and until it is accepted by the Commission; and that the Commission may withdraw its acceptance of the agreement if comments or views submitted to the Commission within sixty (60) days after such acceptance disclosure facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate. In addition, in appropriate circumstances 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.

§ 2.33 Compliance procedure.

The Commission may in its discretion require that a proposed agreement containing an order to cease and desist be accompanied by an initial report signed by the respondent setting forth in precise detail the manner in which the respondent will comply with the order when and if entered. Such report will not become part of the public record unless and until the accompanying agreement and order are accepted by the Commission. At the time any such report is submitted a respondent may request confidentiality for any portion thereof with a precise showing of justification therefor, and the Commission with due regard to statutory restrictions, its rules, and the public interest will act upon such request.

§ 2.34 Disposition.

Upon receiving an executed agreement conforming with the requirements of § 2.32, the Commission may: (1) Accept it; (2) reject it and issue its complaint; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein and any initial report of compliance submitted pursuant to § 2.33 on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the agreement, order and explanation in the Federal Register. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, 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 may require), and decision, in disposition of the proceeding.

§ 2.35 Confidentiality.

All negotiations and communications under this subpart will constitute a part of the confidential records of the Commission, except to the extent otherwise specifically provided therein.

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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

3. Section 3.25 is added to read as follows:

§ 3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for settlement of the case by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion by a respondent or jointly by a respondent and counsel representing the Commission to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Such motion shall be accompanied by the consent agreement executed by the respondent and conforming to the requirements of § 2.32; the consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the motion is not opposed, the Administrative Law Judge shall within fifteen (15) days after service of such motion certify the matter to the Commission, with any recommendation he may make. If the motion is opposed, the Administrative Law Judge may certify the matter to the Commission together with his recommendation if it appears that there is a likehood of settlement. The filing of a motion to withdraw a matter from adjudication and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order.

(c) Upon certification of a motion to withdraw a matter from adjudication pursuant to subsection (b), the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing the matter from adjudication for the purpose of considering the proposed consent agreement. In such event, the Commission will treat the matter as being in a nonadjudicative status and may consult with and receive advice without regard to the requirements of § 4.7.

(d) After the matter has been withdrawn from adjudication, the Commission may (1) accept the agreement; (2) reject it and return the matter to adjudication for further proceedings; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place it on the public record, together with any initial report of compliance submitted pursuant to § 2.33, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will return the matter to adjudication for further proceedings or take such other action as it may consider appropriate, or issue and serve its decision in disposition of the proceeding.

(e) 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 Administrative Law Judge on a stipulation of facts and an agreed order.

PART 4—MISCELLANEOUS RULES

4. Section 4.9(b) (10), (12), and (14) are revised to read as follows:

§ 4.9 Public records.

* * * * *

(b) The public records of the Commission which are routinely available for inspection and copying include:

* * * * *

(10) Agreements containing orders after acceptance by the Commission pursuant to §§ 2.34 and 3.25(d), and assurances of voluntary compliance which are accepted under § 2.21 of this chapter (excluding matters disposed of under § 1.34 of this chapter);

* * * * *

(12) Reports of compliance and supplemental materials in connection therewith filed pursuant to the rules in this chapter or to a provision in an order of the Commission, and reports of compliance filed pursuant to assurances of voluntary compliance which are accepted under § 2.21 of this chapter (excluding matters disposed of under § 1.34 of this chapter), except as provided in § 2.33 and in § 4.9(b)(13), shall be available at the principal office of the Commission for inspection and copying by the public when received, unless at such time of filing the filing party requests confidentiality in whole or in part and submits satisfactory reasons therefor, and the Commission, with due regard for statutory restrictions, its rules and the public interest, grants the request; and

* * * * *

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

* * * * *

(Sec. 6, 38 Stat. 721 (15 U.S.C. 46), 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552))

By direction of the Commission dated March 11, 1975.

[SEAL] VIRGINIA M. HARDING,
Acting Secretary.

[FR Doc.75-8490 Filed 4-2-75;8:45 am]

FEDERAL TRADE COMMISSION

[16 CFR Part 1]

TRADE REGULATIONS RULEMAKING PROCEDURES

Notice of Proposed Rulemaking

The Commission proposes the following rules to implement its trade regulation rulemaking authority under Pub. L. 93-637. These rules supplement rules published under separate announcement which are effective on publication. Comments on these proposed rules shall be received by the Commission through May 5, 1975. Such comments should be addressed to the Secretary, Federal Trade Commission, Washington, D.C. 20580.

The following rules would replace the existing Subpart B and establish procedures for the promulgation of trade regulation rules pursuant to Pub. L. 93-637.

Accordingly, it is proposed to amend Part 1 of Title 16 as set forth below:

Subpart B—Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act as Amended by Public Law 93-637

1. Section 1.12 is added to read as follows:

§ 1.12 Final notice.

A final notice of proposed rulemaking shall be published in the FEDERAL REGISTER, and to the extent practicable, otherwise made available to interested persons. The final notice may include: (a) Designated issues which are to be considered in accordance with § 1.13(d) (5) and (6); (b) the time and place of an informal hearing; (c) instructions to interested persons seeking to make oral presentations; (d) a requirement that interested persons who desire to avail themselves of the procedures of § 1.13 (d) (5) and (6) with respect to any issue designated in paragraph (a) of this section must identify their interests with respect to those issues in such manner as may be established by the presiding officer; and (e) an incorporation by reference of the contents of the initial notice.

2. Section 1.13 is amended by adding paragraphs (c) through (h) as follows:

§ 1.13 Rulemaking proceeding.

