ACTION: Final rule.

SUMMARY: This final rule gives notice that the Office of Management and Budget (OMB) has approved the information collection requirements contained in Part 261 of the Board's Economic Regulation governing the filing of agreements affecting air transportation under section 412 of the Federal Aviation Act (49 U.S.C. 1382) through September 30, 1986. OMB approval is required under the Paperwork Reduction Act of 1980.

DATE: September 26, 1983.

Effective: September 14, 1983.

FOR FURTHER INFORMATION CONTACT: Linda K. Koman, Data Requirements Section, Information Management Division, Office of Comptroller, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428. (202) 673-6042.

List of Subjects in 14 CFR Part 261

Air carriers, Antitrust.

PART 261—[AMENDED]

Accordingly, the Civil Aeronautics Board amends Part 261 of its Economic Regulations (14 CFR 261) by adding a note at the end of the table of contents to Part 261 to read:

Note.—The information collection requirements contained in §§ 261.4 and 261.7 have been approved by the Office of Management and Budget under number 3024-0066.

This amendment is issued by the undersigned pursuant to delegation of authority from the Board to the Secretary in 14 CFR Sec. 385.24(b). (Sec. 204 of the Federal Aviation Act of 1958, as amended, 72 Stat. 743; 49 U.S.C. 1324).

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 83-26835 Filed 9-29-83; 8:45 am]

BILLING CODE 6320-01-M

FEDERAL TRADE COMMISSION

16 CFR Parts 3 and 4

Organization, Procedures, and Rules of Practice

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Commission has amended §§ 3.43(g) and 4.1(a) of its Rules of Practice and Procedure to allow non-attorney experts to participate personally in the cross-examination of other experts in the same discipline during Commission adjudicative proceedings. Such Cross-examination by a non-attorney expert would elicit more precise and useful information from an expert witness than would cross-examination by an attorney who lacks technical expertise in the particular discipline.

EFFECTIVE DATE: September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Bruce G. Freedman, (202) 523-3487, Office of General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: On March 3, 1983 at 48 FR 9289, the Commission published for comment proposed amendments to its Rules of Practice and Procedure which would allow non-attorney experts to participate personally in the cross-examination of other experts in the same discipline. The proposed amendments were to apply to Commission adjudicative proceedings.

The amendments to §§ 3.43(g) and 4.1(a) of the Commission Rules of Practice and Procedure were proposed after the Commission tentatively concluded that, in some cases, cross-examination by a non-attorney expert would elicit more precise and useful information from an expert witness than would cross-examination by an attorney who lacks technical expertise in the particular disipline.

Five comments were filed during the public comment period which closed May 18, 1983. Comments in favor of the proposed amendments were filed by Thomas M. Susman on behalf of the Division of Antitrust, Trade Regulation and Consumer Affairs of the District of Columbia Bar ("D.C. Bar Antitrust Division") and Jonathan Rose, professor of law at Arizona State University College of Law. Professor Rose also submitted a copy of a draft report, which he had previously prepared for the Administrative Conference of the United States. Comments in opposition to the proposed amendments were submitted by Irving Sommer, Chairman of the National Conference of Administrative Law Judges; Joseph S. Brownman, an attorney in the Bureau of Competition of the Federal Trade Commission; and Ray W. Harvey, Jr., Esquire.

The Commission believes that the comments do not raise any new issues that would militate against adoption of the proposal. Instead, on balance, they support allowing non-lawyer experts to cross-examine other experts where the ALJ believes it appropriate. A discussion of the major issues raised by the proposal and the comments follows.

