereof to the representative of each other party who was present or represented at the taking of the deposition.

(f) *Deposition to preserve evidence.* (1) A deposition taken to preserve relevant evidence which any party intends to offer in evidence may be corrected in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and subscribed by him if the party intending to offer it in evidence so notifies the officer before whom the deposition was taken.

(2) Subject to appropriate rulings on such objections to the questions and answers as were noted at the time the deposition was taken or as may be valid when it is offered, a deposition taken to preserve relevant evidence, or any part thereof, may be used or offered in evidence as against any party who was present or represented at the taking of the deposition or who had due notice thereof, if the hearing examiner finds: (i) That the deponent is dead; or (ii) that the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition; or (iii) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or (v) that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

[32 F.R. 8449, June 13, 1967; 32 F.R. 9158, June 28, 1967]

§ 3.34 Subpoenas.

(a) *Subpoenas ad testificandum.* Application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at an adjudicative hearing shall be made to the hearing examiner.

(b) *Subpoenas duces tecum.* (1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the hearing examiner, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena. Any motion to limit or quash such subpoena shall be filed within ten (10) days after service thereof, or within such other time as the hearing examiner may allow.

(2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.[1]

[33 F.R. 7032, May 10, 1968]

[1] Orders for the production of documents, provided for under former rules of practice, are no longer used.

§ 3.35 Rulings on applications for compulsory process; appeals.

(a) *Rulings.* Applications for orders requiring the granting of access pursuant to the provisions of § 3.32, applications for orders requiring the taking of depositions pursuant to the provisions of § 3.33, and applications for the issuance of subpoenas pursuant to the provisions of § 3.34 (other than as provided in §§ 3.36 and 3.37) may be made ex parte, and, if so made, such applications and the rulings thereon shall remain ex parte unless otherwise ordered by the hearing hearing examiner or, in the event the hearing examiner is not available, by the Director of Hearing Examiners or such examiner or the Commission. Such applications shall be ruled upon by the other hearing examiner as the Director may designate.

(b) *Appeals.* Appeals to the Commission from rulings on objections to requests for admissions pursuant to the provisions of § 3.31, or from rulings denying applications within the scope of paragraph (a) of this section, or from rulings on motions to limit or quash process issued pursuant to such applications (other than as provided in § 3.36) will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed thirty (30) pages in length and shall be filed within five (5) days after notice of the ruling complained of. Appeals from denials of ex parte applications shall have annexed thereto copies of the applications and rulings involved. Answer to any such appeal may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission. [33 F.R. 7033, May 10, 1968]

§ 3.36 Form of and rulings on applications for subpoenas for confidential records of the Commission; for appearance of Commission employees; appeals; review.

(a) *Form.* An application for issuance of a subpoena requiring the production of documents, papers, books, physical exhibits, or other material, or the disclosure of confidential information, in the confidential records of the Federal Trade Commission, other than material or information to which the applicant is entitled by law, or for the issuance of a subpoena requiring the appearance of an official or employee of the Commission, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a).

(b) *Content.* The motion shall specify as exactly as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the Commission official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony, and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony is not available from other sources by voluntary methods or through other provisions of the rules in this chapter.

(c) *Rulings.* Such applications (in the form of written motions) shall be ruled upon by the hearing examiner or, in the event the hearing examiner is not available, by the Director of Hearing Examiners or such other hearing examiner as the Director may designate. To the extent that the motion is granted, the hearing examiner shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the Commission official or employee as may appear necessary and appropriate for the protection of the public interest.

(d) *Appeals.* Appeals to the Commission from rulings on motions to limit or quash subpoenas within the scope of paragraph (a) of this section shall be made on the record and shall be in the form of a brief not to exceed thirty (30) pages in length and shall be filed within five (5) days after service of the ruling complained of. Answer to any such appeal may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission.

(e) *Review of rulings in absence of appeals.* At any time prior to return on a subpoena issued under this section, the Commission, on its own motion, may enter an order staying the return date

or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

[33 F.R. 7033, May 10, 1968]

§ 3.37 Applications for appearance of other government officials.

(a) *Form.* An application by any party for the issuance of a subpoena returnable by an official or employee of any governmental agency in an official capacity, other than an official or employee of the Federal Trade Commission, shall be made in the form of a motion filed in accordance with the provisions of § 3.22(a).

(b) *Content and disposition.* The motion shall contain a statement of the necessity for and the relevancy of the expected testimony or the specified material and shall be certified by the hearing examiner with his recommendation to the Commission in accordance with the provisions of § 3.22(a).

