page of more than one-quarter fluid ounce per hour.

2. By adding a new § 183.112 to read as follows:

§ 183.112 Flotation material and air chambers.

(a) Flotation materials must meet the requirements in § 183.114 as listed in table 5 when used in the: (1) Engine room bilge, (2) engine room, or (3) bilge, unless located in a sealed compartment.

(b) Air chambers used to meet the flotation requirements of this subpart must not be integral with the hull.

3. By adding a new § 183.114 to read as follows:

§ 183.114 Test of flotation materials.

(a) *Vapor test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed in a fully saturated gasoline vapor atmosphere for 30 days at a minimum temperature of 38° C.

(b) *24-hour gasoline test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 24 hours at 23 plus or minus 2° C in reference fuel B, of ASTM D-471, dated March 28, 1975.

(c) *30-day gasoline test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 30 days at 23 plus or minus 2° C in reference fuel B, of ASTM D-471, dated March 28, 1975.

(d) *24-hour oil test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 24 hours at 23 plus or minus 2° C in reference oil No. 2, of ASTM D-471, dated March 28, 1975.

(e) *30-day oil test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 30 days at 23 plus or minus 2° C in reference oil No. 2, of ASTM D-471, dated March 28, 1975.

(f) *24-hour bilge cleaner test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 24 hours at 23 plus or minus 2° C in a 5-percent solution of trisodium phosphate in water.

(g) *30-day bilge cleaner test.* The flotation material must not reduce in buoyant force more than 5 percent after being immersed for 30 days at 23 plus or minus 2° C in a 5-percent solution of trisodium phosphate in water.

(h) The buoyant force reduction in (a)–(g) is measured in accordance with ASTM D-2842, dated November 14, 1969 (reapproved 1975).

4. By revising § 183.222 to read as follows:

§ 183.222 Flotation material and air chambers.

(a) Flotation materials must meet the requirements in § 183.114 as listed in table 5 when used in the bilge, unless located in a sealed compartment.

(b) Air chambers used to meet the flotation requirements of this subpart must not be integral with the hull.

5. By revising § 183.322 to read as follows:

§ 183.322 Flotation materials.

(a) Flotation materials must meet the requirements in § 183.114 as listed in table 5 when used in the bilge, unless located in a sealed compartment.

6. By adding a new table 5 to follow § 183.335 to read as follows:

TABLE 5 - FLOTATION PERFORMANCE TESTS

Area 183.110 / Test 183.114		(b) Engineroom Bilge	(c) Engineroom Unless Open to Atmosphere	(d) Bilge
(a)	Vapor Test		X	
(b)	24 Hour Gasoline Test			X
(c)	30 Day Gasoline Test	X		
(d)	24 Hour Oil Test			X
(e)	30 Day Oil Test	X		
(f)	24 Hour Bilge Cleaner Test			X
(g)	30 Day Bilge Cleaner Test	X		

NOTE.—The Coast Guard has determined that this document does not contain a major proposal requiring preparation of an economic impact statement under Executive Order 11821, as amended, and OMB Circular A-107.

(Sec. 5, Pub. L. 92-75, 85 Stat. 215 (46 U.S.C. 1454); 49 CFR 1.46(n)(1).)

Dated: November 27, 1978.

R. H. SCARBOROUGH,
Vice Admiral, U.S. Coast Guard,
Acting Commandant.

[FR Doc. 78-33790 Filed 12-1-78; 8:45 am]

Federal Register

MONDAY, DECEMBER 4, 1978
PART VI



FEDERAL TRADE COMMISSION

■

RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS AND MOTIONS TO QUASH COMPULSORY PROCESS

Final Rules

[6750-01-M]

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER A—ORGANIZATION, PROCEDURES AND RULES OF PRACTICE

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

Discovery Rules; Revision

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: These rules are a revision of the Commission's discovery rules. They are intended to make the procedures for discovery clearer, to provide the parties with more discovery devices, and to strengthen the authority of the Administrative Law Judge to supervise the proceedings effectively. They are more flexible than the previous rules, and are better suited to the needs of complex cases.