* * * * *

(c) *Presiding officer.* Upon commencement of a proposed trade regulation rule proceeding, the Commission shall appoint a presiding officer who shall be responsible for the orderly conduct of the rulemaking proceeding. He shall have all powers necessary to that end including the following: (1) To publish a final notice in accordance with § 1.12 or issue any other public notice that may be necessary for the orderly conduct of the rulemaking proceeding; (2) to designate, modify, or delete issues for consideration in accordance with § 1.13(d) (5) and (6); (3) to set the time and place of the informal hearing and to change any time periods prescribed in this subpart; (4) to prescribe rules or issue rulings to avoid unnecessary costs or delay. Such rulings may include, but are not limited to, the imposition of reasonable time limits on each person's oral presentation and requirements that any examination, including cross-examination, which a person may be entitled to conduct or have conducted under this subpart be conducted in such a manner as the presiding officer shall determine to be appropriate and to be required for a full and true disclosure with respect to any issue designated for consideration in accordance with § 1.13(d) (5) and (6); (5) to make rules and rulings limiting the representation of interested persons for the purpose of examination, including cross-examination, and governing the manner in which such examination is limited, including the selection of a representative from among a group of persons with the same or similar interests; (6) to compel the attendance of persons or the production of documents or to obtain responses to written questions; (7) to require testimony at the informal hearing to be under oath; (8) to require that oral presentations at the informal hearing be submitted in writing in advance of presentation; and (9) to certify questions to the Commission for its determination. Applications for review of a ruling will not be entertained by the Commission prior to its review of the record pursuant to § 1.14, unless the presiding officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy and the Commission permits review. Certification of such rulings shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order.

(d) *Informal hearings.* An informal hearing with the opportunity for oral presentations on all issues shall be conducted by the presiding officer. In addition, if an issue is designated pursuant to these rules for consideration in accordance with § 1.13(d) (5) and (6), the informal hearing on such issues shall be conducted in accordance with those subsections. For all other issues the presiding officer may in his discretion employ, in whole or in part, the procedures of those subparagraphs.

(1) *Designation of issues for consideration in accordance with § 1.13(d) (5) and (6).* The presiding officer may at any time on his own motion or pursuant to a written petition by interested persons, modify the issues designated pursuant to § 1.12(a). No such petition shall be considered unless good cause is shown why any such proposed issue could not have been proposed pursuant to § 1.13(b).

(2) *Nature of issues for consideration in accordance with § 1.13(d) (5) and (6).*—(i) *Issues that must be considered in accordance with § 1.13(d) (5) and (6).* The only issues that must be designated for consideration in accordance with paragraphs (d) (5) and (6) of this section are disputed issues of specific fact, in contrast to legislative fact, that are determined by the Commission or the presiding officer to be material and necessary to resolve.

(ii) *Issues that may be considered in accordance with § 1.13(d) (5) and (6).* The Commission and the presiding officer retain the power to designate any other issues for consideration in accordance with paragraphs (d) (5) and (6) of this section.

(3) *Identification of interests.* Not later than twenty (20) days after publication of the final notice each interested person who desires to avail himself of the procedures of paragraphs (d) (5) and (6) of this section shall notify the presiding officer in writing of his particular interest with respect to each issue designated for consideration in accordance with those subsections. In the event that new issues are designated, each interested person shall promptly notify the presiding officer of his particular interest with respect to each such issue.

(4) *Examination and cross-examination by the staff of the Commission.* The staff of the Commission may examine, including cross-examine, persons making oral presentations subject only to the discretion of the presiding officer.

(5) *Examination and cross-examination by interested persons.*—(i) *In general.* The presiding officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration in accordance with paragraphs (d) (5) and (6) of this section. Examination, including cross-examination, shall be allowed to the extent to which it is appropriate and is required for a full and true disclosure with respect to those issues. Requests for an opportunity to examine, including cross-examine, shall be accompanied by a specific justification therefor. In determining whether or not to grant such requests the presiding officer shall take into account the following considerations:

(A) The extent to which a full and true disclosure with respect to any designated issue can be achieved through rebuttal submissions or the presentation of additional oral submissions;

(B) The extent to which there are circumstantial guarantees of the trustworthiness of the presentations;

(C) Whether a particular person's presentation is required for the resolution of the designated issues; and

(D) Whether a dispute concerns facts in contrast to the inferences and conclusions to be drawn from facts.

(ii) *Selection of representatives for cross-examination.* After consideration of the information supplied in response to the final notice, the presiding officer shall identify groups of persons with the same or similar interests in the proceeding. Such groups may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the presiding

officer shall select a representative of each such group.

(iii) *Inability to select representative for examination, including cross-examination.* No person shall be denied the opportunity to conduct, or have conducted, examination, including cross-examination, under paragraph (d)(5)(i) of this section if he is a member of a group as described in paragraph (d)(5)(ii) of this section and is unable to agree upon group representation with other group members after a good faith effort to do so and seeks to present substantial and relevant issues which will not be adequately presented by the group representative. In that event he shall be allowed to conduct or have conducted any examination, including cross-examination, to which he is entitled on issues designated for consideration in accordance with paragraphs (d)(5) and (6) of this section and which affect his particular interest.

(iv) *Conduct of examination and cross-examination by presiding officer.* The presiding officer may conduct any examination, including cross-examination, to which a person may be entitled. For that purpose he may require submissions of written requests for presentation of questions to any person making oral presentations and shall determine whether to ask such questions or any other questions. All requests for presentation of questions shall be placed in the rulemaking record.