A. The Expert As Witness and Advocate

During the course of Commission adjudications under the proposed amendments it could be expected that the expert who conducts cross-examination may also serve as an expert witness. Several comments raise the possibility that this could result in a potential conflict of interest analogous to that proscribed by the model codes of professional responsibility approved by the American Bar Association and by rules adopted by various states and other jurisdictions. These rules generally prohibit an attorney from acting as an advocate at a trial where he or she is likely to be a necessary or material witness. See Rule 3.7, *ABA Model Rules of Professional Conduct*, 52 U.S.L.W. 19 (Aug. 16, 1983); DR 5-101, *ABA Code of Professional Responsibility* (1975). Although these rules do not apply to non-lawyer "advocates," the policies underlying the prohibition are relevant to the Commission's proposal.

One justification for the disqualification rule is that "the public might think that the lawyer is distorting the truth for the sake of his client." *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975). This justification is based on the reasonable assumption that a witness' objectivity may be undermined by any interests he or she may have in the litigation, for example, in the case of an attorney, the fact that he or she is being compensated by one of the parties and, perhaps even more important, the fact that the attorney has an ethical duty to attempt to promote the interests of the client. A related justification for the rule is that the attorney's effectiveness as a witness may be impaired because he or she can be impeached for interest. See American Bar Foundation, *Annotated Code of Professional Responsibility* 213 (1979).

Nevertheless, a compensated expert witness, unlike the ordinary lay witness who testifies about facts he or she has observed, normally already has a financial interest in the litigation, an interest which, in our view, would not be significantly increased if the expert was also called upon to participate personally in cross-examination. Expert witnesses often assist counsel in developing a case, selecting witnesses, and developing questions for direct as well as cross-examination; indeed, expert witnesses frequently sit at the counsel table. In view of the litigation role experts already play, we do not see how the additional limited role they would assume under the Commission's proposal would create any reasonable

concern that they would be prompted to distort the truth. For the same reasons, we do not believe that this limited additional role would undermine their effectiveness as witnesses.

Other justifications for the attorney-witness disqualification rule are plainly inapplicable. For example, "[a]s an advocate, the attorney is said to be placed in the 'unseemly' position of arguing his or her own credibility." *Id.* The Commission's proposal would not authorize non-lawyer experts to present oral or written argument on credibility issues.

One commentary suggests a further rationale, that "opposing counsel may be handicapped in challenging the testimony of the attorney-witness." It explains that this assertion is based upon the premise that a laywer's professional courtesy will inhibit him or her from fully cross-examining a professional colleague. The commentary, however, characterizes this as "the most questionable rationale." *Id.* Nevertheless, assuming that this rationale has any validity, we believe that the attorney in charge of the litigation should be trusted to make a sensible judgment whether an expert will be inhibited from fully cross-examining an opposing expert.

Finally, there is a concern that the switching of roles may frustrate the adjudicatory process because factfinders may confuse the role of advocate and witness and, thus, give evidentiary weight "to statements that in reality constitute nothing more than mere argument." Opinion No. 44, Legal Ethics Committee of the District of Columbia Bar (Jan. 24, 1978). This is obviously not a concern where the factfinder is an ALJ.

The Commission agrees with Professor Rose that the limited, additional role that the Commission's proposal would provide expert witnesses would not create a conflict of interest or undermine their ability to provide candid testimony. On the contrary, cross-examination by a person trained in the relevant discipline should result in more careful testing of an expert witness and therefore produce more candid and useful testimony.

B. Legal Skills

Two comments suggest that a non-lawyer's lack of legal training might present possible problems. The attorney in charge of the litigation, however, is under a professional duty to assure that the client is effectively represented. The Commission's proposal would not require a non-lawyer expert to conduct cross-examination, and we have no reason to assume that the attorney would permit an expert to conduct all or a portion of cross-examination unless that attorney believed that the cross-examination would be competently conducted. We are confident that the lawyers who appear before this agency will be able to make sensible judgments about when their clients will be best served by cross-examination conducted by a person who does not happen to be an attorney but who is more expert than counsel in the subject matter of the direct testimony.