EFFECTIVE DATE: January 18, 1979. These amendments to the rules shall govern all discovery in Commission adjudicative proceedings that are initiated after they take effect and also all further discovery in proceedings that are then pending except to the extent that in the opinion of the Administrative Law Judge or the Commission their application in a particular proceeding pending when the amendments take effect would not be feasible or would work injustice, in which event the former rule or rules apply.

FOR FURTHER INFORMATION CONTACT:

Jack Schwartz, Assistant to the General Counsel, Federal Trade Commission, Washington, D.C., 20580 (202-523-3615).

SUPPLEMENTARY INFORMATION: The Federal Trade Commission previously published for comment a proposed general revision of its discovery rules based on the Federal Rules of Civil Procedure (40 FR 15239, April 4, 1975) and, subsequently, a less extensive proposed amendment of those rules (41 FR 21793, May 28, 1976). The latter proposal was intended to balance a somewhat broadened range of discovery with firm control by Administrative Law Judges of the pace and scope of adjudicative proceedings. After careful consideration of all comments submitted, the Commission has determined to promulgate the rules set forth below, pursuant to the authority of the Federal Trade Commission Act, 15 U.S.C. 41 et seq.

The Commission's general purpose in adopting these rules is to provide clearer standards, greater specificity, a wider range of discovery devices, and more explicit authority for the Administrative Law Judges to control adjudicative proceedings. The procedures are intended to shorten adjudicative proceedings by enabling the parties to more precisely define the actual issues. The Commission anticipates—and commends to parties and Administrative Law Judges—more frequent use of expedited decisional methods, such as stipulated records and summary judgments, as a consequence of discovery. In order to assure firm control of the proceeding by the Administrative Law Judge, no discovery may be had without advance authorization by the Administrative Law Judge. In no instance is an Administrative Law Judge *required* to authorize discovery. When discovery is authorized, the Commission expects prompt compliance. The Commission intends its Administrative Law Judges vigorously to enforce the provisions of § 3.38.

Like the Commission's present discovery rules, the revised rules are intended, *inter alia*, both to provide several means by which parties to a Commission proceeding may require other parties or nonparties to supply information, and to permit the Commission and its Administrative Law Judges to control the burdens imposed by such compulsory procedures. The discovery rules do not provide the exclusive means by which parties may obtain information, and are not intended to limit such ability as a party otherwise may have to obtain information through voluntary means or that may otherwise be available to them (*e.g.*, access requests under the Freedom of Information Act; information otherwise properly obtained by the Commission).[1] Where parties or nonparties are willing to do so voluntarily, they may of course provide or obtain information without resort to the formalities and procedural requirements applicable to nonvoluntary discovery. In this regard, in recognition of the fact that voluntary production commonly occurs and is often in the interests of all concerned, § 3.31(d) of the revised rules explicitly provides for stipulations as to discovery and procedure, upon approval of the Administrative Law Judge. Parties are especially encouraged to stipulate to cost-saving techniques like telephone depositions.

The Commission wishes to reiterate that these rules are intended to reaffirm and strengthen the authority of the Administrative Law Judge to supervise discovery. The Commission expects that, in carrying out the duty to prescribe a discovery plan and schedule, in deciding whether or not to authorize a particular request for discovery, and in determining whether to "deny or limit discovery" pursuant to the protection order authority under § 3.31(c)(1), the Administrative Law Judge will take into account the contribution that such discovery may make to the resolution of the issues, the needs of the parties, and the public interest in disposition of the proceeding without undue delay. The Administrative Law Judge should give particular attention to these factors in considering requests for authorization of depositions or interrogatories.

Administrative Law Judges and the parties are encouraged to conduct discovery simultaneously and without undue formality. Whenever possible, arrangements to facilitate discovery should be arrived at informally. For example, the "order" reciting the results of a prehearing conference, required under § 3.21(e)(1), need be no more than a one-sentence order, such as an order entering into the record a letter between the parties that memorializes the conference.