(6) *Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions.* During the course of the rulemaking proceeding the presiding officer shall entertain requests from interested persons to compel the attendance of persons or the production of documents or to obtain responses to written questions on behalf of the Commission's staff or any interested person. The presiding officer may require the payment of a fee to any person to whom such requests are directed in accordance with § 4.5 of this chapter. Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions shall contain a statement showing the general relevancy of the material, information or presentation, and the reasonableness of the scope of the request, together with a showing that such material, information or presentation is not available by voluntary methods and cannot be obtained through examination, including cross-examination, of oral presentations or the presentation of rebuttal submissions, and is appropriate and required for a full and true disclosure with respect to the issues designated for consideration in accordance with paragraphs (d)(5) and (6) of this section.

(e) *Written transcript.* A verbatim transcript shall be made of the informal hearing which transcript shall be placed in the rulemaking record.

(f) *Summary and findings.* After the close of the informal hearing, the presiding officer shall prepare a summary of the record, both written and oral, relating to the issues designated for consideration in accordance with paragraphs (d)(5) and (6) of this section and make initial factual findings and conclusions as to these issues and other findings and conclusions as he sees fit.

(g) *Staff recommendations.* The staff shall make recommendations to the Commission in a report based on the rulemaking record and taking into account the presiding officer's findings of fact. Such report shall contain its analysis of the record and its recommendations as to the form of the final rule.

(h) *Post record comment.* The findings and conclusions of the presiding officer as well as the staff report shall be the subject of public comment for a period of sixty (60) days after the staff recommendations are placed in the rulemaking record. Such comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer.

3. Section 1.14 is added to read as follows:

§ 1.14 Promulgation.

(a) The Commission shall review the rulemaking record including the summary, findings, and conclusions of the presiding officer as to the issues designated for consideration in accordance with § 1.13(d)(5) and (6), the verbatim transcript of the informal hearing, the report and recommendations of the staff and any public comments thereon, to determine what form of rule, if any, it should promulgate. The Commission may issue, modify, or decline to issue any rule. Where it believes that it should have further information or additional views of interested persons as to the form and content of the rule, it may withhold final action pending the receipt of such additional information or views. If it determines to issue a rule, it shall adopt a Statement of Basis and Purpose to accompany the rule. If it determines not to issue a rule, it may adopt and publish an explanation for not doing so. The Statement of Basis and Purpose to accompany a rule promulgated under this subpart shall include (1) a statement as to the prevalence of the acts or practices treated by the rule, (2) a statement as to the manner and context in which such acts or practices are unfair or deceptive, and (3) a statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers.

(b) The final rule and Statement of Basis and Purpose shall be published in the FEDERAL REGISTER not less than thirty (30) days prior to the effective date of the rule except where the Commission for good cause found and published with the rule sets an earlier effective date.

Sections 1.17 through 1.20 are added as follows:

§ 1.17 Compensation for representation in rulemaking proceedings.

(a) *Purpose of compensation.* The Commission may provide compensation to any person who has or represents an interest which would not otherwise be adequately represented in a rulemaking proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(b) *Level of funding.* At or after the time of the initial notice of proposed rulemaking, the Commission may announce a tentative total level of funding for compensation for participation in that proceeding.

(c) *Applications.* An application for compensation for participation in a rulemaking proceeding may be filed at any time after the publication of the initial notice of proposed rulemaking. An application for compensation shall be filed prior to the time when the costs for which compensation is sought are incurred. Such application shall contain the following:

(1) A description of the interest the applicant has or represents in the rulemaking proceeding;

(2) A statement of the reasons representation of such interest is necessary for a fair determination of the proceeding taken as a whole taking into account the number and complexity of the issues involved, and the importance of a fair, balanced representation of all interests;

(3) The reasons why such interest would not otherwise be adequately represented in the proceeding;

(4) A statement of the reasons the applicant is unable effectively to participate in the rulemaking proceeding without financial assistance including information relating to:

(i) The economic stake of the interest involved as compared with the costs of participation;

(ii) The feasibility of contributions to the costs of participation by individual representatives of the interests;

(iii) The resources of the applicant, or of the interest represented by the applicant;

(5) Insofar as possible, a specific statement of the expenses to be incurred for which compensation is sought, including an estimate of the total anticipated expenses; and

(6) A statement of the applicant's organizational and financial status in such form as the Commission may prescribe.

(d) *Determination of applications.*—(1) *By the presiding officer.* The presiding officer shall consider applications for compensation filed under this section and forward initial findings to the Director of the Bureau of Consumer Protection as to whether the applicant meets the criteria of paragraph (a) of this section. In connection with his determination the presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary.

(2) *By the Director of the Bureau of Consumer Protection.* The Director of the Bureau of Consumer Protection shall review applications and the initial findings

of the presiding officer and determine, in his discretion, to what extent compensation shall be authorized under this section.

(e) *Payment of compensation.*—(1) *In general.* The Commission will compensate the applicant only for those authorized expenses actually incurred. Appropriate proof of actual expenditures may be required by the Commission. The Commission may make any payments under this section in advance where necessary to permit effective participation in the rulemaking proceeding. Payment will be conditioned upon the execution by the applicant of an appropriate agreement setting forth the terms and conditions of the compensation.

(2) *Attorneys' Fees; Expert Witness Fees.* Attorneys' fees at a rate in excess of $50 per hour will be considered presumptively unreasonable and compensation will not be provided for such excess in the absence of sufficient justification. Experts and consultants will be compensated a rate not to exceed the highest rate at which experts and consultants to the Commission are compensated.

§ 1.18 Public availability of rulemaking record.

(a) *Rulemaking record.* For the purposes of these rules the term "rulemaking record" includes the rule, its Statement of Basis and Purpose, the verbatim transcript of the informal hearing, written submissions, and any other information which the Commission considers relevant to the rule.

