2. Also, the Service proposes to amend § 17.96(a) by adding the Critical Habitat of *Hudsonia montana* after that of *Erysimum capitatum* var. *angustatum* (Contra Costa wallflower) as follows:

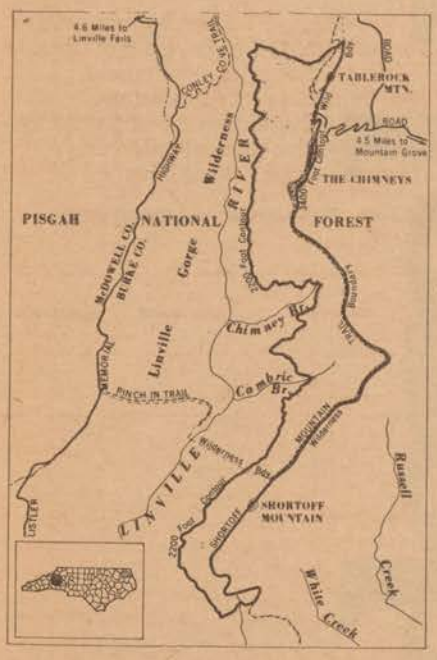
§ 17.96 Critical habitat-plants.

(a) * * *

Family Cistaceae: Mountain golden-heather *(Hudsonia montana). North Carolina,* (Burke County) the area bounded on the west by the 2200′ contour, and on the east by a line extending from the intersection of the 2200′ contour and the Shortoff Mountain Trail north to the eastern boundary of the Linville Gorge Wilderness; following the boundary northward until it intersects the 3400′ contour at "The Chimneys;" then north along the 3400′ contour until it rejoins the Wilderness Boundary; then north to the intersection with the 3200′ contour north of Tablerock Mountain; then westward along the 3200′ contour until the contour turns south. At this point the line extends west until its intersection with the 2200′ contour.

* * * * *

Mountain Golden Heather, Burke Co., North Carolina



Dated: April 10, 1980.

Robert S. Cook,

Acting Director, Fish and Wildlife Service.

[FR Doc. 80-16316 Filed 5-28-80; 8:45 am]

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federal register

Thursday
May 29, 1980

Part IV

Federal Trade Commission

Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules

FEDERAL TRADE COMMISSION

16 CFR Parts 0, 1, 2, and 4

Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules

AGENCY: Federal Trade Commission.

ACTION: Interim rules.

SUMMARY: The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended by the Federal Trade Commission Improvement Act of 1980, is revising its rules of practice to conform its procedures to the amendments made by the FTC Improvement Act of 1980, and to make other changes.

EFFECTIVE DATE: These interim rules are effective on May 28, 1980. The Commission will accept Comments on these rules received on or before July 28, 1980, and may re-evaluate them in light of those comments.

ADDRESS: Comments should be submitted to Secretary, Federal Trade Commission, 6th Street & Pennsylvania Avenue, NW., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Barry R. Rubin, Assistant General Counsel, Federal Trade Commission, Washington, D.C. 20580, (202) 523–3520.

SUPPLEMENTARY INFORMATION: On May 28, 1980, the Federal Trade Commission Improvement Act (Pub. L. 96–252), was enacted. That law amended the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.* These rules are designed to implement those amendments. Additional rule amendments will be published shortly.

1. *Presiding Officers at Rulemaking Proceedings.* Section 9 of the Act amends section 18(c) of the Federal Trade Commission Act, 15 U.S.C. 57a(c), by redesignating section 18(c)(1) through section 18(c)(4) as section 18(c)(2) through section 18(c)(5), respectively, and by adding a new section 18(c)(1). New section 18(c)(1) requires that presiding officers be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The legislative history of Pub. L. 96– , makes clear, however, that periodic evaluations of the performance of presiding officers may be conducted by the Commission through the Office of the Executive Director. New section 18(c)(1) further requires that the officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission. Finally, it prohibits the presiding officer, except, as required for the disposition of *ex parte* matters as authorized by law, from consulting any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

The Commission's Rules of Practices have been amended in the following respects so as to conform with the requirements of new section 18(c)(1):

a. Part 0 of the Commission's Rules of Practice has been amended to reflect the establishment of an "Office of Presiding Officers."