Apart from numerous drafting changes, the principal changes from the May 1976 proposal are as follows:

1. Section 3.21 is amended to provide that one or more prehearing conferences must be held in every case. Such conferences will enable the Administrative Law Judge to ascertain what discovery is necessary in light of the issues in the proceeding. The Administrative Law Judge shall by order set a plan and schedule of discovery, including whatever limitations on discovery may be necessary in aid of expedition. This section is further amended to provide a mechanism whereby the issues in complex cases will, within set deadlines, be more precisely delineated. This new provision is § 3.21(b); the subsections of the former rule are renumbered accordingly.

2. The scope of discovery, as set forth in § 3.31(b), conforms to that proposed on March 31, 1978, for the Federal Rules of Civil Procedure by the Advisory Committee on Civil Rules: discovery may be authorized "upon a satisfactory showing that the requested discovery may reasonably be expected to yield any information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." The same standard applies to discovery of parties and non-parties alike.

The Commission intends this precisely tailored standard to be applied so that unnecessary discovery will not be permitted. The party seeking discovery must state specifically how the requested discovery bears upon the issues as they have been framed by

[1] In a statement dated June 2, 1978, concerning a subpoena issued to Atlantic Richfield Co., the Commission indicated that its existing discovery rules do not limit complaint counsel's access to information properly obtained by the Commission for other purposes. Nothing in the present revisions alters that interpretation.

the pleadings. In considering whether such a showing is "satisfactory," the Administrative Law Judge has broad discretion to weigh the probable relevancy of the information in light of his own assessment of the issues in the proceeding. The need for line-drawing of this kind is especially important in complex cases. See *Dolgow* v. *Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971).

3. The Commission has reinserted a section (3.31) containing provisions applicable to discovery generally. It is substantially similar to Federal Rule 26 and to 1975 proposed § 3.31–2, with the following significant differences:

(a) It contains a provision on privilege adapted from Rule 501 of the Federal Rules of Evidence.

(b) It omits a provision comparable to paragraph 2 of Federal Rule 26(b)(3), because the mechanism provided there is unnecessary in Commission proceedings.

(c) It sets a ceiling on the amount that a party seeking discovery of another party's experts may be required to pay namely "the maximum specified in 5 U.S.C. 3109," unless the parties agree to, and the Administrative Law Judge orders, payment of a higher amount.

(d) It reserves, for the time being, the portion of the subsection on protective orders pertaining to the treatment of assertedly confidential business information. Such a provision has been published for comment at 43 FR 3571 (Jan. 26, 1978) as part of a separate rulemaking. After consideration of those comments, the Commission will decide in what form to promulgate § 3.31(c)(2). In the interim, Administrative Law Judges may continue to issue such protective orders in aid of their duty to conduct fair and impartial hearings and to avoid delay. See 16 CFR 3.42(c).

(e) It includes provisions on stipulations and on applications for compulsory process that were elsewhere in the rules.

4. A rule on interrogatories is added, modeled after Federal Rule 33. However, insofar as information is in the possession of the Commissioners, the General Counsel, the Administrative Law Judges, the Secretary in his capacity as custodian or recorder of any such information, and their respective staffs, that information is excluded from the rule. This exclusion is a necessary corollary of the separation of functions within the Commission. Access to such information continues to be governed by § 3.36. Also, a provision has been added (§3.37) for access orders to parties, paralleling in part the analogous provision in Federal Rule 34. The Commission has incorporated in both of these provisions requirements that records be made available in an orderly fashion, as suggested in the report of the Advisory Committee on Civil Rules.

5. The provisions for class deposition and subpoenas are deleted, because they pose an unacceptable risk to effective Administrative Law Judge supervision of discovery.

6. The previous provision for an order compelling appearance is deleted as unnecessary and dilatory. However, a new subsection (a) has been added to § 3.38, to provide for motions to compel answers to requests for admissions or to interrogatories.

7. Former § 3.31 is renumbered to § 3.32. This rule provides for party-generated requests for admissions. It is augmented by an additional provision (§ 3.42(c)(4)) that empowers the Administrative Law Judge *sua sponte* to compel admissions.