C. Discipline for Misconduct

The Commission has considered the question whether it would be able to impose adequate discipline on non-lawyer participants to control their conduct. The Commission has implied authority to impose reasonable standards of conduct upon those who practice before it. In the case of lawyers, the Commission relies on the established codes of professional responsibility and may suspend or disbar from practice before the agency any attorney who engages in serious misconduct. See 16 CFR 4.1(e). The Administrative Law Judge is also empowered to "regulate the course of the hearings and the conduct of the parties and their counsel"and to suspend or bar from participation in a particular proceeding any attorney who engages in "disorderly, dilatory, obstructionist, or contumacious conduct * * *." 16 CFR 3.42(c)(6), 3.42(d). If the circumstances warrant further action, the Commission may also refer cases of misconduct to appropriate disciplinary bodies.

Although the existing rules might not permit the Commission to proceed against the non-lawyer who engaged in serious misconduct, it is unclear that the activities associated with cross-examination would be particularly likely to generate disciplinary problems. Moreover, the ALJ would retain the authority to halt cross-examination which was disorderly or otherwise inappropriate. The Commission, however, will consider appropriate amendments to assure adequate sanctions for non-attorneys.

D. Other Issues

The proposed amendments would permit cross-examination by an expert in the "same discipline" as the expert witness. The Commission contemplates that the ALJ's will define the term "same discipline" in the same manner that they define relevant disciplines in deciding whether an expert witness is qualified to testify.

The Commission has also considered the question whether the proposed changes would authorize non-attorneys to engage in the practice of law. Cross-examination is a function typically performed by members of the bar, although as noted in D.C. Bar Antitrust Division comment, it is a function that is no longer exclusively performed by attorneys. In the Commission's view, non-attorneys should be allowed to perform this limited role as long as they can do it competently.[1]

Finally, the Commission sees no need to "sunset" the proposed revisions as suggested by the D.C. Bar Antitrust Division. The Commission, however, agrees with the Division that the Commission should evaluate the effects of the amendments and also continue to consider whether non-lawyer practitioners should be allowed to perform additional functions in litigation.

After careful consideration of all the comments submitted, the Commission has determined to promulgate the amendments set forth below, pursuant to the authority of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

List of Subjects

16 CFR Part 3

Administrative practice and procedure, Claims, Equal access to justice, Lawyers.

16 CFR Part 4

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

Accordingly, the Commission amends 16 CFR 3.43 and 4.1 as follows:

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

By revising § 3.43(g) to read as follows:

§ 3.43 Evidence.

* * * * *

(g) *Excluded evidence.*—When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to

[1] The Administrative Procedure Act provides that, "If permitted by an agency," a party may be represented or advised by a person other than counsel. 5 U.S.C. 555(b). This provision appears to allow agencies to authorize non-attorneys to perform all the functions of counsel. Therefore, the modest role non-attorneys would perform under the Commission's proposal will not amount to the *"unauthorized* practice of law."

be available for consideration by any reviewing authority.

PART 4—MISCELLANEOUS RULES

By adding § 4.1(a)(3) to read as follows:

§ 4.1 Appearances.

(a) * * *

(3) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.

(15 U.S.C. 46(g).)

By direction of the Commission, dated September 15, 1983.

Emily H. Rock,

Secretary.

[FR Doc. 83-28719 Filed 9-29-83; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-6485; File No. S7-972]

Definition of Terms

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission announces the adoption of new Rule 158, which defines certain terms for purposes of the last paragraph of Section 11(a) of the Securities Act of 1933. That paragraph relates to liability under the Act and imposes a reliance requirement upon purchasers in certain circumstances. The Rule is intended to provide clarity and certainty with respect to these terms by building upon the Integrated Disclosure System.

EFFECTIVE DATE: September 30, 1983.

FOR FURTHER INFORMATION CONTACT: Barry Mehlman, (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission announces the adoption of new Rule 158, which defines the terms "earning statement", "made generally available to its security holders" and "effective date of the registration statement" for purposes of the last paragraph of Section 11(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. 77a et seq. (1976 and Supp. IV 1980)]. Consistent with the Integrated Disclosure System,[1] the Rule defines such terms with reference to certain reports filed pursuant to the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78a et seq. (1976 and Supp. IV 1980)].