b. Section 1.13(c) has been amended to provide for: (a) the appointment of a presiding officer by the chief presiding officer upon commencement of a proposed trade regulation rule proceeding; (b) a time limit within which any motion may be filed that is predicated upon the substitution of a new presiding officer for the one originally appointed; (c) the independence of presiding officers from any officer or employee of the Commission other than the chief presiding officer, except that periodic evaluations of the performance of presiding officers may be conducted by the Commission through the Office of the Executive Director; and (d) a prohibition on *ex parte* communications by presiding officers.

c. Section 1.13(d)(6) is amended to reflect the fact that compulsory process can only be issued by a Commissioner, acting pursuant to a Commission resolution (except for matters in adjudication). Presiding officers are thus empowered only to recommend to the Commission that it issue compulsory process. Conforming changes are made in § 1.13(c).

d. Section 1.13(f) has been redesignated § 1.13(g) and amended to reflect the requirement that the officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

That section and the following sections have also been amended to change the order of the post-record procedures. Henceforth, the presiding officer's recommended decision will follow the staff report. After the close of the hearing process the staff will prepare its report. The presiding officer would then prepare his recommended decision, taking into account the record of the proceeding as well as the staff report. Interested persons could address both reports in the post-record comment period. This will effectuate the intent of Congress that the presiding officer consider all relevant information in making his decision.

e. Section 1.13(g) has been redesignated § 1.13(f). The first sentence of redesignated § 1.13(f) is amended by substituting the phrase "presiding officer's recommended decision" for the phrase "presiding officer's findings of fact."

f. The first sentence of § 1.13(h) is amended by substituting the phrase "The presiding officer's recommended decision" for the phrase "The findings and conclusions of the presiding officer."

2. *Civil Investigative Demands and Custodial Treatment of Documents.* Section 13 of the Act inserts a new section 20 of the FTC Act which provides that all forms of compulsory process must now be signed by a Commissioner acting pursuant to a Commission resolution. Further, as to investigations "with respect to unfair or deceptive acts or practices" the only form of compulsory process available is a civil investigative demand. This new requirement is modeled after the Department of Justice's authority under the Antitrust Civil Process Act, 15 U.S.C. 1311, *et seq.* The following changes have been made in the Commission's rules:

a. Section 2.4 has been amended to reflect the requirement, contained in amended section 20(i) of the FTC Act that a subpoena or civil investigative demand must be signed by a Commissioner acting pursuant to a Commission resolution. Conforming changes are made in § 2.5.

b. Section 2.6 is amended to reflect the requirement of section 20(c)(2) of the FTC Act that each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

c. Section 2.7 has been amended to reflect the requirement of amended section 20(i) that the Commission shall have no authority to issue compulsory process unless such process is signed by a Commissioner acting pursuant to a Commission resolution. The previous delegation to certain staff members to issue subpoenas has been revoked.

d. Section 2.7(b) is entirely new. The section provides that in investigations performed with respect to unfair or deceptive acts or practices, civil investigative demands as prescribed by amended section 20 of the FTC Act shall

be the only form of compulsory process issued. Subsection (1) of § 2.7(b) adopts the requirements of amended section 20(c)(3) of the FTC Act. Subsection (2) of § 2.7(b) adopts the requirements of amended section 20(c)(4) of the FTC Act. Subsection (3) of section 2.7(b) adopts the requirements of section 20(c)(5) of the FTC Act. Appropriate conforming changes are made in §§ 4.2 and 4.4.

e. Section 2.7(c) continues the existing practice by which the Director, Deputy Director, Assistant Director, Regional Director or Assistant Regional Director in charge of investigating any matter is authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil investigative demands, including the authority to approve extensions of the time prescribed for compliance.

f. Section 2.7(d) has been revised to adopt, with respect to both subpoenas and civil investigative demands, several of the procedures required by amended section 20 of the FTC Act. Specifically, the term "motion to quash" has been changed to "petition to quash" per section 20(f) of the FTC Act. Such petitions shall be filed with the Secretary of the Commission within 20 days after service of the subpoena or demand, or, if the return date is less than 20 days after service of the subpoena or demand, prior to the return date. The 20-day period is adopted for both civil investigative demands and subpoenas, although section 20(f) mandates the 20-day period only for civil investigative demands. A uniform period is adopted to avoid confusion. Appropriate changes conforming to the statutory requirements have been made in §§ 2.7(e), 2.7(f), 2.8(b), 2.8(c), 2.8A(a), 2.9, 2.10, 2.11, 2.12, 2.13, and 2.15. The Director, Deputy Director, Assistant Director, Regional Director or Assistant Regional Director in charge of the investigation has been delegated the authority to grant extensions of time within which to file petitions to limit or quash.