8. Former §§ 3.36 and 3.37 are combined in § 3.36.

The Commission rejects the suggestions of commenters that it return to the Federal Rules of Civil Procedure in their totality as a model, or conversely, make no change in its present rules. The Commission believes that, in general, parties should be permitted sufficient discovery to prepare their presentations effectively. In the long run, time will be saved if issues are explored in discovery, rather than at hearing. However, the complexity of many Commission proceedings and the potential for delay inherent in discovery require careful supervision, by the Administrative Law Judge, at every stage of the proceedings. Thus, though it has adopted the full panoply of Federal Rules devices (except Federal Rule 35 physical or mental examinations, which are unlikely to be required in Commission proceedings), the Commission has retained provisions for advance authorization of discovery and confirms the Administrative Law Judge's full authority to limit discovery in order to ensure fair, orderly, and expeditious proceedings. Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission's rules must be tailored to the circumstances of Commission proceedings.

The Commission also rejects the contention of some commenters that the special provisions in § 3.36 regarding discovery of Commission and other government employees are improper. These provisions are "designed to accommodate the necessity of balancing the private litigant's right to prepare a proper defense against the government's vital interest in maintaining the integrity and efficiency of the administrative process." *Coca Cola Co.*, 85 F.T.C. 398, 399 (1975). The discovery rules provide full and fair access to necessary information; due process requires no more.

The provisions concerning motions to quash have been revised to reflect formally the Commission's view that all objections must be presented in such motions and to make clear that, as is commonly done, such motions can and should be accompanied by all appropriate supporting materials.

The Commission will review the operation of these rules after one year, so as to ascertain whether they have in fact worked as the Commission intends.

Accordingly, § 3.21 of Subpart C, §§ 3.31, 3.32, 3.33, 3.34, 3.35, 3.36, 3.37, and 3.38 of Subpart D, and § 3.42(c) of Subpart E, Part 3, Subchapter A, Chapter I of Title 16 of CFR are amended as set forth below:

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

1. Section 3.21 is revised to read as follows:

§ 3.21 Prehearing conferences.

(a) *Purpose.* The Administrative Law Judge in every case shall direct counsel for all parties to meet with him for one or more conferences 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) A plan and schedule of discovery, and such limitations on discovery as may promote expedition;

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

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

(6) Matters of which official notice will be taken and matters which may be resolved by reliance upon trade regulation and other rules pursuant to §§ 1.8 and 1.22(c) of this chapter; and

(7) 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) *Complex cases.* In any case in which in his judgment the likely complexity of the case or other circumstances so warrant, the Administrative Law Judge shall institute the following procedures:

(1) The Administrative Law Judge shall set a date for a prehearing con-

ference, to be held not later than 45 days after the filing of the answer to the complaint.

(2) The Administrative Law Judge shall order (i) that complaint counsel, not later than 30 days prior to such conference, file a nonbinding statement setting out the theory of the case, the issues to be tried, and what complaint counsel expect their evidence to prove; and (ii) that respondent, not later than 15 days prior to such conference, file a nonbinding statement setting out the theory of the defense, the issues to be tried, and what respondent expects its evidence to prove. Such statements may be changed upon completion of discovery or at such other times as the Administrative Law Judge may direct.

(3) The Administrative Law Judge shall, not later than 30 days after such conference, formulate a statement of the issues of the case, based upon the pleadings of the parties and their statements filed pursuant to this rule.

(4) The Administrative Law Judge may, at appropriate intervals, reformulate the statement of the issues of the case.

(c) *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).

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

(e) *Orders.* (1) The Administrative Law Judge shall enter in the record an order which recites the results of a prehearing conference. Such order shall include the Administrative Law Judge's rulings upon other matters considered at the conference, together with appropriate directions to the parties. The Administrative Law Judge's order shall control the subsequent course of the proceeding, unless modified to prevent manifest injustice. (2) In each proceeding the Administrative Law Judge shall enter an order establishing a plan and schedule of discovery, including limitations on discovery and such other provisions as are necessary for the proper management of discovery in the proceeding. Such order may at any time be modified by the Administrative Law Judge for good cause shown.