Subpart E—Hearings

§ 3.41 General rules.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record, he shall have the authority to order hearings at more than one place and to order brief intervals to permit discovery necessarily deferred during the prehearing procedures. Otherwise, intervals shall not be ordered by the hearing examiner except as directed by the Commission upon his certificate of necessity therefor.

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

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

(e) *Participation in adjudicative packaging and labeling hearings.* At adjudicative hearings under the Fair Packaging and Labeling Act, any party or any interested person designated as a party pursuant to § 3.13, or his representative, may be sworn as a witness and heard.

§ 3.42 Presiding officials.

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified hearing examiner or by the Commission or one or more members of the Commission sitting as hearing examiners; and the term "hearing examiner" as used in this part means and applies to the Commission or any of its members when so sitting.

(b) *How assigned.* The presiding hearing examiner shall be designated by the Director of Hearing Examiners or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the hearing examiner designated.

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

(1) To administer oaths and affirmations;

(2) To issue subpoenas and orders requiring access;

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

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

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

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

(7) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative

proceedings, including motions to open defaults;

(8) To make and file initial decisions;

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

(10) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in Title 5, U.S.C.

(d) *Suspension of attorneys by hearing examiner.* The hearing examiner shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred shall have the right of appeal to the Commission. Such appeals shall be in the form of a brief not to exceed thirty (30) pages in length and shall be filed within five (5) days after notice of the hearing examiner's action. Answer thereto may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

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

(f) *Interference.* In the performance of their adjudicative functions, hearing examiners shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the Commission to hearing examiners concerning any adjudicative proceeding shall appear in and be made a part of the record.

(g) *Disqualification of hearing examiner.* (1) When a hearing examiner deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Hearing Examiners of such withdrawal.

(2) Whenever any party shall deem the hearing examiner for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Commission a motion to disqualify and remove the hearing examiner, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. Copy of the motion shall be served by the Commission on the hearing examiner whose removal is sought, and the hearing examiner shall have ten (10) days from such service within which to reply. If the hearing examiner does not disqualify himself within ten (10) days, then the Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

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

§ 3.43 Evidence.

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

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable.

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

ing the Commission in any such proceeding.

(d) *Official notice.* When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

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

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

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

[32 F.R. 8449, June 13, 1967; 32 F.R. 8711, June 17, 1967]

§ 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the hearing examiner, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

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

§ 3.45 In camera orders.

(a) *Definition.* Except as hereinafter provided, documents and testimony made subject to in camera orders are not made a part of the public record, but are kept confidential, and only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review shall have access thereto. The right of the hearing examiner, the Commission, and reviewing courts to disclose in camera data to the extent necessary for the proper disposition of the proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* Hearing examiners shall have authority, but only in those unusual and exceptional circumstances when good cause is found on the record (see Commission's interlocutory decision in H. P. Hood & Sons, Inc., Docket 7709, Mar. 14, 1961, 58 F.T.C. 1184), to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera. The order shall specify the date on which in camera treatment expires and shall include: (1) A description of the documents and testimony; (2) a full statement of the reasons for granting in camera treatment; and (3) a full statement of the reasons for the date on which in camera treatment expires. Any party desiring, for the preparation and presentation of the case, to disclose in camera documents or testimony to experts, consultants, prospective witnesses, or witnesses, shall make application to the hearing examiner setting forth the justification therefor. The hearing examiner, 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. In camera documents and the transcript of testimony subject to an in camera order shall be segregated from the public record and filed in a sealed envelope, bearing the title and docket number

of the proceeding, the notation "In Camera Record under § 3.45," and the date on which in camera treatment expires.

(c) *Release of in camera information.* In camera documents and testimony shall constitute a part of the confidential records of the Commission and shall be subject to the provisions of § 4.11 of this chapter. However, the Commission, on its own motion without notice to any affected party, may make in camera documents and testimony available for inspection, copying, or use by any other governmental agency.

(d) *Briefing of in camera information.* In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "confidential," which shall be placed in camera and become a part of the in camera record.

§ 3.46 Proposed findings, conclusions, and order.

At the close of the reception of evidence, or within a reasonable time thereafter fixed by the hearing examiner, any party may file with the Secretary of the Commission for consideration of the hearing examiner proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. The record shall show the hearing examiner's ruling on each proposed finding and conclusion, except when his order disposing of the proceeding otherwise informs the parties of the action taken by him thereon.