g. Section 2.16 implements the statutory requirement that the Commission designate a custodian and where necessary a deputy custodian for all information provided to it pursuant to compulsory process in an investigation a purpose of which is to determine whether a violation of law has occurred. The custodial provisions of the rules apply only to documents obtained by the Commission pursuant to compulsory process issued after the effective date of Pub. L. 96– . They are modeled after the Department of Justice's procedures under the Antitrust Civil Process Act, 28 CFR Part 49. The duties and powers of custodians and deputy custodians are as prescribed in FTC Act section 21.

3. *Requests to Reopen Commission Orders.* Section 2 of the Act, amends section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), by adding a provision which requires the Commission to reopen any order issued under section 5 to consider whether such order (including any affirmative relief provision contained in the order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The provision further requires that the Commission determine whether to alter, modify, or set aside such order not later than 120 days after the date of the filing of such request.

Section 2.51 has been amended to conform to the requirements of amended section 5(b). At the same time the rule has been restructured. Specifically, paragraph (a) of § 2.51 sets forth the scope of the rule to include requests to reopen any "Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final," as did previous § 2.51; the rule therefore applies not only to requests to reopen orders issued under section 5 but also to those issued under other statutory authority, *e.g.*, Clayton Act 11(b), as well as to rules issued after adjudicative hearings under the Fair Packaging and Labeling Act. Paragraph (b) incorporates the requirement of amended section 5(b) that a request contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside in whole or in part. Paragraph (c) sets forth the provisions concerning opportunity for public comment, as did previous § 2.51. And paragraph (d) provides, in conformity with amended section 5(b), that not later than 120 days after the date of the filing of a request, the Commission shall determine whether such request contains the showing required by § 2.51(b) and whether the rule or order should be altered, modified, or set aside as requested.

4. *Confidentiality.*[1] Section 14 of the Act inserts a new section 21 of the FTC Act. Section 21(f) exempts from disclosure under the Freedom of Information Act, 5 U.S.C. 552, material received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated the law if the information is provided under compulsory process or voluntarily in lieu of compulsory process. This exemption applies to all such documents in the Commission's possession on the date of enactment of the Act. Furthermore, documents subject to the custodial requirements of section 21(b) (other than documents which are public such a advertisements) may not be disclosed without the consent of the submitter except to a Commission employee or a contractor, or consultant who has signed a non-disclosure agreement. Such material may, however, be disclosed to a committee or subcommittee of either House of Congress. The Commission is required to notify the owner or provider of the information on receipt of such a request. Further, such information may be disclosed to state and federal law enforcement agencies if they certify that the material will be maintained in confidence and will be used only for official law enforcement purposes. The custodial provisions apply only to documents obtained by the Commission after the effective date of the Act.

Material obtained by the Commission not subject to the custodial provisions described above will not be disclosed if marked confidential without first giving the submitter ten days' notice of the intended disclosure except for congressional disclosure and state and federal law enforcement disclosures as described above. The Commission's authority to make information public is restricted by an amendment to section 6(f) of the FTC Act which precludes the Commission from making public trade secrets or commercial or financial information which is obtained from any person and which is privileged or confidential but expressly authorizes disclosures to state and federal law enforcement agencies if they certify that the material will be maintained in confidence and used only for official law enforcement purposes. Such information obtained in accordance with the Federal Reports Act, 44 U.S.C. § 3512, including information obtained under the Commission's Quarterly Financial Reports Program may be disclosed to other federal agencies for economic, statistical or policymaking purposes only, and the receiving agency shall not disclose such information in an individually identifiable form. The Act does not affect the Commission's ability to disclose information in Commission administrative proceedings or court

[1] These rules also represent the completion of the rulemaking proceeding commenced by the Commission on January 26, 1978, regarding confidentiality of business documents submitted to the Commission. See 43 FR 3571.

proceedings subject appropriate Consumer or court protective or *in camera* orders. Cf. 16 CFR 1.18(b), 3.45. Appropriate implementing changes are made in §§ 4.9, 4.10 and 4.11.