(b) *Public availability of written submissions.* Written submissions commenting on the proposed rule as well as the verbatim transcript of the informal hearing, shall be made publicly available except when the presiding officer, for good cause shown, determines that it is in the public interest to allow any such submissions to be received in camera subject to the provisions of § 4.11 of this chapter.

§ 1.19 Modification of a rule by the Commission at the time of judicial review.

In the event that a reviewing court determines under section 18(e)(2) of the Federal Trade Commission Act, as amended by Pub. L. 93-637, to allow further submissions and presentations on the rule, the Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations. Such modified or new rule shall then be filed with the court together with an appropriate Statement of Basis and Purpose and the return of such submissions and presentations.

§ 1.20 Expeditious procedure.

Any or all of the procedures established in this subpart may be dispensed with by the Commission, to the extent that they are not otherwise required by law, when it finds, for good cause, that such procedures are impractical, unnecessary, or contrary to the public interest. In that case the Commission shall publish with the rule or amendment a brief statement of its reasons for dispensing with any such procedures.

By direction of the Commission dated March 11, 1975.

[SEAL] VIRGINIA M. HARDING,
Acting Secretary.

[FR Doc.75-8491 Filed 4-3-75;8:45 am]

[16 CFR Part 3]

RULES GOVERNING DISCOVERY AND COMPULSORY PROCESS IN ADJUDICATIVE PROCEEDINGS

Proposed Rule Changes

The Federal Trade Commission is considering a general revision of its rules governing discovery and compulsory process in adjudicative proceedings to adopt a system modeled on the Federal Rules of Civil Procedure, with modifications adapted to the Commission's structure.

The proposed rules would, among other changes, allow discovery to be initiated in most instances by the parties to the proceeding, without the requirement of obtaining the permission of the presiding administrative law judge. They would add to the list of available methods of discovery between parties written interrogatories and requests for production of documents.

Under the proposed rules, discovery from Commission counsel supporting an administrative complaint is treated as discovery from a party, and discovery from the remainder of the Commission is classified as discovery from a nonparty. Particularly in the context of the proposed liberalized discovery between parties, this approach reflects the distinct functions which various segments of the Commission perform in an adjudicative proceeding.

The proposed rules are promulgated under the authority granted by the Federal Trade Commission Act, 15 U.S.C. section 41 et seq.

Written comments on the proposed rules will be received by the Commission on or before May 5, 1975. Comments should be filed in duplicate and addressed to the Secretary, Federal Trade Commission, Pennsylvania Avenue and Sixth Street NW., Washington, D.C. 20580.

Comments from the Commission's administrative law judges, operating bureaus, and regional offices will be received in the same manner as comments from members of the public.

All comments, including those received from the Commission's staff, will be available for public inspection during normal business hours at the Division of Legal and Public Records, Room 130, Federal Trade Commission Building, Pennsylvania Avenue and Sixth Street NW., Washington, D.C.

The proposed changes are set forth below.

Subpart D—Discovery; Compulsory Process

1. Sections 3.33 through 3.38 are revised and incorporated into proposed §§ 3.31-9, 3.31-11, and 3.31-12 as set forth below.

§ 3.31-10 [Redesignated]

2. The present § 3.31 is proposed to be redesignated as § 3.31-10.

3. Sections 3.31-1 through 3.31-9 and 3.31-11 and 3.31-12 are proposed to read as follows:

§ 3.31-1 Definitions governing discovery.

(a) The following definitions shall apply to the rules of discovery for Commission adjudicative proceedings, infra, §§ 3.31-2 through 3.31-13:

(1) "Party" means each respondent named in the complaint, Commission complaint counsel, and any intervenor under the provisions of § 3.14.

(2) "Person" means any natural person, corporation (including a corporation as defined in section 4 of the Federal Trade Commission Act), partnership, or unincorporated association not a party to the proceeding or an officer, director, partner, or employee of a party; and any government agency, or officer or employee thereof.

(3) "Government agency" means any unit of government, Federal or State, including, unless otherwise indicated, the Commission itself with the exception of complaint counsel.

(4) "Complaint counsel" means, for purposes of a particular adjudicative proceeding, all Commission counsel responsible for supporting the allegations of the complaint in the adjudicative proceeding, in their capacity as complaint counsel in that proceeding.

(b) Discovery which may be sought from a party by any of the means provided by §§ 3.31-2 through 3.31-12 shall, as to discovery sought from complaint counsel, extend to all documents which are within the possession, custody, and control of the Commission, and all information within the knowledge of complaint counsel, which relate to the allegations of the complaint at issue. It shall not extend to documents or information relating to proceedings against other respondents whether or not similar as to their legal bases, to other proceedings against the same respondent or respondents, or to other Commission investigations or non-adjudicative activities; and all such documents or information shall be sought only in accordance with the procedures provided for discovery from persons not parties. For purposes of seeking discovery from the Commission other than complaint counsel, the Secretary of the Commission shall be deemed to have possession, custody, and control of all documents in the possession, custody, and control of the Commission and shall also be the Commission's agent for the service of all motions under §§ 3.31-5 and 3.31-6 for the taking of depositions of Commission officers or employees other than complaint counsel.

(c) Nothing contained herein or in §§ 3.31-2 through 3.31-12 shall in any way alter or affect any restriction upon discovery of documents within the possession and control of, or information within the knowledge of, the Commission (including complaint counsel) or any

other government agency, or alter or affect any privilege or other exemption from discovery of such documents or information, heretofore or hereafter established by statute, rule, regulation or precedent of judicial or administrative body, except insofar as such restriction, privilege, or exemption is solely dependent upon a Commission rule abolished by the promulgation of these discovery rules.