I. Background

In April 1983, the Commission published for comment Rule 158 defining the terms "earning statement", "made generally available to its security holders" and "effective date of the registration statement" for purposes of the last paragraph of Section 11(a).[2] That paragraph imposes a reliance requirement upon purchasers of securities in a registered offering if the purchase is made after the registrant has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement.

Historically, no clear guidelines have existed for determining the meaning of and standards for satisfying the terms and conditions of the last paragraph of Section 11(a). In addition, over the years, a wide variety of practices have developed with respect to the form and content of the earning statement and with respect to demonstrating general availability to security holders. In view of the absence of clear guidelines, the differing practices which had developed, and particularly the establishment of the Integrated Disclosure System, which makes use under the Securities Act of existing reports filed pursuant to the Exchange Act, the Commission believed that it would be appropriate to define the terms in the last paragraph of Section 11(a).

Commentator response to proposed Rule 158 was overwhelmingly favorable.[3] In addition, some commentators suggested modifying or clarifying certain provisions of the Rule. The Commission is adopting the Rule with modifications to reflect certain of the specific comments. These modifications are discussed below.

[1] *See* Release No. 33-6383 (March 3, 1982) [47 FR 11380]. Because the Integrated Disclosure System utilizes the term "registrant," *see* Rule 405 [17 CFR 230.405], the Commission has amended Rule 158 to refer to a "registrant" instead of an "issuer."

[2] Release No. 33-6464 (April 22, 1983) [48 FR 19392] ("Proposing Release").

[3] The Commission received twenty-six comment letters in response to the proposed Rule. The comment letters and a highlight of the comments prepared by the staff are available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549 (*See* File No. S7-972).

II. Discussion

A. Earning Statement

Paragraph (a) of Rule 158, as adopted, is modified in five respects: (1) The Commission has determined to allow statements of income in one or any combination of Exchange Act reports to satisfy the requirements of paragraph (a) of the Rule, provided that certain conditions are met; (2) the Commission has modified paragraph (a) to allow statements of income meeting the requirements of Rule 14a-3(b) [17 CFR 240.14a-3(b)] under the Exchange Act for annual reports to satisfy the requirements of that paragraph; (3) the Commission has revised paragraph (a) to allow a subsidiary issuing debt securities guaranteed by its parent to meet the requirements of that paragraph if the parent's income statements satisfy the requirements of paragraph (a) and information respecting the subsidiary is included to the same extent as was presented in the registration statement; (4) the Commission has added a provision to provide explicitly that paragraph (a) is nonexclusive; and (5) the Commission has added provisions applicable to foreign private issuers (described separately below).

In the Proposing Release, the Commission indicated that only optional cumulative twelve month income statements in reports on Form 10-Q [17 CFR 249.308a] would be deemed "sufficient" for purposes of paragraph (a). Several commentators objected to this proposal, arguing that it would have the effect of making mandatory the filing of optional cumulative twelve month income statements in reports on Form 10-Q and, to the extent it did not and three month Form 10-Q reports were interspersed with twelve month Form 10-Q reports, it would confuse rather than inform investors. These commentators suggested that the Rule be modified to allow the filing of Exchange Act reports for the twelve month period specified in Section 11(a) to meet the requirements of paragraph (a), regardless of whether statements of income in reports on Form 10-Q contain three or twelve month information.

In view of these comments, the Commission has determined to allow statements of income in one or any combination of Exchange Act reports to satisfy the requirements of paragraph (a) of the Rule, provided that certain conditions are met. Thus, an "earning statement" shall be sufficient for purposes of the last paragraph of Section 11(a) if the information specified in the last paragraph of Section 11(a): (1) Is contained in one report or any