Subpart D—Discovery; Compulsory Process

2. Section 3.31 is revised to read as follows:

§ 3.31 General provisions.

(a) *Discovery Methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited.

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

(1) *In General.* The Administrative Law Judge may authorize discovery upon a satisfactory showing that the requested discovery may reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. It shall not be an adequate ground for denying such authorization that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Privilege.* Authorization for discovery may be denied or limited, or a protective order may be entered, to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable Act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing Preparation: Materials.* Subject to the provisions of paragraph (b)(4) 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.

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

(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, but not more than the maximum specified in 5 U.S.C. 3109 unless the parties have stipulated to a higher amount, for time spent in responding to discovery under paragraphs (b)(4)(i)(B) and (b)(4)(ii) of this section.

(c) *Protective Orders.* (1) The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.

(2) [Reserved]

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

(e) *Rulings on Applications For Compulsory Process.* Applications for authorization to take depositions pursuant to the provisions of § 3.33, applications for the issuance of subpoenas pursuant to the provisions of § 3.34 or of offers pursuant to the provisions of § 3.37 (other than as provided in

§ 3.36), and applications for authorization to serve interrogatories pursuant to the provisions of § 3.35 may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission. Such applications, and motions for protective orders shall be ruled upon by the Administrative Law Judge or, in the event the Administrative Law Judge is not available, by the Chief Administrative Law Judge or such other Administrative Law Judge as the Chief Administrative Law Judge may designate.

§ 3.32 Admissions.

(a) At any time after thirty (30) days after issuance of compliant, or after publication of notice of an adjudicative hearing in a rulemaking proceeding under § 3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth. A copy of the request shall be filed with the Secretary.

(b) The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy filed with the Secretary, a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to, or readily obtainable by, him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

§ 3.33 Depositions.

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

(b) *Form of application.* Any party desiring to take a deposition or depositions shall make application in writing to the Administrative Law Judge making the showing required by paragraph (a) of this section and including, as appropriate, any applications or motions for subpoenas or other orders under §§ 3.34 or 3.36.

(c) *Notice to corporation or other organization.* A party may in a request for authorization of a deposition and in a subpoena *ad testificandum* name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. If such deposition is ordered and subpoena issued, 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 non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

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

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall, upon order of the Administrative Law Judge, serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of Rule 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the

taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

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

(g)(1) *Use of Depositions in Hearings.* At the hearing on the complaint or upon a motion, 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:

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

(ii) 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 to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose.

(iii) A deposition may be used by any party for any purpose if the Administrative Law Judge finds: (A) That the deponent is dead; or (B) 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 (C) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or (E) 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.

(iv) If only part of a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced.

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

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

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

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

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

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

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

§ 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 in writing to the Administrative Law Judge. If for the purpose of discovery, such subpoena may be issued upon a satisfactory showing that the testimony may reasonably be expected to yield any information within the scope of discovery under § 3.31(b)(1). If to preserve relevant evidence, such subpoena may be issued upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. If for testimony at an adjudicative hearing, such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) *Subpoenas duces tecum.* Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents (including writings, drawings, graphs, charts, photographs, phono records and other recordings, and other data compilations from which information can be obtained (translated, if necessary, by the person into reasonably usable form)) at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the Administrative Law Judge, shall specify with reasonable particularity the material to be produced, showing that the material sought is reasonable in scope and, if for the purpose of discovery, falls within the limits of permissible discovery under § 3.31(b)(1), or, if for an adjudicative hearing, is reasonably relevant. Subpoenas *duces tecum* may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes.

(c) *Motions to Quash.* Any motion by the subject of a subpoena to limit or

quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motion shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate argument, affidavits and other supporting documentation.

§ 3.35 Interrogatories to parties.

(a) *Availability; Procedures for Use.* (1) Upon authorization by the Administrative Law Judge, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.

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

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

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but 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. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

§ 3.36 Applications for subpoenas for records of the commission or other governmental agency and for appearance of commission or other government officials and employees.