(d) Nothing contained herein shall prevent the Administrative Law Judge presiding over an adjudicative proceeding, on motion or sua sponte, from placing such limits upon the kind or amount of discovery to be had, or the period of time during which discovery may be carried out, as shall be consistent with justice and the public interest in an expeditious resolution of the proceeding.

(e) These amended discovery rules, including this section and §§ 3.31–2 through 3.31–12, shall take effect on ----------, 1975. They govern all discovery in Commission adjudicative proceedings initiated after they take effect and also all further discovery in such proceedings then pending except to the extent that in the opinion of the Administrative Law Judge or the Commission their application in a particular proceeding would not be feasible or would work injustice, in which event the former discovery rules apply.

§ 3.31–2 General provisions governing discovery.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise under paragraph (c) of this section or § 3.31–1, the frequency of use of these methods is not limited.

(b) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, whether it relates to the allegations of the complaint or to the defense of any respondent, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Trial preparation: Materials.* (i) Subject to the provisions of paragraph (b)(3) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including his attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(ii) A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move the Administrative Law Judge for an order. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(3) *Hearing preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (b)(1) of this section and required or developed in anticipation of litigation or for hearing, may be obtained only as follows:

(i) (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Administrative Law Judge may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under paragraphs (b)(3)(i)(B) and (b)(3)(ii) of this section.

(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order which may appear necessary and appropriate for the protection of the public interest or which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Administrative Law Judge; (6) that a deposition after being sealed be opened only by order of the Administrative Law Judge; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Administrative Law Judge.

If the motion for a protective order is denied in whole or in part, the Administrative Law Judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) *Sequence and timing of discovery.* Unless the Administrative Law Judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to

amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Administrative Law Judge, agreement of the parties, or at any time prior to hearing through new requests for supplementation of prior responses.

§ 3.31–3 Persons before whom deposition may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before such person as the parties may stipulate under § 3.31–4.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the Administrative Law Judge, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) before such person as the parties may stipulate under § 3.31–4, or (4) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either my name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

§ 3.31–4 Stipulations regarding discovery procedure.

Unless the Administrative Law Judge orders otherwise, the parties may by written stipulation (a) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (b) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in §§ 3.31–8, –9, and –10 for responses to discovery may be made only with the approval of the Administrative Law Judge.

§ 3.31–5 Depositions upon oral examination.

(a) *When depositions may be taken.* After service of the complaint, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of the Administrative Law Judge, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the complaint upon any respondent, except that leave is not required (1) if a respondent has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in paragraph (b)(2) of this section. The attendance of witnesses may be compelled by subpoena as provided in § 3.31–12.

(b) *Notice of examination: General requirements; special notice; Non-stenographic recording; production of documents and things; depositions of organization.*

(1) A party desiring to take the deposition of any person other than a person described in paragraph (b)(2) of this section upon oral examination shall give reasonable notice in writing to every other party to the action. Reasonable notice is defined to be not less than 10 days, but the Administrative Law Judge may designate a shorter or longer time. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) A party desiring to take the deposition of an officer or employee of the Commission other than complaint counsel, or of an officer or employee of another government agency, or to obtain documents, or other physical exhibits in the custody, control and possession of such officer or employee, shall proceed by written motion to the Administrative Law Judge, filed in accordance with the provisions of § 3.22(a), for leave to apply for a subpoena under § 3.31–12. Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 3.31–2(b) and cannot be obtained without undue hardship by alternative means. No motion for an order or subpoena for production of documents grounded upon § 4.11 of this chapter or upon the Freedom of Information Act shall be entertained by the Administrative Law Judge.

(3) The Administrative Law Judge may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

(4) The notice to a party deponent may be accompanied by a request made in compliance with § 3.31–9 for the production of documents and tangible things at the taking of the deposition. The procedure of § 3.31–9 shall apply to the request.

(5) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph (b)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) *Examination and cross-examination; record of examination; oath; objections.* (1) Examination and cross-examination of witnesses may proceed as permitted at the hearing under the provisions of § 3.43. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with paragraph (b)(4) of this section. If requested by one of the parties, the testimony shall be transcribed.

(2) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Administrative Law Judge may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and man-

ner of the taking of the deposition as provided in § 3.31–2(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the Administrative Law Judge. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) *Submission to witness; changes; signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under § 3.31–7(d)(4) the Administrative Law Judge holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by officer; exhibits; copies; notice of filing.* (1)(i) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the Secretary of the Commission.

(ii) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the Secretary of the Commission, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

§ 3.31–6 Depositions upon written questions.

(a) *Serving questions; notice.* (1) After service of the complaint, any party may take the testimony of any person, including a party, by deposition upon written questions, except that the deposition by written questions of an officer or employee of the Commission other than complaint counsel, or the deposition of an officer or employee of another government agency, may be taken only with leave of the Administrative Law Judge given in response to a motion and upon a showing as specified by § 3.31–5(b)(2). The attendance of witnesses may be compelled by the use of subpoena as provided in § 3.31–12.

(2) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (i) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (ii) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of § 3.31–5(b)(5).

(3) Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The Administrative Law Judge may for cause shown enlarge or shorten the time.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by § 3.31–5 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) *Notice of filing.* When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

§ 3.31–7 Use of depositions in adjudicative proceedings.