Subpart F—Decision

§ 3.51 Initial decision.

(a) *When filed and when effective.* The hearing examiner shall file an initial decision within ninety (90) days after completion of the reception of evidence, or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the hearing examiner. The initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of notice of appeal, whichever shall be later, unless in the interim a party filing such a notice shall have perfected an appeal by filing an appeal brief, or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Content.* The initial decision shall include a statement of (1) findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) an appropriate rule or order. The initial decision shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence.

(c) *By whom made.* The initial decision shall be made and filed by the hearing examiner who presided over the hearings, except when he shall have become unavailable to the Commission.

(d) *Reopening of proceeding by hearing examiner; termination of jurisdiction.* (1) At any time prior to the filing of his initial decision, a hearing examiner may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors, the jurisdiction of the hearing examiner is terminated upon the filing of his initial decision, unless and until the proceeding is remanded to him by the Commission.

[32 F.R. 8449, June 13, 1967, as amended at 35 F.R. 10656, July 1, 1970]

§ 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: *Provided,* That within ten (10) days after completion of service of the initial

decision such party files a notice of intention to appeal.

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

(1) 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;

(2) A concise statement of the case;

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

(4) 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

(5) A proposed form of rule or order for the Commission's consideration in lieu of the rule or order contained in the initial decision.

(c) *Answering brief.* Within thirty (30) days after service of the brief upon a party, such party may file an answering brief which shall also contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto. It shall present 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 legal or other material relied upon.

(d) *Reply brief.* Reply briefs shall be limited to rebuttal of matters in answering briefs and will be received if filed and served within seven (7) days after receipt of the answering brief or the day preceding the oral argument, whichever comes first. No answer to a reply brief will be permitted.

(e) *Length of briefs.* No brief in excess of sixty (60) pages, including any appendices, shall be filed without leave of the Commission.

(f) *Oral argument.* 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.

[32 F.R. 8449, June 13, 1967, as amended at 33 F.R. 7033, May 10, 1968]

§ 3.53 Review of initial decision in absence of appeal.

An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

§ 3.54 Decision on appeal or review.

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

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

(c) In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.

(d) The order of the Commission disposing of adjudicative hearings under the Fair Packaging and Labeling Act will be published in the FEDERAL REGISTER and, if it contains a rule or regulation, will specify the effective date thereof, which will not be prior to the ninetieth (90th) day after its publication unless the Commission finds that emergency conditions exist necessitating an earlier effective date, in which event the Commission will specify in the order its findings as to such conditions.

§ 3.55 Reconsideration.

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

Subpart G—Reports of Compliance

§ 3.61 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 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 where the order was issued under the Flammable Fabrics Act, 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 10 days after service of the order. When court review of an order of the Commission is pending, the respondent shall file only such reports of compliance as the court may require. Thereafter, the time for filing 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 affirmance 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. The Commission will review such reports of compliance and will advise each respondent whether the actions set forth therein evidence compliance with the Commission's order.

(b) The Commission has delegated to the Directors of the Bureaus of Competition and Consumer Protection, without power of redelegation, the authority to approve compliance reports, reject compliance reports, and to close compliance investigations. This delegation does not apply to compliance with orders involving section 7 of the Clayton Act, to any matter which has received previous Commission consideration as to compliance or in which the Commission or any Commissioner has expressed an interest, any matter proposed to be closed by reason of expense of investigation or testing, or any matter involving substantial questions as to the public interest, Commission policy or statutory construction, in each of which type of case a report with recommendation will be made to the Commission. The approvals, rejections, and closings shall not be effective until the file relating to the subject matter has been transmitted to the Secretary and he shall have advised the Commission of the Bureau Director's determination and no one member within five (5) working days thereafter shall have objected to such determination. If upon the expiration of such 5-day period no Commissioner shall have objected, the Secretary shall enter upon the records of the Commission the determination of the matter and take such other action as is required.

(c) The Commission has delegated to the Directors and Assistant Directors of the Bureaus of Competition and Consumer Protection, without power of redelegation, the authority, for good cause shown, to extend the time within which reports of compliance with orders to

cease and desist may be filed. It is to be noted, however, that an extension of time within which a report of compliance may be filed, or the filing of a report which does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to compliance with such order. An order of the Commission to cease and desist becomes final on the date and under the conditions provided in section 5 (g), (h), (i), (j), and (k) of the Federal Trade Commission Act (15 U.S.C. 45 (g), (h), (i), (j), and (k)) and section 11 (g), (h), (i), (j), and (k) of an Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, as amended—the Clayton Act, as amended (15 U.S.C. 21 (g), (h), (i), (j), and (k)). Any person, partnership or corporation against which an order to cease and desist has been issued who is not in full compliance with such order on and after the date provided in these statutes for the order to become final is in violation of such order and is subject to an immediate action for civil penalties.