5. *Disposition of Documents Submitted to the Commission.* In the past, it has been the Commission's policy to return original documents on request at the close of a proceeding. This policy was based on the Commission's belief that original documents remain the property of the submitter. The Commission is entitled to retain copies of all documents submitted where the documents constitute "agency records" under the Federal Records Act, 44 U.S.C. 3301. The new legislation expressly requires the return of originals not received into the record of a proceeding (while preserving the right of the Commission to make and retain copies) of documents submitted to the Commission under compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. Accordingly, a new § 4.12 (the former 4.12 is being redesignated as section 4.16) is added to explain the Commission's policy on treatment of documents at the close of a proceeding or in cases where no proceeding is commenced within a reasonable time after the staff has completed its examination and analysis of the materials assembled in the investigation. It should be noted that although the new legislation only requires return of original documents that have been obtained pursuant to compulsory process, § 4.12 provides for the return of all originals, however obtained, at the close of the proceeding or where a proceeding has not been commenced within a reasonable time after staff has completed its analysis of all documents assembled in the investigation.

Copies of documents will be returned only in extraordinary circumstances and upon a showing that the public interest require return. The procedures described in the rule will be the only way documents submitted to the Commission may be returned and no commitments to return documents will be entered into at any other time.

6. *LB and QFR Programs.* The Line of Business confidentiality provision, an addition to Section 6(f) of the FTC Act, in essence enacts into permanent law restrictions which were contained in the Commission's appropriations riders for fiscal years 1975, 1976, and 1977. Indeed, the Senate Report explains that the Line of Business provision "eliminates the need to re-enact annually what is meant to be a continuing protection." Two sets of LB confidentiality rules (those for 1974 reports and for 1975/76 reports) explicitly are based on these former appropriations riders, so that those rules are not inconsistent with the new legislation. The 1973 LB rules were in effect during the time the riders were effective and are also consistent with the new LB Section.

The Line of Business provision is different from the prior riders in one respect, in providing that "[n]o one other than designated sworn officers and employees of the Commission may examine the line-of-business reports from individual firms." The following officers and employees are so designated: (1) Employees of the Division of Financial Statistics of the Bureau of Economics; (2) Employees of the Data Processing and Information Systems Division of the Office of the Executive Director, but only during and for the purpose of electronic processing of information and data contained in LB reports; and (3) Employees of the General Counsel's office and Commissioners and their assistants, upon notification to the General Counsel by the Assistant Director for Financial Statistics of a refusal or failure of the reporting company to file an adequate LB report. These persons shall have access to such portions of that company's LB report required to evaluate the noncompliance and to advise and represent the Commission with respect to any proceeding initiated because of the noncompliance. All of these uses are directly parallel to the Commission's current LB confidentiality rules.

Proposed revisions to 1973–76 LB rules, and proposed 1977 rules, have been published in the **Federal Register** and comment received; 44 FR 59552 (1979); 45 FR 18446 (1980). The Commission anticipates that all of these rules will shortly be revised, and 1977 rules issued, to be based directly on this statute. In the interim the statutory confidentiality restrictions are effective according to their terms.

The QFR confidentiality rules are consistent with the new legislation. The statute puts new limits—Section 6(f), Sections 21(c)–(e)—on disclosure of information obtained by the Commission including QFR information. The QFR rules already provide, however, that data obtained from the reporting companies will not be disclosed outside the Commission and that no individual company data will be disclosed in aggregate reports.

The QFR rules provide few exceptions to this blanket confidentiality. One is that individual company data may be released to other federal agencies under condition of confidentiality. This exception is currently used only for disclosure to the Bureau of Economic Analysis of the Department of Commerce for statistical purposes. It thus is consistent with the new legislation, which permits release of disaggregated confidential commercial or financial information to other federal agencies for economic, statistical or policymaking purposes under confidentiality restrictions.

The QFR rules also except from certain of their prohibitions legal action initiated because of a company's failure to submit reports. This exception, which must be read also to encompass disclosures necessary in the court filing of an action, is consistent with the new legislation's provision for disclosure of confidential commercial or financial information in judicial proceedings to which the Commission is a party.