(a) *Use of depositions.* At hearing or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under §§ 3.31–5(b)(5) or 3.31–6(a) to testify on behalf of a public or private corporation, or partnership or association or governmental agency which is a party or on behalf of complaint counsel may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Administrative Law Judge finds: (i) that the witness is dead; or (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, 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 at hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when a complaint has been dismissed and another complaint involving the same subject matter is afterward brought against the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Subject to the provisions of § 3.31–3(b) and paragraph (d)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of taking or using depositions.* A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition,

but this shall not apply to the use by any adverse party of a deposition under paragraph (a)(2) of this section: At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Effect of Errors and Irregularities in Depositions.* (1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

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

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

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

(iii) Objections to the form of written questions submitted under § 3.31–6 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under §§ 3.31–5 and –6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§ 3.31–8 Interrogatories to parties.

(a) *Availability; procedures for use.* (1) Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a corporation or a partnership or association, by any officer or agent or if complaint counsel, by any one of complaint counsel, who shall furnish such information as is available to the party. Interrogatories may, without leave of the Administrative Law Judge, be served upon complaint counsel after service of the complaint and upon the respondent or respondents with or after service of the complaint upon that party.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a respondent may serve answers or objections within 45 days after service of the complaint upon that respondent. The Administrative Law Judge may allow a shorter or longer time. The party submitting the interrogatories may move for an order under § 3.31–11(a) with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters which can be inquired into under § 3.31–2(b), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

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

§ 3.31–9 Production of documents and things for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party upon whom the request is served through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 3.31–2(b) and which are in the possession, custody or control of the party upon whom the request is served.

(b) *Procedure.* (1) The request may, without leave of the Administrative Law Judge, be served upon complaint counsel after service of the complaint and upon the respondent or respondents with or after service of the complaint upon that respondent. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a respondent may serve a response within 45 days after service of the complaint upon that respondent. The Administrative Law Judge may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Section 3.31–11 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

§ 3.31–11 Failure to make discovery: sanctions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply to the Administrative Law Judge for an order compelling discovery as follows:

(1) *Motion.* (i) If a deponent fails to answer a question propounded or submitted under § 3.31–5 or § 3.31–6, or a corporation or other entity fails to make a designation under § 3.31–5(b)(5) or § 3.31–6(a), or a party fails to answer an interrogatory submitted under § 3.31–8, or if a party, in response to a request for inspection submitted under Section 3.31–9, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(ii) If the Administrative Law Judge denies the motion in whole or in part, he may make such protective order as he would have been empowered to make on a motion made pursuant to § 3.31–2(c).

(2) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(b) *Failure to comply with order.* If a party or an officer or agent of a party or

a person designated under § 3.31–5(b)(5) or § 3.31–6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this section, the Administrative Law Judge may make such orders in regard to the failure as are just, and among others the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

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

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

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

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

(c)(i) Action under paragraph (b) of this section may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and the Administrative Law Judge to grant such of the means of relief listed in paragraph (b) of this section or other appropriate relief as may be sufficient to compensate for the lack of testimony, documents, or other evidence withheld by a party. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in the case of a subpoena or other discovery order against a person, not a party, would be inappropriate, and if the party who obtained the subpoena or other discovery order so requests, he shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(ii) Any request for enforcement of a subpoena or other discovery order against a party certified by an Administrative Law Judge to the Commission shall contain a statement that the party who obtained the subpoena or other discovery order has sought relief of the type listed in paragraph (b) hereof and that the Administrative Law Judge finds that such relief would be insufficient under the circumstances.

§ 3.31–12 Subpoenas.

(a) *Issuance of subpoenas ad testificandum and duces tecum.* Subpoenas requiring a person to appear and depose or testify and subpoenas requiring a person to depose or testify and to produce specified documents or other tangible things, at the taking of a deposition or at a hearing, shall be issued by the Administrative Law Judge, signed and sealed but otherwise in blank, to a party requesting it, who shall fill each subpoena in before service.

(b) *Form of subpoenas duces tecum.* Subpoenas duces tecum shall specify as exactly as possible the documents or physical exhibits to be produced. When the subpoena is sought for discovery purposes, the documents or physical exhibits sought shall constitute or contain matters within the scope of examination permitted by § 3.31–2(b), and the subpoena shall be subject to the provisions of § 3.31–2(c) and of paragraph (c) of this section.

(c) *Objections to subpoenas duces tecum.* The person to whom a subpoena duces tecum is directed may, within 10 days after the service thereof, or such other time as the Administrative Law Judge shall allow, serve upon the attorney designated in the subpoena and file with the Secretary of the Commission written objection to inspection or copying of any or all of the material sought. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the Administrative Law Judge. The party serving the subpoena may, if objection has been made, move upon notice to the person to whom the subpoena is directed, within 20 days or such other time as the Administrative Law Judge shall allow after service of the objections, for an order directing compliance with the subpoena or any part thereof. The party upon whom the subpoena is served may move within the time allowed for service of objections or within 20 days after service of a motion for an order directing compliance, or such other time as the Administrative Law Judge shall allow, for an order quashing or modifying the subpoena upon any ground contained in § 3.31–2(b) or (c).

(d) *Objections to subpoenas for nonparty Commission records or for records or personnel of other government agencies.* (1) Subpoenas duces tecum served upon the Commission or Commission officials or employees other than complaint counsel or upon other government agencies or their officials or employees shall be subject to objection and motion to quash or modify as provided in paragraph (c) of this section and upon the further ground, if applicable, that the information contained in these materials or their substantial equivalent as evidence could be obtained without undue hardship by alternative means.

(2) Subpoenas ad testificandum served upon the Commission or Commission officials or employees other than complaint counsel or upon other government agencies or their officials or employees shall include a statement of the subject matter of the testimony sought, and shall be subject to objection and motion to quash or limit as provided in paragraph (c) of this section, and upon the further grounds, if applicable, that such testimony would be contrary to the public interest, or that the information or evidence sought could be obtained without undue hardship by alternative means.