(d) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order. A request ordinarily will be considered inappropriate for such advice: (1) Where the course of action is already being followed by the requesting party; (2) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (3) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing or collateral inquiry. Furthermore, the filing of a request for advice under this paragraph does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to his compliance with the order. He must in any event be in full compliance on and after the date the order becomes final as prescribed by statute referred to in paragraph (b) of this section. Advice to respondents under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under § 1.4 of this chaptor.

(e) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(f) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Also, any communications, written or oral, concerning such proposed transactions, received by any member of the Commission, or by any employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth

the full contents of such communication and the circumstances thereof, and such memorandum will immediately be placed on the public record. Within thirty (30) days after such applications and materials are placed on the public record, any person may file for the public record written objections or comments with the Secretary of the Commission. All responses to applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with a statement of supporting reasons, will be published when made.

[32 F.R. 8449, June 13, 1967, as amended at 34 F.R. 17432, Oct. 29, 1969; 35 F.R. 5399, Apr. 1, 1970; 35 F.R. 10584, June 30, 1970; 35 F.R. 10656, July 1, 1970; 35 F.R. 13726, Aug. 28, 1970; 36 F.R. 9008, May 18, 1971]

Subpart H—Reopening of Proceedings

§ 3.71 Authority.

Except while pending in a U.S. court of appeals on a petition for review (after the transcript of the record has been filed) or in the U.S. Supreme Court, a proceeding may be reopened by the Commission at any time. Such a reopening may be either on the Commission's own initiative or on the request of any party to the proceeding.

§ 3.72 Reopening.

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever any person subject to a decision containing a rule or order which has become effective, or an order to cease and desist which has become final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. The petition shall state the changes desired, the grounds therefor, and shall include, when available, such supporting evidence and argument as will in the absence of a contest provide the basis for a Commission decision on the petition. Within thirty (30) days after service of such a petition, the Director of the appropriate bureau of the Commission shall file an answer.

(3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise

ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts B, C, D, and E of Part 3 of this chapter. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter.

PART 4—MISCELLANEOUS RULES

Sec.

AUTHORITY: The provisions of this Part 4 issued under sec. 6, 38 Stat. 721; 15 U.S.C. 46, unless otherwise noted.

SOURCE: The provisions of this Part 4 appear at 32 F.R. 8456, June 13, 1967, unless otherwise noted.

§ 4.1 Appearances.

(a) *Qualifications.* (1) Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(2) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf of himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(b) *Restrictions as to former members and employees.* (1) Except as specifically authorized by the Commission, no former member or employee of the Commission shall appear as attorney or counsel or otherwise participate through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission.

(2) In cases to which subparagraph (1) of this paragraph is applicable, a former member or employee of the Commission may request authorization to appear or participate in a proceeding or investigation by filing with the Secretary of the Commission a written application therefor, disclosing the following relevant information: (i) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceeding or investigation during his service with the Commission; (ii) whether the files of the proceeding or investigation came to his attention; (iii) whether he was employed in the same bureau, division, or administrative unit in which the proceeding or investigation is or has been pending; (iv) whether he worked directly or in close association with Commission personnel assigned to the proceeding or investigation; (v) whether during his service with the Commission he was engaged in any mattor concerning the individual, company, or industry involved in the proceeding or investigation.

(3) The requested authorization will not be given in any case (i) where it appears that the former member or employee during his service with the Commission participated personally and substantially in the proceeding or investigation, or (ii) where the application is filed within one (1) year after termination of the former member's or employee's service with the Commission and it appears that within a period of one (1) year prior to the termination of his service the former member or employee was officially responsible for the proceeding or investigation. In other cases, authorization will be given where the Commission is satisfied that the appearance or participation will not involve any actual or apparent impropriety.

(4) In any case in which a former member or employee of the Commission is prohibited under this section from appearing or participating in a Commission proceeding or investigation, any partner or legal or business associate of such former member or employee shall likewise be so prohibited, unless: (i) Such partner or legal or business associate files with the Commission an affidavit that in connection with the matter the services of the disqualified former member or employee will not be utilized in any respect and the matter will not be discussed with him in any manner, and that the