The QFR rules do not explicitly refer to disclosures to Congress of individual company data. Disclosures of confidential commercial information for this purpose is permitted by the legislation under stated conditions. Because these provisions formally reflect Congress' inherent authority to require the production of information, they are not inconsistent with QFR confidentiality rules as they would likely be construed if a Congressional request were received.

The Commission has proposed, and has received comments on revisions to the QFR rules. See 44 FR 59552 (1979). The Commission anticipates that it will shortly revise the rules, in part to make them more directly parallel with the statute. In the interim, the statutory confidentiality restrictions are effective according to their terms.

In consideration of the foregoing, the Commission hereby amends its rules of practice as follows:

PART 0—ORGANIZATION

1. Section 0.9 is revised to read as follows:

§ 0.9 Organization structure.

The Federal Trade Commission comprises the following principal units:

Office of the Executive Director
Office of the General Counsel
Office of the Secretary
Office of the Policy Planning
Office of Administrative Law Judges
Office of Presiding Officers
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics
The Regional Offices

§§ 0.15 through 0.18 [Redesignated as §§ 0.16–0.19]

2. Sections 0.15 through 0.18 are redesignated §§ 0.16 through 0.19 respectively. New § 0.15 is added to read as follows:

§ 0.15 Office of Presiding Officers.

Presiding Officers are employees assigned to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act as amended and other rulemaking proceedings as directed.

PART 1—GENERAL PROCEDURES

§ 1.13 [Amended]

3. Section 1.13(c)(1)(vi) is deleted. Sections 1.13(c)(1) (vii), (viii) and (ix) are renumbered 1.13(c)(1) (vi), (vii), and (viii) respectively.

4. Sections 1.13(c) (1) and (2) are redesignatd §§ 1.13(c) (2) and (3) respectively, and new §§ 1.13(c) (1), (4), (5) and (6) are added to read as follows:

§ 1.13 Rulemaking proceeding.

* * * * *

(c) *Presiding Officer.* * * *

(1) *Assignment.*—Upon commencement of a trade regulation rule proceeding, a presiding officer shall be appointed by the chief presiding officer.

* * * * *

(4) *Substitution of presiding officer.*—In the event of the substitution of a new presiding officer for the one originally appointed, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(5) *Organization.*—In the performance of their rulemaking functions, presiding officers shall be responsible to the chief presiding officer who shall not be responsible to any other officer or employee of the Commission, *provided, however,* that periodic evaluations of the performance of presiding officers may be conducted by the Commission through the Office of the Executive Director.

(6) *Ex parte communications.*—Except as required for the disposition of *ex parte* matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

5. Section 1.13(d)(6) is revised to read as follows:

* * * * *

(d) *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. Requests to compel the attendance of persons or the production of documents or to obtain reponses 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 (d)(6) of this section. If the Presiding Officer determines that a request should be granted he shall transmit his determination to the Commission which shall determine whether to issue an order under rule 2.7.

6. Sections 1.13 (f), (g) and (h) are revised to read as follows:

§ 1.13 Rulemaking proceeding.

* * * * *

(f) *Staff recommendations.*—The staff shall make recommendations to the Commission in a report on the rulemaking record. Such report shall contain its analysis of the record and its recommendations as to the form of the final rule.

(g) *Recommended decision.*—After publication of the staff report, the presiding officer shall make a recommended decision based upon his or her findings and conclusions as to all relevant and material evidence, and taking into account the staff report. The recommended decision shall be made by the presiding officer who presided over the rulemaking proceeding except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(h) *Post record comment.*—The staff report and the presiding officer's recommended decision shall be the subject of public comment for a period of sixty (60) days after it is 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.

7. Section 1.18(a) is revised to read as follows:

§ 1.18 Rulemaking record.

(a) *Definition.*—For 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, the recommended decision of the presiding officer, and the staff recommendations as well as any public comment thereon, verbatim transcripts of oral presentations to the Commission, if any, and any other information which the Commission considers relevant to the rule.

PART 2—NONADJUDICATIVE PROCEDURES

8. Section 2.4 is revised to read as follows:

§ 2.4 Investigational policy.

The Commission encourages voluntary cooperation in its investigations. Where the public interest requires, however, the Commission may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law.

9. Section 2.5 is revised to read as follows:

§ 2.5 By whom conducted.

Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are "examiners" or "Commission investigators" within the meaning of the Federal Trade Commission Act and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

10. Section 2.6 is revised to read as follows:

§ 2.6 Notification of purpose.

Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation. When such information or documentary evidence is compelled pursuant to a civil investigative demand issued under Section 20 of the Federal Trade Commission Act, the person served with such demand shall be advised, in the demand, of the nature of the conduct constituting the alleged violation which

is under investigation and the provisions of law applicable to such violation.

11. Section 2.7 is revised to read as follows:

§ 2.7 Compulsory process in investigations.

(a) *In general*—The Commission or any member thereof may, pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission. Material for which a civil investigative demand has been issued but which is still in the physical possession of the person upon whom the demand has been served, may by agreement between such person and the custodian designated pursuant to rule 2.16, be reproduced by such person, in which case the custodian may require that the copies so produced be duly certified as true copies of the original of the materials involved.

(b) *Civil Investigative Demands*—Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1).

(1) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Production of documentary material in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(10) of the Federal Trade Commission Act.

(2) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted. Response to a civil investigative demand for a written report or answers to questions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(3) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(c) Bureau Directors, Deputy Directors, Assistant Directors, Regional Directors, or Assistant Regional Directors, are authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil investigative demands and for good cause shown, may extend the time prescribed for compliance. Specifically, the subpoena power conferred by Section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) is included within this delegation.

(d) *Petitions to limit or quash.*—Any petition to limit or quash any investigational subpoena or civil investigative demand shall be filed with the Secretary of the Commission within twenty (20) days after service of the subpoena or civil investigative demand, or, if the return date is less than twenty (20) days after service prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash any investigational subpoena or civil investigative demand shall be ruled upon by the Commission itself, but Bureau Directors, Deputy Directors, Assistant Directors, Regional Directors or Assistant Regional Directors are delegated, without power or redelegation, the authority to rule upon requests for extensions of time within which to file such petitions.

(e) The timely filing of a petition to limit or quash any investigational subpoena or civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the Commission denies the petition in whole or in part, the Commission shall specify a new return date.

(f) All petitions to limit or quash investigational subpoenas or civil investigative demands and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

12. Paragraph 2.8 (b) and (c) are revised to read as follows:

§ 2.8 Investigational hearings.

* * * * *

(b) Investigational hearings shall be presided over by the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation; and the term "presiding official," as used in this part, means and applies to the Commission or any of its members or designated representative when so presiding and the "Commission investigator" designated in a civil investigative demand for the giving of oral testimony. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

(c) Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. A copy of the transcript shall promptly be forwarded by the Commission investigator to the custodian designated in section 2.16.

13. Section 2.8A(a) is revised to read as follows:

§ 2.8A Withholding requested material.

(a) Any person withholding material responsive to an investigational subpoena or civil investigative demand issued pursuant to § 2.7, an access order issued pursuant to § 2.11, an order to file a report issued pursuant to § 2.12, or any other request for production of material issued under this Part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

* * * * *

14. Sections 2.9(a), (b)(2), and (b)(4) are revised to read as follows:

§ 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony. Where the investigational hearing has been conducted pursuant to a civil investigative demand issued under Section 20 of the Federal Trade Commission Act, upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his testimony. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness unless the witnesss cannot be found, is ill, waives in writing his right to signature or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to review it, the Commission investigator shall take the actions prescribed by Section 20(c)(12)(E)(ii) of the Federal Trade Commission Act.

(b) * * *

(2) Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

* * * * *

(4) Counsel for a witness may not, for any purpose or to any extent not allowed by subparagraphs (1) and (2) of this paragraph, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena or civil investigative demand must have been addressed to the Commission in advance of the hearing. Copies of such petitions may be filed with the presiding official or Commission investigator as part of the record of the investigation, but no arguments in support thereof will be allowed at the hearing.

* * * * *

15. Section 2.10 is revised to read as follows:

§ 2.10 Depositions.

In investigations other than those conducted under Section 20 of the Federal Trade Commission Act, the Commission may order testimony to be taken by deposition at any stage of such investigation. Such depositions may be taken before any person having power to administer oaths who may be designated by the Commission. The testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed to by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in §§ 2.7 through 2.9.

16. Section 2.11(a) is revised to read as follows:

§ 2.11 Orders requiring access.