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

4. Sections 3.21(b) and 3.23(a) are revised to conform with the proposed substantive and formal changes in §§ 3.31–3.38.

§ 3.21 Prehearing conferences.

* * * * *

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on *subpoenas duces tecum* issued pursuant to the provisions of § 3.31–12.

§ 3.23 Interlocutory appeals.

* * * * *

(a) *Appeals without a determination by the Administrative Law Judge.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge: (1) Requires the disclosure of documents within the possession, custody and control of the Secretary of the Commission or information within the knowledge of Commission personnel other than complaint counsel; (2) requires the appearance of other government officials or the disclosure of the records of another government agency; (3) suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or (4) grants or denies an application for intervention pursuant to the provisions of § 3.14. Appeal from such a ruling may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages, within five (5) days after notice of the Administrative Law Judge's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should designate the ruling or part thereof from which appeal is being taken; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order for discovery pursuant to §§ 3.31–1 through 3.31–12 of these rules which will require the disclosure of documents within the possession, custody and control of the Secretary of the Commission or information within the knowledge of Commission personnel other than complaint counsel, or the appearance of other government officials or the disclosure of the records of another government agency, and such order may place 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.

§ 3.32 [Redesignated]

5. Section 3.39 is proposed to be redesignated as § 3.32.

Subpart E—Hearings

6. Section 3.41(f) is revised to conform with the redesignation of § 3.39 as proposed § 3.32.

§ 3.41 General rules.

* * * * *

(f) Requests for an order requiring a witness to testify or provide other information and granting immunity under Title 18, Section 6002, of the United States Code, shall be disposed of in accordance with § 3.32.

By direction of the Commission dated March 11, 1975.

[SEAL] VIRGINIA M. HARDING,
Acting Secretary.

[FR Doc.75-8492 Filed 4-3-75;8:45 am]

[16 CFR Part 4]

RULES OF PRACTICE AND PROCEDURE

Separation of Functions and Ex Parte Communications

Notice is hereby given that the Federal Trade Commission, pursuant to section 6 of the Federal Trade Commission Act, 38 Stat. 721 (15 U.S.C. 46) (1970) and 5 U.S.C. 552 (1970), 80 Stat. 383, as amended, 81 Stat. 54 (formerly section 3 of the Administrative Procedure Act) is proposing a revision of § 4.7 of its rules of practice and procedure, 16 CFR 4.7.

Under the proposal, present § 4.7 would be revised to separate and distinguish restrictions on ex parte communications between, on the one hand, Commission decisionmakers and staff investigators and prosecutors of an adjudicative proceeding or a factually related adjudicative proceeding, and between, on the other hand, Commission decisionmakers and persons outside the Commission. Proposed § 4.7(a) would concern the first type of communications and would incorporate language which conforms to the "separation of functions" provision of 5 U.S.C. 554(d) (formerly section 5 (c) of the Administrative Procedure Act). Proposed § 4.7(b) would focus exclusively on the second type of communications, would expand the prohibition to include any communication "about" an adjudicative proceeding, as distinguished from "the merits" of the proceeding, except for an ex parte communication authorized by law or the Commission's Rules or a request for information about the status of a proceeding, and would substitute the phrase "a member of a Commissioner's personal staff" for the present phrase "any employee involved in the decisional process in such a proceeding". Proposed § 4.7(c) would eliminate the requirement of present § 4.7 (c) that the Commission be informed of the substance of a prohibited ex parte communication, would provide that any such communication be placed on the public records of the Commission, but not considered as part of the record in the proceeding for purposes of decision unless introduced into evidence and would retain a discretionary right of the Commission to take such further action for a violation of the section as it may deem appropriate.

Section 4.7 would be revised to read as follows:

§ 4.7 Separation of functions and ex parte communications.

(a) No Commission employee or agent who has performed an investigative or prosecuting function for the Commission in connection with an adjudicative proceeding shall, in that or a factually related adjudicative proceeding, participate or advise in any decision therein of the Administrative Law Judge or of the Commission except as a witness or as counsel in public proceedings.

(b) No person not employed by the Commission shall communicate about an adjudicative proceeding to the Administrative Law Judge presiding therein, to a Commissioner or to a member of a Commissioner's personal staff except to the extent required for the disposition of ex parte matters as authorized by law or as authorized by the Commission's Rules to be disposed of on an ex parte basis. A request for information with respect to the status of an adjudicative proceeding shall not be deemed to be a communication prohibited by this subsection.

(c) If a communication is made in violation of paragraphs (a) or (b) of this section, the recipient thereof shall file a copy of the pertinent part of such communication, if written, or a summary of such communication, if oral, with the Secretary for inclusion in the docket binder of the case to which it pertains and it shall be made part of the public records of the Commission. However, such communications will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence. The Commission may take such further action as it may deem appropriate for violation of this section.

Written comments on the foregoing proposed revision of § 4.7 may be sent to the Secretary, Federal Trade Commission, Pennsylvania Avenue and 6th Street NW., Washington, D.C. 20580 on or before May 5, 1975. Such comments will be entered on the public records of the Commission and will be available for inspection in Room 130 at the above address during normal business hours.

By direction of the Commission dated March 11, 1975.

[SEAL] VIRGINIA M. HARDING,
Acting Secretary.