(a) *Form.* An application for issuance of a subpoena for documents (as defined in § 3.34(b)), or for the issuance of an order requiring access to documents pursuant to § 3.37, in the possession, custody, or control of the Federal Trade Commission or its employees, or of another governmental agency or its employees; or for the issuance of a subpoena requiring the appearance of an official or employee of the Commission, including complaint counsel, or the appearance of an official or employee of another governmental agency, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall make the same showing required to obtain a subpoena under § 3.34 or an order under § 3.37, together with a specific showing that the information or material sought cannot reasonably be obtained by other means.

§ 3.37 Access for inspection and other purposes.

(a) *Availability; Procedures for Use.* Upon application in writing by any party, the Administrative Law Judge may issue an order requiring a party (1) to permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are in the possession, custody or control of the party upon whom the order would be served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. Each such application shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered, showing that the material sought is reasonable in scope and falls within the limits of permissible discovery under § 3.31(b)(1). Each such application shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the order that requires their production.

(b) *Motions to Quash.* Any motion by the subject of an order to limit or quash the order shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motion shall set forth all assertions of privilege or other factual and legal objections to the order, including all appropriate argument, affidavits and other supporting documentation.

§ 3.38 Motion for order compelling answer; sanctions.

(a) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions; or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is

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

§ 3.42 **Presiding Officials.**

* * * * *

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

(1) To administer oaths and affirmations;

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

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

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

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

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

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

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

(9) To make and file initial decisions;

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

(11) 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.

By direction of the Commission dated November 9, 1978.

CAROL M. THOMAS,
Secretary.

[FR Doc. 78-33772 Filed 12-1-78; 8:45 am]

[6750-01-M]

MOTIONS TO QUASH COMPULSORY PROCESS

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: Section 1.13(d)(6), 2.7(b), 2.11(b), and 2.12(d) are amended to provide that objections to Commission demands for information should set forth all claims of privilege or other objections including all supporting documentation. A parallel technical amendment is made to § 4.9(b)(22). These amendments codify requirements under existing Commission practices.

EFFECTIVE DATE: December 4, 1978.

FOR FURTHER INFORMATION CONTACT:

Jerold D. Cummins, Deputy Assistant General Counsel, Office of General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580, (202) 523-1928.

In consideration of the foregoing, 16 CFR Chapter I is amended as follows:

PART 1—GENERAL PROCEDURES

§ 1.13 **[Amended]**

(1) Add to § 1.13(d)(6) just before the next to the last full sentence.

* * * * *

(d) * * *

(6) * * * Such motion shall set forth all assertions of privilege or other factual and legal objection to the ruling, including all appropriate argument, affidavits and other supporting documentation. * * *

PART 2—NONADJUDICATIVE PROCEDURES

§ 2.7 **[Amended]**

(2) Add to § 2.7(b) after the first sentence:

* * * * *

(b) * * * Such motion shall set forth all assertions of privilege or other factual and legal objections to the subpena, including all appropriate argument, affidavits and other supporting documentation. * * *

§ 2.11 **[Amended]**

(3) Add to § 2.11(b) after the first sentence:

* * * * *

(b) * * * Such motion shall set forth all assertions of privilege or other factual and legal objections to the order requiring access, including all appropriate argument, affidavits and other supporting documentation. * * *

§ 2.12 **[Amended]**

(4) Add to § 2.12(d) after the first sentence:

* * * * *

(d) * * * Such motion shall set forth all assertions of privilege or other factual and legal objection to the order requiring a report or answer to specific questions, including all appropriate argument, affidavits and other supporting documentation. * * *

PART 4—MISCELLANEOUS RULES

§ 4.9 **[Amended]**

(5) Revise § 4.9(b)(22) to read in its entirety:

* * * * *

(b) * * * (22) Motions to limit or quash compulsory process, and the rulings thereon, except for information exempt from disclosure under § 4.10(a)(2) or § 4.10(a)(7) of this chapter.

By direction of the Commission dated November 9, 1978.

CAROL M. THOMAS,
Secretary.

[FR Doc. 78-33773 Filed 12-1-78; 8:45 am]