(a) In investigations other than those conducted under Section 20 of the Federal Trade Commission Act, the Commission may issue an order requiring any person, partnership or corporation being investigated to grant access to files for the purpose of examination and the rights to copy any documentary evidence. The Directors, Deputy Directors, and Assistant Directors of the Bureau of Competition, Consumer Protection, and Economics, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring access issued during the investigation of any matter.

* * * * *

17. Sections 2.12 (a) and (b) are revised to read as follows:

§ 2.12 Reports.

(a) In investigations other than those covered by Section 20 of the Federal Trade Commission Act the Commission may issue an order requiring a person, partnership, or corporation to file a report or answers in writing to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(b) The Assistant Director for Financial Statistics, Bureau of Economics, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized to issue notices of default under the Commission's quarterly financial reporting program.

18. Section 2.13(b)(1) is revised to read as follow:

§ 2.13 Noncompliance with investigational processes.

* * * * *

(b) * * *

(1) to institute, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a person, partnership, or corporation to comply with, or to obey, a subpoena, or civil investigative demand if the return date or any extension thereof has passed;

19. Section 2.15(a) is revised to read as follows:

§ 2.15 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) The Bureau Directors, Deputy Directors, Assistant Directors, Regional Directors or Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity under Title 18, section 6002, of the United States Code. The presiding officials or Commission investigators at investigational hearings or depositions are hereby authorized to issue such an order upon the Attorney General's approval. Approval of such an order may be sought only upon determinations by the party requesting approval (1) that the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and (2) that such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. Such order shall be issued upon the approval of the Attorney General where it cannot be determined that a witness or deponent has improperly invoked his privilege against self-incrimination.

* * * * *

20. Section 2.16 is added as follows:

§ 2.16 Custodians.

(a) *Designation.*—The Commission shall designate a custodian and deputy custodian for material to be delivered

pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. The custodian shall have the powers and duties prescribed by Section 21 of the FTC Act. Deputy custodians may perform all of the duties assigned to custodians. The appropriate Bureau Directors, Deputy Directors, Regional Directors or Assistant Directors shall take the actions required by section 21(b)(7) of the FTC Act if it is necessary to replace a custodian or deputy custodian.

(b) *Copying of custodial documents.*—The custodian designated pursuant to Section 21 of the Federal Trade Commission Act (subject to the general supervision of the Executive director) may, from among the material submitted, select the material the copying of which is necessary or appropriate for the official use of the Commission, and shall determine, the number of copies of any such material that are to be reproduced. Copies of material in the physical possession of the custodian may be reproduced by or under the authority of an employee of the Commission designated by the custodian.

(c) Material produced pursuant to the Federal Trade Commission Act, while in the custody of the Custodian, shall be for the official use of employees of the Commission in accordance with the Act, but such material shall upon reasonable notice to the Custodian, be made available for examination by the person who produced such material or his duly authorized representative during regular office hours established for the Commission.

21. Section 2.51 is revised to read as follows:

§ 2.51 Requests to reopen.

(a) *Scope.*—Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part.

(b) *Contents.*—A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside, in whole or in part or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications of the rule or order.

(c) *Opportunity for public comment.*—A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days from the date that the request was filed. During this period the public is invited to comment on the request.

(d) *Determination.*—After the period for public comment on a request under this section has expired and no later than one-hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with subsection (b) and whether the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue and order to show cause pursuant to Section 3.72, or take such other action as is appropriate.

PART 4—MISCELLANEOUS RULES

22. Section 4.2(a) is revised to read as follows:

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

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission including those addressed to the Administrative Law Judge shall be filed with the Secretary of the Commission; provided, however, that in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the Director, Deputy Director, or Assistant Director of the appropriate bureau or office or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings shall, at or before the time of filing, be served by the party filing the documents or person acting for that party on all other parties pursuant to § 4.4. (2) Documents submitted to the Commission in response to a Civil Investigative Demand under § 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

* * * * *

23. Section 4.4(a)(2) is revised to read as follows:

§ 4.4 Service.

(a) * * *

* * * * *

(2) All other orders and notices, including subpoenas, orders requiring access, orders to file annual and special reports, and notices of default, may be served by any method reasonably certain to inform the affected person, partnership, corporation or unincorporated association, including any method specified in paragraph (a)(1), except that civil investigative demands may only be served in the manner provided by section 20(c)(7) of the FTC Act (in the case of service on a partnership, corporation, association, or other legal entity) or section 20(c)(8) of the FTC Act (in the case of a natural person).