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PART III

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

BASIC EDUCATIONAL OPPORTUNITY GRANT PROGRAM

Expected Family Contribution For Academic Year 1975–1976

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 190—BASIC EDUCATIONAL OPPORTUNITY GRANT PROGRAM

Expected Family Contribution for Academic Year 1975–1976

A notice of proposed rule making was published in the FEDERAL REGISTER on July 2, 1974 (39 FR 24481), to amend Subparts C and D of Part 190 of Title 45 of the Code of Federal Regulations dealing with the Family Contribution Schedules for the Basic Educational Opportunity Grant Program. Such amendments were to apply for academic year 1975–1976. The key provisions of these amendments were essentially as follows:

1. Subpart C set forth the method to be used in determining the expected family contribution for dependent students which is used to determine a student's grant under the Basic Educational Opportunity Grant Program. It established procedures for determining the expected family contribution from parental income and assets, including the allowances to be made against income and assets and the rates of contribution against income and assets after such allowances have been made, and the expected contribution from the effective income of the dependent student and from the dependent student's assets.

2. Subpart D set forth the methods to be used in determining the expected family contribution for independent students. It established the definition of the independent student and further set forth procedures for determining the expected family contribution from the effective income of the independent student, the contribution from the income of the independent student including allowances against such income and the rates of contribution to be used in determining the contribution from the income after the allowances have been made, and the rates to be used in determining the contribution from the assets of the independent student.

Interested parties were invited to submit written comments, suggestions, or objections with regard to the proposed Family Contribution Schedules. In addition, as required by section 411(a)(3)(A)(ii) of the Higher Education Act of 1965, as amended (20 U.S.C. 1070a(a)(3)(A)(ii)), the schedules were submitted to the President of the Senate and the Speaker of the House and hearings on these Schedules were held by the Senate Subcommittee on Education on October 3, 1974, and by the House Special Subcommittee on Education on September 30, 1974.

Comments from the public, as well as Congressional comments, centered around four main issues in the Schedules: the treatment of assets; the treatment of "effective income of the student;" the level of the family size offsets; and the treatment of independent students who leave their jobs to pursue postsecondary education.

During the first two years of Program operations, the treatment of assets in the family contribution schedules has raised considerable Congressional and public concern. During the first year of program operation, the 1973–1974 academic year, the amount of assets which were considered in the formula was that amount which remained after deductions for any debts against the assets and an asset reserve of $7,500. This treatment was revised in 1974–75 to provide for an offset against the contribution from assets in those cases where allowable deductions from income exceeded the family's income. This revised treatment reduced the problems for families with a relatively high asset position and low annual incomes, such as farmers and small business owners.

Despite those changes however, concern was still expressed regarding those families who have the bulk of their assets in home equity. This is particularly true for many families with low and lower-middle incomes who by reason of a substantial home equity may not qualify for assistance under this program. To alleviate this situation, the asset reserve has been raised from the current $7,500 to a $10,000 level. Because the median home equity of all dependent applicants according to the latest program statistics on the 1974–75 Basic Grant applicants is $10,535, raising the asset reserve to $10,000 will, we believe, bring it more into line with general experience and expectations.

A second major concern was expressed regarding the treatment of effective income of the student which is defined by law to be any amount paid to or on behalf of the student under the Social Security Act which would not be paid if he were not a student and one-half of any amount of educational benefits paid through the Veterans Administration. While few objections were raised to the treatment of V.A. benefits, the treatment of social security benefits is of major concern, in that many families receiving social security benefits are dependent on these funds for family maintenance. For the lowest income families, social security benefits often represent their sole financial support.

In response to the concern expressed with regard to the treatment of effective income of the student, the Schedules were changed during the 1974–75 academic year to provide, in those cases where the allowable offsets against the total family income exceeded the amount of that income, a deduction from the effective income of the student to offset this negative amount. Although this changed treatment partially alleviated the problems affecting social security recipients, it did not remove all of the inequities for many student recipients. Consequently, for the 1975–76 academic year, the treatment of the effective income of the student is changed to include such income as regular family income for purposes of computing the family contribution. As such, the effective income of the student is subject to the same treatment and assessment rates as the regular family income. In this context, it should be noted that the effective income of the student as specified in the legislation includes both social security benefits and benefits from the Veterans Administration. Therefore, any modification proposed to alleviate the problems affecting social security recipients must necessarily have the same impact on recipients of Veterans educational assistance.

In making adjustments in the treatment of the student's effective income, the social security income will be collected for the base year rather than the year subsequent to the base year, which has been the case in the past. This change has been made because under the new treatment of social security income it is not essential that the educational benefits for social security recipients be separately collected. Further, the social security payments for the total family rarely differ from one year to the next, regardless of whether a student is enrolled in school. In addition, this change will contribute to a simplification of instructions for the completion of the application form, as well as the reduction of the complexity of the form itself.

The comments on the family size offsets dealt with the proper rate of increase to be applied to current offsets in order to reflect rising costs. In order to establish a standard for determining the amount of subsistence expenses, the Basic Grant Program adopted during the initial year of operation the "Weighted Average Thresholds at the Low Income Level" published by the Bureau of Census as a reasonable approximation of family expenses. These expenses are based on the food cost of families of a given size and make certain assumptions about the additional expenses of shelter and other family needs. These base line data have been up-dated annually to accommodate the increases in the Consumer Price Index as published by the Department of Labor. For the 1975–76 academic year, the family size offsets used during the 1974–75 academic year have been increased by 11.9 percent to reflect the rise in cost of living expenses from November 1973 to October 1974. The percentage increase is taken from the published Department of Labor Consumer Price Index Statistics.

A fourth major concern dealt with the treatment of the independent student who was employed on a full-time basis in the base year but who left his job in order to pursue postsecondary education. For the 1974–75 academic year, the independent student's eligibility is calculated based on base year 1973 income data. The only provisions which would allow the independent student to file a Basic Grant application using estimated current year (1974) income data are: (1) The inability of the applicant to pursue normal income producing activities due to disability or natural disaster, (2) the separation or divorce of the applicant since the time the Basic Grant application was filed, and, (3) the