* * * * *

24. Section 4.9(b)(22) is revised to read as follows:

§ 4.9 Public records.

* * * * *

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

* * * * *

25. Introductory text of § 4.10(a), paragraphs (a)(2) and (a)(8) are revised, and paragraphs (a)(9) and (d) are added to read as follows:

§ 4.10 Confidential information.

(a) Except as provided in paragraph (b) of this section, the following records of the Commission are exempt from availability for public inspection and copying pursuant to 5 U.S.C. 552; however, records exempt from disclosure by the provisions of this section may be made available to a requester for inspection and copying upon requests for records under the procedures set forth in § 4.11 or by the Commission upon its own motion, except where prohibited by law:

* * * * *

(2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is proprietary

or highly competitive interest. Assurances of confidentiality given by Commission staff are not binding upon the Commission.

(8) Material which is received by the Commission (i) in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and (ii) which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, or which is provided voluntarily in place of compulsory process in such an investigation. This material is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. Except as provided in section 21 of the FTC Act and § 4.11 (b), (c) and (d) of this part, no material received pursuant to compulsory process, in an investigation, a purpose of which is to determine whether any person may have violated any provisions of the laws administered by the Commission, that is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts. Such material may, however, be used in connection with the taking of oral testimony.

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

* * * * *

(d) No document submitted to the Commission and marked confidential by the submitter pursuant to section 21(c) of the FTC Act will be released, except as provided in section 21(d) of the FTC Act and in § 4.11 (b), (c) and (d) of this Part, unless it is determined that the document is not a trade secret or commercial or financial information which is obtained from a person and which is privileged or confidential within the meaning of section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and unless the submitter is provided at least 10 days' notice of the intent to disclose the document involved.

§ 4.11 [Amended]

26. Paragraphs 4.11 (b) and (c) are revised, and paragraph 4.11(d) is added, to read as follows:

* * * * *

(b) *Requests from congressional committees and subcommittees.*—Requests from congressional committees and subcommittees shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act § 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, the General Counsel will notify the owner or provider or any material marked confidential that is responsive to the request, that the request has been received. No other notice need be provided prior to granting the request.

(c) *Requests from Federal and State law enforcement agencies.*—Requests from law enforcement agencies of the Federal Government should be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies should be addressed to the General Counsel. The appropriate liaison officer or the General Counsel may grant the request or where appropriate may authorize the custodian to grant the request, or refer it to the Commission for determination. Prior to granting access under this section to any material submitted to the Commission, the General Counsel or liaison officer will obtain from the requestor a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes.

(d) *Requests from Federal agencies for purposes other than law enforcement.*—Requests from Federal agencies for access not related to law enforcement should be addressed to the General Counsel. Disclosure of nonpublic information will be made consistent with section 21 of the FTC Act.

§ 4.12 [Redesignated as § 4.16].

27. Section 4.12 is redesignated as § 4.16, and a new § 4.12 is added to read as follows:

* * * * *

§ 4.12 Disposition of documents submitted to the Commission.

(a) *Original documents.*—Any person who has submitted documentary material to the Commission may file a written request for the return of original documents which have not been received into evidence, (1) after the close of the proceeding in connection with which the documents were submitted, or (2) when no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation. Such request shall be in writing, addressed to the Custodian designated pursuant to 15 U.S.C. § 61(b)(2)(A) or the Secretary of the Commission in all other circumstances, and shall reasonably describe the documents requested. Request for return of documents shall not be made nor commitments to return documents entered into prior to the time described in this subsection. The Commission is expressly permitted to make the retain copies of documents submitted to it.

(b) *Non-original documents.*—The Commission will not return non-original documents to the submitter unless, upon a showing of extraodinary circumstances made at the time described in subsection (a), the Commission determines that return would be required in the public interest.

(c) *Disposition of documents not returned.*—At the time prescribed in subsection (a), the staff will examine all submitted documents and will determine, pursuant to the Federal Records Act, 44 U.S.C. § 3301, which documents are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all documents determined under paragraph (b) of this section not to be appropriate for preservation in accordance with applicable regulations of the General Services Administration.

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

By direction of the Commission dated May 22, 1980.

Carol M. Thomas,

Secretary.

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